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WITH KEY-NUMBER ANNOTATIONS

VOLUME 78
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CONTAINING ALL THE DECISIONS OF THE

SUPREME COURTS OF APPEALS OF VIRGINIA AND WEST VIRGINIA
THE SUPREME COURTS OF NORTH CAROLINA AND SOUTH
CAROLINA, AND THE SUPREME COURT AND
COURT OF APPEALS OF GEORGIA

WITH TABLE OF SOUTHEASTERN CASES IN WHICH REHEARINGS
HAVE BEEN DENIED

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THE SOUTHEASTERN REPORTER VOLUME 78

(162 N. C. 622)

STATE et al. v. WALLACE et al.

(Supreme Court of North Carolina. May 7, 1913.)

1. WITNESSES (§ 191*)—HUSBAND AND WIFE—WRITTEN COMMUNICATION—PRESENTATION BY THIRD PERSON.

In a prosecution of a husband for theft, a letter written by the husband to his wife when presented by a third person was admissible, and was not objectionable as a confidential communication between husband and wife.

[Ed. Note.—For other cases, see *Witnesses*, Cent. Dig. § 738; Dec. Dig. § 191.*]

2. CRIMINAL LAW (§ 894*) — EVIDENCE UNLAWFULLY OBTAINED.

That a letter written by accused to his wife was obtained by an unlawful search of his premises did not render it inadmissible against him.

[Ed. Note.—For other cases, see *Criminal Law*, Cent. Dig. §§ 875, 876; Dec. Dig. § 894.*]

3. LARCENY (§ 55*)—EVIDENCE.

In a prosecution for larceny of a money package, circumstantial evidence held sufficient to sustain a conviction.

[Ed. Note.—For other cases, see *Larceny*, Cent. Dig. §§ 152, 164, 165, 167-169; Dec. Dig. § 55.*]

4. CRIMINAL LAW (§ 338*)—EVIDENCE—MATERIALITY.

In a prosecution for larceny of a money package from an express company, a question asked of a state's witness whether he knew what bond a servant of the express company, who handled such packages, was under, was immaterial.

[Ed. Note.—For other cases, see *Criminal Law*, Cent. Dig. §§ 752, 753, 755, 756, 787, 788, 801, 855; Dec. Dig. § 338.*]

5. CRIMINAL LAW (§ 1120*) — EXCLUSION OF EVIDENCE—OFFER OF PROOF—APPEAL—REVIEW.

Exclusion of a question is not reviewable on appeal, in the absence of anything to indicate the answer expected.

[Ed. Note.—For other cases, see *Criminal Law*, Cent. Dig. §§ 2931-2937; Dec. Dig. § 1120.*]

6. CRIMINAL LAW (§ 351*) — EVIDENCE — FLIGHT.

In a prosecution for larceny, evidence as to advertising for defendant was competent on the issue of flight.

[Ed. Note.—For other cases, see *Criminal Law*, Cent. Dig. §§ 776, 778-785, 930-932; Dec. Dig. § 351.*]

7. CRIMINAL LAW (§ 829*)—TRIAL—REQUEST TO CHARGE—INSTRUCTIONS GIVEN.

It is not error to refuse a request to charge embodied in the instructions given.

[Ed. Note.—For other cases, see *Criminal Law*, Cent. Dig. § 2011; Dec. Dig. § 829.*]

Appeal from Superior Court, Mecklenburg County; Webb, Judge.

Sam Wallace and Lula Wallace were indicted for the larceny of an express package containing \$1,650 in money. A verdict in favor of defendant Lula Wallace was directed by the court, and from a conviction of Sam Wallace, he appeals. **Affirmed.**

The state introduced evidence that a package containing \$1,650, which was being shipped by the Southern Express Company from the Treasury Department at Washington, D. C., to the First National Bank of Shelby, N. C., was lost on the 27th day of May, 1912, in the city of Charlotte. This was what was called by Miss Martin, a witness for the state, who held a position in the Treasury Department at Washington, "fit money"—that is, money fit to go back into circulation—this witness testifying that on the 23d day of May, 1912, she approved a package of money, \$1,650, fifty 20's and sixty-five 10's, the First National Bank notes of Shelby, this money having been once put in circulation and having gone back into the Treasury Department and rendered again fit for circulation. The witness testified that she placed this money in a particular kind of envelope and sealed it, the same kind of package which was introduced in evidence, and that the money in the package was of the same class and character of the bill introduced and marked "Exhibit A."

William Marsh testified that he was night money clerk; that his records show that he received a package containing \$1,650, which was being shipped to the First National Bank of Shelby, N. C.; that this package was the one that was lost; that he got the package from the express messenger on train No. 35, the train which came from Washington to Charlotte; that he received the package on Saturday night, May 25th, at

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

7:15 o'clock, when he turned it over to J. H. Massey, the day money clerk.

J. H. Massey, the day money clerk, testified that he remembered receiving the package from Marsh on the morning of May 27th, and that his records also show an entry of receipt of this package, which entry he made himself; Marsh took the packages from the safe that morning just before he turned them over to him; that he receipted for them and placed them in his safe, and about 9 or 10 o'clock Mr. E. W. Plexico, the transfer clerk, whose business it was to transfer the money to the Seaboard station, came, and he turned the packages over to Plexico; he gave it to Plexico, and Plexico took it and carried it towards his safe; that Plexico walked around the radiator to the door.

E. W. Plexico testified that he was transfer clerk; that he received a sealed package of money, \$1,850, from Washington to the First National Bank of Shelby; that he was just inside of Mr. Massey's office when he received it; that when he got the packages he went to the safe with them and dropped the packages down into the safe; that Sam Wallace, the defendant, was standing behind him, waiting to get the packages to take them to the wagon; that he dropped the packages into the safe and then locked it and stepped inside the room; that after the safe was locked, which was a portable safe, Sam Wallace, the defendant, was told to get it, and defendant carried the safe to the wagon, and Van Grier drove the wagon to the Seaboard depot; that when the witness got to the Seaboard depot, the train from Rutherfordton came in; he opened the safe, took out the contents and put them in his book, and had the driver, Van Grier, to drive him across to the car; the defendant Sam Wallace was standing near the car door, and the witness stepped right out of the truck into the car door; that the witness then gave the messenger on the Seaboard train his book to sign for, and he found that the package of money was gone; that the witness looked in the car, went back to his safe, and also followed over the route to see if he had dropped it; he did not find it, and has never found it.

Mamie Crawford testified: That on the 8th day of August, 1912, she saw Sam Wallace at the house of a woman named Rose Chestnut, and asked Sam for a nickel for street car fare. That Sam Wallace gave her a \$20 bill and told her to get it changed and she could have the nickel. That she took it to Beulah Carpenter, who was on her way up town, and asked her to get it changed. That Beulah came from up town and gave her the change, and then they took it up to the house where Sam Wallace was. Beulah went with her to where Sam Wallace was, and told Sam that she got the money changed up town at the express office. That the man questioned her about it and looked like he did not want to give her the change.

Sam asked her what they said, and she said they asked her where she got this money. Sam said, "Why didn't you tell him that your husband gave it to you?" That nothing more was said until some one said, "Here comes the expressman and the police," that Sam further cautioned her, "If they ask you where you got this money, tell them that your husband gave it to you." Beulah said, "I can't tell them that, because I haven't got no husband." Sam got up and went out of the room, and did not come back while witness was there.

Beulah Carpenter saw the witness Mamie Crawford, on the 8th day of August, 1912, receive the \$20 bill which she had changed at the Southern Express office. This was the bill which was identified by John W. Hatley as the bill that he changed. The witness said that the man at the express office asked her where she got the bill, and she told him that a man gave it to her. She also testified that she "came about getting into trouble about it," and Sam asked her why she did not say that her husband gave it to her; that two men came down the railroad; and that Sam went out the door, and afterwards she did not see him until the trial at the recorder's court.

Beulah Pressly testified that she was at the same place, and corroborated Beulah as to what Sam said, and further stated that some one said, "The police is coming," and Sam went out the door.

William Young testified that he was at Rose Chestnut's house on the same day that Sam was there; that a girl asked Sam for a nickel; that he went out on the porch and took the money out and went in the house; that there were three \$20 bills; he took one of them off and gave it to the girl; that he (the witness) was in the yard when the girl got back with the change; he saw Sam leaving the house, going a trot; that at that time the policeman was coming in at the back.

Tom Brown, a colored porter who is running on the Southern Railroad, about August 1, 1912, said: That Sam Wallace got on the train at Griffiths, about four miles from Charlotte, at 6:40 or 6:50 in the morning. This was the time that Sam left Charlotte. That he went through Chester to Cornwallia.

John W. Hatley said that Beulah Carpenter brought a \$20 bank note issued by the First National Bank of Shelby to the express office to get it changed; that he took the number and asked where she got it; he gave her the change for it and turned it over to the cashier.

There was evidence that Lula Wallace, wife of Sam Wallace, paid W. C. McDonald, furniture collector, about June 11, 1912, a \$20 bill when he went to collect \$1.

There was evidence that on July 23, 1912, Lula Wallace gave Mrs. W. B. Moore a \$20 bill in payment of a bill for \$4.98.

There was evidence that the defendant Sam Wallace had a \$20 bill on an excursion which went to Mooresville, about the 26th of June.

There was evidence that he defendant was arrested twice prior to his arrest in September; that he was arrested once or twice after the excursion to Mooresville; that the witness Johnson talked to Sam about the money business, and he denied having but "75 cents to his name." After he had been arrested in October and asked to account for the \$20 bill which he gave Mamie Crawford, he stated that he got this bill on an excursion train to Mooresville.

There was evidence that the defendant had three front teeth crowned with gold before he left Charlotte, and that after he was found the crowns had been taken off.

For the purpose of showing the rigid business methods of the express company, and for all other purposes for which the question may be competent, the defendant asked the state's witness Marsh, "Do you know what bond Plexico was under?" Upon objection by the state this question was excluded, and defendant excepted.

A policeman testified that, acting under a search warrant, he searched the home of the defendant, and found there a letter which the state identified as a letter written by the defendant to his wife. This letter was admitted in evidence; the defendant excepting. The letter was material as impeaching evidence; the defendant having denied on the witness stand that he went to Tampa, Fla., after he left Charlotte, and the letter containing the statement that he had done so. The state introduced evidence that after the defendant left Charlotte advertisement was made for him, and that post cards were written to different points, describing him, and defendant excepted.

The defendant requested his honor to charge the jury that, "taking all the evidence into consideration, it would not warrant the conviction of the defendant Sam Wallace, and you are therefore instructed to return a verdict of 'not guilty.'" "That although the evidence may excite suspicion, even strong suspicion, in your mind that the male defendant is a guilty person, still, if it is a rational conclusion that some other person may have committed the crime, it is your duty to acquit him." These requests were denied, and defendant excepted.

His honor charged the jury, among other things: "I am going to use the language as given by the attorneys for the state and the defendant. The state, as I have stated, relies upon circumstantial evidence in this case and the court instructs you that each fact proving a necessary link in the chain must point to the guilt of the accused and must be as clearly and as distinctly proven as if the whole question depended upon it. The court further instructs you that in cases of

this kind, where the state relies upon circumstantial evidence, in order to convict the defendant the evidence must be clear, convincing, and conclusive; it must be natural, clear, and satisfactory. If the facts proven could all be true, and still not inconsistent with the innocence of the defendant, your verdict should be 'not guilty.' In order to convict the defendant, the evidence must naturally and necessarily imply his guilt, and it must exclude the probability that some one else might be the guilty party. If you should find that the evidence only raises in your minds a strong suspicion of the defendant Sam Wallace's guilt, or that it is not inconsistent with his innocence, the court instructs you that it would be your duty to acquit him."

There was a verdict of guilty as to Sam Wallace, and from the judgment pronounced thereon he appealed.

Walter R. Henry, T. L. Kirkpatrick, and Stewart & McRae, all of Charlotte, for appellant. Atty. Gen. Bickett, and T. H. Calvert, of Raleigh, for the State.

ALLEN, J. The exceptions chiefly relied on by the defendant are to the admissibility of the letter alleged to have been written by the defendant to his wife, and to the refusal to instruct the jury that the evidence was not sufficient to sustain a conviction. The objection to the introduction of the letter is upon two grounds: (1) That it is a confidential communication between husband and wife, which is excluded by the rules of the common law upon grounds of public policy. (2) That the letter was obtained by an illegal search of his premises, and to admit it in evidence is violative of the constitutional protection against unlawful searches and seizures, and of the principle that he cannot be compelled to incriminate himself.

[1] 1. The authorities seem to be uniform that a third person may testify to an oral communication between husband and wife, although his presence was not known; but there is much diversity of opinion as to the right to introduce a writing from one to the other in the hands of a third person. The cases are collected in the notes to *Gross v. State*, 33 L. R. A. (N. S.) 478, and *Hammons v. State*, 3 Ann. Cas. 915. It is difficult to find a satisfactory reason for the distinction. The rule of the common law is based on the confidential relationship existing between husband and wife, and the importance to the public of maintaining this relationship, deeming it wiser and to the public interest for some particular evidence to be suppressed than to require the husband or wife to disclose a communication between them, as to do so "might be a cause of implacable discord and dissension between the husband and wife, and a means of great inconvenience" (*State v. Brittain*, 117 N. C. 785, 23 S. E.

433, 434); but the inhibition is as to the husband or wife and not to a third person, and if the communication by the husband is in writing, and is procured by a third person, without the consent or privity of the wife, the reason for the exclusion of communications at common law no longer exists. In our opinion the rule is stated correctly in Whar. Cr. Ev. § 398: "Confidential communications between husband and wife are so far privileged that the law refuses to permit either to be interrogated as to what occurred in their confidential intercourse during their marital relations, covering, therefore, admissions by silence as well as admissions by words. The privilege, however, is personal to the parties; a third person who happened to overhear a confidential conversation between husband and wife may be examined as to such conversation. A letter, also, written confidentially by husband to wife, is admissible against the husband, when brought into court by a third party."

[2] 2. The second objection is fully met by *Adams v. New York*, 192 U. S. 595, 24 Sup. Ct. 372, 48 L. Ed. 575. In that case, the defendant was convicted of the crime of having in his possession certain gambling paraphernalia and one of the assignments of error was: "First. That the court erred in holding that by the reception in evidence of the defendant's private papers seized in the raid of his premises, against his protest and without his consent, which had no relation whatsoever to the game of policy, for the possession of papers used in connection with which said game he was convicted, his constitutional right to be secure in his person, papers, and effects against unreasonable searches and seizures was not violated, and that he was also thereby not compelled to be a witness against himself in contravention of the fourth, fifth, and fourteenth articles of amendment to the Constitution of the United States." The court, in passing on this assignment, says: "We think there was no violation of the constitutional guaranty of privilege from unlawful search or seizure in the admission of this testimony. Nor do we think the accused was compelled to incriminate himself." And *Greenleaf*, Ev. vol. 1, § 254a, is quoted with approval, as follows: "It may be mentioned in this place that, though papers and other subjects of evidence may have been illegally taken from the possession of the party against whom they are offered or otherwise unlawfully obtained, this is no valid objection to their admissibility if they are pertinent to the issue. The court will not take notice how they were obtained, whether lawfully or unlawfully, nor will it form an issue to determine that question." The court also discusses *Boyd v. United States*, 116 U. S. 616, 6 Sup. Ct. 524, 29 L. Ed. 746, and shows that that decision is con-

fined to the consideration of the constitutionality of an act compelling a party to produce papers in an action to enforce a forfeiture. The same section from *Greenleaf*, taken from the *Adams Case*, is approved in *People v. Adams*, 178 N. Y. 359, 88 N. E. 636, 63 L. R. A. 406, 98 Am. St. Rep. 675; *Com. v. Tibbetts*, 157 Mass. 519, 32 N. E. 910; *State v. Griswold*, 67 Conn. 306, 34 Atl. 1046, 33 L. R. A. 227. And the same doctrine is declared in *State v. Fuller*, 34 Mont. 26, 85 Pac. 369, 8 L. R. A. (N. S.) 762, 9 Ann. Cas. 648; *Jacobs v. People*, 117 Ill. App. 206; *Hartman v. U. S.*, 168 Fed. 33, 94 C. C. A. 124; *Imboden v. People*, 40 Colo. 142, 90 Pac. 620; and in other cases. We are therefore of opinion there was no error in admitting the letter.

[3] The evidence was sufficient to sustain a verdict of guilty. If true, the defendant had the opportunity to steal the money as charged; he was found in possession of at least one bill of the Shelby Bank of the same denomination as that stolen; he and his wife had other bills of that denomination; he made false statements about the money and tried to induce another witness to make a false statement, and he fled.

[4, 5] We see no materiality in the question asked the witness Marsh, and there is nothing to indicate what answer the witness would have made.

[6] The evidence as to advertising for defendant was competent on the question of flight, but in any event it had no relevancy except to prove that the defendant was absent from Charlotte, and this he admitted.

[7] His honor charged the jury as favorably as the defendant was entitled to. The first prayer for instructions could not have been given, as there was evidence of guilt sufficient to be submitted to the jury, and the second was embodied in the charge given, with additions favorable to the defendant.

No error.

(163 N. C. 123)

MCLEOD v. GOOCH et al.

(Supreme Court of North Carolina. April 30, 1913.)

1. APPEAL AND ERROR (§ 934*) — PRESUMPTIONS.

In the absence of findings, the Supreme Court must presume that the trial judge found such facts as would support his ruling, since it does not presume error on the part of the trial court.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 3777-3781, 3782; Dec. Dig. § 934.*]

2. APPEAL AND ERROR (§ 265*)—EXCEPTIONS—NECESSITY.

An assignment of error in refusing to make fact findings must be based upon an exception duly taken at trial.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 1461, 1536-1551; Dec. Dig. § 265.*]

3. JUDGMENT (§ 363*)—VACATION—GROUNDS—EXCUSABLE NEGLIGENCE.

Where defendant was notified that the term of court might end before the 27th and if the court adjourned before the 27th a motion would be disposed of before adjournment, defendant's counsel was not entitled to rely absolutely upon an agreement by plaintiff's counsel to have the hearing on the 27th "if convenient to the judge," and hence could not have a judgment, entered on a hearing before that date, set aside upon the ground of surprise, inadvertence, and excusable neglect.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. § 705; Dec. Dig. § 363.*]

4. JUDGMENT (§ 569*)—RES JUDICATA.

A proceeding to set aside a judgment on the ground of excusable neglect and inadvertence will not bar a subsequent proceeding to set it aside upon the ground of irregularity.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. § 998; Dec. Dig. § 569.*]

Appeal from Superior Court, Granville County; Peebles, Judge.

Action by Neill McLeod against J. W. Gooch and others. From an order denying a motion to set aside a judgment for defendants, plaintiff appeals. **Affirmed.**

This is a motion to set aside a judgment upon the ground of "mistake, inadvertence, surprise or excusable neglect," under Revision, § 513. The facts are that plaintiff brought this action to November term, 1910, for the recovery of a planing machine with its outfit, alleged to be unlawfully detained by defendant. He filed his complaint January 10, 1911, and defendant answered February 27, 1911. The cause was continued until April term, 1912, when, plaintiff having failed to appear, the court submitted the issues to the jury, which were answered as follows: "(1) Is the plaintiff the owner of the property described in the complaint? Answer: No. (2) What was the value of the milling machinery, planer, and other apparatus at the time of the seizure by the sheriff in the claim and delivery proceedings in this action? Answer: \$275"—and entered judgment for the defendant upon the verdict. Plaintiff moved to set aside the verdict and judgment, upon the ground of mistake, surprise, inadvertence, fraud, and excusable neglect, which motion the court refused, and plaintiff assigned the following errors: "(1) To the signing of the judgment denying the motion to set aside the judgment rendered at April term, 1912, and the judgment and order rendered at November term, 1912. (2) Plaintiff excepts to the failure to set aside the judgment rendered at April term, 1912, for the reason that said judgment was void and absolutely null, since defendant's answer was not verified as required by statute. (3) The plaintiff excepts to the judgment on the ground that the court failed and refused to find the facts and set them out in the case."

Baggett & Baggett, of Lillington, and D. G. Brummitt, of Oxford, for appellant. Graham & Devin, of Oxford, for appellees.

WALKER, J. [1] There are no findings of fact in the record as to excusable neglect. The judge, at the hearing, merely denied the motion. In the absence of the findings, we must presume that the judge found such facts as would support his ruling, for we do not presume error, but the appellant must show it; the burden of doing so being upon him. If he wished to review the decision of the court, he should, in apt time, have requested a finding of the facts. *Albertson v. Terry*, 108 N. C. 75, 12 S. E. 892; *Hardware Co. v. Buhman*, 159 N. C. 511, 75 S. E. 731. This is the well-settled practice.

[2] The plaintiff, it is true, states in one of his assignments of error that such a request was made and refused; but an assignment of error, as we have repeatedly held, must be based upon an exception duly taken during the trial of an action or the hearing of a motion, and there is no such exception, and nothing in the record to show that the request was made and refused. "The preparation of the assignment of error is the work of the attorney for the appellant, and is not a part of the case on appeal, and its office is to group the exceptions noted in the case on appeal, and if there is an assignment of error not supported by an exception, it will be disregarded." *Worley v. Logging Co.*, 157 N. C. 490, 73 S. E. 107. We have, nevertheless, examined the affidavits filed by the plaintiff in support of his motion, and find nothing stated therein which tends to show a case of excusable neglect. The case was pending in the court nearly two years before the trial was had and the judgment rendered at April term, 1912, and no steps were ever taken to ascertain when it would be called for trial. It seems that plaintiff and his counsel relied on the clerk or some one else to notify them of the time; but there was no legal obligation resting upon any one to do so, and no request was made to the clerk or to opposing counsel to give the information, so far as appears, and no promise made by them, or either of them, to give seasonable notice of the time when the case would be reached in regular order on the calendar.

[3] The motion was first made before Judge Whedbee, to set aside the judgment; but plaintiff failed to appear at the time appointed for the hearing of the same, and he then moved before Judge Peebles to set aside the judgment and the former order of Judge Whedbee denying the first motion. The judgment was rendered at April term, 1912, motion to set it aside made July 10, 1912, nearly three months afterwards, and July term, 1912, set for the hearing. The defendant did not appear in person or by counsel at that term; but the court allowed plaintiff time to file additional affidavits, and Tuesday of the

next (November) term was set as the day for hearing the motion. It appears that plaintiff's counsel, by letter, of November 1, 1912, requested of defendant's counsel that the time for the hearing be changed to Wednesday the 27th, and plaintiff's counsel agreed to this date, "if convenient to the judge," but insisted that the motion be heard during the term. The court adjourned on the 26th, the day first set for the hearing. If counsel of defendant had agreed unconditionally that the motion should be heard on the 27th, our decision might be different; but they did not, and plaintiff should not have relied upon the conditional promise, as he was warned by the terms of the letter that the term might end before the 27th, and, if so, it would not be convenient to the judge to hear the motion, and he was further notified that, if the court did adjourn before the 27th, "the matter would be disposed of" by the judge before adjournment. The terms of the letter gave the plaintiff full notice that his presence, or that of his attorney, was required on Tuesday of the term, in order to protect his interests, and that delay was dangerous. He should not have taken the chance of the court continuing in session until Wednesday the 27th, in the circumstances, and having taken it and lost his day in court, he must abide the consequences. He was making serious charges against the defendant, and should not have trusted to his favor or leniency. Defendant's counsel were as liberal towards him as he had a right to expect and as was consistent with their plain duty to their client. Plaintiff should have employed resident counsel to watch the calendar, or he should, at least, have seen that his nonresident counsel attended the court and remained on guard to take care of his interests, or, as another alternative, that he had a more definite agreement with plaintiff's counsel as to the time for the hearing. Instead of this, there was inattention and seeming indifference throughout the progress of the case. The undisputed facts do not show a case of excusable neglect. *White v. Rees*, 150 N. C. 678, 64 S. E. 777. A party has no right to abandon all active prosecution of his case simply because he has retained counsel to represent him in the court. We have held that he must bestow that attention and care upon it which a man of ordinary prudence usually gives to his important business. *Roberts v. Allman*, 106 N. C. 391, 11 S. E. 424.

It seems that the defendant has recovered judgment for about \$215 more than, in law and good conscience, he is entitled to have, and plaintiff's application to be relieved of the judgment appeals strongly to our sense of justice and right. Defendant bought the machine for \$250, paid \$60, and now owes \$190 on the price. He has a judgment for \$275. Now deducting the \$60 paid by defendant, the latter has made a clear gain of \$215, unless he pays the \$190, and we infer

that he is insolvent. Plaintiff has the property, to be sure; but he must pay \$215 and the costs for the privilege of keeping it. It appears to be a very hard case, but by his own neglect he has deprived us of the power to help him, by requiring the defendant to deal fairly and account for the price of the property, which he promised to pay at the time he received the machine and as a condition of acquiring the title thereto. This is taking the plaintiff's statement of the transaction between them. The defendant denies it, but the fact remains that he will receive far more than he has parted with. In law, however, he is entitled to keep it, because the plaintiff has slept soundly upon his rights, and the court, therefore, cannot aid him. If he had been vigilant as the defendant was, and as alert and enterprising, he would not have lost them. We are not now passing upon the merits, however. They may all be with the defendant, as the facts, perhaps, have not yet been fully disclosed.

[4] The plaintiff contended that the judgment was irregular or taken contrary to the course and practice of the court, but he made no such point below, and the judge, therefore, has not passed upon it. This proceeding, though, will not bar him from moving to set aside the judgment, upon the ground of irregularity, and have it vacated, if the facts and the law will sustain such action by the court. *McKeel-Richardson Hardware Co. v. Buhman*, 159 N. C. 511, 75 S. E. 731.

There was no error that we can discover in the rulings of the court upon the motions.

No error.

(162 N. C. 106)

JACKSON et ux. v. BEARD et al.

(Supreme Court of North Carolina. April 23, 1913.)

1. INFANTS (§ 31*)—CONVEYANCE OF WIFE'S LAND—INFANT HUSBAND—DISAFFIRMANCE.

The joining by the husband, necessary, under Revisal 1905, § 952, to conveyance by a married woman of her lands, being contractual, by reason of his estate as tenant by the curtesy initiate, may, he being an infant at the time, be disaffirmed on his arrival at majority, with the effect of voiding the deed.

[Ed. Note.—For other cases, see *Infants*, Cent. Dig. §§ 41, 46, 50-63; Dec. Dig. § 31.*]

2. HUSBAND AND WIFE (§ 80*)—CONTRACTS—STATUTES.

Revisal 1905, § 2108, as to validity of contracts between husband and wife, has no application to contracts between them and a third person.

[Ed. Note.—For other cases, see *Husband and Wife*, Cent. Dig. §§ 327-330; Dec. Dig. § 80.*]

3. INFANTS (§ 31*)—AVOIDANCE OF DEED—CONVEYANCE TO THIRD PERSON.

The right of an infant to avoid his deed, in a reasonable time after coming of age, is not affected by the grantee having conveyed to a third person without notice.

[Ed. Note.—For other cases, see *Infants*, Cent. Dig. §§ 41, 46, 50-63; Dec. Dig. § 31.*]

Clark, C. J., and Brown, J., dissenting.

Appeal from Superior Court, Cumberland County; Peebles, Judge.

Action by Pearl Jackson and wife against D. E. Beard and another. From a judgment on a verdict for defendants, plaintiffs appeal. Reversed, and new trial granted.

Civil action to set aside certain deeds to recover one undivided seventh of a tract of land. On the hearing it was properly established: That on the 21st of November, 1907, Nancy Lee Jackson, feme plaintiff, was the owner of one undivided seventh of this tract of land in controversy, the same having descended to her from her father, John C. Beard, and on said day, for a small consideration, executed a paper writing purporting to be a valid deed of conveyance to James R. Beard, one of defendants, and on December 6, 1907, the said grantee conveyed the same to his brother and codefendant, D. E. Beard. That the consideration for said deed from Nancy Lee Jackson was alleged to be only \$18 and admitted by defendants to have been only \$35. That Pearl Jackson, husband of Nancy Lee Jackson, joined in the execution of the conveyance of November 29th, and at the time was under the age of 21. That immediately after his becoming of age, he and his wife, as coplaintiffs, joined in the present suit to set aside the deed and recover the land, and that said Pearl Jackson has "done nothing since arriving at full age to ratify or confirm said deed." The court, being of opinion that the infancy of the husband did not in any way affect the validity of the deed of himself and wife, so instructed the jury. There was verdict and judgment for defendants, and plaintiffs excepted and appealed.

V. C. Bullard, of Fayetteville, for appellants. H. L. Cook, of Fayetteville, for appellees.

HOKE, J. [1] Our statute, Revisal, § 952, provides that: "Every conveyance, power of attorney or other instrument affecting the estate, right or title of any married woman in lands, tenements, hereditaments, must be executed by such married woman and her husband, and due proof or acknowledgment thereof must be made as to the husband and due acknowledgment thereof must be made by the wife, and her private examination, touching her voluntary assent to such instrument, shall be taken separate and apart from her husband, and such acknowledgment or proof as to the execution by the husband and such acknowledgment by the wife and her private examination shall be taken and certified as provided by law." This section has been repeatedly held a constitutional and valid enactment, and authority with us is equally decisive that, unless the formalities established by this statute are complied with, the deed of a married woman is absolutely void. *Council v. Pridgen*, 153 N. C. 443, 69 S. E. 404; *Bank v. Benbow*, 150 N. C. 781, 64 S. E. 891; *Ball v. Paquin*, 140 N. C. 83, 62

S. E. 410, 3 L. R. A. (N. S.) 307; *Smith v. Bruton*, 137 N. C. 79, 49 S. E. 64; *Ferguson v. Kinsland*, 93 N. C. 337; *Southerland v. Hunter*, 93 N. C. 310.

In *Council v. Pridgen*, the accepted doctrine on this subject is stated as follows: "Article 10, § 6, of our Constitution requiring that a married woman conveying her separate real estate shall have the 'written assent of her husband,' the statute laws, now embodied in Revisal, § 952, provides the manner in which the assent of the husband must be obtained, to wit, that the deed 'must be executed by such married woman and her husband and due proof or acknowledgment thereof must be made by the wife, and her privy examination taken,' etc.; and, thus construed, the statutes are constitutional and valid. In order to convey a married woman's separate real estate or fix a charge upon it, her privy examination is required, and the husband must join in the deed. * * * A deed executed by a married woman to her separate real property, the name of the husband not appearing in the body of the deed or his signature thereto, proved on oath of a subscribing witness and registered on such probate, without her privy examination, is inoperative, and the written assent of her husband indorsed on the deed does not meet with the constitutional and statutory requirements necessary for her to make a valid conveyance."

It will be noted that the essential requirements to a valid deed by the feme covert are that her husband must join in the execution of the deed and the privy examination of the wife must be taken, and, this act of the husband being contractual in its nature, both by the express terms of our statutory law and in its operative effect, we are of opinion that it is subject to the general principle prevailing here and elsewhere that the deeds and contracts of an infant, except for necessities, etc., may be avoided by him in a reasonable time after coming of age. *Weeks v. Wilkins*, 134 N. C. 516, 47 S. E. 24; *McCarty v. Woodstock Iron Co.*, 92 Ala. 463, 8 South. 417, 12 L. R. A. 138; *Miles v. Lingerman*, 24 Ind. 385; 22 Cyc. p. 546. The purpose of our statute in making these requirements as to the deeds of feme covert is stated by Chief Justice Smith, in *Ferguson v. Kinsland*, supra, as follows: "The requirement that the husband should execute the same deed with the wife was to afford her his protection against the wiles and insidious arts of others, while her separate and private examination was to secure her against coercion and undue influence from him." *Ferguson v. Kinsland*, supra, and *Connor, J.*, in *Ball v. Paquin*, supra, says: "For the purpose of throwing around her the protection of her husband's counsel and advice, the Legislature declared that, with certain exceptions, she could not contract without the written consent of her husband." The basic

reason for permitting infants to avoid these deeds and contracts is that until they are 21 they are not supposed to have the mental capacity to make them, and, if the reasons for such enactment be correctly stated by these eminent jurists, the principle should apply, we think, when in order to its validity the husband is required to join in the execution of the deed for his wife's property. If the husband were shown to be a lunatic and this fact were known to the purchaser, it would hardly be contended that his assent to his wife's deed would stand, and the same reason for avoiding the deed in the one case appears in the other, to wit, the mental incapacity to make a deed.

The question has been directly presented to the Supreme Court of Tennessee in *Barker v. Wilson*, 51 Tenn. (4 Heisk.) 268, and it was there held that "a bargain and sale made by an infant husband jointly with a wife of full age, of the real estate of the wife, is voidable at the election of the husband," and in *Craig v. Van Bebber*, 100 Mo. 584, 13 S. W. 906, 18 Am. St. Rep. 569, the court, treating of a similar question, said: "Now, it is true that in the cases cited the deeds were worthless from the beginning, whilst here the deed is voidable only; but we do not see that this makes any difference. When the deed is disaffirmed because of the minority of the wife, it becomes worthless as to the husband. As said in the case last cited, the title can only be transferred by an indivisible integer, or not at all. So, too, if the deed be avoided as to the wife, it is avoided as to the husband. It must stand or fall as a whole." And our own court is not without expression on the subject. The same article of our Constitution which, in section 6, enables a married woman to convey her property with the written assent of her husband, in section 8 provides that no deed made by the owner of a homestead shall be valid without the "voluntary signature and assent of his wife, signified on her private examination, according to law." There is nothing here said as to whether the wife shall be over or under 21 years old, and in *Ritch v. Oates*, 122 N. C. at page 633, 29 S. E. at page 902, in discussing the validity of a deed by the husband and his wife, who had joined in the deed, being privily examined and under age at the time of its execution, the present Chief Justice said: "She being under age, her assent, though given with privy examination, is invalid; but the interest of the husband, a mere right to call for the title, was not such an interest as to require her legal assent to the conveyance to bar the husband's assertion of a homestead therein." As the excerpt shows, the case was decided on other grounds, to wit, that the husband's interest did not amount to a homestead, but the view of the learned judge as to the validity of a deed, under section 8 of the Constitution,

by an infant wife, seems to be in full accord with the Tennessee decision. On reason and authority, therefore, we are of opinion that it was open to the husband to disaffirm his consent on arrival at full age, and that, having done so, the deed must be held void as not conforming to our statute on the subject.

It is earnestly urged that the act of the husband in consenting to his wife's deed has no operative or contractual effect, as he has no longer any interest in his wife's land; but this, we think, cannot be maintained. It is true that, under the terms of our Constitution, we have held that a wife may devise her land and thus defeat any and all interest of the husband therein. *Tiddy v. Graves*, 126 N. C. 620, 36 S. E. 127. But unless this has been done the estate and interest of her husband, as tenant by curtesy after issue born alive, is still regarded as existent under our law recognized both in our statutes and decisions as a valuable interest. In *Revisal*, § 1730, where the interest of one who has entered land dies the estate is recognized. It may be lost by decree of divorce in certain cases. *Revisal*, §§ 2109-2111. By virtue of such estate he is regarded as a freeholder. *Thompson v. Wiggins*, 109 N. C. 508, 14 S. E. 301. In *McGlennery v. Miller*, 90 N. C. 215, it was held: "That a husband, tenant by courtesy, has an interest in his wife's land and is a necessary party to a suit concerning it, and, if he refuses to become a coplaintiff in an action by the wife to assert her right to the property, he must be made defendant." *Pell's Revisal* and note to section 2102. In *Tiddy v. Graves*, supra, there are some expressions in the opinion which seem to favor defendant's position, but the decision properly rests upon the express provision of the Constitution that the wife may devise her lands, and on the question presented here the expressions referred to may not be allowed to reverse the entire current of authority to the effect that a tenancy by the curtesy initiate must still be considered an existent interest.

[2] As to section 2108 of the *Revisal*, a provision much relied upon by defendant, it clearly refers throughout to contracts between the husband and the wife and does not and was not intended to affect the contracts between the husband and the wife and third parties. These, as we have seen, are chiefly controlled by section 952 of the law as heretofore cited.

[3] We have not referred to the fact that the first grantee, a brother of the feme covert, had conveyed the property to another brother. It does not appear whether the second grantee did or did not have notice, but this does not seem to affect the application of the principle that an infant may avoid his deed within a reasonable time after coming of age. 22 Cyc. p. 551.

For the reasons stated, we hold there was

error in the proceedings below which entitles plaintiff to a new trial of the cause.

New trial.

CLARK, C. J. (dissenting). The requirements of Revisal, § 952, as to the conveyance of real estate by a married woman, have been in every particular scrupulously complied with. The deed was executed by her and her husband with due proof thereof as to both the husband and the wife and her private examination duly certified. The first cause of action alleging fraud or undue influence is negated by the jury, and there is no appeal on that point.

The plaintiff seeks to set aside the deed because he insists that the court should write into the statute words that are not placed therein by the Legislature and which are not in the Constitution, to wit, "the husband being 21 years of age." He insists that these words are implied because a conveyance of realty can only be made by one 21 years of age. But "the written assent of the husband," which is all that is required by the Constitution and to which the Legislature cannot add, and has not sought to add, is not a conveyance.

The husband had nothing to convey. He has no interest in his wife's estate. The Constitution expressly prohibits his having any. It says (Const. art. 10, § 6) that "The real and personal property of any female in this state * * * shall be and remain the sole and separate property of such female * * * and may be devised and bequeathed and with the written assent of her husband may be conveyed by her as if she were unmarried." If the property of a married woman "shall be and remain her sole and separate property, as if she were unmarried," her husband certainly cannot have any interest therein during her lifetime, nor acquire any at her death unless by her will or dying intestate he succeeds thereto under the general statute of distribution and descent. Such "possibility of inheritance" is not an "interest in" her property. He is forbidden the latter by the Constitution. Her children or her heirs at law have exactly the same possibility of succeeding to her property by devise, or in case of intestacy. But that does not confer on them any interest in her estate which requires them to join in any conveyance of her property. This written assent does not invest him with any interest in the property, but is merely a "veto power," and there is nothing in the Constitution or in the statute which requires that the husband should be 21 years of age. To so hold is for the court to write into the Constitution words which are not placed there, and which the Legislature has not attempted to place in the statute, and which would have been unconstitutional if it had done so by requiring an addition to the simple requirement of the Constitution. That simply gives the husband a veto power. It requires merely

for the "written assent" that he shall be her "husband" and nothing more.

It is true that Revisal, § 952, does require that the husband must join in the deed and proof of his execution must be made. If this meant that he must convey, it is an additional requirement negating the guaranty given by the Constitution that his "written assent" shall be the only clog upon the wife's right to convey her property as if she had "remained unmarried." It can only be construed that the law required his formal acknowledgment to the deed, not as a conveyance (for he has nothing to convey), but simply as a method of authenticating his signature, and, being such, there is no necessity of his being 21 years of age. If he is old enough to be legally her "husband," he is old enough under the Constitution to withhold his assent, or to give it.

The privy examination which is still required of women by the statute as to conveyances of her own property has been sustained by the court "upon the ground solely that it is not an additional clog upon her power of conveyance (because the Legislature could not add additional requirements), but because it was merely a means of authenticating her signature and is therefore allowable." *Rea v. Rea*, 156 N. C. 582, 72 S. E. 574; *Douglas, J., in Weathers v. Borders*, 124 N. C. 621, 32 S. E. 881.

After the sweeping provision of the Constitution which emancipated women as to their property rights, retaining only the requirement of the written assent of the husband as to conveyances of realty, that provision came to be construed by judges who were imbued with the previous learning as to the status of married women and whose decisions, to say the least, were not in accordance with the clear meaning of the Constitution. Some of these decisions have been overruled since, and others have been sustained by the majority of the court solely upon the ground that it "has been so decided." *Connor, J., in Ball v. Paquin*, 140 N. C. 90, 94, 52 S. E. 410, 3 L. R. A. (N. S.) 307. Many of these have since been cured by repeated acts of the Legislature conforming the law more closely to the terms of the Constitution. But up to this time there has been no decision of the court that has written into the Constitution, or the statute, the words requiring the husband to be of age when he gave or withheld his written assent.

But it is urged that it is in the eternal order of things that before a man can make himself responsible, or do any act, he must be 21 years of age. That is true in our law, as to conveyances and contracts; but the "written assent" of her husband required by the Constitution is neither a conveyance nor a contract. He has nothing to convey, for he has no interest in his wife's land; nor is it a contract, for there is no consideration to him from the grantee. There is nothing magical in being "21 years of age." For the

purposes of contracts and conveying and of suffrage there must be some arbitrary age substituted for proof of discretion which otherwise would be required for each conveyance or contract. This is purely arbitrary and varies in different countries. In many countries the age for suffrage is 25, and in some it is 30. In Russia, and indeed in most countries, a monarch who is a minor becomes of legal age, and is invested with the highest powers of government, at 16. We know that in this country the Governor of one of our territories was under 21 years of age when he succeeded to that position under the authority of the President. *U. S. v. Bixby* (D. C.) 10 Biss. 520, 9 Fed. 78. In that case there is a full discussion of the subject by Judge Gresham, who points out that notaries public are not required to be 21 years of age unless in those few states where this is specially required by statute. He says: "While at common law persons are not admitted to full enjoyment of civil and political rights until they have attained the age of 21 years, yet infants are capable of executing mere powers and as agents of making binding contracts for others. In England they are allowed to hold the office of park keeper, forester, jailer, and mayor of a town; and in both England and this country they are capable of holding and discharging the duties of such mere ministerial offices as call for the exercise of skill and diligence only." He then points out that Stevens S. Mason at 19 years of age was appointed Secretary of the Territory of Michigan by President Jackson in 1831 and succeeded to the duties of Governor before he was 21, which he discharged with "vigor and wisdom that vindicated the propriety of his appointment." We know that La Fayette was a Major General in the American army at 19 in the command of 4 brigades, the duties of which position he discharged with ability. We need not multiply other well-known instances, which are numerous. It is sufficient to say that neither the Constitution, nor the statute, nor the eternal fitness of things, requires the court to write into the Constitution an additional requirement that a married woman cannot convey her realty "as if she remained single" unless the husband is "21 years of age." It may be that the courts could write a better Constitution in some respects than the convention with the approval of the people have done; but that duty was not committed to the courts, and we should observe the plain requirements of the Constitution, adding nothing thereto and taking nothing therefrom.

That the husband has no interest in the wife's estate has been again and again held by this court; but we need only cite the lucid remarks of Merrimon, C. J., in *Walker v. Long*, 109 N. C. 510, 14 S. E. 299, in which he says: "Const. art. 10, § 6, has wrought very material and far-reaching changes as to the rights respectively of husband and wife

in respect to her property, both real and personal, and enlarged her personalty and power in respect to and control over her property. It provides that 'the real and personal property of any female in this state acquired before marriage and all property real and personal to which she may after marriage become in any manner entitled *shall be and remain the sole and separate estate and property of such female*, and shall not be liable for any debts, liabilities or engagements of her husband and *may be devised and bequeathed* and with the written assent of her husband conveyed by her *as if she were unmarried*.' This provision is very broad, comprehensive and thorough in its terms, meaning and purpose, and *plainly gives and secures to the wife the complete ownership and control of her property as if she were unmarried except in the single instance of conveying it*. She must convey with the assent of her husband. It clearly excludes the ownership of the husband as such and *sweeps away the common-law right of estate which he might at one time have had as tenant by the courtesy initiate*. The strong and exclusive language of the clause above recited is that the property 'shall be and remain the sole and separate property of such female.' The husband shall be, *not* tenant by the courtesy initiate, but tenant by courtesy *after the death of his wife in case she die intestate*." The court in *Tiddy v. Graves*, 126 N. C. 622, 36 S. E. 127, cited *verbatim* and indorsed the above quotation and negatives the argument which was insisted on, in that case, that the courtesy of the husband in the whole of the wife's realty is the correlative of the dower of the wife in one-third of the husband's realty, and hence that if the Legislature can confer dower it can retain courtesy. The court referred to the Constitution as conclusive of the absolute and unlimited ownership of the wife in her property during her lifetime and rests the power of the Legislature to confer both dower, or courtesy, *after the death* of a party, upon the ground that no one has a natural right to control his property after death and that the disposition thereof whether by will or by inheritance is purely statutory.

The decision in *Tiddy v. Graves*, 126 N. C. 620, 36 S. E. 127, that the tenancy by the courtesy initiate as an interest in the wife's property has been destroyed by the Constitution and is now only a personal right to associate with his wife, and the possibility of inheriting (like her heirs at law) if she dies intestate, is not only a summary of all previous decisions, but it is the last discussion of the subject. It has never been questioned since till now, but has been cited and approved. On rehearing 127 N. C. 502, 37 S. E. 513 (though the result was changed in that case on the ground that it did not appear that the marriage occurred since 1868); *Ex parte Watts*, 130 N. C. 242, 41 S. E. 289; *Hallyburton v. Slagle*, 130 N. C. 482, 41 S. E.

877; s. c. (on rehearing) 132 N. C. 948, 44 S. E. 655; S. v. Jones, 132 N. C. 1047, 43 S. E. 939, 61 L. R. A. 777, 95 Am. St. Rep. 688; Watts v. Griffin (Walker, J.) 137 N. C. 579, 50 S. E. 218; Eames v. Armstrong, 146 N. C. 6, 59 S. E. 167, 125 Am. St. Rep. 436, where Connor, J., says: "That her husband had 'no estate or interest' in the land, notwithstanding birth of issue, is settled." Richardson v. Richardson (Walker, J.) 150 N. C. 553, 64 S. E. 510, 134 Am. St. Rep. 948. The husband therefore had nothing to convey, and there is no ground to require him to be "of age." He could marry under age and his veto power is given by virtue of marriage and not by virtue of his age. Long before Walker v. Long, this court, in Manning v. Manning, 79 N. C. 293, 28 Am. Rep. 324, and Id., 79 N. C. 301, in a strong and lucid opinion by Bynum, J., had affirmed the absolute ownership and control of her property by a married woman and held that the husband had no interest therein of any kind whatever.

In three cases, filed on the same day and written by three different judges (Thompson v. Wiggins, 109 N. C. 508, 14 S. E. 301; Walker v. Long, 109 N. C. 511, 14 S. E. 299; and Jones v. Coffey, 109 N. C. 515, 14 S. E. 84), all three speaking for a unanimous court, it was held that while a husband may still be called a "tenant by the curtesy initiate" and deemed a freeholder for the purposes of sitting on a jury, he has in fact *no estate or interest* whatever in his wife's property and was entitled to no more than the right of ingress and egress, and that she could, as the statute provides, sue for the possession of her property and for rents and damages thereto, without joining her husband. There are numerous other decisions to the above effect.

It being clear upon the face of the Constitution and the above-cited decisions that the husband has "no interest in" his wife's property which he can convey or refuse to convey, there is nothing that authorizes judicial legislation to read into the Constitution, or the statute, additional words which will forbid a wife to convey her realty, when she has the written assent of her husband, without the additional clog added by the courts "provided such husband is 21 years of age." This is not required by the Constitution, nor by the statute, nor by the "reason of the thing" which gives a husband the veto power *ex virtute officii*, without any reference to his age.

No opinion can be found which denies the

power of a wife to convey her realty unless her husband is of age. McGlennery v. Miller, 90 N. C. 216, which is relied upon by the plaintiff, states in the face of the opinion that: "The marriage took place in 1850; the wife was seised in fee of the lands at the time of the marriage and there were children of the marriage born alive. Hence the husband has a life estate in the land as tenant by the *curtesy initiate*." The opinion is by Merrimon, J., who wrote Walker v. Long, 109 N. C. 510, 14 S. E. 299, who there says that the Constitution "*sweeps away* the common-law right of estate which he might at one time have had as tenant by the curtesy initiate." The case of Barker v. Wilson, 51 Tenn. (4 Helsk.) 268, speaks of a "bargain and sale" made by an infant husband jointly with a wife of full age and is under a Constitution totally different from ours. Indeed, Revisal, § 2102, especially restricts the tenancy by the curtesy to cases "after the death of the wife *intestate*." The absolute power of the wife to devise her property is set out in the Constitution and in Revisal, § 2098, which could not be the case if the husband had any vested interest in her realty. Walker, J., in Watts v. Griffin, 137 N. C. 572, 50 S. E. 218. This is further recognized by Revisal, §§ 2116 and 2117, which make the deed of the wife of her property valid where the husband is an idiot or lunatic or has abandoned her without any assent of the husband, which could not be the case if he had any interest therein. See numerous cases cited in Pell's Revisal under those sections, holding them constitutional.

It may be noted that in all the more recent state Constitutions the requirement of the "written assent" of the husband has been dispensed with, as has also been the case in England and in Australia and Canada and other English speaking countries. The requirement of a privy examination of the wife to a deed was abolished in England some 40 years ago, and also this has been followed in Australia and Canada and in all the states of this Union, including all the states adjoining us—Virginia, South Carolina, Georgia, and Tennessee—except in North Carolina and seven others. There can therefore be no protection and only an unnecessary clog, in requiring an addition to the "written assent" of the husband which is not set out in our Constitution nor in any statute.

BROWN, J., concurs in this dissenting opinion.

(122 N. C. 121)

THOMAS v. ELLINGTON et al.

(Supreme Court of North Carolina. April 30, 1913.)

EXECUTORS AND ADMINISTRATORS (§ 436*)—ACTIONS—VENUE.

The only jurisdictional fact alleged or appearing being that the action is to recover from defendant administratrix the amount due from the estate to the other defendants as heirs of deceased, pledged by them to plaintiff to secure their debt, and this involving an account and settlement of the estate, Revisal 1905, § 421, declaring the venue of actions against administrators in their official capacity to be in the county where their bonds were given, applies.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. §§ 1726-1728; Dec. Dig. § 436.*]

Appeal from Superior Court, Forsyth County; Allen, Judge.

Action by F. E. Thomas against R. C. Ellington and others. From a judgment changing the venue, plaintiff appeals. Affirmed.

On motion, formally made, in apt time, the cause was removed to the county of Guilford, the court entering the following judgment: "On written motion on the part of the defendants to remove this cause to the superior court of Guilford county, and it appearing to the court that the intestate of the executrix, Mrs. Ballinger, lived and died in Guilford county, and then the executrix duly qualified as such before the superior court of Guilford county, and that the plaintiff seeks to recover out of the assets of the said intestate in her hands, the estate being unsettled, it is now ordered that the motion to remove to the superior court of Guilford county for trial be allowed."

Louis M. Swink, of Winston, for appellant. Watson, Buxton & Watson, of Winston, for appellees.

HOKE, J. Revisal, § 421, enacts: "All actions upon official bonds or against executors and administrators in their official capacity shall be instituted in the county where the bonds shall have been given, if the principal or any of the sureties on the bond is in the county; if not, then in the plaintiff's county." On the record it was made to appear that the father of the defendant, R. P. Ballinger, died resident in Guilford county, and that defendant Dora T. Ballinger duly qualified in said county as his administratrix, and that a suit to adjust and settle the estate is now pending in that county; that plaintiff heretofore sold to defendants Ellington and R. P. Ballinger, a tailoring business and outfit, and took and holds three notes for the purchase price in the aggregate sum of \$200, and as security for said notes a "pledge" of the property sold, and as further security R. P. Ballinger assigned to plaintiff "all his interest due him from his father's estate."

It is alleged in the complaint that the

business and property sold has been entirely disposed of, and the action is to recover judgment on the \$200 note, and to condemn and apply the interest due R. P. Ballinger from his father's estate to its payment. The note for \$200 being of itself within the jurisdiction of a justice of the peace, and the complaint having alleged that the property sold had been entirely disposed of, the only jurisdictional fact alleged in the pleadings or appearing of record is an action to recover from the administratrix the amount due R. P. Ballinger from his father's estate. This involves an account and settlement of said estate, and, by the express words of the statute, such an action must be instituted in the county where the administrator qualified. The case of Roberts v. Connor, 125 N. C. 45, 84 S. E. 107, does not conflict with this position. That was a suit which concerned the conduct of a bank operated by an executor, and the decision was put on the express ground that the official acts and conduct of the executor were in no wise involved.

The judgment removing the cause is affirmed.

Affirmed.

(123 N. C. 216)

SHELBY NAT. BANK v. HAMRICK et al.

(Supreme Court of North Carolina. April 30, 1913.)

LIMITATION OF ACTIONS (§ 155*)—PAYMENTS BY RECEIVER—EFFECT.

Since it is only because payments by a debtor recognize the existence of the debt and his obligation to pay the balance that they toll the statute of limitations, payments by a receiver, or other representative of the debtor for the benefit of creditors, do not have such effect.

[Ed. Note.—For other cases, see Limitation of Actions, Cent. Dig. §§ 623-630; Dec. Dig. § 155.*]

Appeal from Superior Court, Cleveland County; Justice, Judge.

Action by the Shelby National Bank against D. W. Hamrick and others to recover an alleged balance of \$638.31 on a note executed by the Ottoray Furniture Company to plaintiff with the other defendants as sureties. Defendants' plea of limitations having been sustained, plaintiff appeals. Affirmed.

Quinn, Hamrick & McRorie, of Rutherfordton, for appellant. Ryburn & Hoey, of Shelby, for appellees.

BROWN, J. It is agreed by counsel that the only question involved is whether the payments made by the receiver of the Ottoray Furniture Company at the time and in the amounts shown by the credits entered upon the note prevented the bar of the statute of limitations.

We agree with the court below that such payments do not prevent the bar of the statute of limitations.

nte. Payments made by trustee, or assignee, for the benefit of creditors, do not have such effect. *Battle v. Battle*, 116 N. C. 161, 21 S. E. 177; *Cone v. Hyatt*, 132 N. C. 810, 44 S. E. 678; *Robinson v. McDowell*, 133 N. C. 185, 45 S. E. 545, 98 Am. St. Rep. 704. Neither do payments made by an assignee in bankruptcy have such effect. 13 Am. & Eng. Enc. 760; *Burrill on Assignments* (6th Ed.) § 399, and cases there cited; *Battle v. Battle*, 116 N. C. 164, 21 S. E. 177. Nor payments by a receiver. 25 Cyc. p. 1383, and cases cited. In *Battle's Case*, supra, 116 N. C. page 164, 21 S. E. 177, it is said partial payments are allowed the effect of stopping the running of the statute "only when it is made under such circumstances as will warrant the clear inference that the debtor recognizes the debt as then existing, and his willingness, or at least his obligation, to pay the balance."

Affirmed.

(162 N. C. 113)

DOCKERY v. TOWN OF HAMLET.

(Supreme Court of North Carolina. April 30, 1913.)

1. MUNICIPAL CORPORATIONS (§ 1022*)—ACTIONS—PRESENTATION OF CLAIM.

Under Revisal 1905, § 396, providing that all claims against a city shall be presented to the chief officers within two years after maturity or recovery shall be barred, where a complaint showed that an unitemized claim for personal services was presented to the city on May 10, 1910, an action brought thereon on December 12, 1912, could not be maintained, nor could such a claim be the basis of a subsequent action if the services were rendered more than two years before May 10, 1910.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. § 2193; Dec. Dig. § 1022.*]

2. MUNICIPAL CORPORATIONS (§ 1034*)—PLEADING—DEMURRER—GROUNDS.

Where it appeared on the face of the complaint that a claim against a city for personal services was not rendered within two years before the action was brought, as required by Revisal 1905, § 396, so that no action could be maintained thereon, a demurrer was properly sustained to the complaint on the ground that it stated no cause of action.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. §§ 2203-2205; Dec. Dig. § 1034.*]

3. PLEADING (§ 243*)—RULINGS.

Where the complaint is merely a defective statement of the cause of action and not necessarily a statement of a defective cause of action, the action should not be dismissed, but plaintiff should be permitted to amend by alleging the essential matters.

[Ed. Note.—For other cases, see *Pleading*, Cent. Dig. §§ 643-651, 820-822; Dec. Dig. § 243.*]

4. PLEADING (§ 408*)—OBJECTIONS—MANNER OF OBJECTIONS.

An objection to a statement of a defective cause of action must be raised by demurrer or it will be deemed waived.

[Ed. Note.—For other cases, see *Pleading*, Cent. Dig. §§ 1362, 1368; Dec. Dig. § 408.*]

Appeal from Superior Court, Richmond County; R. B. Peebles, Judge.

Action by Mary L. Dockery, Administratrix, against the Town of Hamlet. From a judgment sustaining a demurrer to the complaint and dismissing the action, plaintiff appeals. Judgment dismissing the action reversed, but ruling sustaining the demurrer affirmed.

Morrison & McLain, of Charlotte, for appellant. M. W. Nash, of Hamlet, for appellee.

CLARK, C. J. The plaintiff, administratrix of her husband, instituted this action December 12, 1912, against the town of Hamlet for the "statement of an account" for the services of her husband as an attorney. The complaint, paragraph 7, alleges: "That plaintiff's intestate, previous to his death, rendered various services as an attorney at law to the defendant, the exact character of which she is not informed of, and the exact amounts which should be paid her for said services are unknown to her; that she is prepared to prove (as she is informed and believes) service in various matters, but the exact amount which she should receive is uncertain, unless defendant is to be bound by the bill presented by intestate on or about May 10, 1910, a copy of which is hereto attached." The bill attached reads as follows: "Exhibit A: Town of Hamlet, to A. S. Dockery, Attorney. Services in Steve Propst, Harrington, Dobbin, Griffin, Henderson, Ohay Hall, Nowell, Napier, Kendall, Hubbard, Cooper, Harrington, Bennett, Brown, Gorden, Suttle, Carter, Adams, Parham and other cases before the mayor including retainer for two years, drafting ordinances, etc., attending several meetings of the board of commissioners, including retainer for two civil suits, McLean and Napier v. Town, including services and advice in Griffith Case, together with prosecution of application for pardon before Governor, together with costs, aggregating \$40; statements for all of which were regularly presented to the board, less \$100 paid, \$750."

The defendant town demurred:

(1) In that the complaint does not state a cause of action against the defendant.

(2) That the complaint does not show that an itemized verified account was presented to the defendant to be audited and allowed; therefore no itemized account was ever presented, as required by section 1385 of the Revisal of 1905.

(3) That the complaint does not show that any claim was presented to the chief officers of the town within two years after the maturity of said claim.

Taking the last paragraph of the demurrer first, it appears from the complaint that, even if the bill set out in Exhibit A was sufficient in law, the demand is barred, and the demurrer should have been sustained.

Rev. 396, provides that: "(1) All claims against the several counties, cities and towns in this state, whether by bond or otherwise shall be presented to the chairman of the board of county commissioners or to the chief officers of said cities and towns, as the case may be, within two years after the maturity of said claims, or the holders of such claims shall be forever barred from a recovery thereof."

In *Wharton v. Commissioners*, 82 N. C. 14, where this section first came up for review, the court said: "The statute relied on is not in strict terms an act limiting the time in which the action may be prosecuted, but it imposes upon the creditor the duty of presenting his claim within a defined period of time, and, upon his failure to do so, forbids a recovery in any suit thereafter brought. If the claim is presented, and the commands of the statute complied with, no bar or obstruction is interposed in the way of its successful prosecution." Further on it is said that the act is "a restricted and conditional limitation upon the right to sue." The statute is in effect the same as Rev. 59, as to an action for "wrongful death," which has also been held to be not strictly a statute of limitations but an act prescribing the time within which action can be brought (*Best v. Kinston*, 106 N. C. 205, 10 S. E. 997), and in which a demurrer lies unless it appears on the face of the complaint that the action was brought in the time limited.

The language above cited is quoted and approved in *Royster v. Commissioners*, 98 N. C. 151, 3 S. E. 739. In *Board of Education v. Greenville*, 132 N. C. 4, 43 S. E. 472, the above rulings are affirmed; *Walker, J.*, saying: "We think it is unnecessary to inquire or to decide whether the statute is strictly one of limitation, or whether it merely imposes a duty upon the holder of a claim against a municipal corporation, the performance of which is a condition precedent to his right of recovery. In either view of the nature of the statute, the claimant, by its very words, is 'barred from a recovery' of any part of the claim that did not mature within the two years immediately preceding the date of his demand, and this conclusion as to the effect of the statute is all sufficient for the disposition of this appeal."

[1] It appears upon the face of the complaint, therefore, that this claim was presented more than two years prior to the beginning of this action, to wit, on May 10, 1910. As the claim must have been mature then, if valid, it appears upon the face of the complaint that this action, which was not begun till December 12, 1912, was not within two years, and therefore no cause of action is stated. The plaintiff does not aver that she has made any demand, but on the contrary says in the complaint, as above set out, that

she "is not informed as to the character of the services or the amount that ought to be paid," and that she has "asked a settlement." But, even if there has been a demand alleged of so uncertain and insufficient a claim, it is not alleged to have been made within two years after May 10, 1910. Nor even as to the claim filed on May 10, 1910, does it appear therein that the services were rendered in two years prior thereto, and hence it was invalid when filed and could be no basis for a subsequent demand, if it had been made.

[2] Therefore, upon the face of the complaint, the first and third grounds of the demurrer were properly sustained by the judge for "no cause of action stated." *Wharton v. Commissioners*, 82 N. C. 14; *Best v. Kinston*, 106 N. C. 205, 10 S. E. 997. It is therefore unnecessary to discuss the second ground of demurrer.

[3] The demurrer was properly sustained. But as the complaint is a defective statement of a cause of action and not necessarily a statement of a defective cause of action, it was error to dismiss the action, and the plaintiff should be allowed to amend by setting out the matters required by the statute. *Bowling v. Burton*, 101 N. C. 176, 7 S. E. 701, 2 L. R. A. 285; *Mizzell v. Ruffin*, 113 N. C. 69, 23 S. E. 927.

[4] Objection to a statement of a defective cause of action must be taken advantage of by a demurrer or it will be deemed waived. *Knowles v. Railroad*, 102 N. C. 59, 9 S. E. 7; *Ladd v. Ladd*, 121 N. C. 118, 28 S. E. 190.

The judgment dismissing the action is reversed, but the action of the court in sustaining the demurrer is affirmed.

WALKER, J., did not sit.

(162 N. C. 127)

In re BIG COLD WATER CREEK DRAINAGE DIST.

(Supreme Court of North Carolina. April 30, 1913.)

1. TRIAL (§ 295*)—INSTRUCTIONS—CONSTRUCTION AS A WHOLE.

The entire charge, read as a whole, not being misleading, it is immaterial that a portion of it taken alone, might be some ground for exception.

[Ed. Note.—For other cases, see *Trial*, Cent. Dig. §§ 703-717; Dec. Dig. § 295.*]

2. DRAINS (§ 14*)—PROCEEDINGS FOR ESTABLISHMENT—APPEAL—SCOPE OF HEARING.

By express provision of Pub. Laws 1911, c. 67, § 3, amending the Drainage Act (Pub. Laws 1909, c. 442, § 17), appeal to the superior court in a proceeding thereunder is to be heard only on the exceptions theretofore filed.

[Ed. Note.—For other cases, see *Drains*, Cent. Dig. §§ 5, 6; Dec. Dig. § 14.*]

3. DRAINS (§ 2*)—STATUTES.

Pub. Laws 1895, c. 206, simply authorizing the adjacent owners on a certain creek to clean out and straighten its channel, somewhat on the system under which the roads have been

worked by conscription of labor, even if not repealed, is no bar to proceedings under Drainage Act (Pub. Laws 1909, c. 442), for a drainage district including such creek.

[Ed. Note.—For other cases, see Drains, Cent. Dig. § 17; Dec. Dig. § 2; * Constitutional Law, Cent. Dig. § 884.]

Appeal from Superior Court, Cabarrus County; Justice, Judge.

Proceeding for establishment of the Big Cold Water Creek Drainage District. Objectors appealed to the superior court, and from its judgment again appeal. Affirmed.

Morrison Caldwell, of Concord, for appellants. Heriot Clarkson, of Charlotte, L. T. Hartsell and J. Lee Crowell, both of Concord, for appellees.

CLARK, C. J. This is a proceeding under the General Drainage Act, c. 442, Laws 1909. The petitioners, 58 in number, filed their petition, duly signed and setting out the necessary allegations. The summons was served upon 9 others in the district who did not join in the petition. Under section 3 of the act, and after hearing objections, the order was made establishing the drainage district and appointing the board of viewers. Upon objections filed, the clerk confirmed the report of the viewers, and an appeal was taken to the judge. At term an issue was submitted to the jury, upon the only objection filed by the objectors, i. e., "Is the cost of construction greater than the benefits that will accrue to the land?" to which the jury responded "No," and thereupon judgment was rendered confirming the action of the clerk.

The proceedings were regular in all respects under chapter 442, Laws 1909, whose constitutionality was thoroughly discussed and upheld by Mr. Justice Hoke in *Sanderlin v. Luken*, 152 N. C. 739, 68 S. E. 225, which has been reaffirmed. *White v. Lane*, 153 N. C. 17, 68 S. E. 895; *Trustees v. Webb*, 155 N. C. 386, 71 S. E. 520; *Carter v. Commissioners* (In re Drainage of Mattamuskeet Lake) 156 N. C. 187, 72 S. E. 380.

[1] The objectors filed two assignments of error to the charge. The first of these is abandoned here. The other, that the court instructed the jury to take into consideration the health of the community, instead of confining them to the question of health in so far as it affected the lands within the drainage district, cannot be sustained, for the court charged that the jury should consider, "not only the increased facilities of the land for producing crops, but the benefit to the health of the people who live in the district." Taking a detached portion of the charge, there might be some ground for the exception, but as Walker, J., said in *Kornegay v. Railroad*, 154 N. C. 392, 70 S. E. 732: "We are not permitted to select detached portions of the charge, even if in themselves subject to criticism, and assign errors as to them, when, if considered with the other por-

tions of the charge, they are readily explained and the charge, in its entirety appears to be correct. Each portion of the charge must be construed with reference to what precedes and follows it. * * * And this is the only reasonable rule to adopt." Reading the entire charge, we do not think the jury was misled.

[2] The third exception is that in the judgment the clerk failed to find as a fact that the lands described were "wet, swamp or overflowed lands, or lands covered by water or that the drainage of the lands described would benefit the public health or be conducive to the general welfare." The court found as a fact that the allegations set out in the petition were true, and those allegations are distinctly and clearly made in the petition. Besides, on appeal the cause was tried de novo, and the only issue raised by the objectors was as to the cost of construction, and whether it would exceed the benefits. The amendment to the Drainage Act, § 3, c. 67, Laws 1911, provides that appeals in these cases "shall be based and heard only upon the exceptions theretofore filed by the complaining party, either as to the issues of law or fact, and no additional exceptions shall be considered by the court upon the hearing of the appeal." In fact, none other was raised.

[3] The objectors' last exception is that chapter 442, Laws 1909, provided that it should not repeal or change "any local drainage law already enacted or to be enacted by the General Assembly of 1909." It was earnestly debated before us whether that restriction applied to local drainage acts already enacted by the General Assembly of 1909 or to those enacted prior thereto. But we need not pass upon the point. Aside from the fact that this exception was not made before the clerk, and therefore, under section 3, c. 67, Laws 1911, was not a matter for consideration on appeal, we are of opinion that chapter 206, Laws 1895, which defendants claim is a bar to this proceeding, in no wise covers the ground of the statute under which this proceeding is taken out. Chapter 206, Laws 1895, simply authorized the adjacent owners on Cold Water creek to clean out and straighten the channel thereof, somewhat upon the system under which our roads have been worked by conscription of labor. The hands to be furnished were to be worked not less than 4 nor more than 20 days in each year. Chapter 442, Laws 1909, was a new departure in North Carolina. It is the adoption of a system, heretofore successfully operated in many other states, for the co-operation of landowners in the drainage of lands by forming drainage districts, which were to become quasi public corporations, for the purpose of improving the health of the district and the fertility of the lands. Under this drainage district system, the lands are assessed in proportion

to the benefits derived. An organization is effected in each district to execute and maintain a system of drainage. As in every community there are some who oppose any proposition looking to co-operation for the public benefit, this act provides therefore that, when three-fifths of the landowners in any proposed district shall sign a petition, notice shall be issued to the others, and if upon examination of the petition, and into the facts, the clerk of the court shall find that the law has been complied with, a board of viewers shall be appointed who shall make investigation and report, with the aid of a competent civil engineer, and upon coming in of the report of the viewers the clerk will hear the objections raised and render a judgment from which an appeal lies to the superior court.

This act is well drawn, and is based upon the experience and the statutes of other states, and up to date more than 100 of these drainage districts have been organized in North Carolina with great benefit to the health and in the increased productiveness of the lands in these districts. Together with the increased school facilities and better roads this new drainage system is aiding vastly in promoting the development of this state. In Florida the state itself has created a drainage district of 4,500,000 acres. This system operating in many states has by the co-operation of landowners redeemed a vast acreage.

The proceedings herein have been regular, and we find therein no error.

(33 S. C. 445)

KEENAN v. WARFIELD et al.

(Supreme Court of South Carolina. Jan. 29, 1913.)

NUISANCE (§ 84*)—INJUNCTION — CONSTRUCTION.

Complainant sued to abate a nuisance, consisting of the operation of a coal chute near complainant's dwelling by the receivers of a railroad company; the injury being occasioned by the use of the chute in its objectionable locality. *Held*, that an injunction restraining defendants from doing or carrying on the acts and operations alleged in the complaint, or any of them, and from operating any of the works described, whereby further injury might result to complainant, etc., was confined to the nuisance arising from the operation of the chute, without more, and was therefore not objectionable as enjoining defendants' use of their tracks, where the coal chute was located, for ordinary purposes, after the chute had been removed.

[Ed. Note.—For other cases, see Nuisance, Cent. Dig. §§ 196-199; Dec. Dig. § 84.*]

Appeal from Common Pleas Circuit Court of Richland County; T. H. Spain, Judge.

Action by George Keenan against S. Davies Warfield and others, as receivers of the Seaboard Air Line Railway. Judgment for plaintiff, and defendants appeal. Dismissed.

Lyles & Lyles, of Columbia, for appellants. Frank G. Tompkins, of Columbia, for respondent.

FRASER, J. This is an action by the plaintiff against the defendants, as receivers of the Seaboard Air Line Railway, to abate a nuisance, to wit, the operation of a coal chute in the city of Columbia, near the dwelling of the plaintiff. The nuisance is alleged to arise from coal dust, smoke of engines, noise, etc., occasioned by the use of the coal chute at its then location. The jury found a verdict for the plaintiff for \$1. Thereupon the presiding judge, his honor, Judge Spain, issued an injunction against the defendants. The coal chute has been removed, but the defendants appealed. There are several exceptions.

It was agreed by the attorneys representing the appellants and the respondent in this court that this court shall decide a single question, and that is the extent of the injunction contained in Judge Spain's order.

The order provides: "It is therefore ordered that the defendants, their agents, servants, and all persons or corporations claiming under or as the principals of these defendants, their agents and servants, be, and they are hereby, enjoined and restrained from doing or carrying on the acts and operations, or any of them, alleged in the complaint in this action, and from operating or maintaining any of the works described in the complaint, whereby further injury may result to the plaintiff, his home, property, easements, and privileges alleged in the complaint, and that the nuisance alleged in the complaint be forever abated and stopped, and that the prayer of the complaint craving an injunction be granted."

The appellants claim that this order might be construed to prevent the use of its tracks, where the coal chute was located, for ordinary purposes other than those incident to the coal chute. The words, "enjoined and restrained from doing and carrying on the acts and operations, or any of them, alleged in the complaint," confine the injunction to the acts alleged in the complaint. The complaint alleged that the nuisance arose from the operation of the coal chute, and nothing more. The order is confined to the operation of the coal chute, and as it has been removed there is nothing upon which it can operate, except a re-establishment of the coal chute. It does not bind either party to any use of its tracks, unless they are connected with the coal chute.

The judgment of this court is that the appeal be dismissed.

GARY, C. J., and WOODS, HYDRICK, and WATTS, JJ., concur.

(94 S. C. 349)

JONES v. KELLY et al.

(Supreme Court of South Carolina. April 22, 1913.)

1. REFORMATION OF INSTRUMENTS (§ 45*)—MUTUAL MISTAKE—EVIDENCE.

In a suit to reform, on the ground of mutual mistake, a deed conveying a life estate, so as to make it convey the fee, evidence *held* not to show mistake.

[Ed. Note.—For other cases, see Reformation of Instruments, Cent. Dig. §§ 187-193; Dec. Dig. § 45.*]

2. REFORMATION OF INSTRUMENTS (§ 45*)—MUTUAL MISTAKE—EVIDENCE.

That a grantee who obtained a deed for a life estate paid full price for a fee does not of itself, after the death of the grantor, justify a reformation of the deed so as to make it convey the fee.

[Ed. Note.—For other cases, see Reformation of Instruments, Cent. Dig. §§ 187-193; Dec. Dig. § 45.*]

3. APPEAL AND ERROR (§ 1056*)—HARMLESS ERROR — ERRONEOUS EXCLUSION OF EVIDENCE.

The error, if any, in excluding evidence which would not affect the result, is immaterial.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4187-4193, 4207; Dec. Dig. § 1056.*]

4. WITNESSES (§ 112*)—COMPETENCY — INTEREST—RELEASE.

Under the statute excluding the testimony where it can in any manner affect the interest of the witness or the interest previously represented by him, a witness who testifies to facts that will relieve him from liability is not competent to testify to the same facts after he has been released from liability.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. §§ 426-475; Dec. Dig. § 112.*]

Woods, J., dissenting.

Appeal from Common Pleas Circuit Court of Florence County; S. W. G. Shipp, Judge. Action by Ella F. Jones against Chas. M. Kelly and others. From a judgment for defendants, plaintiff appeals. Affirmed.

Walter Hazard, of Georgetown, for appellant. Willcox & Willcox and Henry E. Davis, all of Florence, for respondents.

FRASER, J. This is an action to reform a deed. The complaint alleges: That heretofore, to wit, on or about the 5th day of October, 1863, one Charles McAllister, being then the owner thereof, executed and delivered to E. T. Moody his certain deed, whereby he conveyed, in consideration of the sum of \$500, a certain tract of land in Williamsburg county containing 15 acres (describing the land). That at the time of the conveyance above mentioned the sum of \$500 was the full and fair value of the absolute title of said Chas. McAllister without any limitation or reservations. That as plaintiff is informed and believes the said Chas. McAllister and the said E. T. Moody both at the time understood that said E. T. Moody was receiving a conveyance in fee simple without reservation or limitation, and the said E. T. Moody paid the consideration

mentioned in the deed with this understanding; but that on account of an error in the preparation of the deed of conveyance (which was prepared by a party not skilled in such matters) such deed was so formed as to convey, as plaintiff is informed and believes, a life estate only to the said E. T. Moody. That thereafter, by a succession of conveyances, the land was conveyed to the plaintiff. That Charles McAllister died in 1876. That the defendants are his heirs at law and the heirs of the heirs who are now dead. The complaint prays for a reformation of said deed, and that she be declared the owner of said land. Some of the defendants answered the allegations as to a mistake in the deed, and set up laches, etc. It was referred to a referee to take the testimony. The trial was had before his honor, Judge Prince, who in a very strong and elaborate decree found as follows: "Without prolonging the discussion to greater length, it is sufficient to say that a careful consideration of all the facts established by the testimony fails to satisfy me that there was a contract between McAllister and Moody, whereby the former agreed to convey to the latter a fee-simple estate in the property in question, and that through mistake the deed which was executed by McAllister failed to express that contract." E. T. Moody was offered as a witness. Moody had warranted the title, but during the taking of the testimony, after he had testified, he was given a release under his warranty, and he went back on the stand, and reaffirmed his statements. His honor ruled out the testimony of Moody, and held that the plaintiff was guilty of laches, and that the claim was stale. In the view that this court takes of this case, it will only be necessary to consider the ninth exception, and we will consider that exception as raising the initial question in this case and in its consideration will consider the testimony of Moody. Has the plaintiff shown that the deed from McAllister to Moody does not contain the contract between the parties?

[1] There must be a meeting of two minds in order to make a contract. The complaint recognizes this, and alleges that both Charles McAllister and Moody understood that E. T. Moody was receiving a conveyance in fee simple. Moody testified: That he married a granddaughter of Charles McAllister. That he rented the land in dispute from him at \$6 per month. That W. G. McAllister, a son of Charles and the uncle of Moody's wife, suggested to him that he buy the place, and that he talk to Charles about it. That he (Moody) went to see him (Charles), and the old man talked favorably about the sale. That some time afterwards he saw W. G. McAllister again, and told him that the old gentleman had talked favorably about it. That W. G. McAllister told him that he (W. G.) would see his father,

and try to get the deed for him (Moody). That six months afterwards he was given the deed by W. G. McAllister, and executed the notes for the purchase money. W. G. McAllister is also dead. All that is known of Charles McAllister afterwards is that he collected some of the notes, and lived in that community until 1876. *There is no word of direct evidence to show what Charles McAllister intended by the conveyance.* It is said, however, that Charles McAllister lived close by, and could have seen Moody cut down the timber, and there is no evidence of his objection. That is true, but Moody testified that the timber was "very poor. It had been culled over, and it had pretty well all been burnt over." It is said that the deed was drawn by W. G. McAllister, and he was not skilled in such matters. That is true, but in 1872 Moody sold the land to M. L. Jones. This deed is also said to have been written by W. G. McAllister, and conveys a fee and a warranty that is significant. Judge Prince thinks that that warranty indicates a doubt as to the sufficiency of the title. In this we cannot say he was in error. W. G. McAllister used the word "heirs" in 1872, and used it in an inartificial conveyance. Charles McAllister was then alive and in that community. If the deed did not convey what he intended to convey and what Moody intended to purchase, that was the time to correct the mistake.

[2] But it is said Moody paid full price for a fee, and that entitles him to a conveyance in fee. Full price standing alone has never been held to be conclusive that it was the intention to convey a fee. If a full price is sufficient of itself to carry a fee after the death of the grantor, then a small price after the death of the grantee ought to cut down a fee to a life estate or a term of years. That would be a very dangerous doctrine in this state, where land values are rapidly increasing. That is not the law, and we have not been referred to any case that so holds. The witnesses are not agreed as to whether it was full price or no. Moody paid \$500 for land with a dwelling house on it which rented for more than 7 per cent. on \$1,000. It is said Charles McAllister did not make any objection to the sale to M. L. Jones. There is no evidence of any objection, but he had no right to object as long as Moody lived. Moody lived until this case was nearly ready for a hearing before Judge Prince and testified in the case. This court cannot find any evidence to contradict the plain import of the deed. There is no evidence that Charles McAllister contracted to convey a fee, and none that even Mr. Moody stipulated for a fee. There was conflicting evidence as to what Mr. Moody thought he was getting. It will be observed that the plaintiff claims that the deed does not convey a fee simple but a life estate, and in the failure to convey a fee it failed to express the contract between the parties. The ac-

tion is to reform the deed. The plaintiff proved that there was no contract except the deed, and thereby failed utterly to prove the essential fact necessary to reform the deed.

[3,4] This court holds that the appellant has failed to prove the contract set up in the complaint. The testimony, though formally ruled out by Judge Prince, has been considered by this court as it is all in the record. It would not have affected the result, and the error, if any, is immaterial. It was not error. The statute of this state excludes the testimony where it "can in any manner affect the interest of such witness or the interest previously owned or represented by him." What a travesty it would be to put a witness on the stand and allow him to state what will relieve him from liability, then release him from liability, and put him back on the stand, and ask him if the things to which he has just sworn are true or false. Our statute prevents just that thing. There was no error in ruling out the testimony of E. T. Moody.

As this court has held that the appellant has failed to establish the contract, the other questions do not arise.

The judgment of this court is that the judgment of the circuit court be affirmed.

GARY, C. J., and HYDRICK and WATTS, JJ., concur.

WOODS, J. (dissenting). The plaintiff, Ella F. Jones, being the holder of the deed to a tract of land hereinafter described, brought this action against all the heirs of Charles McAllister for the reformation of the title whereby Charles McAllister conveyed the land to E. T. Moody, under whom the plaintiff claims. The complaint alleges that on or about the 5th day of October, 1868, Charles McAllister executed and delivered his certain deed to E. T. Moody, intending to convey the fee-simple title to 15 acres of land in the incorporate limits of the town of Lake City, county of Williamsburg, for the named consideration of \$500; but by a mistake, caused by the deed having been drawn by an unskilled person, the necessary words of inheritance were omitted from the deed. The land was conveyed by E. T. Moody to M. L. Jones January 28, 1872; by M. L. Jones to Pittman Bros.; by Pittman Bros. to B. Wallace Jones, December 17, 1885; by B. Wallace Jones to Pittman Bros. April 17, 1895; by Pittman Bros. to Ella F. Jones, the plaintiff in this action, May 1, 1900. All the deeds made to the land since the transfer from Charles McAllister to E. T. Moody have been fee-simple titles. The deed which the plaintiff seeks to have reformed is as follows: "State of South Carolina, Williamsburg County. Know all men by these presents, that I, Charles McAllister, of the county and state aforesaid, for and in consideration of the sum of five hun-

dred dollars to me paid by E. T. Moody, of Williamsburg county and state aforesaid, have granted, bargained, sold and released, unto the said E. T. Moody, one lot or tract of land, containing fifteen acres, more or less, being a part of a tract of land, containing fifteen hundred acres, surveyed for Charles McAllister and to him granted the 14th of March, 1790, situated in Williamsburg county and state aforesaid on the south-west side of Lynches' Lake, bounded N. E. by lands of Ann Jones, on the Georgetown road, south by Charles McAllister and Mrs. Mary Murphy's land and continuing straight line to W. G. McAllister's line, west by W. G. McAllister's line, north by Alder and Charles Kelley's line to the Georgetown road, and has such shapes, forms and boundings as a plat doth represent. Together with all the rights, titles, members and appurtenances incident or appertaining. Him to have and to hold from this day forward the above named land against myself, and I, Charles McAllister, of the aforesaid county and state, do further bind myself to warrant and defend against my heirs, executors and administrators, and all other persons lawfully claiming the same or any part thereof. In witness whereof, I do hereunto set my hand and seal this 5th day of October, in the year of our Lord one thousand eight hundred and sixty-eight, and do sign, seal and deliver in the presence of these witnesses. Charles McAllister. [L. S.] S. D. McCutchen. R. D. Isgott."

The defendants in their answer deny that the omission of the words of inheritance from the deed was due to mistake, and set up as a further defense "that a period of more time than forty (40) years has elapsed since the date of the execution of the said deed from Charles McAllister to E. T. Moody and since the date of its record in the office required by law; and the defendants therefore submit and allege that the original grantee and all his successors in interest and privies in estate, including the plaintiff in this action, have been and are now estopped by the lapse of time and the staleness of the claim, involving the loss of evidence by the death of Charles McAllister and others, which would make it impossible to ascertain the true facts, and it would therefore be inequitable to grant the relief prayed for in the complaint." The case, being at issue, was referred by consent to Charles W. Stoll, Esq., as special referee to take and report the testimony. The report was made and the case heard before Judge George E. Prince at the November term of the court of common pleas for Florence county, that portion of Williamsburg county where the land is situated being now in Florence county. Judge Prince dismissed the complaint, holding in an elaborate decree (1) that the plaintiff had failed to show that the deed was not intended to convey a life estate to Moody

but a fee simple; and (2) that the plaintiff's claim was barred by her laches in presenting it to the court.

In considering these conclusions of the circuit court, it is of prime importance to bear in mind that the plaintiff is not asserting a claim for reformation of the deed against bona fide purchasers from the grantor, Charles McAllister, but against his heirs at law, who can have no higher right than their ancestor would have if he were living. It is true, however, that even as to the parties to a deed the evidence of mistake in its terms must be clear and convincing to warrant a reformation. I agree that the circuit judge correctly held that the testimony of the grantee, Moody, to the effect that the intention was to convey a fee, was incompetent because such testimony as to the transactions or communications between Moody and McAllister, his deceased grantor, would affect the interest previously owned by the witness. But, leaving out of view all other testimony, it seems to me that the deed furnishes on its face evidence clear and convincing that the intention was to convey a fee simple, and not a life estate. It was manifestly drawn by one not familiar with technical forms in conveyances, for only a part of the usual tenendum clause is found, and the habendum and warranty are mingled in the same paragraph. The evidence leaves no doubt that the draftsman was W. D. McAllister, a son of the grantor, a plain countryman without professional training in conveyancing.

In construing deeds as in the performance of all other judicial functions, the court must take judicial notice of the manners and customs of the people whose writings they try to understand; and clear conviction arising from taking into account such manners and customs surely is as good as any other conviction. Having in view the manners of the plain people of the country, it is inconceivable that any man without legal training would write such a deed as is now before us when his intention was to convey a life estate. Indeed, it seems safe to say that if two deeds were presented to such a man, one to A., and the other to A. and his heirs, with the statement that one conveyed a life estate and the other a fee simple, he would say that the deed to A. was absolute and the deed to A. and his heirs conveyed for A.'s life only and after his death to his heirs. So universal is the custom to use the words "for life" or similar words when the intention is to convey a life estate, and not a fee, that I venture to think that there will be no dissent from the statement that the attempt to limit to a life estate is never attempted without the use of such words either by lawyers or laymen, unless the purpose be to entrap or deceive. In view of these facts, can there be a doubt that courts of equity should relieve against the injustice

which arises from the absurd rule of common law that the use of the word "heirs" is necessary to create a fee whenever they can possibly do so without interfering with the rights of innocent purchasers or creditors? But in this case, not only is the intention to convey absolutely and not to limit to a life estate shown by the absence of any express limitation, but the language of the deed affirmatively shows that intention. The words "together with all the rights, titles," etc., indicated, if they meant anything, to a man untutored in the law that all the grantor's rights and titles in the land were conveyed without reservation. The words "him to have and to hold from *this day forward*," etc., meant from this day forward indefinitely; that is, without limit. They are equivalent to the words "to have forever." In *Johnson v. Gilbert*, 13 Rich. Eq. 42, there were no words of inheritance in the deed, yet the court held that the clause, "I, said Jesse Gilbert, Senior, warrants and defends unto Jesse Gilbert, Junior, forever, against myself, my heirs and assigns forever," etc., were in themselves "satisfactory evidence at the least of an executory contract for the sale of the land in fee," and that the heirs of the grantor had no interest in the property conveyed. Looking to the deed alone, it seems to me that this case is conclusive authority for holding that the intention in the present case was to convey a fee simple. The case of *Austin v. Hunter*, 85 S. C. 472, 67 S. E. 734, was decided on the same principle. In *Sullivan v. Moore*, 92 S. C. 305, 75 S. E. 497, the court said: "The deed of conveyance * * * was written by Jared D. Sullivan, plaintiff's husband. Unless the courts must look away from the obvious, they know that it is probable almost to the point of certainty that in writing a deed no layman would express the conveyance of a life estate by the mere omission of the word 'heirs' in the premises and the habendum when using it in the warranty, and that no lawyer would do so, except one wholly possessed with the spirit of priggishness." In *Trustees v. Bryson*, 34 S. C. 401, 13 S. E. 619, and *Sullivan v. Latimer*, 38 S. C. 417, 17 S. E. 221, it was held that a paper in form a deed and purporting on its face to be under seal furnished conclusive evidence that the parties intended to seal it, and that in equity it would be regarded a good conveyance. The ruling was based on the court's knowledge that reasonable men would not make such a paper without intending to seal. It seems to me that the court must know with equal certainty that the people of this country do not make papers of this sort when they intend to convey a life estate but only when they intend to convey a fee simple, and that the rule of the common law that the use of the word "heirs" is necessary to convey a fee is in modern life a fiction as absurd as would be its ancient con-

temporaries, fines and common recoveries.

With the intention to convey a fee made manifest beyond doubt from the terms of the deed itself, it is by no means necessary for the plaintiff to prove that she paid full value, for the evidence of value is important only as showing the improbability of the grantee paying the full value of the fee for a life estate. If that intention is evident from the deed or otherwise, the plaintiff will not be denied relief merely because the grantor chose to take a small price. When the evidence of value is considered in view of the well-known depression in the price of land, and the backwardness of the country where it is situated in 1868, it seems to me the clear preponderance favors the conclusion that \$500 was a full price for the fee-simple title. Certainly, it produces a clear conviction that \$500 would have been a very excessive price for the life estate.

There are other circumstances showing that the parties thought that McAllister had parted with all interest in the land. The renunciation of dower was in the regular form to Moody and his heirs. Moody cut and removed timber from the land, and there was no evidence of objection. He conveyed by fee simple to M. L. Jones and W. G. McAllister, the son and agent of Charles McAllister, wrote the deed, thus indicating his belief that Moody had the fee simple. There is not a particle of evidence that Charles McAllister or any of his heirs in all the long period since the deed was made to Moody, and in view of all the changes in ownership ever made or referred to any claim to a reversion. The only other obstacle to the reformation of the deed is the alleged laches of the plaintiff. The plaintiff acquired title to the land from Pittman Bros., through successive conveyances from Moody, on May 1, 1900. There is no claim that she had actual knowledge of the defect in the title until 1909, when it was developed in an action for specific performance of an agreement for exchange of this land for another lot brought by the plaintiff against C. M. Kelly. The plaintiff and those under whom she claims have been in possession of the land since the conveyance from Charles McAllister to E. T. Moody. Each grantee in these successive conveyances acquired the rights of his grantor, including the right to have the title reformed. There is no evidence that any of the parties, either plaintiff or defendants, knew of the defect, or that Charles McAllister or the defendants, his heirs, ever made any claim that they had any interest in the land until the defect was discovered and introduced in the course of the litigation with Kelly. It is true that under the recording laws of the state the plaintiff is chargeable with constructive notice of the defendant's claim as heirs at law of Charles McAllister, but it by no means follows that she or her grantors are chargeable in a court of equity

with laches in not knowing of the defect in the deed, and asking for its reformation at an earlier date. "As a definition of laches, however, it is sufficiently correct to say that it is the neglecting or the omitting to do what in law should have been done, and this for an unreasonable and unexplained length of time, and in circumstances which afforded opportunity for diligence. * * * It is manifest, therefore, that the period of time which shall be a bar in equity must needs vary with the varying circumstances in the different cases. Thus, to constitute laches in a case showing gross negligence, a lesser lapse of time would suffice than in a case of ordinary carelessness and inattention. So, too, would the length of time deemed sufficient be greater or less according as the evidence in the case might show whether the party to whom laches is imputed actually knew of the opportunity he neglected, or was simply presumed to have known." *Babb v. Sullivan*, 43 S. C. 436, 21 S. E. 277.

It would be a hard rule for courts of equity to deny to landholders relief against their grantors from technical defects in old deeds like this, on which their titles depend, on the ground of laches, merely because such defects which appear in the record have remained undiscovered for many years. In this case it seems to me peculiarly hard and inequitable. As I have endeavored to show, the defendants have nothing but a naked technical legal claim, based on a paper which shows on its face the claim to be grossly inequitable, and its assertion most unjust; the plaintiff bought without knowledge of the defect, paying full value, and brought this action almost immediately after the discovery of the technical defect in the deed; and the issue is between the plaintiff and the heirs of the grantor who made the defective deed, no innocent purchasers being involved.

All the equities being, in my opinion, on the side of the plaintiff, and the defendants having nothing to support their unjust claim except a naked legal technicality, I think the judgment should be reversed, and the deed reformed according to the prayer of the complaint.

(94 S. C. 342)

GIBBES v. RIVERS.

(Supreme Court of South Carolina. April 21, 1913.)

JUDGMENT (§ 614*)—ISSUES—RES JUDICATA.

Code Civ. Proc. § 821, provides that in every action to recover personal property pledged for debt the jury may find the amount due plaintiff, and defendant shall be entitled to pay such amount and costs, and free the property from incumbrance. Plaintiff sued in replevin to recover certain machinery under a mortgage and recovered judgment for the surrender thereof, which judgment also fixed the amount of the debt, damages for detention, etc., and was satisfied "by the delivery of the ma-

chinery and payment of the costs." Plaintiff then sold the machinery on foreclosure, receiving but a part of the debt, and then sued to recover the balance. *Held*, that the finding of the amount of the debt and damages in replevin was only to enable defendant to free the property if he desired to pay the debt, and that the satisfaction of that judgment was no bar to an action for the balance of the debt.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 1128-1129; Dec. Dig. § 614.*]

Watts, J., dissenting.

Appeal from Common Pleas Circuit Court of Hampton County; John S. Wilson, Judge. "To be officially reported."

Action by A. M. Gibbes, trading as Gibbes Machinery Company, against J. T. Rivers. From a judgment for defendant, plaintiff appeals. Reversed.

J. W. Vincent, of Hampton, for appellant. W. D. Connor and J. P. Youmans, both of Brunson, for respondent.

HYDRICK, J. To clearly understand the issue involved, a brief statement is necessary. On March 20, 1911, defendant gave plaintiff two notes for \$72.02 and \$73.45, respectively, and secured them by mortgage of a planing machine, for the purchase price of which they were given in part payment. The notes were not paid at maturity, and, plaintiff's demand for possession of the planer, in order that he might sell it under the mortgage, having been refused, he brought an action of claim and delivery against defendant and J. C. Dowling (who seems to have had actual possession) to recover the possession, or the value thereof, in case delivery could not be had, and damages for the detention thereof. The defendants did not answer, but appeared and consented that the whole case be referred. The referee took the testimony and reported that the value of the property sued for was \$200, that there was due on defendant's notes to plaintiff \$150, and that plaintiff had been damaged \$50 by the detention of the property. His report concluded as follows: "I find as a matter of law that the plaintiff is entitled to the possession of the machinery in question, for the purposes contemplated by his mortgage over the same; and, in case the said property cannot be delivered to plaintiff, plaintiff is entitled to judgment against the defendants, jointly and severally, in the sum of \$150, and in the sum of \$50, actual damages, together with the costs of this action." There were no exceptions to the report. On hearing the report, the court passed the following order for judgment: "It is ordered that the said report be and the same is hereby confirmed and made the judgment of this court. It is further ordered that the plaintiff herein, A. M. Gibbes, have leave to enter up judgment against the defendants J. T. Rivers and J. C. Dowling for the possession of the property mentioned and described in the affidavit

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Index.

and complaint in this action, and in case a delivery thereof cannot be had, then for the sum of \$200, the value thereof, and for the sum of \$50 damages as found by the referee, and for his costs and disbursements in this action." Judgment was entered accordingly, and execution was issued thereon. That judgment was satisfied by payment of the costs and damages and delivery of the property to the plaintiff, who sold it under the mortgage, and credited the net proceeds of the sale on the notes. Plaintiff then brought this action to recover judgment for the balance due on the notes. Defendant pleaded, besides several other defenses, that the matter was *res judicata*, because the referee had found and reported the amount due on the notes in the action of claim and delivery, and his report had been confirmed by the court. All the defenses were overruled, except the plea of *res judicata*, which was sustained.

As to the satisfaction of the judgment, the record is somewhat confusing. While the "case" states that the judgment entered on the referee's report has been fully satisfied, it will be seen, upon examination of defendant's answer and the testimony, that defendant only claimed that the judgment was satisfied "by the delivery of the machine and payment of the costs." He did not contend that it was satisfied by payment of the amount found due to the plaintiff on the notes. On the contrary, he alleges in his answer that the machine was advertised and sold by the plaintiff, under the mortgage, and brought \$40, which was credited on the notes. The answer practically admits, and the evidence shows, that the debt was not paid.

The court erred in sustaining the plea of *res judicata*. The finding in the claim and delivery action of the amount due on the notes was not intended to and did not authorize the entry of judgment for that amount, and no judgment therefor was entered. The finding was made under the authority of section 321 of the Code of Procedure, which provides that, "in every action for the recovery of personal property which has been pledged in any way to secure credit or debt, the defendant may plead his counterclaim arising out of the same transaction, and the jury in such case may find, in addition to the verdicts now provided by law, the amount due to the plaintiff, if any; and in such case the defendant shall have the right to pay said amount, and costs, and the property shall thereafter be free from the incumbrance." As it frequently happens that the only contention between the mortgagor and mortgagee of personal property is as to the amount due on the mortgage, and as the mortgagee has the right to the possession of the property after condition broken, for the purpose of selling it and applying the proceeds to the mortgage debt, if anything is

due thereon, the act above quoted was passed, in 1909, in order that the amount due might be ascertained in the claim and delivery action (which could not have been done prior to the act), so that he (mortgagor) might pay it, and save further expense and costs. But the finding of the amount due was, by the terms of the statute, limited to that purpose, and no authority is thereby given for the entry of a personal judgment against the mortgagor for that amount. The defendant might have paid the amount found to be due and the costs, and, by the terms of the statute, the property would have been released from the incumbrance of the mortgage. But, having failed to pay the amount, he is bound for the balance due on the debt after application of the proceeds of the sale of the mortgaged property.

Reversed.

GARY, O. J., and WOODS and FRASER, JJ., concur.

WATTS, J. (dissenting). The record in the case shows that the respondent, on March 20, 1911, bought of the appellant and gave for the same part cash and balance in notes and at the same time executed and delivered to the appellant a chattel mortgage covering the machinery so sold to the respondent to secure the payment of the notes. The notes were not paid at maturity, and demand was made upon respondent for possession of the machinery under chattel mortgage. Possession of the same was refused to the appellant, and appellant thereupon brought an action in claim and delivery for the possession of the machinery, or, in case a delivery thereof could not be had, then for \$200, the value thereof and damages and costs. The respondent did not answer the complaint in this action of claim and delivery, but appeared and consented to an order of reference, referring the whole matter to a referee. A reference was held, testimony taken, and report filed. No exceptions were filed to the report of the referee, and it was confirmed and made the judgment of the court. The referee found: That the actual value of the property sued for was \$200, and that the amount due on the two notes, attached to his report, was \$150, principal and interest, exclusive of costs and expenses of collection. That the notes were secured by a mortgage over the machinery in question, and that the mortgage was past due and condition broken. That appellant had suffered actual damages in the sum of \$50 by reason of breach of contract and detention of property, and that appellant is entitled to possession of the property and recommends judgment for possession of the same, and, in the event it cannot be delivered, a judgment for the value thereof, \$150, and \$50 actual damages. This report is dated May 18, 1912, and his honor,

Judge Rice, presiding judge, confirmed the same on June 21, 1912. Judgment was duly entered thereon, and it is admitted that this judgment has been paid and satisfied and duly extinguished.

Subsequent to this, on August 28, 1912, the appellant commenced this action against the respondent to collect two notes, which were secured by mortgage over the machinery and were included in the suit for claim and delivery which had been reduced to judgment and paid. One of these notes was for \$72.02, due November 1, 1911, and the other for \$73.45, due December 20, 1911. The respondent appeared and answered these two cases, which were tried together by consent before Magistrate Murdaugh, on September 20, 1912, who by an order dated October 3, 1912, says, "After hearing the evidence and argument thereon, I find for the defendant." In his report of the case after appeal therefrom was duly perfected to the court of common pleas, he says: "The two cases entitled as above were by consent tried together before me on the 30th of September, 1912. The only plea interposed by the defendant was that the plaintiff had sold to the defendant certain machinery to which machinery plaintiff did not have title and there was a total failure of consideration for the notes sued upon. The evidence in the case showed to my mind conclusively that the plaintiff did have good title and that there is no failure of consideration. In the trial the defendant introduced in evidence the records of another case in the court of common pleas in which former case these same notes were an issue and a judgment rendered thereon, for which reason I have found for the defendant; it appearing to me that the present controversy has already been adjudicated. There was no question of fact involved, there being no witnesses for the plaintiff and no conflict of testimony in the case. If the court should decide that I am in error in holding that the present controversy is *res adjudicata*, the plaintiff herein is entitled to a judgment for the face value of the notes in question, interest, attorney's fees, and costs."

Upon appeal from magistrate, Judge Wilson dismissed the appeal, and appeal was then taken to this court, questioning the correctness of his ruling. The evidence shows that the judgment in the first case was fully satisfied and that appellant got possession of the property and \$50 damage. We think the exceptions should be overruled, not only on grounds that the magistrate and circuit judge concurred in their findings of fact and there is testimony to sustain such findings and this court will not disturb such findings (*Morgan v. Moorhead*, 90 S. C. 278, 73 S. E. 189; *Myers v. Burnsidess*, 90 S. C. 186, 71 S. E. 977; *Saunders v. Southern Ry. Co.*, 90 S. C. 79, 72 S. E. 637), but for the further reason that the magistrate and circuit judge

were right in holding the question was *res adjudicata*. A decree was a final judgment where it disposed of the whole case on the merits and left nothing further for consideration. *Whitcomb v. Manderville*, 90 S. C. 384, 73 S. E. 775. "The rule of *res adjudicata* is based upon the idea that there should be an end of litigation as well upon the maxim that one should not be twice vexed for the same cause." *Ludwick v. Penny*, 158 N. C. 104, 73 S. E. 228. Estoppel by judgment of the merits covers not only what was actually decided but also what was necessarily implied in the final result. 23 Cyc. 1306. "A judgment is conclusive between the parties to it not only as to those matters which were actually decided, but to all such as were necessarily involved in its rendition. *Trimmier v. Thomson*, 19 S. C. 254; *Caldwell v. Micheau*, 1 Speers, 276." *Willis v. Tozer*, 44 S. C. 17, 21 S. E. 622.

I think the judgment should be affirmed.

(94 S. C. 376)

STONE v. CITY OF FLORENCE.

(Supreme Court of South Carolina. April 22, 1913.)

1. MUNICIPAL CORPORATIONS (§ 816*)—DEFECTIVE STREETS—ACTIONS—PLEADINGS.

One suing a city for a personal injury must, as required by Civ. Code 1912, § 3053, allege and prove that his injury was not brought about by his own negligence, and that he did not negligently contribute thereto.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. §§ 1711-1716, 1718, 1720-1723; Dec. Dig. § 816.*]

2. MUNICIPAL CORPORATIONS (§ 817*)—DEFECTIVE STREETS—FREEDOM FROM CONTRIBUTORY NEGLIGENCE.

A child five years old injured on a defective street is presumptively incapable of negligence within Civ. Code 1912, § 3053, providing that one suing for injury on a defective street must show that the injury was not caused by his own negligence.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. § 1725; Dec. Dig. § 817.*]

3. MUNICIPAL CORPORATIONS (§ 783*)—DEFECTIVE STREETS—LIABILITY.

A city negligently maintaining unguarded a ditch along the edge of a street is liable for injuries to a child falling into the ditch, for negligence in the repair of the street may consist in omission.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. §§ 1636, 1637; Dec. Dig. § 783.*]

4. MUNICIPAL CORPORATIONS (§ 819*)—DEFECTIVE STREETS—PERSONAL INJURIES—LIABILITY.

Where a city, maintaining an unguarded ditch along the edge of a street, dumped trash into it and the trash was set on fire and the fire burned in the ditch for nearly a week, when a child five years old, playing in the street, fell into the ditch and was injured, an inference that the city was negligent for failing to prevent injury from the fire to persons using the street was justified.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. §§ 1739-1743; Dec. Dig. § 819.*]

Appeal from Common Pleas Circuit Court of Florence County; J. W. De Vore, Judge.

Action by Francis Stone, by his guardian ad litem, E. J. Stone, against the City of Florence. From a judgment for plaintiff, defendant appeals. Affirmed.

Henry E. Davis and D. Gordon Baker, both of Florence, for appellant. Ragsdale & Whiting, of Florence, for respondent.

HYDRICK, J. About 80 years ago, the city of Florence dug a drain from 12 to 15 feet deep through the western portion of the city, which was then undeveloped. Since that time, McQueen street has been laid off along the drain. There is conflict of evidence as to whether the drain is wholly within the street—between the sidewalk and driveway—or merely on the extreme eastern edge of the street; but, as we shall see, that is not material. The drain remained an open waterway until 1910, when the city built a concrete arch in it, so as to leave sufficient space beneath for drainage, and began filling the space above by dumping into it the trash from the city, which contained a good deal of combustible matter. About June 1, 1911, the driver of the city dump cart, after dumping in a load of trash, set fire to it. The fire smoldered along the ditch for nearly a week, and apparently went out; but there was left a bed of embers, into which the plaintiff, a child about five years old, fell, while playing in McQueen street. Plaintiff was very badly burned and recovered judgment against the city in this action for damages for his injuries.

[1] By the terms of the statute under which the action was brought (section 3053, Civ. Code 1912), it was incumbent upon the plaintiff to allege and prove that his injury was not brought about by his own negligent act, and that he did not negligently contribute thereto. *Walker v. Chester*, 40 S. C. 342, 18 S. E. 986.

[2] The plaintiff so alleged in his complaint, and, when he proved that he was only five years old, he proved a fact which raised a presumption that he was incapable of negligence (*Tucker v. Buffalo Mills*, 76 S. C. 539, 57 S. E. 626, 121 Am. St. Rep. 957), and in that way he fully complied with the condition of the statute.

[3] In *Irvine v. Greenwood*, 89 S. C. 511, 72 S. E. 228, 36 L. R. A. (N. S.) 363, the neglect or mismanagement of the corporation in the repair of the street complained of consisted in leaving an electric light pole in the street from which an iron chain connected with the wire hung so low that plaintiff caught it and received a deadly charge of electricity. It was argued for the city that this was not such a defect in the repair of the street as was contemplated by the statute. In rejecting that contention, the court said: "But we are unable to give the duty

of keeping streets in repair the narrow meaning contended for by respondents. To keep a street in repair means to keep it in such physical condition that it will be reasonably safe for street purposes. It is not enough that its surface should be safe; a street is not in repair when poles or wires or other structures are so placed in or over it as to be dangerous to those making a proper use of the street. In *Duncan v. Greenville*, 71 S. C. 170, 50 S. E. 776, it was held that a wagon left on the public road so as to put travelers in peril must be regarded under the statute as a failure to keep the road in repair. In this case the pole was placed in the street as a fixture and became a part of the street, which it became the duty of the municipal authorities to keep safe." In *Hutchison v. Summerville*, 66 S. C. 442, 45 S. E. 8, this court held that the corporation was liable for an injury to plaintiff resulting from negligence in leaving a ditch at the end of a sidewalk unguarded, so that plaintiff fell into it. Hence, if a ditch or drain along the edge of a street or highway is negligently left unguarded, and a person lawfully using the highway is injured thereby, the corporation is liable. It is not material, therefore, whether the ditch into which the plaintiff fell was wholly within the street, or merely along the extreme eastern edge of it; for, in either case, defendant is liable, if, under all the circumstances, it was negligence to leave it unguarded. Negligence in the repair of a street may consist in omission or nonaction.

[4] There was testimony from which the jury might properly have inferred that the act of the driver in setting fire to the trash in the ditch was done within the scope of his duties. There was therefore no error in refusing defendant's motion to direct the verdict on the ground that there was no evidence that the city authorized the act. Moreover, the fact that the fire burned in the ditch for nearly a week afforded ample ground for an inference that the city authorities knew of it, and made no effort to prevent injury therefrom to those properly using the street.

Affirmed.

GARY, O. J., and WATTS and FRASER, JJ., concur.

(94 S. C. 410)

BLOUNT v. CHARLESTON & W. C. RY. CO.
(Supreme Court of South Carolina. March 28, 1913. On Petition for Rehearing, May 2, 1913.)

1. APPEAL AND ERROR (§ 989*)—FINDINGS—CONCLUSIVENESS.

The Supreme Court cannot consider the preponderance of the evidence, but can only consider whether there was any evidence to support a finding.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 3897; Dec. Dig. § 969.*]

2. MASTER AND SERVANT (§ 111*) — NEGLIGENCE—MASTER'S DUTY.

The fact that a freight car step did not break when an employé stepped thereon would not of itself relieve the company from liability, if it was negligent in not providing and maintaining a reasonably safe and suitable step.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 215-217, 255; Dec. Dig. § 111.*]

3. MASTER AND SERVANT (§ 208*)—RISKS ASSUMED—NEGLIGENCE.

A railroad employé did not assume the negligence of the company in not providing safe appliances.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 551; Dec. Dig. § 208.*]

4. MASTER AND SERVANT (§ 289*)—CONTRIBUTORY NEGLIGENCE — BOARDING MOVING TRAIN.

It is not contributory negligence per se for an employé to board a moving train; that depending on the particular circumstances.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 1089, 1090, 1092-1182; Dec. Dig. § 289.*]

5. MASTER AND SERVANT (§ 289*)—INJURIES — JURY QUESTION.

Whether a brakeman's injuries in falling while boarding a moving train by the step giving way were proximately caused by his own negligence held a question for the jury.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 1089, 1090, 1092-1182; Dec. Dig. § 289.*]

6. MASTER AND SERVANT (§ 293*)—INJURIES — INSTRUCTIONS—NEGLIGENCE.

An instruction, in an action for a brakeman's injuries while boarding a freight train, that it was not negligence per se to board a moving train, necessarily submitted the question of whether it was negligence in the railroad in not stopping the train until plaintiff could board it.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 1148-1156, 1158-1160; Dec. Dig. § 293.*]

Appeal from Common Pleas Circuit Court of Edgefield County; George E. Prince, Judge.

Action by J. C. Blount against the Charleston & Western Carolina Railway Company. From a judgment for plaintiff, defendant appeals. Affirmed.

Sheppard Bros., of Edgefield, and F. B. Grier, of Greenwood, for appellant. Thurmond & Nicholson, of Edgefield, for respondent.

FRASER, J. This is an action for personal injury. The plaintiff alleges that he was a flagman on a freight train of the defendant; that the train stopped at Lanford, a station on defendant's railroad, and that as the said train started the conductor of said train gave the defendant an order, when the train was in motion, to board the last car on said train while the train was in motion; that the plaintiff was subject to the orders of the conductor; that the plaintiff met the caboose (the last car), and, believing that he could board it safely, endeavored to board it from the right side and caught the grip iron in front of the rear platform

of the caboose and placed his left foot on the bottom step of the caboose, but said step was old, badly worn, and was very sleek, as defendant then and there well knew, and was defective and insecure for that reason, and the plaintiff's foot slipped off said step and he was thrown to the ground and injured by the train—his leg was broken. Negligence, recklessness, and wantonness were alleged on the part of the defendant. Negligence was alleged in that: (a) The plaintiff was ordered to board a moving train knowing it to be moving. (b) In failing to provide a safe place to work in that the step was old, worn, and very sleek, and for that reason defective and unsafe. (c) In failing to stop the train until the plaintiff could board said train. The defendant answered pleading assumption of risk and contributory negligence. The defendant made a motion for a nonsuit at the close of plaintiff's testimony, which was granted as to recklessness and wantonness, but refused as to negligence. The jury found for the plaintiff a verdict for \$400, and judgment was entered upon the verdict. From this judgment the defendant appealed. There are six exceptions, but the appellant states his propositions in succinct form in his argument, and we will adopt his statement.

I. "There is no testimony tending to establish actionable negligence as a proximate cause of plaintiff's injury."

[1] To this proposition this court cannot assent. The plaintiff testified that the step was worn sleek and that caused his foot to slip off and that caused the injury. Was the step sleek? If it was sleek, was it negligence to have a sleek step? This court has no jurisdiction to determine these questions. There was testimony from which the jury might find that the step was not safe and suitable and that it was negligence. It is true that there was testimony to the contrary and by a greater number of witnesses. This court has no jurisdiction to consider the preponderance in this case. The question here is: Was there evidence? There was evidence.

[2] Appellant claims, however, that there was no evidence that the step was originally defective, and if it became unsafe in the use the master is not liable, and bases this claim on *Martin v. Royster Guano Co.*, 72 S. C. 242, 51 S. E. 680. That case is not so broad as that. In the *Martin Case* the servant furnished a safe place to work and helped to make an excavation that caved in and injured him. It was the servant's own act that produced the injury. The *Martin Case* is not authority for the proposition that, if a master once furnishes a safe place and suitable machinery, he is absolved from further duty to maintain them in safety. It is claimed that, inasmuch as the step did not break, the defendant is not liable. The

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

breaking of machinery is not the test of liability. The test is: Was the defendant guilty of negligence in not providing and maintaining a reasonably suitable and safe step?

II. "The testimony shows conclusively that plaintiff's injury was due to one of the ordinary risks incident to his employment, which he assumed on entering the employment."

[3, 4] Not if the defendant was negligent in providing an unsafe step. Appellant thinks that his honor ought to have charged the jury that there was no negligence in this case arising from the order to board a moving train. His honor charged the jury that boarding a moving train is not negligence per se. "Now, it is my duty to charge you that it is not negligence per se for a man to board a moving train. That depends on the apparent and obvious danger or, at least, I should say I won't put it that way; it depends on the danger of obedience to that order." That was as far as his honor ought to have gone. In *Creech v. Railway*, 86 S. C. 534, 45 S. E. 88, this court says, "Ordinarily it should be left to the jury to determine whether the passenger's act of alighting or boarding, under all circumstances, was negligent." There is no reason why the same rule should not be applied here.

III. "The testimony shows that, if there was any negligence as alleged, plaintiff's injury was due to his own contributory negligence as a proximate cause in the manner in which he undertook to board the train."

[8] Appellant says: "If he had put his foot on the step for a sufficient distance and not simply caught on the ball or toe, he would not have slipped." To catch "on the ball or toe" may be the most approved and safest method so far as this court can know. That was a question for the jury, and this ground cannot be sustained.

IV. "It was error in his honor to allow the jury to consider the specifications of negligence contained in subdivisions 'a,' and 'c,' when there was not a particle of testimony tending to support the same."

[6] The circuit judge was requested to charge in accordance with this statement, but said, "I cannot charge it in those words." His honor had charged that it was not negligence to board a moving train. That included necessarily whether it was negligence not to stop the train. It was a question of fact whether, under all the circumstances, it was negligence or not, and that question it was proper to send to the jury.

The judgment of this court is that the judgment appealed from be affirmed.

HYDRICK and WATTS, JJ., concur.

WOODS, J. I concur in the result. The fact that the step of a car has been made

smooth and sleek by use is no evidence that the step was defective. To hold that a railway company must see that its car steps are rough, not smooth, so that the foot of one getting on a car while in motion will not slip, is carrying the law of negligence to a decree of refinement not sanctioned by reason or precedence. There was evidence, however, that the conductor of the train ordered the plaintiff to board a moving car, and I think it was for the jury to say whether it was negligence on the part of the conductor to give the order, or contributory negligence on the part of the plaintiff to obey it. On this ground, I concur in affirming the judgment.

On Petition for Rehearing.

PER CURIAM. After careful consideration of the petition herein, this court is satisfied that no material question of law or of fact has either been overlooked or disregarded. It is therefore ordered that the petition be dismissed, and that the order heretofore granted staying the remittitur be revoked.

(129 Ga. 727)

BAILEY v. MADDEN et al.

(Supreme Court of Georgia. April 18, 1913.)

(Syllabus by the Court.)

INTERPLEADER (§ 11*) — RIGHT TO INTERPLEADER.

"Whenever a person is possessed of property or funds, or owes a debt or duty, to which more than one person lays claim, and the claims are of such a character as to render it doubtful or dangerous for the holder to act, he may apply to equity to compel the claimants to interplead." Civ. Code 1910, § 5471.

(a) Applying the above-stated rule to the facts of this case, the plaintiff in error had no just ground of complaint of the refusal of the judge to vacate an order for an interpleader and an interlocutory injunction.

[Ed. Note.—For other cases, see Interpleader, Cent. Dig. §§ 13-34; Dec. Dig. § 11.*]

Error from Superior Court, Floyd County; J. W. Maddox, Judge.

Action by R. L. Madden against Charles Ball and others. Judgment for plaintiff, and defendant Ball brings error. Affirmed.

Harris & Harris, of Rome, for plaintiff in error. M. B. Eubanks and Seaborn & Barry Wright, all of Rome, for defendants in error.

FISH, C. J. Mrs. Echols, the owner of a farm in Floyd county, on January 24, 1911, leased it for three years, beginning January 1, 1912, to three persons by the name of Madden, who were in possession of the farm as her tenants when the lease contract was executed. This contract was in writing, but was never recorded. The stipulated rental was 3,000 pounds of lint cotton for each year, for which the tenants gave Mrs. Echols their joint notes, maturing at stated inter-

vals during the months of October and November of each year during the term. The tenants have since remained in possession. On February 3, 1911, Mrs. Echols transferred to the Citizens' Bank of Rome, as collateral security for a loan, the notes given her by the tenants. The loan has never been paid. On May 12, 1911, Mrs. Echols executed to Willis a deed to the leased premises, to secure a loan from him to her. This deed contained a power to Willis to sell the lands at public sale and to pay the loan made by him, in the event of its nonpayment at maturity. A bond to reconvey upon the payment of the loan was given by Willis to Mrs. Echols. At the time of this transaction Willis had no actual notice or knowledge of the lease. His loan not having been paid at maturity, Willis, in pursuance of the power of sale contained in the security deed executed to him by Mrs. Echols, sold at public outcry, on July 12, 1912, the lands composing the farm to Ball, and conveyed the same to him by deed. At the time he purchased, Ball had actual notice of the lease contract between Mrs. Echols and the Maddens.

When the note for the rent of 1912 became due, the bank, who held the same as collateral for its unpaid loan to Mrs. Echols, and Ball, who had purchased the land, were both about to distrain for the rent of that year. Thereupon the Maddens presented their petition to the judge of the superior court, against the bank and Ball, setting forth the facts above stated, alleging their ability and readiness to pay the rent for 1912, but declaring their inability to determine with safety to themselves who was legally entitled to the same, the bank or Ball. The petitioners also offered to deliver the rent to the court. They prayed that the bank and Ball be required to interplead as to their respective claims to the rent, and that meanwhile they be enjoined from proceeding against petitioners for the same. Upon considering such verified petition, the judge granted an order enjoining the defendants as prayed for, until the further order of the court, and also requiring the defendants to interplead in the cause and set up whatever right and claim they might have against the rent. It was further ordered that the petitioners deliver the rent to the clerk of the court, and that thereupon they be discharged from any and all further liability to either of the defendants for such rent. This order was granted October 15, 1912. Ten days thereafter Ball filed a motion to vacate the order. The facts set forth in the motion were the same as those in the petition for interpleader, and which we have already stated. The motion further stated that when Ball purchased the land the crops had not matured. The Maddens alone were made parties respondent to the motion. Upon the hearing of the motion the facts stated in the petition and the motion were admitted to be

true, and it was shown that the crops had not matured when Ball purchased the land. The judge refused to grant the motion. By consent of all parties, the clerk of the court was ordered to sell the cotton and deposit the proceeds in a designated bank, to await the final determination of the interpleader between Ball and the Citizens' Bank of Rome, and that the final judgment in the interpleader attach to the fund as fully as to the cotton had it not been sold.

The only question presented for decision is whether the judge erred in refusing, on the motion of Ball, to vacate a former order requiring Ball and the bank to interplead, and enjoining them both, pending the interpleader, from proceeding against the Maddens for the collection of the rent due for the year 1912. The bank was not a party to the motion; and, even if it had been, it would not be necessary for us to determine whether it or Ball had the better claim to the rent. "Whenever a person is possessed of property or funds, or owes a debt or duty, to which more than one person lays claim, and the claims are of such a character as to render it doubtful or dangerous for the holder to act, he may apply to equity to compel the claimants to interplead." Civil Code, § 5471. Applying the provisions of this section to the facts of the case at bar, it is clear enough, without discussion or the citation of authority, that the Maddens had the right to an interpleader and an interlocutory injunction, and that the judge did not err in refusing to revoke the order granting them such relief. Accordingly the judgment is affirmed.

Judgment affirmed. All the Justices concur.

(129 Ga. 669)

VIRGINIA-CAROLINA CHEMICAL CO. v.
RYLEE et al.

(Supreme Court of Georgia. April 16, 1913.)

(Syllabus by the Court.)

1. INSOLVENCY (§ 27*)—INVOLUNTARY PROCEEDINGS—RIGHT TO MAINTAIN.

The statutory action under the insolvent traders' act is maintainable only against one who is a trader at the time the petition is filed.

[Ed. Note.—For other cases, see Insolvency, Cent. Dig. §§ 83, 84; Dec. Dig. § 27.*]

2. BANKRUPTCY (§ 9*)—ADJUDICATION—EFFECT ON PENDING ACTION.

In its original form, the action was by lien creditors against their debtor to cancel certain deeds to land alleged to have been fraudulently made by their debtor, and to subject the land to their specific liens. By amendment it was sought to subject the debtor's equity of redemption in the same land to the payment of these liens. Such a suit is not a general insolvency proceeding, and is unaffected by the debtor's subsequent adjudication as a bankrupt, occurring more than four months after the liens on the land were obtained.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 7-9; Dec. Dig. § 9.*]

3. EXECUTION (§ 38*)—CREDITORS' SUIT (§ 7*)—EQUITABLE INTERESTS.

A debtor has no leviable interest in land which he has conveyed to secure a debt until the property has been redeemed by himself or the moving creditor; and redemption can be accomplished only by payment of the secured debt in full. In the absence of equitable ground, the mere fact that the lien of a judgment creditor obtained against the grantor subsequently to the making of the security deed cannot be enforced by levy and sale until the grantor's title has become revested by redemption is insufficient to subject the grantor's interest in the land as an equitable asset.

[Ed. Note.—For other cases, see Execution, Cent. Dig. §§ 51, 98-102; Dec. Dig. § 38; Creditors' Suit, Cent. Dig. §§ 3, 9-11; Dec. Dig. § 7.*]

4. CREDITORS' SUIT (§ 33*)—BANKRUPTCY (§ 200*)—RECEIVER—TRUSTEE.

Applying the foregoing principles to the facts, no case was made authorizing the appointment of a receiver of the property by the state court; and as the property was in custodia legis by virtue of a levy of a distress warrant made more than four months prior to the debtor's adjudication as a bankrupt, against which a levy claim was filed and is now pending in the superior court, it was error to direct the receiver to deliver possession of the property to the bankrupt's trustee for administration in the court of bankruptcy.

[Ed. Note.—For other cases, see Creditors' Suit, Cent. Dig. §§ 133-144; Dec. Dig. § 33; Bankruptcy, Cent. Dig. §§ 289, 296-300, 306-316; Dec. Dig. § 200.*]

Error from Superior Court, Hall County; J. B. Jones, Judge.

Action by the Virginia-Carolina Chemical Company against J. M. Rylee and others. From the judgment, plaintiff brings error. Reversed.

The Virginia-Carolina Chemical Company, Billups Phinizy, and Hardeman & Phinizy filed an action against J. M. Rylee, his wife, Chastalet Rylee, and T. E. Atkins, praying for the cancellation of certain deeds, the appointment of a receiver, and other equitable relief. It was alleged that J. M. Rylee was indebted to the Virginia-Carolina Chemical Company in the principal sum of \$594.90 upon a judgment dated March 16, 1908, to Billups Phinizy in the principal sum of \$1,247.54, besides interest, on a distress warrant, which had been levied on 200 acres of land on January 1, 1908, and to Hardeman & Phinizy in the principal sum of \$558.73 on a judgment obtained May 16, 1910, and that these debts represent as much as one-third in amount of the unsecured debts of Rylee, and were incurred while he was engaged in the business of buying and selling cotton and fertilizers; that Rylee is the owner of two described tracts of land, one of which, containing 200 acres, he has conveyed to T. E. Atkins, and the other to his wife, in fraud of petitioners, and with intent to hinder them in the collection of their debts; and that the debtor owes no other property upon which petitioners can enforce their liens. The prayers of the petition were to enjoin the defendants from conveying the land or

changing the status, for cancellation of the deeds from the debtor to his wife and to Atkins, for process, and "that a receiver be appointed to take charge of the property above described, and to collect all of the assets, real and personal, choses in action, money, notes, and accounts of the defendant, J. M. Rylee, and that the same may be appropriated to the claims of your petitioners and the just debts of the creditors of said J. M. Rylee." By amendment the plaintiffs alleged that Rylee was insolvent; that he was receiving the rents of the lands; and that for stated reasons a better price could be secured if the land be sold by a receiver than if sold by the sheriff. In a second amendment they alleged that the distress warrant of Billups Phinizy was levied on the 200-acre tract of land on March 1, 1908; that Atkins filed a claim to the land, and the papers were returned to the superior court of Banks county for trial; that the land was in the custody of the sheriff who made the levy; that the land was conveyed to Atkins to secure a debt amounting to something over \$3,000; that Atkins' title is good as against all claims except those of the Virginia-Carolina Chemical Company and of Billups Phinizy; that there is no contest between these claims, inasmuch as the property is enough to pay them all; that there are outstanding liens against the principal debtor, four months older than the adjudication in bankruptcy, to the extent of \$11,000; that the holders of junior liens cannot levy their *fi. fas.* without redeeming the property and paying off the Atkins debt; that since the petition was filed the court has dissolved the order appointing a receiver as to all the property except the 200-acre tract, which was worth from \$6,000 to \$7,000—much less than the subsisting liens. Upon this petition B. F. Carr was appointed temporary receiver. At an interlocutory hearing the court refused to appoint a receiver for the land alleged to have been conveyed to Mrs. Rylee. Afterward J. M. Rylee was adjudged a bankrupt, and his trustee filed an application to require the temporary receiver to deliver to him the possession of the 200-acre tract of land, to be administered in the court of bankruptcy. The application for the appointment of a permanent receiver and the motion of the bankrupt's trustee were heard together. In his order, after reciting that the creditors' petition was an insolvency proceeding filed within four months of the bankrupt's adjudication, the court ordered the temporary receiver to deliver the property in his hands to the trustee in bankruptcy. Exception was taken to this judgment.

Evins & Spence, of Atlanta, and Jno. J. & R. M. Strickland, of Athens, for plaintiff in error. B. P. Gaillard, Jr., Johnson & Johnson, and C. N. Davie, all of Gainesville, for defendants in error.

EVANS, P. J. (after stating the facts as above). The application of the complaining creditors for a permanent receiver and the motion by the bankrupt's trustee to require the temporary receiver to turn over to him the tract of land for administration in the United States court were heard together. The judgment under review is silent as to any action by the court upon the creditors' application for a permanent receiver; but, notwithstanding the court's omission in this regard, it becomes necessary in passing upon the propriety of the judgment to which exception is taken to consider whether the evidence on the interlocutory hearing presented a case for receivership.

[1] 1. The court was of the opinion that the suit before him was an insolvency proceeding. The petition had one or two earmarks of a statutory proceeding against an insolvent trader, but its general structure clearly indicates that it was designed to subject in equity two specific tracts of land to the liens of the complaining creditors. One factor is conclusive against characterizing the petition as brought under the insolvent traders' act; and that is there is no pretense that the principal debtor was a trader at the time the petition was filed. The statutory proceeding under the insolvent traders' act can be brought only against a trader—one engaged in business at the time. Civil Code, § 3249; *Ball v. Lastinger*, 71 Ga. 678.

[2] 2. In its original form the petition sought to subject in equity to the plaintiffs' liens specific property alleged to have been fraudulently conveyed for the purpose of hindering the complaining lien creditors. In its amended form the plaintiffs sought to subject the debtor's equity of redemption in the same land to the payment of their liens. At an interlocutory hearing the court eliminated the creditors' attack on the tract of land alleged to have been fraudulently conveyed to the debtor's wife. So that all that remained in the case at the time of the hearing were the allegations pertaining to the plaintiffs' claim to subject in equity to the payment of their liens Rylee's interest in the 200-acre tract of land which he conveyed to T. E. Atkins.

It is contended that, though the plaintiffs' petition may not have been brought under the insolvent traders' act, nevertheless it is such an insolvency proceeding that the possession of the temporary receiver thereunder cannot be saved from the nullifying effect of the bankruptcy of the principal defendant occurring within four months of the filing of the petition. The accuracy of this contention depends upon the scope and purpose of the suit. The liens of the complaining creditors were obtained more than four months before the defendant was adjudged a bankrupt. The distress warrant had been levied more than four months before the defendant's bankruptcy. Section 67 (e) of the Bankruptcy Act (Act July 1, 1898, c. 541, 30 Stat. 564

[U. S. Comp. St. 1901, p. 3449]) applies only to such liens as are created within four months prior to the filing of the petition in bankruptcy; but, where the lien of a judgment or a distress warrant fixed by its levy is obtained more than four months prior to the filing of the petition, it is not only not to be deemed to be null and void on adjudication, but its validity is recognized. *Metcalf v. Barker*, 187 U. S. 165, 23 Sup. Ct. 67, 47 L. Ed. 122; 1 *Loveland on Bankruptcy*, § 447. The plaintiffs had valid liens which were unaffected by the bankruptcy of the defendant, and which were enforceable in the state courts. They were attempting to enforce these liens in an equitable action having for its main purpose the equitable subjection of a specific tract of land to their lien. Where the main purpose of an equitable action is to subject specific property to the plaintiffs' liens, an incidental prayer for relief appropriate to an insolvency proceeding will not alone suffice to convert the action into such a proceeding. *Merry v. Jones*, 119 Ga. 643, 46 S. E. 861.

[3] 3. On the hearing there was absolutely no evidence to sustain the original theory of the petition that Rylee's deed to Atkins was fraudulent and made to hinder creditors in the collection of their debts. It appeared that Rylee borrowed of Atkins \$3,000, and secured the debt by deed to the 200-acre tract of land, and that he owed this amount on January 1, 1913. Subsequently to the execution of the deed, but prior to its record, Billups Phinizy obtained a judgment against Rylee, upon which execution issued, and he also procured a distress warrant to be issued against Rylee and levied before the record of the deed. These two liens were levied on the same land, and statutory claims were filed by Atkins. The papers were returned to court, and were pending therein when the present petition was filed four or five years thereafter. During this time some sort of arrangement was made between Billups Phinizy and Atkins, whereby the execution which the former held against Rylee was transferred to Atkins, and at the time of the hearing it had been reduced by payments made by Rylee to \$257. After the record of the security deed from Rylee to Atkins, the Virginia-Carolina Chemical Company obtained a judgment against Rylee, and later on Hardeman & Phinizy obtained judgments against Rylee. More than four months after the various judgments were obtained against him, Rylee was adjudged a bankrupt. The only property of which Rylee was possessed at the time of his adjudication was his equity of redemption in this 200-acre tract of land. The land was worth from \$6,000 to \$7,000, and the amount due Atkins on his assigned execution and security deed, and that due to Billups Phinizy on his distress warrant, aggregated about \$5,000. The amount of the judgments of the other complaining creditors, when added to

these liens, greatly exceeded the value of the land. From the foregoing summary of the evidence it will appear that the situation was this: Atkins held a security deed to the land, and the oldest *fi. fa.* against the debtor. Billups Phinzy had a distress warrant which had been levied prior to the record of the security deed to Atkins. This prior levy gave the warrant a priority of lien over the security deed. Civil Code, § 3307. So the plaintiff Billups Phinzy needs no equitable aid to enable his distress warrant to proceed.

Under the facts developed on the interlocutory hearing, have the creditors whose judgments were obtained after the record of the security deed the right to subject the debtor's equity of redemption as an equitable asset? Under the statute (Civil Code, §§ 6037, 6039) the holder of a bond for titles has no leviable interest in the land until he becomes invested with the legal title. The statute has been held applicable to the grantor in a security deed, who has taken from his grantee a bond to reconvey upon payment of the debt. Before creditors of a grantor in a security deed can levy upon his interest in the land, there must be a redemption of the property, which can be accomplished only by payment of the secured debt. *Phinzy v. Clark*, 62 Ga. 623; *Groves v. Williams*, 69 Ga. 614; *Shumate v. McLendon*, 120 Ga. 396, 48 S. E. 10. The mere fact that the lien of a judgment creditor, obtained against the grantor subsequently to the making of the security deed, cannot be enforced by levy and sale until the grantor's title has become revested by redemption, is insufficient to subject the grantor's interest in the land as an equitable asset. *Swift v. Lucas*, 92 Ga. 796, 19 S. E. 758. Perhaps a judgment creditor, unable by reason of his insolvency or inability to redeem the land, might go into equity and subject the interest of his debtor in land conveyed to another to secure a debt, without redemption; but no such ground for equitable interference is made in this case. The undisputed proof was that the judgment creditors were able to redeem the land.

[4] 4. Therefore, inasmuch as the integrity of the security deed was not impugned, and as the judgment creditors whose liens were obtained subsequently to the record of the security deed show no equitable ground for the subjection of the maker's interest in the land as an equitable asset, and as there is no legal impediment against the enforcement of the liens obtained prior to the record of the security deed, it follows that a permanent receiver should not have been appointed.

There being no ground for the appointment of a permanent receiver, the next question is what disposition of the land in the hands of the temporary receiver should have been made. As we have shown, the trustee was not entitled to the possession of the property,

for the reason that at the time of the bankrupt's adjudication the property was in custodia legis by virtue of the levy of a lien obtained more than four months prior to the bankruptcy. It was improper to appoint a permanent receiver under the facts developed at the hearing. Therefore the court should have refused the application for a receivership and also the application of the trustee of the bankrupt, and remanded the property to the sheriff, from whose custody it was taken by the appointment of a temporary receiver, to await the final disposition of the litigation pending in Banks superior court, to wit, the issue formed by the filing of a claim to the levy of the distress warrant.

Judgment reversed. All the Justices concur.

(139 Ga. 654)

CRAWFORD et al. v. WILSON.

(Supreme Court of Georgia. April 15, 1913.)

(Syllabus by the Court.)

1. ADOPTION (§ 6*)—AGREEMENT TO ADOPT—ENFORCEMENT—INHERITANCE.

A parol obligation by a person to adopt the child of another as his own accompanied by a virtual, though not a statutory, adoption, and acted upon by all parties concerned for many years and during the obligor's life, may be enforced in equity upon the death of the obligor by decreeing the child entitled as a child to the property of the obligor, undisposed of by will.

[Ed. Note.—For other cases, see *Adoption*, Cent. Dig. § 11; Dec. Dig. § 6.*]

2. CONTRACTS (§ 187*)—RIGHT TO ENFORCE—THIRD PERSON.

Such an equitable suit is maintainable by the child in her own name against the administrators of the obligor.

[Ed. Note.—For other cases, see *Contracts*, Cent. Dig. §§ 798-807; Dec. Dig. § 187.*]

3. WITNESSES (§ 144*)—COMPETENCY—TRANS-ACTION WITH DECEASED PERSON—CONTRACT FOR ADOPTION.

Where the contract for adoption is made by the grandmother of the child at the instance of the mother, and is subsequently ratified and renewed between the person adopting the child and the mother, in a suit by the child, of the nature described in the preceding headnotes, against the administrators of the person contracting to adopt, the grandmother and the mother are competent witnesses to prove the contract.

[Ed. Note.—For other cases, see *Witnesses*, Cent. Dig. §§ 625-643; Dec. Dig. § 144.*]

4. SPECIFIC PERFORMANCE (§ 105*)—LACHES—CONTRACT FOR ADOPTION.

The plaintiff is not barred of her equitable cause of action referred to in headnotes 1 and 2, where the suit is instituted within a few months after the obligor's death, notwithstanding the plaintiff may be 30 years of age at the time of the institution of the suit.

[Ed. Note.—For other cases, see *Specific Performance*, Cent. Dig. §§ 325-341; Dec. Dig. § 105.*]

5. EXECUTORS AND ADMINISTRATORS (§ 437*)—ACTIONS AGAINST—EXEMPTIONS FROM SUIT—EQUITY.

The action in the instant case does not fall within the provisions of the Civil Code 1910, § 4015, exempting administrators from suits on debts due by their intestate until after the

lapse of 12 months from their qualification as administrators.

[Ed. Note.—For other cases, see *Executors and Administrators*, Cent. Dig. §§ 1729-1761, 1764; Dec. Dig. § 437.*]

6. INJUNCTION (§ 38*)—GROUNDS—ACTION AGAINST ADMINISTRATORS—CONTRACT FOR ADOPTION.

One of the prayers of the plaintiff is to enjoin the administrators from further proceeding with their application before the court of ordinary for leave to sell the land as that of their intestate. Inasmuch as the plaintiff does not occupy the legal status of heir or creditor, she cannot contest in the court of ordinary, with the administrators, their right to administer the estate of their intestate. And her equitable claim to the property growing out of the defendant's intestate's failure to consummate the plaintiff's adoption as a child extends to the whole estate of the intestate, and as the personal estate is sufficient to pay all debts, equity will preserve the status of the realty by enjoining a sale of it pending the litigation.

[Ed. Note.—For other cases, see *Injunction*, Cent. Dig. §§ 86-90; Dec. Dig. § 38.*]

7. RECEIVERS (§ 16*)—PRESERVATION OF PROPERTY—EQUITABLE ACTION.

But as it was not shown that the administrators were guilty of waste or mismanagement, and the circumstances are not such as to indicate that the rights of all the parties would be more effectually and expeditiously protected and enforced by the appointment of a receiver, it was error to appoint a receiver, and, on interlocutory hearing, to divest the administrators of the possession of the property of their intestate, pending the litigation.

[Ed. Note.—For other cases, see *Receivers*, Cent. Dig. §§ 24, 28; Dec. Dig. § 16.*]

Error from Superior Court, Hall County; J. B. Jones, Judge.

Petition by Daisy Puckett Wilson against J. D. Crawford and others, administrators. Judgment for petitioner, and defendants bring error. Affirmed, with directions.

J. H. Skelton, of Hartwell, and H. H. Dean, of Gainesville, for plaintiffs in error. H. H. Perry and W. A. Charters, both of Gainesville, for defendant in error.

EVANS, P. J. The plaintiffs in error, as administrators of the estate of Mrs. M. F. Puckett, made application to the ordinary for an order granting them leave to sell the land of their intestate, when Mrs. Daisy Puckett Wilson filed her petition for injunction against such application on the ground that she was entitled to the whole of the estate by reason of the facts alleged in her petition and for other relief. The substantial allegations of the petition are as follows: The petitioner is the daughter of James Gaffney and his wife Katie. Shortly after her birth her father abandoned his family and removed to Texas, where he died many years ago. In December, 1882, when she was an infant of about three months of age, she was brought to the home of Mrs. M. F. Puckett by her maternal grandmother and turned over to the care and custody of Mrs. Puckett under an agreement by her mother and

grandmother that Mrs. Puckett was to have the sole custody and service and company of petitioner during her minority, in consideration of Mrs. Puckett's agreement and promise to take petitioner and keep her as her own child and to adopt her as such, with all the rights of a child related to her as such by blood. In pursuance of this contract, Mrs. Puckett took petitioner into her home, gave her name to her, and always treated her as a child; and the petitioner knew no other mother or home, and only since the death of Mrs. Puckett did she discover who her natural mother was. At the time petitioner was received into Mrs. Puckett's home, Mrs. Puckett was a widow with one child, a son, who never married, and who died before his mother. Petitioner remained with Mrs. Puckett until she was 25 years of age, when she married, and during this time she gave to Mrs. Puckett her love and constant attention as a child, assisting her in all household work, and rendering such personal service as only a dutiful child can render a mother. Mrs. Puckett was old and infirm and required much personal attention; she was peculiar in her temperament, lived largely the life of a recluse, had no near relatives to visit her and very few friends; and petitioner devoted her life to cheering and comforting and waiting upon her foster mother. Up to Mrs. Puckett's death petitioner always considered herself as her child, and was always treated by Mrs. Puckett as such. Mrs. Puckett told petitioner that she was adopted by her as a child, and petitioner believed this, and on the faith of it rendered the service and bestowed upon her the love and affection of a child. After marriage she made frequent visits to her foster mother. Mrs. Puckett was sick on several occasions and sent for her, and she always responded to her calls on such occasions and waited on her during her illness.

Mrs. Puckett died on July 20, 1912, leaving no children; and her nearest relatives are two brothers and two sisters, all of the half blood. Petitioner is unable to say whether Mrs. Puckett ever took formal steps to adopt her as a child, but she has reason to believe that she did so, and that the papers have been misplaced in the office of the clerk of the superior court, and bases such belief on the oft-repeated declaration of Mrs. Puckett to petitioner and others that she had adopted petitioner as a child. When petitioner was about a year old her mother desired to take her back, and Mrs. Puckett refused to surrender petitioner to her mother. Mrs. Puckett told her mother that she had legally adopted petitioner as a child and caused her lawyer to state to her mother that petitioner had been legally adopted, and that her mother had no legal right to the custody of petitioner; and petitioner's mother, believing this statement to be true, relin-

quished all efforts to recover possession of petitioner. Mrs. Puckett owned at her death considerable personal property and two houses and lots in the city of Gainesville, in one of which petitioner has been residing since Mrs. Puckett's death. Mrs. Puckett left no debts, and her personal property is more than sufficient to pay the expenses of her last illness and burial. The defendants, as administrators, have applied for leave to sell the land of their intestate, and the petitioner cannot make any legal objection to the granting of the order for leave to sell, except in a court of equity. The administrators refuse to recognize petitioner as having any interest in the estate of their intestate, but claim that they and their sisters are her sole heirs at law and entitled to the whole of the estate; and the defendants have taken possession of the personal property of considerable value. The prayers are that petitioner be decreed to be entitled to all of the estate of Mrs. Puckett; that the administrators account for what assets may have come into their hands; that they be enjoined from paying any money to any person claiming to be a distributee of the estate, from interfering with her possession of the lot she is occupying, and from procuring an order to sell the realty of the estate; that the letters of administration be abated and a receiver be appointed; and for general relief. The defendants showed cause against the grant of an injunction and the appointment of a receiver by demurrer and answer. On the interlocutory hearing, the court heard evidence and granted the prayers for injunction and receiver.

[1] 1. A child may be adopted on application to the superior court, and, after judgment of adoption, the relation between the person asking for the adoption and the adopted child shall be, as to their legal rights and liabilities, the relation of parent and child. The adopted child inherits from the adopting parent, but the latter does not inherit from the former. Civil Code, § 3016. There was no evidence on the interlocutory hearing before the judge that Mrs. Puckett ever applied for or obtained a judgment adopting Mrs. Wilson as her child, though several neighbors testified that she declared that she had done so. Whatever right, therefore, the petitioner may have in Mrs. Puckett's estate depends, not upon her status as a legally adopted child, but upon equities growing out of the agreement of Mrs. Puckett to adopt as a child, and the action taken thereunder by the parties thereto and the petitioner. The authorities very generally establish the proposition that a parol obligation by a person to adopt the child of another as his own, accompanied by a virtual, though not a statutory, adoption, and acted upon by both parties during the obligor's life, may be enforced, upon the death of the obligor, by adjudging the child entitled as a

child to the property of the obligor who dies without disposing of his property by will. *Van Tine v. Van Tine* (N. J. Eq.) 15 Atl. 249, 1 L. R. A. 155; *Van Dyne v. Vreeland*, 11 N. J. Eq. 370; *Sharkey v. McDermott*, 91 Mo. 648, 4 S. W. 107, 60 Am. Rep. 270; *Haines v. Haines*, 6 Md. 435; *Jaffee v. Jacobson*, 48 Fed. 21, 1 C. C. A. 11, 14 L. R. A. 352; *Healy v. Simpson*, 113 Mo. 340, 20 S. W. 881; *Chebak v. Battles*, 133 Iowa, 107, 110 N. W. 830, 8 L. R. A. (N. S.) 1130, 12 Ann. Cas. 140; *Gates v. Gates*, 34 App. Div. 608, 54 N. Y. Supp. 454. In these and in other cases various reasons were urged against the specific performance of such an agreement.

It was said that an agreement to adopt a child is too indefinite to decree such child rights to property as an heir; but it was replied that, where a parent surrenders his child to another who accepts the custody on the promise to adopt the child as his own, it cannot be doubted that the parties intended that the act of adoption, when consummated, would carry with it the right of inheritance, and that equity would consider that done which ought to have been done and decree the child's right to his inheritance as if formal adoption had taken place. Another objection urged against specific performance was that adoption was not recognized at common law; but, inasmuch as our statutes justify it, such a contract cannot be said to be illegal or contrary to public policy. Then, again, it was said that, if the contract rested in parol, it fell within the statute of frauds; but the full performance of the contract by the parent and by the child in the assumed relation was deemed sufficient to overcome this objection. Another obstacle urged was that such a contract, if broken, was remediable in damages, but it was shown that, where the consideration of the agreement consists in services, companionship, and a change of domestic relationship, its value cannot be adequately compensated in damages. So that it is now well established by authority that an agreement to adopt a child so as to constitute the child an heir at law on the death of the person adopting, performed on the part of the child, is enforceable upon the death of the person adopting the child as to property which is undisposed of by will. Though the death of the promisor may prevent a literal enforcement of the contract, yet equity considers that done which ought to have been done; and as one of the consequences, if the act of adoption has been formally consummated, would be that the child would inherit as an heir of the adoptor, equity will enforce the contract by decreeing that the child is entitled to the fruits of a legal adoption. 1 Cyc. 936; *Parsons on Contracts* (9th Ed.) 406, 407.

[2] 2. The point upon which the parties in this case most seriously differ is the right

of the plaintiff, who was not a party to, the contract upon which she predicates her claim to relief, to bring this suit. The contract was originally made by the plaintiff's grandmother with the assent of her mother, and was afterwards ratified by Mrs. Puckett with the plaintiff's mother. When the contract was made, the plaintiff's father had abandoned his family, and under the statute the father lost his parental control over the plaintiff, which survived to the mother. Civil Code, § 3021; Sav., etc., Ry. Co. v. Smith, 93 Ga. 742, 21 S. E. 157. It was within the power of the mother to make the contract, and the question is whether the right to enforce it inheres exclusively in her.

Before adverting to our own decisions, we wish to call attention to the two general rules on the subject of enforcing a contract by a person for whose benefit it was made, though he was not a party to it, known respectively as the English and American rules, the statement and rationale of which is so clearly made by Lumpkin, J., in *Sheppard v. Bridges*, 137 Ga. 615, 74 S. E. 245. The modern English rule has been thus formulated by Cotton, L. J.: "As a general rule, a contract cannot be enforced except by a party to the contract; and either of two persons contracting together can sue the other, if the other is guilty of a breach of or does not perform the obligations of that contract. But a third person, a person who is not a party to the contract, cannot do so. That rule, however, is subject to this exception: If the contract, although in form it is with A., is intended to secure a benefit to B., so that B. is entitled to say he has a beneficial right as cestui que trust under the contract, then B. would, in a court of equity, be allowed to insist upon and enforce the contract." *Gandy v. Gandy*, 30 L. R. Ch. Div. 57. The rule which obtains most generally in America is that a person not a party to the contract may maintain an action on it if he is a party to the consideration or the contract was entered into for his benefit; and, if the person for whose benefit a contract is made has either a legal or equitable interest in the performance of the contract, he need not necessarily be privy to the consideration. 9 Cyc. 380. An exception to the general rule that a stranger to a contract, deriving a benefit from it, cannot sue upon it arises when the contract has been so far performed as to change the condition in life of the stranger and to raise in him reasonable expectations grounded on the conduct of the contractor. *Waterman on Specific Performance*, § 54. An illustration of the application of this principle is given by this text-writer, as, when a gentleman of wealth enters into an agreement with a poor man that the former will take the child of the latter, bring him up in affluence, and leave him certain property, and there is part performance, the child is entitled to have the

agreement carried out, "his right," says the author, "being derived, not from the contract itself, but from what has been done under it, and the wrong he will otherwise sustain." Where one takes an infant into his home, and the child performs all the duties growing out of the substituted relationship of parent and child, rendering years of service, companionship, and obedience to the foster parent, upon the faith that such foster parent stands in loco parentis, and that upon his death the child will sustain the legal relationship to his estate of a natural child, there is equitable reason that the child may appeal to a court of equity to consummate, so far as it may be possible, the foster parent's omission of duty in the matter of formal adoption.

In the case at bar Mrs. Wilson was received into the home of Mrs. Puckett as a three months old infant upon the promise by Mrs. Puckett to her mother to adopt her as a child. For 25 years Mrs. Puckett accepted her service upon the understanding that the agreement with petitioner's mother was the basis of the relationship existing between them. Petitioner grew up as a dutiful daughter of her foster mother; and the latter, most probably with affection for Mrs. Wilson, and with a desire to bind that affection, never disclosed who her mother was, and left it to be discovered by petitioner after her death. Under the agreement between her mother and Mrs. Puckett, petitioner was to receive something beyond the literal terms of the contract. The contractual obligation was to adopt petitioner as a child. If formal adoption had been consummated, then the law would have vested her with a right of inheritance from Mrs. Puckett, and it is this right of inheritance which petitioner is seeking to enforce in this action. Therefore, when we consider that this action is not to recover for services under her mother's contract, but is grounded on what was done under it, the changed domestic relation which was contemplated to be accomplished by the contract, and the personal rights which would accrue to petitioner from the act of adoption by operation of law, we see no reason why it cannot be maintained by petitioner in her own name.

In reaching this conclusion we do not think that we run counter to any decision of this court or statute of this state. The statute declares that "as a general rule" an action on a contract must be brought by a party to it. Civil Code, § 5516. The statutory statement that as a general rule only a party to a contract can enforce it carries with it the implication that there are exceptions to the general rule. The various adjudications of this court on the subject were critically analyzed in *Sheppard v. Bridges*, supra; and in that case it was held that, if a beneficiary of a contract, though not a party to it, stand in a quasi trust relation

to its subject-matter, he may enforce his rights under it in a court of equity with proper parties. The present case is to be differentiated from the cases of *Gunter v. Mooney*, 72 Ga. 205, and *Cooper v. Claxton*, 122 Ga. 596, 50 S. E. 399, which concerned suits at law by a child to recover, as for breach of contract made by the parent with a stranger, the stipulated compensation for the child's services. In the present case the subject-matter of the contract was that the petitioner was to be adopted as a child of the promisor, which contract, if it had been consummated, would have given petitioner a beneficial right of inheritance by operation of law and beyond the express terms of the contract. The suit is in equity, and the changed domestic relation between the foster parent and foster child, together with the right of inheritance under the law, as a result of the changed parental relation, if formal adoption had been consummated under the contract, serves to bring this case within the exception recognized in *Sheppard v. Bridges*, *supra*; *Robson v. Harwell*, 6 Ga. 589.

[3] 3. In the discussion of the foregoing legal principle, we have been considering the case on demurrer, which, of course, admitted the truth of the allegations of the petition. The petitioner submitted evidence to support her allegations, to the admissibility of some of which objection was made. The petitioner's grandmother and mother were permitted to testify to the contract claimed to have been made with them by Mrs. Puckett, over objection that, if they were acting as agents for the petitioner, they would be disqualified under the Civil Code, § 5858. In the transaction between Mrs. Puckett and the grandmother and mother of the petitioner, the latter did not purport to be acting as agent of the petitioner; neither are they suing to enforce the contract with Mrs. Puckett. The fact that the petitioner may profit by their testimony will not exclude them. They do not fall within any of the classes of persons declared to be incompetent by the Civil Code, § 5858; and the next section declares that there shall be no other exceptions. *Jackson v. Gallagher*, 128 Ga. 321, 57 S. E. 750.

[4] 4. One ground of the demurrer is that, if petitioner had a cause of action, she is barred by her laches in asserting it. The defendants' intestate, according to the allegations of the petition, never repudiated her contract to adopt petitioner; on the contrary, it is alleged that she repeatedly admitted that she had taken petitioner for adoption as her child. It is alleged further that up to her death Mrs. Puckett always treated the petitioner as her child. Not only this, but Mrs. Puckett never disclosed to petitioner the identity of her mother, and it was not until after Mrs. Puckett had died that petitioner found her mother. Adult persons may be adopted in like manner as

minors. Civil Code, § 3018. In view of these circumstances and the fact that the petition was brought a few months after Mrs. Puckett's death, we do not think the petitioner's action is stale.

[5] 5. The action was brought within 12 months from the appointment of the defendants as administrators of Mrs. Puckett; and, inasmuch as the statute exempts administrators from suit for 12 months after their appointment, it is contended that the action is premature. The statute prohibits suits against administrators within 12 months from their qualification on debts due by the decedent. Civil Code, § 4015. This section has no application to a case like this. The defendants were applying for an order to sell the realty of the intestate. The petitioner had no legal status as a child and could not contest with them her right to the estate in the court of ordinary. It was necessary for her to come into equity to establish her right to the property, and the efforts of the defendants to sell property which in equity belonged to her would defeat her right to the property if she were required to wait 12 months before bringing suit.

[6] 6. The petitioner's right to the remedy of injunction and receiver is also denied. As we have just said, she had no legal status as heir; and, as only heirs and creditors may contest with an administrator respecting the administration of the property of his intestate, she was forced into equity to establish her equitable claim to the property which defendants were proceeding to administer as the property of their intestate. Having an equitable interest in the property of the defendants' intestate, and presenting a meritorious case for its recovery, she had the right to preserve its status until final decree, and injunction is an appropriate remedy for that purpose.

[7] 7. But we do not think that a receiver should have been appointed. There is no charge of waste or mismanagement by the administrators. It is not alleged that they perpetrated any fraud on the ordinary in procuring letters of administration. If the petitioner should fail to prevail on the final trial, an administration of the estate would be necessary; and although it is alleged that the intestate left no debts, and that her personal estate is ample to pay the expenses of the last illness and burial, these creditors would be entitled to have an administration. The equitable claim of the petitioner is to the estate after all debts are discharged. The fact that the personal estate is ample to discharge the expenses of the intestate's last illness does not compel an abatement of the administration. Courts of equity are slow and cautious about appointing receivers to take charge of the assets of an estate in the hands of a duly appointed administrator, and will not interfere with his possession of property coming into his hands as the property of the intestate, except in cases

where all the circumstances indicate that the rights of all parties would thereby be more effectually and expeditiously protected and enforced. The case presented in *Hill v. Arnold*, 79 Ga. 367, 4 S. E. 751, is quite dissimilar to the case at bar. There an administrator was seeking to administer, as belonging to his intestate, property to which the intestate had no title, whereas in the case at bar the petitioner's title is derivative from the defendant's intestate and is dependent upon her establishing such equitable relation to it as to constitute her the sole heir at law of the intestate. Accordingly that portion of the interlocutory injunction pertaining to the appointment of a receiver is erroneous, and in affirming the judgment we direct its modification to that extent.

Judgment affirmed, with direction. All the Justices concur.

(139 Ga. 692)

MAYOR, ETC., OF MILLEDGEVILLE v. STEMBRIDGE

(Supreme Court of Georgia. April 17, 1913.)

(Syllabus by the Court.)

1. MUNICIPAL CORPORATIONS (§ 845*)—TORTS—DIVERSION OF SURFACE WATER—ACTION FOR DAMAGES—PETITION.

Where a plaintiff sues a municipality for negligently diverting water upon premises used by him as a lumber yard and a place for conducting a business of selling lumber and builders' supplies, and one of the items of damages claimed is a gross sum, alleged to have been expended in filling up the ditches caused by the overflow of water, so that the premises could be restored to their former condition and use, such allegations are not open to special demurrer on the ground that the character of the washes, the necessity for repairs, and the various items of payment should be more specifically stated.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. §§ 1796-1802; Dec. Dig. § 845.*]

2. MUNICIPAL CORPORATIONS (§ 835*)—TORTS—DIVERSION OF SURFACE WATER—CONSTRUCTION OF SEWER—LIABILITY.

Where a municipality constructs a sewer in an open drain in a street, which hitherto has been sufficient to carry off the surface water, and by reason of the construction of the sewer the surface water is diverted upon the premises of an owner of abutting property, to the injury and damage thereof, a cause of action arises. *Langley v. City Council of Augusta*, 118 Ga. 591, 45 S. E. 486, 98 Am. St. Rep. 133; *Mayor, etc., of Albany v. Sikes*, 94 Ga. 30, 20 S. E. 257, 26 L. R. A. 653, 47 Am. St. Rep. 132.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. § 1785; Dec. Dig. § 835.*]

3. DAMAGES (§§ 60, 220*)—TRIAL (§ 343*)—INTEREST—VERDICT—ACTIONS EX DELICTO.

In actions ex delicto the jury may well allow interest as part of the damages. If interest is allowed, it is not recoverable eo nomine, and the verdict should express the damages in an aggregate sum. But verdicts are to be given a reasonable intentment; and where the jury return a verdict in an ex delicto action for the plaintiff in "the sum of \$200 principal, interest \$47.82, making principal and in-

terest \$247.82," it will be upheld as a finding for \$247.82 damages. *W. & A. R. Co. v. Brown*, 102 Ga. 13, 29 S. E. 130; *T. T. & G. Ry. Co. v. Butler*, 4 Ga. App. 191, 60 S. E. 1087.

[Ed. Note.—For other cases, see *Damages*, Cent. Dig. §§ 137-140, 563-566; Dec. Dig. §§ 69, 220.* Trial, Cent. Dig. §§ 809-812; Dec. Dig. § 343.*]

4. JUDGMENT AFFIRMED.

The charge of the court was comprehensive, and fairly submitted the issues, and was not open to any of the criticisms made upon it. The evidence authorized the verdict, which has the approval of the trial judge; and no sufficient reason is made to appear why a new trial should be granted.

Error from Superior Court, Baldwin County; J. B. Park, Judge.

Action by J. E. Stembridge against the Mayor, etc., of Milledgeville. Judgment for plaintiff, and defendant brings error. Affirmed.

Livingston Kenan, of Milledgeville, for plaintiff in error. Allen & Pottle, of Milledgeville, for defendant in error.

EVANS, P. J. Judgment affirmed. All the Justices concur.

(139 Ga. 783)

WOODSON v. PAULK et al.

(Supreme Court of Georgia. April 18, 1913.)

(Syllabus by the Court.)

1. HAWKERS AND PEDDLERS (§ 4*)—PATENT MEDICINE VENDER—TAX—CONFEDERATE SOLDIER.

The decision in the case of *Smith v. Whiddon*, 138 Ga. 471, 75 S. E. 635, is controlling upon the issues in the present case.

[Ed. Note.—For other cases, see *Hawkers and Peddlers*, Cent. Dig. §§ 7-9; Dec. Dig. § 4.*]

2. OPINION AFFIRMED AND DISTINGUISHED.

The case of *Smith v. Whiddon*, supra, after review, is affirmed, and distinguished from the older case of *Hartfield v. City of Columbus*, 109 Ga. 112, 34 S. E. 288.

(Additional Syllabus by Editorial Staff.)

3. HAWKERS AND PEDDLERS (§ 4*)—"PEDDLING"—"BUSINESS."

"Peddling" is not covered by the word "business," as employed in Civ. Code 1910, § 1888, authorizing indigent and disabled Confederate soldiers to peddle or conduct business without paying a tax therefor, and hence it does not follow from the fact that employes of an indigent Confederate soldier conducting a business need not pay the license tax that the same privilege extends to the employes of a peddler who is an indigent Confederate soldier.

[Ed. Note.—For other cases, see *Hawkers and Peddlers*, Cent. Dig. §§ 7-9; Dec. Dig. § 4.*]

For other definitions, see *Words and Phrases*, vol. 1, pp. 915-926; vol. 8, pp. 7593, 7594; vol. 6, pp. 5260-5267; vol. 8, p. 7750.]

Error from Superior Court, Turner County; Frank Park, Judge.

Action by C. B. Woodson against E. Y. Paulk and others. Judgment for defendants, and plaintiff brings error. Affirmed.

Mann & Milner, of Albany, for plaintiff in error. W. E. Wooten, Sol. Gen., and I. J. Hofmayer, both of Albany, for defendants in error.

BECK, J. C. B. Woodson filed a petition seeking to enjoin the sheriff and the tax collector of Turner county, from collecting a special or occupation tax from petitioner, who was engaged in selling patent medicine in said county. He alleged that he was in no way interested in the goods sold, except as the agent and employé of T. P. Buntin, who was an indigent Confederate soldier residing in Dougherty county, and he attached to his petition a copy of a certificate issued by the ordinary of Dougherty county, certifying that the said Buntin was an indigent Confederate soldier, and as such entitled to the exemptions in such cases provided by law. When the case came on for trial, it was submitted, by consent, to the judge to be tried by him without the intervention of a jury. It appeared from the testimony of the plaintiff that he had been employed by Buntin on salary, and that he "carried the goods with him in a buggy and sold them and delivered them on the spot." The court refused to grant the injunction, and the plaintiff excepted.

[1] Upon a comparison of the facts in the present case with those in *Smith v. Whiddon*, 138 Ga. 471, 75 S. E. 635, it will be seen that the two cases present identically the same question. And there it was held: "Under the provisions of section 946 of the Civil Code, one who actually travels as a hawker or vender of patent medicine is liable for the payment of the tax provided for under that section, although he may not be the proprietor of the articles sold or of the animals and vehicles by means of which the articles are transported from place to place, and be acting only as the agent and employé of a disabled or indigent Confederate soldier, who, under the provisions of section 1888 of the Civil Code, is authorized to peddle without obtaining license for the privilege of so doing." That ruling controls the present case, unless the ruling there made be upon review reversed.

[2] A review of the case of *Smith v. Whiddon* has been asked in this court; counsel for the plaintiff in error contending that it conflicts with the ruling in the case of *Hartfield v. Columbus*, 109 Ga. 112, 34 S. E. 288, and that the ruling made in the latter case, which is the the older of the two, should prevail, as it has never been reversed or set aside. Upon a review of the *Whiddon* Case we are satisfied as to the soundness of the decision as rendered, and do not find that it is in conflict with the ruling made in the *Hartfield* Case, after giving the latter case, as well as the former, very careful consideration. In the *Hartfield* Case it was said: "We accordingly hold that a Confederate soldier having a proper certificate from the or-

dinary may carry on a draying business without paying any license for the privilege of so doing, and also without having any specific taxes upon the drays used by him in connection therewith; and, further, that he may engage in selling wood and delivering the same by wagons without becoming liable for any municipal tax either upon his occupation or upon the vehicles by means of which his business is conducted. As a matter of course his servants and employés are also protected by the certificate under which he operates, and cannot themselves be called upon to pay for any license covered by the exemption granted to him." This ruling covers the precise issues made by the facts of that case. Stated briefly and simply, the rule laid down in the *Hartfield* Case is that a Confederate soldier having a proper certificate may conduct a business and employ therein the necessary instrumentalities, however numerous they may be, and employ servants and agents to carry on the business, and that both the instrumentalities and the servants and employés are covered by the exemption granted to the soldier.

[3] Now, if the expression, "conduct business," includes peddling, then a Confederate soldier having the proper certificate could engage and appoint others to do the peddling for him, and they would be covered by the exemption granted to the soldier holding the certificate. But, while the term "business" in its broadest sense might include "peddling" and while peddling is a form of business, it will be seen from a consideration of the decisions which are cited and quoted from in the case of *Smith v. Whiddon*, supra, and of the statutes providing for imposing a tax upon peddlers, and the cognate sections of the Code, that "peddling" is not covered by the word "business," as employed in section 1888 of the Civil Code, that being the section under which indigent and disabled Confederate soldiers derive their right to peddle or conduct business without paying a fee or tax therefor. The expression employed in the section last referred to, "peddle or conduct business," tends to show that peddling was not necessarily included in the term "business." If so, it would have been unnecessary to use both the expressions "peddle" and "conduct business." This idea that "peddling" is distinguished from "conducting business" is further emphasized by a consideration of sections 1889, 1890, and other sections to which we will refer later. In section 1889 it is provided that Confederate soldiers of a certain class are authorized to conduct the business of traveling life insurance agents or solicitors, or fire insurance agents or solicitors, and may "peddle in the state" without obtaining a license therefor. Here, in section 1889, the vocation of peddling is kept distinct and separate from other forms of business. And in section 1890 the Confederate soldier seeking to avail himself of the privilege of peddling without obtaining

a license is required, as a condition precedent to the exercise of that privilege, to go before the ordinary of the county of his residence, and make an affidavit wherein he shall state, among other things, "what business he proposes to conduct, and, if he proposes to peddle, shall state that the business which he proposes to carry on is his own, and that he will not sell, or offer to sell, any article for another, directly or indirectly." This quotation is made primarily for the purpose of showing that the vocation of peddling was kept distinct in the legislative mind, in these sections relating to peddlers and peddling, from "conducting a business," in the general and broad sense of the term business. And it may be remarked, before passing from a consideration of that portion of section 1890 of the Civil Code which we have just set forth, that the Confederate soldier availing himself of the privilege conferred by these sections relating to peddling must take an oath that "he will not sell, or offer to sell, any article for another, directly or indirectly"; which would hardly be required of him if he were proposing to carry on a business, using the term in its broad and general sense. We do not overlook the fact that the class of Confederate soldiers referred to in section 1890 is that of Confederate soldiers who have attained the age of 50 years, while section 1888 relates only to disabled or indigent soldiers. But that difference in the class of soldiers dealt with in no wise affects the force of the observation that in the legislative mind "peddling" was kept distinct from "business" used in its broad and general sense. There are other sections of the Code showing that peddling and the peddler are dealt with as subjects of police regulation, and not merely as subjects of statutes intended to raise revenue, such as those imposing taxes upon occupations. And very properly so, when we consider the fact that the peddler under his license travels from place to place in the county, and enters the homes of citizens in order to exhibit his wares. The law requires a showing of good character to be made on the part of a person who desires to peddle, and of the sufficiency of such proof a responsible official of the state is made the judge. In dealing with the subject of granting privileges to Confederate veterans the Legislature apparently felt that an indigent Confederate veteran might be treated as being a person of good character, without requiring such proof as was demanded from others desiring to peddle. But it by no means follows, because the indigent Confederate veteran may be considered as a person of good character, that every other person who may be seeking to travel about the state and enter the homes of the people to exhibit goods or property for sale, under the cover of a certificate granted to a Confederate veteran, may be assumed to be of equally good

character. The liberality of the state towards its Confederate veterans did not go to this extent. In this connection we call attention to sections 1886 and 1893. In section 1886 it is provided that every peddler must apply to the ordinary of the county where he desires to trade for a license, "which shall be granted to him on the terms said ordinary has or may impose. They are authorized to impose such tax as they may deem advisable, to be used for county purposes." And in section 1893 it is provided that: "Every peddler shall furnish said ordinary with evidence of his good character, and shall take and subscribe before him this oath: 'I swear that I will use this license in no other county than the one for which it is granted, nor suffer any person to use it in my name, and that I am a citizen of this state. So help me God.'" Such enactments as these, which deal with peddling as a "thing apart" from business in its ordinary sense, considered in connection with the other statutes which we have referred to or recited above, strengthen us in the conclusion announced, that the decision of our court dealing with the right of a Confederate soldier, exempted from the necessity of obtaining a license to conduct a business and employ therein the necessary instrumentalities and agents is not controlling upon the question as to whether the soldier thus exempted may send out another person as a peddler, and whether the person thus sent out and who does the actual peddling and hawking of the wares may claim the cover of the exemption. For these reasons we are of the opinion that the case of *Hartfield v. City of Columbus*, which deals with conducting business in its general sense and not with "peddling," is clearly distinguishable from that of *Smith v. Whiddon*, and that the latter should be held to be controlling in the present case.

Judgment affirmed. All the Justices concur.

(139 Ga. 787)

JOHNSON v. BROOKS et al., Com'rs of
Roads and Revenues.

(Supreme Court of Georgia. April 18, 1913.)

(Syllabus by the Court.)

JUDGES (§§ 7, 22*)—OFFICERS (§ 63*)—ABANDONMENT OF OFFICE—RIGHT TO COMPENSATION.

Petitioner for mandamus was appointed for judge of the city court of Newton for the term of four years from November 1, 1906, and until his successor should be appointed and qualified. He qualified and discharged the duties of the office until January 1, 1911. In August, 1910, he was appointed for a like term from November 1, 1910, but received no commission under the reappointment until January, 1912, and did not qualify thereunder until that time. After his reappointment in August, 1910, the General Assembly passed an act abolishing the city court of Newton on and after January 1, 1911, provided the act should be approved

by a majority of the qualified voters of Baker county at an election to be held as designated by the act. An election was held in October, 1910, which resulted in the approval of the act. In January, 1912, the Supreme Court of this state held the act to be nugatory and ineffectual. In obedience to the act and the result of the election, all the records, books, papers, etc., in the office of the clerk of the city court were taken possession of by the clerk of the superior court of Baker county, who was ex officio clerk of the city court; and, accepting the act and the election as valid, petitioner on this account alone failed to discharge any of the duties of the office of judge of the city court during the year 1911. *Held*, (1) that petitioner was judge of the city court during the year 1911; (2) that he never abandoned the office; (3) that he was entitled to receive the salary annexed to the office for the year 1911; (4) that the judge erred in granting a nonsuit.

[Ed. Note.—For other cases, see Judges, Cent. Dig. §§ 24-28, 75-88, 179; Dec. Dig. §§ 7, 22; *Officers, Cent. Dig. § 94; Dec. Dig. § 63.*]

Error from Superior Court, Baker County;
Frank Park, Judge.

Petition by A. S. Johnson against J. W. Brooks and others, commissioners of roads and revenues, for mandamus. From a judgment for defendants, plaintiff brings error. Reversed.

Benton Odom, of Newton, W. I. Geer, of Colquitt, H. M. Calhoun, of Arlington, L. M. Rambo, of Blakely, and E. E. Cox, of Camilla, for plaintiff in error. E. M. Davis, of Camilla, R. J. Bacon, of Albany, and Spence & Bennet, of Camilla, for defendants in error.

FISH, C. J. In January, 1912, A. S. Johnson brought his petition for mandamus against the county of Baker and the commissioners of roads and revenues thereof to compel the commissioners to issue a warrant to the treasurer of the county in favor of petitioner for salary claimed to be due him as judge of the city court of Newton by the county for the year 1911. On the trial of the case before a jury, the following facts were made to appear in behalf of the petitioner: Petitioner was duly appointed and commissioned as judge of the city court of Newton on August 18, 1906, for the term of four years from November 1, 1906, and until his successor should be appointed and qualified. He qualified as judge on the last-named day, entered upon the discharge of the duties of the office, and continued to perform them until January 1, 1911. On August 9, 1910, he was reappointed judge of the city court for a term of four years from November 1, 1910, but no commission was issued to him under this last appointment until January 25, 1912, when he qualified by taking the oath of office. On August 15, 1910, the General Assembly passed an act abolishing the city court of Newton on and after January 1, 1911, upon condition, however, that the provisions of the act should be ratified by a majority of the qualified voters of

Baker county, at an election to be held for the purpose of submitting to the voters of that county the question whether the act should become operative. On October 5, 1910, an election was accordingly held, and a majority of the qualified voters of the county voted in favor of the abolishment of the court; and the commissioners of roads and revenues of the county on the same day declared the result of the election, and that the court was abolished from and after January 1, 1911. The act establishing the city court (Acts 1906, p. 306, § 7) made the clerk of the superior court of Baker county ex officio clerk of the city court, and the act for the abolishment of said court provided that "all records, papers, books, suits, meane and final processes of whatever nature, and all criminal cases that may be pending in the city court of Newton at the time this act goes into effect as aforesaid be, and the same are, hereby transferred to the superior court of Baker county for trial and disposition." Acts 1910, p. 201. On January 1, 1911, the clerk of the superior court of Baker county took charge of all the records, papers, books, dockets, etc., at that time in the office of the clerk of the city court. On January 22, 1912, the Supreme Court of the state in *Cook v. State*, 137 Ga. 486, 73 S. E. 672, held the act to abolish the city court of Newton to be nugatory and ineffectual, because it failed to provide how the election therein mentioned should be held, who should hold it, to whom the returns of the election should be made, and whose duty it should be to declare the result of such election. After the rendition of this decision, Johnson, the petitioner, made written demand upon the commissioners of roads and revenues of Baker county that they issue to him a warrant for his salary as judge of the city court for the year 1911 on the treasurer of the county, which demand was refused. On account of the passage of the act conditionally providing for the abolishment of the city court and of the result of the election held in accordance therewith, and acquiescing in the presumed validity of such act, and of the election, petitioner made no objection to the taking by the clerk of the superior court of the records, dockets, papers, etc., in the office of the clerk of the city court, and for the same reason never made any demand upon the clerk of the superior court for such records, books, papers, etc., and for the like reason petitioner performed no duties as judge of the city court during the year 1911. Petitioner testified that he did not voluntarily give up the office of judge of the city court, but that he merely failed to act as judge during the year 1911 in obedience to what he thought to be the law. A nonsuit was granted and the petitioner excepted.

In our opinion the court erred in granting a nonsuit. As the act providing for the abol-

ishment of the city court of Newton was nugatory and ineffectual, the court, of course, was not abolished, and it is equally manifest that the office of judge of the court has continued to exist; and as the petitioner was appointed judge of the court for the term of four years from November 1, 1906, and until his successor should be appointed and qualified, and though he was appointed as his own successor, no commission was issued to him until January, 1912; and, as he did not qualify until then, it follows, with the same certainty as the other results just announced, that the petitioner held the office of judge of the city court during the year 1911 (Civil Code, § 261; *Shackelford v. West*, 138 Ga. 159, 74 S. E. 1079), unless his conduct and his failure to perform the duties of the office in the circumstances above set forth amounted to an abandonment of the office, as was contended to be the case by counsel for the defendants in error, who relied upon Civil Code, § 264, par. 7, which is to the effect that all offices in this state "are vacated by abandoning the office and ceasing to perform its duties, or either." This language of the Code means the willful and voluntary forsaking or relinquishment of the office or of the right to hold the same, or a willful and voluntary failure to perform the duties of the office, and not a failure to discharge its duties by reason of the acquiescence in the validity of a statute until it is judicially declared to be nugatory. In *Turnipseed v. Hudson*, 50 Miss. 429, 19 Am. Rep. 15, the plaintiff was elected to an office in 1871 for the term of four years. In 1873 an act was passed by the Legislature, providing for an election in November of that year to fill the office. Among the contestants for election were the plaintiff and defendant, who entered into a written agreement to abide the result of a primary election. At the primary the defendant was selected, and in November he was elected, and thereupon qualified and took possession of the office, plaintiff surrendering the same. The statute was subsequently decided to be unconstitutional and the election void, and the plaintiff brought his action to recover possession of the office. It was held (1) that the plaintiff was not estopped by the agreement with the defendant; and (2) that such agreement and the surrender of the office by plaintiff did not amount to an abandonment or resignation. In *Hampton v. Dilley*, 3 Idaho (Hasb.) 427, 31 Pac. 807, the following facts appear: Hampton was duly elected judge of the probate court of Logan county at the regular election in 1890. The Legislature on March 3, 1891, and after Hampton had taken office in pursuance of such election, passed an act creating the counties of Alta and Lincoln out of the territory theretofore comprising the counties of

Alturas and Logan. When the act was passed, Bellevue was the county seat of Logan county. Under the act, the town of Shoshone was made the county seat of Lincoln county, and the town of Bellevue was included within the boundaries of the county of Alta. Upon the passage of the act, the Governor immediately appointed various persons to fill the several county offices of Alta and Lincoln, and among them Hampton was appointed probate judge of Lincoln county. He accepted the appointment and at once qualified. The board of commissioners of Logan county, refusing to recognize the validity of the act, immediately on the acceptance by Hampton of the appointment as judge of the probate court of Lincoln county and his qualification as such officer, appointed Dilley probate judge of Logan county and installed him in office. The Supreme Court of the state subsequently held the above-mentioned act to be unconstitutional. Thereupon Hampton demanded of Dilley the possession of the office of probate judge of Logan county, which demand was refused. Hampton then instituted proceedings against Dilley to recover possession of that office; and it was held by the Supreme Court of Idaho that Hampton was entitled to recover. While we are not to be taken as agreeing to all that is said in the opinion rendered in the two cases cited, we think the conclusions reached are sound; that is, in effect, that the mere acquiescence by the officer in the validity of a statute purporting to abolish the office held by him, and his failure on that account alone to discharge the duties of the office, do not amount to an abandonment of the office, where such statute is subsequently held to be unconstitutional or otherwise invalid.

We have no doubt of the right of petitioner to recover his salary as judge of the city court of Newton for the year 1911, notwithstanding under the facts of the case he discharged none of the duties of the office during that year. "It has often been held that an officer's right to his compensation does not grow out of a contract between him and the state or the municipality by which it is payable. The compensation belongs to the office, and is an incident of his office, and he is entitled to it, not by force of any contract, but because the law attaches it to the office." *Throop on Public Officers*, § 443. It follows that the rules of law relative to contracts do not apply to the official relation; and therefore the fact that an officer has not performed the duties of his office does not deprive him of the right to the salary attached thereto, provided his conduct does not amount to an abandonment of the office. 29 Cyc. 1422.

Judgment reversed. All the Justices concur.

(139 Ga. 698)

MARTIN v. GAISSERT.

(Supreme Court of Georgia. April 17, 1913.)

*(Syllabus by the Court.)***EXECUTORS AND ADMINISTRATORS (§ 176*)—WIDOW'S SUPPORT—RIGHT TO ALLOWANCE.**

Where application was filed by a widow, under sections 4041 and 4042 of the Civil Code 1910, for a second 12 months' support for herself, and on the trial of the case it appeared that there were debts to pay by the estate of the testator, by virtue of whose will the estate was being kept together, it was not error for the trial judge to direct a verdict for the executor against whom the application was filed.

[Ed. Note.—For other cases, see *Executors and Administrators*, Cent. Dig. §§ 661-666; Dec. Dig. § 176.*]

Error from Superior Court, Morgan County; J. B. Park, Judge.

Action by M. O. Martin against J. H. Gaisert, executor. Judgment for defendant, and plaintiff brings error. Affirmed.

Zach Martin died in 1907, leaving a will and naming J. H. Gaisert as executor, who qualified as such. The testator left his wife, the plaintiff in error here, and their son, Steven B. Martin, as his only heirs at law and legatees under his will. After the probate of the will in solemn form, the widow made application for a year's support, and she was awarded the sum of \$2,300, which was paid by the executor. The executor removed the administration of the estate from Fulton county, where the testator died, and where the will was probated and the first 12 months' support was granted, to Morgan county, the place of his residence. There the widow applied for a second year's support, and to which application the executor filed a demurrer and a caveat. The widow was awarded as a second year's support the sum of \$1,000. Both parties appealed from this award to the superior court by consent. On the trial of the case the plaintiff introduced in evidence certified copies of the will and of the inventory and appraisement; the latter showing the estate to have been appraised at about \$27,000. The testimony for the widow tended to show that she had been paid the sum of \$2,300 as the first year's support, and that it required the whole of this amount to meet her necessary expenses for that year. The second year her health had improved somewhat, and it required \$1,200 for her support for the second year, and that was the year the second application was made. On cross-examination she testified that she had brought suit in Morgan superior court against the executor to recover \$2,058.37 which the testator had collected for her in 1906 and deposited in bank in his own name and never paid to her, and that suit is still pending in court. Also her suit against J. H. Gaisert, executor, and Steven B. Martin, for cancellation of a deed to certain realty in Atlanta, and for the rents

thereof, was filed in Morgan superior court on March 28, 1910, and which is still pending.

The material portions of the will are as follows: "Item Second. I give and bequeath to my wife, Mollie O. Martin, three thousand (\$3,000.00) dollars insurance in the O. R. C., having already given her six thousand (\$6000.00) dollars; also my personal property, except one diamond ring once the property of my deceased daughter. Item Third. I will and direct that all the net income of my real estate, including notes and moneys, be equally divided between my wife, Mollie O. Martin, and my son, Steven B. Martin, my wife to receive her part of the income as fast as collected during her natural life. Item Fourth. I direct that the part my son is to receive be held in trust by my executor, unless my son become helpless and in want of the necessities of life; then my executor shall use his own discretion as to his condition, and no other person to be cared for or receive any benefit through or on account of my son Steven B. Martin. Item Fifth. I will and direct that my executor hold my estate together during my beloved wife's, Mollie O. Martin, natural life. In the case of her death before ten years from date of this will, I desire that my estate be held in trust till February 11th, 1916, then it shall be vested in and become the property in fee simple to my son Steven B. Martin."

The defendant testified that he paid all of the debts of the estate of Zach Martin before the end of the year 1908, and that he was holding the estate of the testator as directed in item 5 of his will. At the close of the testimony the court directed a verdict for the defendant, on which ruling the plaintiff assigned error.

F. C. Foster and E. W. Butler, both of Madison, and Westmoreland Bros., of Atlanta, for plaintiff in error. S. H. Sibley, of Union Point, and George & Anderson, of Madison, for defendant in error.

HILL, J. The right to a second year's support allowed a widow out of the estate of her deceased husband is a statutory right, and can only be obtained under strict conformity to the conditions of the statute. Civil Code, § 4041, provides for the setting apart of a year's support to a widow, or to a widow and minor child or children only, and is ranked among the expenses of administration, to be preferred before all other debts, other than the exceptions made in sections 4048 to 4050, inclusive. By section 4042 a second year's support may be had by the widow, provided she comes within the terms of that statute. One of the prerequisites is that "there are no debts to pay." It becomes material to inquire, therefore, whether there are "debts to pay" in this

case. The evidence shows that the widow herself has filed suits against the estate amounting to several thousand dollars for money claimed to be due her by the estate. It cannot be held, at least at the instance of one asserting herself to be a creditor of the estate, that under these circumstances there are "no debts to pay." It certainly was not the intention of the statute to allow the widow, or widow and minor child or children, or minor child and children only, while there is pending litigation against the estate, by repeated applications year after year, to exhaust the estate, and thus defeat the purpose of the will of the testator. It will be borne in mind that this is not a case of intestacy and pending litigation where the estate is to be kept together until the litigation ends or for other reasons. But this is a case where the testator has provided by will for the support of his widow. By the third item of his will he directs "that all the net income of my real estate, including notes and moneys, be equally divided between my wife, Mollie O. Martin, and my son, Steven B. Martin, my wife to receive her part of the income as fast as collected during her natural life." The plaintiff in error has already had one year's support, amounting to \$2,300. The first year's support is intended for the purpose of providing for the necessities of the decedent's family for 12 months, within which time the executor is required to collect the debts due to the estate and assent to and turn over the legacies devised by the will. The record in the present case shows that the income from the property devised in item 3 of the testator's will has been turned over to the widow. Whether this amount is sufficient for her support is not for our decision. But to hold that it is not, and that a year's support can be set aside year after year, and thus exhaust the estate, would be to set aside her husband's will, as said by Mr. Justice Simmons in the case of *Hill v. Lewis*, 91 Ga. 796, 798, 799, 18 S. E. 63, 64. In that case he said: "To allow a widow * * * and have the whole property set apart to her as a support for all the years she has lived on it, would be to allow her to set aside her husband's will of her own volition, and to deprive the remaindermen of the provision left for them by their father. We are sure the law will not authorize such a proceeding." The effect of such policy would be to consume the whole estate before final distribution, which was never contemplated by the lawmakers or by the testator.

But it is insisted that under the ruling in the case of *Woodbridge v. Woodbridge*, 70 Ga. 733, although there are debts to pay, if there is still enough left over of the estate to supply the widow's wants, she should be paid her second year's support. The argument is that the question at last is between

the widow and the creditors of the estate. This view leaves entirely out of consideration legatees and remaindermen under the will, who certainly have rights—to say nothing of the testator's intention. If no one were interested but the widow and the creditors of the estate, this position might be tenable, and especially when the widow was both the applicant for the year's support and the creditor, as in the present case; but it leaves entirely out of consideration the testamentary scheme and those who are interested as legatees or remaindermen under the will. It is further insisted that this court held in the *Woodbridge Case*, supra, that the widow need not allege in her application that there are no debts to be paid, as that would be a matter of defense. We have examined the *Woodbridge Case*, including the original record, and what was there said to the effect that "if the estate, under the facts, should prove sufficient to pay off the debts and also provide a reasonable support for the widow during the time the same may be kept together, then the widow is entitled to such allowance," was obiter dictum. The statute is plain and unequivocal that the widow is entitled to the second year's support under the condition named, "and there are no debts to pay." We cannot enlarge the statute beyond the limits prescribed by the Legislature. It is within their province, and not ours, to extend the provisions of the statute, if they so desire. Until such time as they see fit to do so, we must construe the statute as we find it. The record shows that there are debts to pay relatively to the applicant in this case, and therefore the court did not err in directing a verdict for the defendant.

Judgment affirmed. All the Justices concur.

(129 Ga. 771)

WILSON v. WILSON.

(Supreme Court of Georgia. April 18, 1913.)

(Syllabus by the Court.)

1. EXECUTORS AND ADMINISTRATORS (§ 15*)—QUALIFICATIONS—ORDINARY.

An ordinary cannot act as executor in the county of which he is ordinary.

[Ed. Note.—For other cases, see *Executors and Administrators*, Cent. Dig. §§ 32-35; Dec. Dig. § 15.*]

2. WILL ADMITTED TO PROBATE, BUT EXECUTOR NOT ALLOWED TO QUALIFY.

Where, in such a case, the executor, who is also the ordinary, files with the clerk of the superior court (there being no judge of the city or county court) a petition to probate the will in common form and to have himself qualified as executor, and the clerk orders the will to probate, and also allows the executor to qualify as such, and where the case is appealed to the superior court and the trial judge hears the case without the intervention of a jury, and renders his decision affirming the judgment of the clerk as to the probate of the will, but reversing the judgment that the executor could qualify as such, there was no error.

Error from Superior Court, Taylor County; S. P. Gilbert, Judge.

Petition by W. B. Wilson to be allowed to qualify as executor of the will of Robert E. Wilson. The superior court reversed an order of the clerk allowing him to qualify, and he brings error. Affirmed.

W. D. Crawford, of Buena Vista, for plaintiff in error. C. W. Foy, of Butler, for defendant in error.

HILL, J. Robert E. Wilson died testate in November, 1911, and named W. B. Wilson, his father, as executor of his last will and testament. W. B. Wilson at the time of the death of his son was the ordinary of Taylor county. On December 26, 1911, the named executor presented the will, with an indorsement thereon of his disqualification as ordinary to act in the matter of its probate, to the clerk of the superior court of Taylor county for probate in common form. There being no city court or county court judge in Taylor county, it was agreed upon the trial that the clerk of the superior court had jurisdiction to probate the will. The petition was accordingly heard by the clerk. A caveat was filed by the widow and sole heir at law of the testator to the probate of the will and to the right of the named executor to qualify, upon the grounds: (1) That the testator being a resident of Taylor county at the time of his death, the court of ordinary of that county had exclusive jurisdiction of the probate of his will. (2) That the nominated executor of the will was also the ordinary of Taylor county, and therefore ineligible to qualify and act as executor of any will over which his court had jurisdiction, and, having no other interest, could not offer the will for probate. On hearing the case, the clerk, acting as ordinary, passed an order probating the will, and allowing the petitioner to qualify as the executor thereof. The caveatatrix appealed from this decision to the superior court. By consent of the parties the trial judge heard the case without the intervention of a jury, and rendered judgment allowing the decision of the clerk to stand as to the probate of the will, but reversed it as to allowing W. B. Wilson to qualify as executor, and Wilson excepted.

[1, 2] 1. The sole question to be determined in the case is whether the ordinary of a county, who has been named as executor, can qualify and act as such in the county of which he is ordinary. The Civil Code, § 4786, provides: "The eligibility and disabilities of the ordinary, aside from the Constitution, are the same as the clerks of the superior courts for their offices, with the addition that they cannot, during their terms of office, be executors, administrators, or guardians, or other agents of a fiduciary nature required to account to their courts;

but they may be administrators, guardians, or executors in cases where the jurisdiction belongs to another county, or where, in special cases, they may be allowed by law and required to account to the ordinary of another county." This section of the Code by express terms renders any ordinary ineligible to act as an executor during his term of office where as such executor he would be required to account to the court of ordinary. In the present case the ordinary applied for the executorship during his term of office. While he remained in office as ordinary, he would be accountable to himself. It is true that by the terms of the will he was relieved from giving bond, or from making any returns to the ordinary. But this provision in the will does not relieve him from being subject to the jurisdiction of the court of ordinary with respect to his other acts and doings as executor. For instance, should he refuse to make settlement with the legatee, or legatees under the will, he (as executor) could be cited to appear before himself (as ordinary) to make settlement with any legatee. Civil Code, § 4073. Section 4787 goes to the extent of declaring that when any persons holding such trusts as executors, etc., are elected ordinaries, their letters and powers immediately abate on their qualification. The whole scheme of our law with respect to the estates of decedents is to put them under the control and supervision of the ordinary. Aside from the express inhibition of the statutes, it would be contrary to public policy to allow an ordinary to become executor, guardian, etc., of various estates, and thus disqualify him to that extent from discharging the duties he was elected to perform. By so doing, he could greatly impede and retard the transaction of business before his own court, and greatly inconvenience and hamper the administration of estates. If he can act as executor of one estate, he could of a dozen or more, and likewise as guardian of any number of minors, and in this way create endless confusion by occupying two relations utterly inconsistent with each other, and thus interfere with the orderly process of business before his court.

Judgment affirmed. All the Justices concur.

(139 Ga. 676)

STRIBLING et al. v. GEORGIA RY. & POWER CO.

(Supreme Court of Georgia. April 16, 1913.)

(Syllabus by the Judge.)

1. APPEAL AND ERROR (§ 801*)—DISMISSAL—INJUNCTION.

Where an injunction is denied, and the decision is brought to the Supreme Court by writ of error, but no supersedeas is granted, a motion to dismiss such writ of error, on the ground that before the hearing in this court the act or

acts against which it was sought to enjoin have been completed, will be denied when the evidence offered by the defendant in error in support of the motion to dismiss is controverted by the opposite party as to facts material to the ground of the motion.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3161-3164; Dec. Dig. § 801.*]

2. EMINENT DOMAIN (§ 52*)—EXERCISE OF POWER.

Where provision is made by sections 5240 and 5241 of the Civil Code of 1910 for the exercise of the right of eminent domain in connection with the generation and transmission of electricity for supplying light, heat, and power to the public, and section 5242 declares that "the power given under the two preceding sections shall not be used to interfere with any mill or factory actually in operation," the prohibition contained in the last section applied to mills and factories operated by steam power, as well as to those operated by water power.

[Ed. Note.—For other cases, see Eminent Domain, Cent. Dig. §§ 121-130; Dec. Dig. § 52.*]

3. APPEAL AND ERROR (§ 947*)—REFUSAL TO EXERCISE DISCRETION—DECISION.

The presiding judge in refusing to grant the injunction prayed, having stated in his order that he had concluded that he had "no discretion in the premises," and having based his ruling on an erroneous view of the law which he apparently thought concluded him, and not upon a full consideration of the application for injunction on the issues of law and fact, his judgment is reversed, with direction to rehear the application and pass upon it on its merits.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 3813; Dec. Dig. § 947.*]

Error from Superior Court, Habersham County; J. B. Jones, Judge.

Action by H. B. Stribling and others against the Georgia Railway & Power Company. Judgment for defendant, and plaintiffs bring error. Reversed, with directions.

Stribling and others filed a petition against the Georgia Railway & Power Company, alleging in substance as follows: As tenants in common they are the owners of four acres of land (described) in Habersham county, upon which they have located a manufacturing plant consisting of a gristmill, planing mill, sawmill, and crate factory, together with lumber yards and buildings necessary for the carrying on of their business. The mills and factory are in actual operation, grinding grists for the public, and sawing lumber and manufacturing crates for shipment and sale, and are permanent in character. The plaintiffs invested about \$4,000 in the land, buildings, machinery, and equipment, and have established a rapidly growing milling and manufacturing business. The four acres are necessary for the operation of the milling and manufacturing enterprise, and are used and will be used in the operation thereof. The land is peculiarly adapted to the location of such an enterprise, having a stream of running water of sufficient flow to furnish water for the generation of steam, and for other purposes necessary and desirable in operation. The defendant, a corporation chartered for

the purpose of generating electricity by water, for supplying light, heat, and power to the public, is engaged in erecting a line of towers between its works on the Tallulah river and the city of Atlanta and other points preparatory to stringing wires for the transmission of electricity. It has purchased from Mrs. Harriet M. Stribling a right of way over lands adjoining on all sides the four acres belonging to the plaintiffs, which formerly belonged to Mrs. Stribling, but had been sold and conveyed to them prior to the sale of the right of way by her. Though the deed of conveyance was not recorded at the time, the defendant had full knowledge of it, and was notified that the plaintiffs would not consent to or sell the privilege of stringing wires charged with heavy voltage of electricity over their mill and manufacturing plant. Nevertheless the defendant has erected two towers on the lands of Mrs. Stribling adjoining that of the plaintiffs, the towers being about 1,000 feet apart, and is threatening to string numbers of wires to be charged with a heavy voltage of electricity from one tower to another over and across the mills and manufacturing plant of the plaintiffs. The machinery and implements used in these mills are largely made of steel, a substance highly attractive to electricity, and the wires charged with high voltage, hanging and sagging above the mill and in close proximity to the machinery, will render it almost impossible for the plaintiffs to continue business or to operate their mills. The danger incident to the breaking of wires, and their falling upon the lumber, shavings, and other inflammable substances necessary to the operation of the plaintiffs' business, would increase the fire risk to such an extent as to make the cost of insurance almost prohibitive; and the danger and apprehension arising from working under wires so charged would render it almost impossible to secure effective labor for the operation of the mill. Moreover, the going through the plaintiffs' property in the erection, repairing, and maintenance of the wires of the defendant would be a constant interference with the operation of their mill. The injury will be irreparable, and the damages of a character which cannot be calculated or recovered. The defendant is attempting to condemn an easement or right of way over the plaintiffs' property, and has served notice on them of its intention so to do, and that the hearing before the assessors will be had on the 15th day of June. It is unnecessary for the defendant to pass over the property of the plaintiffs in order to establish its line of transmission, but it can be established at a small outlay upon a right of way adjoining that property.

Under the statute the defendant has no authority to condemn a right of way so as

to interfere with any mill or factory in operation. The prayers were that the defendant be enjoined from further prosecuting or carrying on any proceeding for the condemnation and assessment of damages for an easement or right of way over the property of the plaintiffs; and that "the proceedings instituted within the jurisdiction of the superior court of Habersham county by the Georgia Railway & Power Company and now pending, for the condemnation and assessment of damages for an easement or right of way for its power line over petitioners' mill and mill plant, and the right to place wires and charge them with electricity over petitioners' four acres of land and upon which is situated petitioners' mill and crate factory, be stayed and perpetually enjoined." A rule to show cause and a temporary restraining order were granted.

The defendant denied the principal allegations on which the petition was based, and alleged in substance as follows: On January 23, 1912, the defendant purchased from Mrs. Stribling for \$250 a complete right of way 40 feet wide across her property, and received a conveyance thereof. It has been informed that on the evening before the plaintiffs, with full notice of the fact that Mrs. Stribling had sold the right of way and agreed to make a conveyance thereto, obtained from her, their mother, some sort of conveyance of the strip of land they now claim, and that this was done for the purpose of committing a fraud upon the defendant, and in effect to hold up the development and harass and "bleed" the defendant, or prevent the completion of its tower line. After purchasing the right of way from Mrs. Stribling, it proceeded to erect towers, and completed the erection of the line of towers without placing any of them on the four acres now claimed by the plaintiffs, and it is not necessary to do so; but it is necessary to string a line of wires across and over the land from one tower to another. In doing so the wires will be about 40 feet from the ground, out of the way of any mill, machinery, or buildings that the plaintiffs now have upon the property, and will in no wise interfere with their operation. After the defendant commenced the erection of its power line from Tallulah Falls to Atlanta, and after a large part of it was completed, and after the survey had been completed, the plaintiffs found out where the line would cross the property of their mother, and undertook to move a small sawmill to one side of the right of way or tower line; and the defendant is informed that they obtained some sort of a conveyance from their mother. The mill and machinery were not in operation at the time the defendant purchased the right of way from Mrs. Stribling, and the corn mill and attachments were not received and located until after the towers had been erected and the plaintiffs were familiar therewith. When Mrs. Stribling executed the

deed to the defendant, she stated that she had made a deed to her children for the four acres on the preceding day. The mill and machinery of the plaintiffs are not directly under the place where the line of wires will be strung, but are located a considerable distance to one side, and the wires and electric current will in no wise interfere with the mill and machinery. The allegations of danger to the mill and machinery from fire, and of injury to persons or property, are denied. The defendant endeavored to procure by contract the right to place its wires over the property of the plaintiffs, and offered \$25 for that purpose, but the plaintiffs refused to negotiate with the defendant at all, or to make any sale or contract for that purpose, but informed the defendant that it could not procure such right at any price, and the defendant was therefore forced to begin condemnation proceedings in order to obtain the necessary right of way. It has commenced proceedings for that purpose and notified the plaintiffs, and intends to proceed when permitted to do so by the court. It will only cut such trees and brush or remove such other obstruction as may now or hereafter interfere with the operation of its transmission line, or cause danger thereto by falling upon the wires. The line of towers has been constructed as nearly straight as possible between Tallulah Falls and Atlanta; and to place the line around the four acres of the plaintiffs would necessitate making four bends at practically right angles, which would cause a heavy strain on the towers and wires and subject them to great danger of breakage, and cause greater danger to persons and property. The defendant has the legal right to exercise the power of eminent domain; and, if it were prevented from placing its wires across the property of the plaintiffs, this would entirely defeat the successful transmission of electricity from its power plant at Tallulah Falls to the places of consumption. The exception in the act of 1897 in regard to a mill or factory refers to a mill or factory in operation upon some water course; and the Legislature did not intend to refer to any mill or factory that might be located elsewhere and operated by steam. But, if this were otherwise, the Legislature did not intend to permit persons after having found out the location of a water power plant and where the line for the transmission of power is being located to erect a temporary mill directly in the line of such proposed development for the purpose of "holding up and bleeding" the condemning company, or to prevent and destroy such development by using the exception thus made in the statute for fraudulent and illegal purposes. Any damages to the plaintiffs can be estimated and determined in the condemnation proceeding. The tower line has been secured in a direct line for almost the entire distance from Tallulah Falls to Atlanta, with very few exceptions in each county. Over 95

per cent. of the line has been procured and paid for, and it would be practically impossible for the defendant at this time to make a change in its line.

The defendant also filed a demurrer. The hearing upon the application for injunction took place on July 20th. On August 3d the presiding judge passed an order containing the following: "I have concluded as follows: (1) That I have no discretion in the premises, but that my duty is plain. (2) That under the issue made by the pleading and evidence the defendant has the right to proceed with its statutory condemnation proceeding. The interlocutory injunction is therefore refused, and the restraining order heretofore granted is dissolved." Whereupon the plaintiffs excepted.

When the case was reached in the Supreme Court, it was submitted on briefs. The defendant also filed a motion to dismiss the writ of error, on the ground that no supersedeas was granted, and the condemnation proceedings had been carried on and completed, the right of way condemned, wires strung across the property, the right of way cleared of trees and underbrush, "and everything has been done against which injunction was prayed," and that the award of the arbitrators had been filed and the amount of the award deposited with the clerk of the superior court, and, though more than 10 days had elapsed after the deposit, no appeal had been entered. In the original brief of counsel for the defendant in error on the motion to dismiss it was stated that "the arbitrators having been chosen and hearing had, in which both parties were present by themselves and counsel, evidence introduced and argument had, and the judgment fixed the damages at \$50, and the money tendered and refused, and then deposited in the office of the clerk of the superior court," etc. Accompanying this motion was an affidavit of one of counsel for defendant in error (W. S. Erwin, Esq.) to the effect that after the refusal of the injunction "said condemnation proceedings were duly had and held, resulting in an award of \$50 as damages, by said assessors, to be paid to the said G. B. Stribling et al. for said right of way; that said award has been returned to the superior court of Habersham county, and the money there deposited after the same had been refused by the said G. B. Stribling et al.; and that no appeal has been entered from said award since the filing of the same. Deponent further says that after said condemnation proceedings were had that the Georgia Railway & Power Company proceeded in accordance with its said petition, and strung its said wires across and over the property of the said G. B. Stribling et al., cut down trees, cleared up the right of way, and have occupied the same in accordance with its said condemnation proceedings, and that all of the acts and things against which injunction is prayed have been completed

and finished." There was also a certificate of the clerk of the superior court, dated December 28, 1912, that the return of the assessors was filed in his office on August 24, 1912, that no appeal was taken, and that \$50, the amount of the award, had been deposited, and remained subject to be paid over to G. B. Stribling et al.

In reply the leading counsel for the plaintiffs, (Hon. H. S. West, who stated that he was the sole counsel until after the denial of the injunction, and that he alone had directly communicated with his clients) filed an affidavit in which he denied that there had been any hearing before "arbitrators" (assessors), in which both parties were present and participated by themselves and counsel. He stated that he sent the bill of exceptions to the presiding judge by mail, and requested a supersedeas, and did not learn until some time thereafter that it had not been granted; that he expected the judge to return the bill of exceptions to him, but some days later was notified by the clerk of the court to which the case was returnable that he had found the papers in his office, and that the adverse attorney had acknowledged service on them; that he is informed and believes that on the day after the bill of exceptions was signed his clients were approached to appoint an arbitrator (assessor), but declined to do so, and thereupon the company appointed as arbitrator (assessor) for his clients one of its employés; and that neither the affiant nor his associate has ever taken part or acquiesced in "the so-called arbitration or award," and he denies that they are bound thereby.

At a later date counsel for the defendant sent to this court an additional brief on the motion to dismiss, in which they stated that in their original brief they had inadvertently stated that "both parties were present by themselves and counsel"; that this was incorrect, as none of the plaintiffs or their counsel attended the condemnation proceedings; that this error crept into the brief by copying a brief in another case, and they desired to strike from the original brief the words quoted, but that they insisted that the condemnation proceedings were legally held, arbitrators (assessors) duly chosen, and parties duly notified, and the hearing had in pursuance of the notice required by law. Accompanying this additional brief was another affidavit of the same counsel who had filed the original affidavit with the motion to dismiss. He deposed in substance as follows: The condemnation proceedings were begun on May 30, 1912. The petition to enjoin against them was filed on June 13th, and the injunction denied on August 3d. On August 12th the ordinary of the county where the proceedings were had appointed a named person as assessor for the Striblings, and written notice was given to the original attorney for them, and personal notice also to two of them, who were named. Another

plaintiff resided out of the state, and no personal notice was given to him, but notice was given to his attorney that the condemnation proceedings would be held on the premises on August 24th. The three arbitrators went first to the residence of the two plaintiffs mentioned, but they declined to go with the arbitrators upon the premises, though requested to do so. The assessors then went upon the premises and viewed them, heard evidence, and made their award of \$50. The owners refused to accept that sum, and it was deposited with the clerk of the superior court on August 29th. The condemnation proceedings were returned and filed on August 24th, and no appeal was entered therefrom. After the award was so returned and the money so deposited, the condemnor proceeded to clear off the right of way and string wires "in accordance with their rights secured by the said condemnation proceedings." Counsel for the plaintiffs also filed an additional affidavit in opposition to the motion to dismiss. G. B. Stribbling deposed in substance as follows: He repeated the denial that parties or their counsel were present or took any part in the so-called arbitration, and asserted, on the contrary, that they considered it illegal and void, and declined to have anything to do with it. The bill of exceptions was signed by the judge on August 24th, as deponent was informed. The certificate was dated August 22d, and the entry of filing was dated August 26th. Deponent's counsel lived in Athens, and the land was located in Habersham county, 75 or 80 miles distant. On Saturday, August 24th, "the arbitration" (assessment) took place. Neither deponent nor any of the plaintiffs selected an "arbitrator" (assessor), but refused to do so. The company thereupon selected and had appointed a person who deponent is informed and believes is regularly employed by it; and plaintiffs have since learned a "so-called arbitration was had." Deponent denied the statement in the brief accompanying the motion to dismiss that "the company then proceeded and erected towers upon this property in accordance with the proposed condemnation proceeding." The proposed proceeding showed on its face that no towers were to be erected on this property, and none have been so erected. The injuries complained of by the plaintiffs have not been fully completed. While some wires have been strung over the property, not all of the wires "contemplated, and that can be and will be done, have yet been strung," and more important still none of the wires have yet been charged with electricity, and the principal apprehended damage was the sending of a high voltage of electricity over wires in close proximity to the mills of the plaintiffs, causing danger of fire from breaking, and interfering with the mills by reason of the menace arising from this high voltage of electricity overhead, and the interference

with the employment of hands which will arise therefrom.

H. S. West and E. K. Lumpkin, both of Athens, for plaintiffs in error. H. H. Dean, of Gainesville, and McMillan & Erwin, of Clarksville, for defendant in error.

LUMPKIN, J. (after stating the facts as above). [1] 1. The motion to dismiss the writ of error on the ground that since the injunction was refused, and with no supersedeas granted, everything has been done against which injunction was prayed, must be denied. The rule on this subject is clearly stated in *Tuells v. Torras*, 113 Ga. 691, 39 S. E. 455, thus: "If the judge refuses to grant an injunction to prevent the commission of a given act, and the refusal to grant the injunction is brought to this court, no supersedeas of the judgment having been obtained, and it appears to the satisfaction of this court, by uncontroverted evidence, that the act sought to be enjoined has been completed, the writ of error will be dismissed. If an issue of act is raised as to this matter between the parties to the case, the writ of error will not be dismissed." And again: "When it is shown *prima facie* to the satisfaction of this court that the act sought to be enjoined has been completed, and, in response to the motion to dismiss, the plaintiff either admits the existence of the facts as claimed by the defendant in error, or fails to deny the existence of the same, the writ of error will be dismissed. But when the existence of the fact is in any way denied, either by affidavit of the party or his counsel or by statement of counsel in open court, the motion to dismiss will be overruled."

In the case before us the defendant in error made a *prima facie* showing that everything had been done against which injunction was prayed. But the counter showing tended to prove that everything against which injunction was prayed had not been fully completed. As to the attempted assessment since the signing of the bill of exceptions, the evidence seriously attacks its validity, both because of want of any statutory authority therefor and also because of the manner in which it was sought to be made. If it was invalid, this might furnish ground for an additional prayer for injunction; but, in view of the statements and counter statements, it would hardly be ground for dismissing the writ of error. Under the briefs and affidavits, the plaintiffs will not be compelled by dismissal of their writ of error to waive the contention that the attempted assessment was void, and submit to it as being valid by appealing from it or receiving the amount awarded. This case does not fall within any of those relied on by counsel for defendant in error. The last case on the subject is that of *Moody v. Georgia Railway & Power Co.*, 76 S. E. 857, where

other cases are cited. There (as appears from the record on file) an injunction was sought to restrain the company from condemning a right of way or easement over certain lots, not on the ground that any mill or factory was involved, and that there was no authority to condemn under the statute, but because of an alleged arbitrary and unnecessary location, and damage especially to a hotel property. The injunction was denied, and exception was taken. In this court the case was submitted on briefs, and a motion to dismiss the writ of error was made, on the ground that everything had been already done against which injunction was prayed. An affidavit and certificate of the clerk were filed in support of the motion. When this court reached the case for consideration, after examining the affidavit and certificate, a rule was issued requiring the plaintiff in error to show cause why the writ of error should not be dismissed. At the time when the rule was returnable no response to it was made, and there was no traverse or denial of the facts stated in the affidavit and certificate. The writ of error was accordingly dismissed. The distinction between the two cases is apparent.

[2] 2. There was conflicting evidence in the case, but the presiding judge did not base his denial of an injunction upon the facts in controversy, nor did he pass a general order refusing it. He expressly stated in his order that he had concluded that he had "no discretion in the premises," thus negating any discretionary finding on conflicting evidence. The reason urged in this court in support of this statement that the judge had no discretion, but was obliged to deny the injunction, was that the exception from the right of condemnation by corporations constructing plants for generating electricity for supplying light, heat, or power to the public, contained in the Civil Code, § 5242, did not apply to a mill or factory operated by steam, but only to one in operation on a water course. Sections 5240 to 5242 were codified from the act of 1897. Section 5240 is as follows: "Any corporation or individual owning or controlling any water power in this state, or location for steam plant hereinafter mentioned, and operating or constructing or preparing to construct thereon a plant or works for generating electricity by water or steam power, to be used for the purpose of lighting towns or cities, or supplying motive power to railroads or street car lines, or supplying light, heat, or power to the public, shall have the right to purchase, lease, or condemn rights of way or other easements upon the lands of others in order to run lines of wires, maintain dams, flow back water, or for other uses necessary to said purposes, upon first paying just compensation to the owners of the land to be affected." Section 5242 is as follows: "The power given under the two preceding sections shall

not be used to interfere with any mill or factory actually in operation." It will be observed that the first section quoted confers the right of condemnation, not only on persons owning or controlling "any water power in this state," but also on those owning or controlling a "location for steam plant hereinafter mentioned," and operating or constructing or preparing to construct thereon "a plant or works for generating electricity by water or steam power," to be used as there described. And by the second section it is declared that the power given shall not be used to interfere with "any mill or factory actually in operation." It has frequently been held that acts conferring powers of this character upon individuals or corporations, being in derogation of common right, are to be strictly construed. *Carr v. Georgia Railroad, etc., Co.*, 1 Ga. 524; *Young v. McKenzie*, 3 Ga. 31 (3), 40; *Justices of the Inferior Court v. Griffin, etc., Plank Road Co.*, 9 Ga. 475; *Ala. Great Southern R. v. Gilbert*, 71 Ga. 591; *Frank v. City of Atlanta*, 72 Ga. 428 (2), 432. No good reason is suggested to us for holding that in conferring the power of condemnation persons operating plants either by water or steam power are included, but in protecting other mills or factories in actual operation the Legislature protected only those operated by water power. There is nothing in the act to indicate that the legislative purpose to protect mills and factories in actual operation was limited to those run by water. The language is broad enough to include both classes; and there is nothing to show that the Legislature meant less.

The decision in the case of *Nolan v. Central Georgia Power Co.*, 134 Ga. 201, 67 S. E. 656, does not conflict with this ruling. The question decided in that case in the second headnote was whether the power to condemn land to "flow back water" conferred by the act of 1897 (Civil Code, § 5240 et seq.) included the right to condemn lands which might contain a water power not in actual use. The question being considered was stated on page 203 of 134 Ga., on page 658 of 67 S. E. In discussing this point in the opinion, it was said (referring to what is now section 5242 of the Civil Code): "This section would be without meaning or applicability unless the act intended to give the power to back water, except where it interfered with a mill or factory in actual operation." "Applicability" to what? Palpably to the facts of the case being considered, or similar circumstances; not to some entirely different case, or imaginary circumstances wholly irrelevant to the case then in hand. Language of a discussion must be considered in the light of the question being discussed, and a sentence should not be wrenched from its context and used as proof of a wholly different proposition.

[3] 3. Much of the brief of counsel for de-

defendant in error was devoted to contentions that the evidence showed that the line of towers and the wires were not near enough to the machinery of the plaintiffs to cause interference therewith; that one who erects a mill with knowledge and in the face of an approaching public improvement not bona fide, but for the purpose of obstructing or preventing condemnation, is not entitled to the benefit of the statutory exemption; and that a person could not, after ascertaining that a line of wires would pass over his property, remove a portable mill from another part of it so as to occupy the proposed right of way of the line about to be erected, and obstruct it, and then obtain an injunction to restrain interference with such mill. Without determining the questions of law or fact involved in these contentions, it is sufficient to say again that the presiding judge evidently did not base his judgment upon them, or upon the conflicting evidence, but upon the theory that he had "no discretion in the premises." As he determined the case on an erroneous view of the law, binding him, as he apparently thought, upon a single point, the case is returned with direction that it be reheard upon its merits.

Judgment reversed, with direction. All the Justices concur.

(12 Ga. App. 671)

STRICKLAND v. MILLER. (No. 4,701.)
(Court of Appeals of Georgia. May 6, 1913.)

(*Syllabus by the Court.*)

TROVER AND CONVERSION (§§ 2, 52*)—DAMAGES.

Where crude gum is wrongfully extracted from growing trees and manufactured into spirits of turpentine and resin, the owner may maintain trover for the manufactured products. If the taking was under an honest claim of right, only the value of the crude gum can be recovered; but if the taking was not in good faith the trespasser cannot set off the expense of manufacture.

[Ed. Note.—For other cases, see Trover and Conversion, Cent. Dig. §§ 3-20, 269-271; Dec. Dig. §§ 2, 52.*]

Error from City Court of Quitman; J. G. Cranford, Judge.

Action by F. J. Miller against D. S. Strickland and the Downing Company. Demurrer to the petition overruled, and Strickland brings error. Affirmed.

Bennet, Long & Harrell, of Quitman, for plaintiff in error. Branch & Snow, of Quitman, for defendant in error.

POTTLE, J. Plaintiff sued Strickland and the Downing Company to recover the value of certain spirits of turpentine and resin. A general demurrer to the petition was overruled, and Strickland excepted. The petition alleged that during the year 1911 the plaintiff was owner and in possession of a certain tract of land in Brooks county; that

the defendant Strickland entered upon this land against the will of the plaintiff and over his protest, and willfully and without any lawful claim whatever extracted from the pine trees growing on the land, crude gum, from which he manufactured spirits of turpentine and resin and sold the manufactured product to the Downing Company. The argument in behalf of the defendant proceeds upon the idea that the property sued for is fructus industriales, and that, since it appears from the petition that the defendant was in possession of the trees and gathered the crude gum therefrom, the plaintiff was not entitled to maintain an action of trover to recover the value of the spirits and resin manufactured from the gum.

Standing timber is a part of the realty, and this includes the constituent parts of the timber, such as the wood, sap, leaves, etc. However, when timber is severed from the soil, it becomes personality, and trover will lie to recover it from one who has wrongfully converted it to his own use. Thus, in *Milltown Lumber Co. v. Carter*, 5 Ga. App. 344, 63 S. E. 270, it was held that, where timber is severed from the soil by a trespasser and manufactured into lumber, the owner may maintain trover, and in such an action would be entitled to recover the value of the manufactured product without any deduction for the cost of the labor of manufacture, if the trespass was willful; but if the trespass was innocent or inadvertent and under a bona fide claim of right the defendant would have the right to set off the value of the labor by which the property has been enhanced. There is little or no distinction in principle between that case and one where a person wrongfully takes a part of the timber, such as the sap, rather than the whole of it. Crude turpentine, which has been extracted from the tree, becomes personality immediately upon its extraction. *Melrose Mfg. Co. v. Kennedy*, 59 Fla. 312, 51 South. 595. And where such crude gum has been unlawfully converted trover may be maintained for its recovery. *Quitman Naval Stores Co. v. Conway*, 63 Fla. 253, 58 South. 840; *Branch & Thomas v. Morrison*, 50 N. C. 16, 69 Am. Dec. 770. In the case last cited counsel sought to draw a distinction between things which are cultivated on the soil and those which are the natural growth of the earth. It was pointed out by the court that the only distinction between the two is in the fact that things which are fructus industriales are personal property for some purposes before severance; while things which are fructus naturales are always a part of the realty until they are severed from the soil. After severance both are personality, and the same principle is applicable to each. The rule that after severance the property becomes personality and may be recovered in trover has been applied

to sand, gravel, standing timber, growing crops, fruit, and turpentine. See cases col-
lated in 38 Cyc. 2018.

Reliance is placed by the plaintiff in error upon the decision of the Supreme Court in the case of *Dollar v. Roddenbery*, 97 Ga. 148, 25 S. E. 410. It was there held that where, after the rendition of a judgment against the owner of land, he rented the land to another, who planted a crop thereon, the latter was entitled to the crop as against the judgment creditor. This decision, however, was distinctly put on the ground, not that trover would not lie for the recovery of a crop which had matured or been severed from the soil, or which after maturity was to be treated as personalty, but upon the ground that the entry of the tenant was rightful, and his title to the crop was superior to that of the execution creditor. This appears clearly from the following excerpt from the opinion in that case: "It is an ancient maxim of the law that he who rightfully sows ought to reap the profits of his labor, and if he rightfully enter in subordination to the title of another, but his tenancy be terminated without fault on his part and in consequence of some uncertain event, he shall be allowed to take away his way-going crops; for emblements, in strict law, are confined to the products of the earth arising from the annual labor of the tenant. The tenant, under the protection of this rule, is invited to agricultural industry without the apprehension of loss by reason of some unforeseen contingency which might arise and terminate his estate." See, also, *Blitch v. Lee*, 115 Ga. 112, 41 S. E. 275; *Garrison v. Parker*, 117 Ga. 537, 43 S. E. 849; *Raines v. Hindman*, 136 Ga. 450, 71 S. E. 738, 38 L. R. A. (N. S.) 863, Ann. Cas. 1912C, 347.

While the petition in the present case alleges that the defendant was in possession of the trees when the gum was extracted, it is distinctly alleged that this possession was tortious, against the will and over the protest of the plaintiff. If the defendant's possession was under an honest claim of right, he would be liable to the plaintiff only for the value of the crude gum extracted from the trees. But if the taking was willful and not in good faith, as the petition alleges, the plaintiff would be entitled to recover the value of the manufactured product. There was no error in overruling the demurrer.

Judgment affirmed.

(12 Ga. App. 652)

HALLIBURTON v. HARSHFIELD BROS.
(No. 4,399.)

(Court of Appeals of Georgia. May 6, 1913.)

(Syllabus by the Court.)

JUSTICES OF THE PEACE (§ 209*)—CERTIORARI.

Since the verdict rendered in the justice's court was not demanded by the evidence, the judge of the superior court did not err in sus-

taining the certiorari and remanding the case for another trial. *Fair v. Metropolitan Life Insurance Company*, 2 Ga. App. 376, 58 S. E. 492.

[Ed. Note.—For other cases, see *Justices of the Peace*, Cent. Dig. §§ 818-828; Dec. Dig. § 209.*]

Error from Superior Court, Bibb County; N. E. Harris, Judge.

Action between R. L. Halliburton and Harshfield Bros. From an order of the superior court, sustaining certiorari to the verdict of a justice and remanding the case, Halliburton brings error. Affirmed.

Mallory & Wimberly, of Macon, for plaintiff in error. Hardeman, Jones, Park & Johnston, of Macon, for defendant in error.

RUSSELL, J. Judgment affirmed.

(12 Ga. App. 681)

CHANDLER v. SCHOFIELD. (No. 4,718.)
(Court of Appeals of Georgia. May 6, 1913.)

(Syllabus by the Court.)

NEGLIGENCE (§ 136*)—QUESTIONS FOR JURY.

The evidence was such as to authorize the submission to the jury of the question whether the defendant was negligent, and, if so, whether his negligence or that of the plaintiff, if the plaintiff was negligent, was the proximate cause of the damage. It was therefore error to grant a nonsuit.

[Ed. Note.—For other cases, see *Negligence*, Cent. Dig. §§ 277-353; Dec. Dig. § 136.*]

Error from City Court of Macon; Robt. Hodges, Judge.

Action by S. S. Chandler against J. S. Schofield. From a judgment of nonsuit, plaintiff brings error. Reversed.

R. D. Feagin and O. C. Hancock, both of Macon, for plaintiff in error. Ernest C. Her-
ring, of Macon, for defendant in error.

POTTLE, J. The suit was for damage to machinery which the defendant had been employed to unload from a railway car. The negligence alleged is the failure to block and properly support two planks composing an inclined plane along which the machinery was to be unloaded. The plaintiff was nonsuited, and he excepted.

It appears from his testimony that the defendant, for an agreed price, undertook to unload the machinery in the manner above pointed out, furnishing for this purpose several of his employes. The plaintiff was present when the machinery was unloaded. He noticed that the defendant did not have enough blocking to properly support both of the planks, and called the attention of the defendant's manager to this fact. One of the planks was properly blocked, leaving only a 10-inch block with which to support the other plank. The plaintiff suggested to the defendant's employes that, as they did not have a sufficient number of blocks, they

might take some 6-inch pipes which they had, about 12 feet long, and fasten them in such a way as to make the plank safe. The plaintiff offered to assist the defendant's servants in unloading the machinery by taking hold of a rope which had been placed around the machinery and "easing it off" for them. The plaintiff fastened this rope himself, and then got under the car with the rope in his hand, and in this way eased the machinery off. The defendant's servants directed the plaintiff when to slacken the rope and let the machinery down onto the planks. One of the planks had not been properly blocked. The plaintiff's suggestion in reference to the use of the pipes was not followed, and the machinery fell to the ground and was damaged.

It was the duty of the defendant to use ordinary care in unloading the machinery, and this involved the duty of using instrumentalities which were reasonably safe and suitable for the purpose. The plaintiff alleged, and testified positively, that an unsafe and insecure instrumentality was employed by the defendant, and that this act of negligence was the proximate and efficient cause of the damage. The nonsuit was doubtless awarded on the theory that, the plaintiff having voluntarily undertaken to assist the defendant's servants by adjusting the rope and pulling the machinery from the car onto the planks, he himself was guilty of negligence in failing to ascertain that the planks were properly blocked before he released the machinery by slackening the rope. Of course, if damage to the machinery was due to the negligence of the plaintiff—that is to say, if the plaintiff's negligence in failing to ascertain that the planks were securely blocked was the proximate cause of the damage—he would not be entitled to recover. But this was a question, under the evidence, which the trial judge ought not to have resolved against the plaintiff, as a matter of law. By his testimony he sufficiently met the charge of negligence against him to entitle him to be heard before a jury. He gave directions to the defendant's servants as to how the planks should be blocked. If they had followed these directions, and damage had resulted from so doing, the defendant would not be liable. The plaintiff testifies that they failed to follow his directions; that he was under the car in a position where he could not see that the plank had not been blocked in accordance with his suggestion; and that the defendant's servants called to him to slacken the rope and release the machinery. If this was true, we do not think the plaintiff was guilty of such negligence as would defeat a recovery, as a matter of law. The jury should be allowed to say whether there was any negligence on the part of anybody, and, if so, who was negligent; and if both plaintiff and

defendant were negligent the jury should be allowed to compare their negligences and see which was the proximate cause of the damage to the plaintiff's machinery.

We make no ruling in reference to the respective items of damage which the plaintiff claims in his petition, because it is unnecessary to do so in the present state of the record.

Judgment reversed.

(12 Ga. App. 666)

DOUGLAS v. WILSON. (No. 4,667.)

(Court of Appeals of Georgia. May 6, 1913.)

(Syllabus by the Court.)

CERTIORARI (§ 60*)—DISMISSAL.

This case is controlled by the decision of this court in *High Co. v. Georgia Railway & Power Co.*, 12 Ga. App. —, 77 S. E. 588. The court erred in refusing to dismiss the certiorari on the ground that the answer of the judge of the city court was not filed within the time required by law, and that no order was applied for by the plaintiff in certiorari during the first term, requiring an answer to be filed. See, also, *Sutton v. State*, 120 Ga. 865, 48 S. E. 342.

[Ed. Note.—For other cases, see *Certiorari*, Cent. Dig. §§ 153, 167; Dec. Dig. § 60.*]

Error from Superior Court, Johnson County; K. J. Hawkins, Judge.

Action by J. A. Douglas, survivor, against J. A. Wilson. From an order refusing to dismiss a certiorari, Douglas brings error. Reversed.

B. H. Moye and A. L. Hatcher, both of Wrightsville, for plaintiff in error.

POTTLE, J. Judgment reversed.

(13 Ga. App. 660)

WATSON v. WHITEHEAD. (No. 4,629.)

(Court of Appeals of Georgia. May 6, 1913.)

(Syllabus by the Court.)

EVIDENCE (§ 441*)—PAROL EVIDENCE—CONSIDERATION OF NOTE.

A plea of breach of warranty or failure of consideration does not add to, take from, or vary the contract between the parties. Therefore, in a suit on a note given for rent, containing a limitation as to warranty, parol evidence is admissible to show that the consideration of the note had failed, because the maker did not get the number of acres for which the note was given, and also that the landlord, the payee in the note, had not performed his agreement to place on the rented land certain improvements. The court erred in excluding parol testimony offered to prove the above-indicated defense to the note. *Toller v. Hewitt*, 12 Ga. App. —, 77 S. E. 650; *Baggs v. Funderburke*, 11 Ga. App. 173, 74 S. E. 937; *Burke v. Napier*, 106 Ga. 327, 32 S. E. 134; *Anderson v. Brown*, 72 Ga. 718.

[Ed. Note.—For other cases, see *Evidence*, Cent. Dig. §§ 1719, 1723-1763, 1765-1845, 2030-2047; Dec. Dig. § 441.*]

Error from City Court of Houston; A. C. Riley, Judge.

Action by W. C. Whitehead against W. D. Watson. Judgment for plaintiff, and defendant brings error. Reversed.

Sam A. Nunn, of Perry, for plaintiff in error. M. Kunz, or Perry, for defendant in error.

HILL, C. J. Judgment reversed.

(12 Ga. App. 661)

VIRGINIA-CAROLINA CHEMICAL CO. v. BOUCHELLE. (No. 4,647.)

(Court of Appeals of Georgia. May 6, 1913.)

(Syllabus by the Court.)

1. FRAUDULENT CONVEYANCES (§ 47*)—SALES IN BULK.

The act approved August 17, 1903 (Civ. Code 1910, § 3226 et seq.), known as the sales in bulk act, is applicable to a stock of meat and other merchandise such as is usually sold in a market.

[Ed. Note.—For other cases, see Fraudulent Conveyances, Cent. Dig. § 34; Dec. Dig. § 47.*]

2. FRAUDULENT CONVEYANCES (§ 47*)—SALES IN BULK.

Where the owner of a stock of goods sells a half interest therein to another, and a short time thereafter sells to his partner the other half interest in the business, the sale is void as to the creditors of the vendor, unless the provisions of the sale in bulk act have been complied with.

[Ed. Note.—For other cases, see Fraudulent Conveyances, Cent. Dig. § 34; Dec. Dig. § 47.*]

Error from City Court of Thomasville; W. H. Hammond, Judge.

Proceeding between the Virginia-Carolina Chemical Company and H. P. Bouchelle to determine claim to property levied on in execution. Judgment for claimant, and the Chemical Company brings error. Reversed.

Branch & Snow, of Quitman, and Snodgrass & MacIntyre, of Thomasville, for plaintiff in error. T. N. Hopkins and R. S. Burch, both of Thomasville, for defendant in error.

POTTLE, J. [1] The only question in this case is whether or not the sale was void as against a creditor of the vendor under the act of August 17, 1903 (Civil Code, § 3226 et seq.), regulating sales of stocks of goods in bulk. That act is applicable to sales of "any stock of goods, wares and merchandise in bulk." It appears from the evidence that the debtor owned a stock of meat and other merchandise such as is usually sold in beef markets. On April 19, 1912, he sold out a half interest in his business to the claimant; and on June 16, 1912, the claimant bought the other half interest, and thus became the sole owner of the stock of goods, including all the fixtures. It cannot admit of serious doubt that the property was a stock of goods, wares, and merchandise in bulk within the meaning of the act of 1903. The decision in Cooney v. Sweat, 133 Ga. 511, 66 S. E. 257, 25 L. R. A. (N. S.) 758, rules nothing to the contrary.

It was simply held in that case that the act of 1903 has no application to a sale of all the lumber manufactured by one who operates a sawmill at which trees were manufactured into lumber. It has several times been held that the act of 1903, being in derogation of the common law, should be strictly construed. Cooney v. Sweat, supra; Stovall Co. v. Shepherd Co., 10 Ga. App. 498, 73 S. E. 761. It is insisted that, under a strict construction of the act, it should not be made to apply to a sale by one partner to his associate of his interest in a mercantile business. This was held in Taylor v. Folds, 2 Ga. App. 453, 58 S. E. 683, a decision relied on by the defendant in error. We are unwilling, however, to extend the principle of that decision so far as to include a case like the present, for to do so would practically nullify the sales in bulk act and defeat the very purpose which the General Assembly had in mind, namely, to protect persons who had extended credit to a merchant on the faith of apparent prosperity indicated by a stock of goods which would be sold out gradually and replenished from time to time.

[2] If the debtor and the claimant had been partners in the business at the time the credit was extended to Cook, a subsequent sale by Cook to the claimant of his interest in the business would have been valid, under the decision in Taylor v. Folds, supra. But Cook and the claimant were not partners when the credit was extended to Cook. After the extension of credit, Cook sold out a half interest in the business to the claimant, and then within less than three months sold out the other half interest to his partner. If a transaction of this kind could be sustained, it would be quite an easy matter in any case to defeat the act of 1903 by selling out on one day a half interest in a business and then selling the other half on the day following. No such construction of the act of 1903 is permissible, and the decision in Taylor v. Folds does not so hold.

Judgment reversed.

(12 Ga. App. 685)

SEGAR v. STATE. (No. 4,771.)

(Court of Appeals of Georgia. May 6, 1913.)

(Syllabus by the Court.)

1. HOMICIDE (§ 309*)—INSTRUCTIONS—INVOLUNTARY MANSLAUGHTER.

Under the evidence and the prisoner's statement, the law of murder, of voluntary manslaughter, and justifiable homicide in self-defense, and the sections of the Code applicable to these subjects, were clearly submitted to the jury. Neither grade of involuntary manslaughter was in issue, either under the evidence or the statement of the accused, and the trial judge properly omitted any instruction on that subject.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. §§ 649, 650, 652-655; Dec. Dig. § 309.*]

2. REVIEW ON APPEAL.

No error of law appears, and the verdict is supported by the evidence for the state.

Error from Superior Court, Madison County; B. F. Walker, Judge.

George Segar was convicted of crime, and brings error. Affirmed.

John E. Gordon, of Danielsville, and W. W. Stark, of Commerce, for plaintiff in error. Thos. J. Brown, Sol. Gen., of Elberton, for the State.

HILL, C. J. Judgment affirmed.

(12 Ga. App. 674)

COLUMBUS R. CO. v. WALLER. (No. 4,705.)

(Court of Appeals of Georgia. May 6, 1913.)

(Syllabus by the Court.)

1. STREET RAILROADS (§ 117*) — COLLISION WITH AUTOMOBILE—ORDINANCES—REASONABLENESS.

The question whether a municipal ordinance is reasonable and valid is one of law for the court. In the present case it was error, requiring the granting of a new trial, to charge the jury that they should examine the facts and circumstances in the evidence and determine whether or not the municipal ordinance prescribing the maximum rate of speed at which automobiles could be propelled along a specified part of the highway was reasonable and valid. The ordinance was reasonable, and the only question for the jury was as to its applicability to the facts of the case on trial.

[Ed. Note.—For other cases, see Street Railroads, Cent. Dig. §§ 239-257; Dec. Dig. § 117.*]

2. REVIEW.

Other than as above indicated, there is no error in the record.

Error from City Court of Columbus; G. X. Tigner, Judge.

Action by R. A. Waller against the Columbus Railroad Company. Judgment for plaintiff, and defendant brings error. Reversed.

F. U. Garrard and A. W. Cozart, both of Columbus, and A. S. Bradley, of Swainsboro, for plaintiff in error. Wynn & Wohlwender, of Columbus, for defendant in error.

POTTLE, J. The plaintiff recovered a verdict for an injury to his automobile, resulting from a collision with a street car of the defendant, and the defendant excepts to the overruling of its motion for new trial.

1. An ordinance of the city of Columbus was introduced in evidence, prohibiting the running of an automobile on any bridge in the city at a greater rate of speed than three miles per hour. Complaint is made that the court refused a written request to charge the jury that, if the plaintiff ran his automobile on an approach to a bridge at a rate of speed of over three miles per hour, he would be guilty of an act of negligence, as a matter of law; and that the court instructed the jury that if they should find that the plaintiff ran his automobile upon a bridge

(which would include its immediate abutments and approaches) at a greater rate of speed than three miles per hour, and if they should find, from the facts and circumstances and the location, that the ordinance was reasonable and valid, and the plaintiff's injury was caused by running his machine at such a rate of speed, and not by reason of the negligence of the company, he would not be entitled to recover. The criticism upon this charge is, we think, well founded. The evidence was conflicting as to whether the damage to the plaintiff's machine occurred on an approach to a bridge, and also as to the rate of speed at which the plaintiff was propelling his machine. According to his testimony, the injury occurred about 40 feet from the end of the bridge, and he was driving along very slowly. According to some of the testimony for the defendant, the automobile was being propelled about 10 or 12 miles per hour, and the street car was running at a rate of about 5 or 6 miles per hour. The automobile was struck just as the street car turned off the bridge. It will thus be seen that the evidence was in sharp conflict both in reference to the rate at which the plaintiff was driving his machine and as to the exact point at which the collision took place. It was the duty of the court, and not of the jury, to pass upon the reasonableness of the city ordinance. *Central R. Co. v. Brunswick & Western R. Co.*, 87 Ga. 392, 13 S. E. 520; *Atlantic Coast Line R. Co. v. Adams*, 7 Ga. App. 146, 66 S. E. 494. The ordinance involved in the present case cannot be said to be unreasonable, as a matter of law. It is entirely reasonable and proper for the rate of speed to be limited at which a vehicle is propelled over a dangerous place along the highway, such as a bridge and its approaches. The maximum rate of speed at which it should be allowed to run is a question for determination by the municipal authorities. Unless it should appear that the rate of speed prescribed is such as to render it impossible for the machine to be propelled, the limitation would not be held to be so unreasonable as to make the ordinance void.

Under the evidence in the present case, the jury should have been instructed that the ordinance was a valid and reasonable one, and that, if the collision occurred on the bridge or an approach thereto, the plaintiff would be guilty of negligence, as a matter of law, if he was propelling his machine at a greater rate of speed than three miles per hour. Such an act of negligence, however, would not defeat the right of recovery entirely, if the jury believed that the proximate cause of the damage was the defendant's negligence, or that the defendant was guilty of a greater quantum of negligence than the plaintiff. In view of the conflicting character of the evidence, the erroneous instruction on the subject of the municipal

ordinance was so prejudicial as to require a new trial. The verdict for the plaintiff could under this instruction, and may in fact, have been based upon the theory that the municipal ordinance was unreasonable, and that even if the plaintiff violated it, he was not guilty of an act of negligence.

2. There are several other assignments of error in the motion for a new trial, but none of them are of sufficient importance to require the reversal of the judgment refusing a new trial. It would not have been improper for the trial judge to have given the charge requested by the defendant that, where a party offers himself as a witness, his testimony is to be construed most strongly against him, and also to have charged upon request that, where the witness knowingly testifies falsely to a material matter, his entire testimony ought to be disregarded unless corroborated. Upon another trial, if requested, such instructions would not be improper. The other requests, so far as legal and pertinent, were covered by the general charge. Other than above indicated, we find no error.

Judgment reversed.

(12 Ga. App. 688)

JACKSON v. STATE. (No. 4,817.)

(Court of Appeals of Georgia. May 6, 1913.)

(Syllabus by the Court.)

MASTER AND SERVANT (§ 67*)—VIOLATION OF LABOR CONTRACT—EVIDENCE.

The uncontroverted evidence showing that the accused was a minor, and that his failure to perform the services stipulated in his contract was due to the fact that his father, who under the law was entitled to his services, had hired him for the same period to another person, his conviction of a violation of the "labor contract law" of 1903 (Pen. Code 1910, § 715), was unauthorized. Harwell v. State, 2 Ga. App. 613, 58 S. E. 1111; Howard v. State, 126 Ga. 538, 55 S. E. 239.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 75; Dec. Dig. § 67.*]

Error from City Court of Sparta; R. W. Moore, Judge.

Clarence Jackson was convicted of a violation of the labor law, and brings error. Reversed.

T. L. Reese, of Sparta, for plaintiff in error. R. L. Merritt, Sol., of Sparta, for the State.

HILL, C. J. Judgment reversed.

(12 Ga. App. 688)

ROBINSON v. STATE. (No. 4,760.)

(Court of Appeals of Georgia. May 6, 1913.)

(Syllabus by the Court.)

1. GAME (§ 7*)—FISHING ON LAND OF ANOTHER.

The primary purpose of the act approved August 21, 1911 (Acts 1911, p. 137), is the preservation of game and fish; but, as incidental to this purpose, it is by section 7 of the

act made a misdemeanor to "hunt or fish upon the lands of another, with or without a license, without first having obtained permission from such landowner." Consent of the landowner is in all cases an essential condition precedent to the right to hunt or fish on his lands. *Blossingame v. State*, 11 Ga. App. 809, 76 S. E. 392. [Ed. Note.—For other cases, see Game, Cent. Dig. §§ 6, 7; Dec. Dig. § 7.*]

2. GAME (§ 7*)—FISHING ON LAND OF ANOTHER.

One who fishes upon the lands of another without his consent is guilty of a misdemeanor, without reference to the character of the water from which the fish are taken. Hence one who enters upon the land of another without his consent, and while thereon takes fish from a navigable stream upon which the land abuts, is guilty of a violation of Acts 1911, p. 137.

[Ed. Note.—For other cases, see Game, Cent. Dig. §§ 6, 7; Dec. Dig. § 7.*]

3. NAVIGABLE STREAM.

It is not decided whether the Ochlochnee river is a navigable stream in Thomas county, within the meaning of section 3631 of the Civil Code of 1910.

Error from City Court of Thomasville; W. H. Hammond, Judge.

F. W. Robinson was convicted of fishing on the land of another, and brings error. Affirmed.

Fondren Mitchell, of Thomasville, for plaintiff in error.

POTTLE, J. Judgment affirmed.

(12 Ga. App. 652)

ATLANTA TELEPHONE & TELEGRAPH CO. v. CHESHIRE. (No. 4,554.)

(Court of Appeals of Georgia. May 6, 1913.)

(Syllabus by the Court.)

1. ELECTRICITY (§ 19*)—ACTION FOR INJURIES—PETITION—GENERAL DEMURRER.

The allegations of the petition set forth a cause of action due to the negligent conduct therein described, and the general demurrer thereto was properly overruled.

[Ed. Note.—For other cases, see Electricity, Cent. Dig. § 11; Dec. Dig. § 19.*]

2. ELECTRICITY (§ 19*)—PLEADING (§ 8*)—CONCLUSIONS—ACTION FOR INJURIES—PETITION—SPECIAL DEMURRERS.

The special demurrers to the petition are all without substantial merit.

[Ed. Note.—For other cases, see Electricity, Cent. Dig. § 11; Dec. Dig. § 19.* Pleading, Cent. Dig. §§ 12-28½, 68; Dec. Dig. § 8.*]

3. ELECTRICITY (§ 19*)—APPEAL AND ERROR (§ 1002*)—ACTION FOR INJURIES—INSTRUCTION—EVIDENCE—FINDINGS.

Where defendant claimed that plaintiff was a trespasser, and plaintiff claimed that she was a licensee, and the law applicable to both theories was fully and accurately presented in the charge to the jury, defendant has no ground of complaint if, in fact, there was evidence as to both contentions, and the verdict as to the issue was conclusive.

[Ed. Note.—For other cases, see Electricity, Cent. Dig. § 11; Dec. Dig. § 19.* Appeal and Error, Cent. Dig. §§ 3935-3937; Dec. Dig. § 1002.*]

4. APPEAL AND ERROR (§ 1001*)—FINDINGS—EVIDENCE.

Whether the defendant had notice, actual or constructive, of the dangerous condition of

its wire, as described and proved, was for the determination of the jury; and there being evidence to support the contention of at least constructive notice the finding as to this issue must be accepted as final.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3922, 3928-3934; Dec. Dig. § 1001.*]

5. ELECTRICITY (§ 19*)—ACTION FOR INJURIES—VARIANCE—MATERIALITY.

The allegations descriptive of the defendant's negligence which caused the injuries to the plaintiff were substantially proved as laid, and there was no material variance between the allegata and the probata.

[Ed. Note.—For other cases, see Electricity, Cent. Dig. § 11; Dec. Dig. § 19.*]

Error from City Court of Atlanta; H. M. Reid, Judge.

Action by Laura Cheshire against the Atlanta Telephone & Telegraph Company. Judgment for plaintiff, and defendant brings error. Affirmed.

This was a suit brought by Mrs. Laura Cheshire against the Atlanta Telephone & Telegraph Company to recover damages for personal injuries alleged to have been sustained by reason of the defendant's negligence. The allegations of the petition in substance are as follows: On February 27, 1911, the defendant company was maintaining a line of telephone poles and wires along the public road leading from Atlanta to College Park, and particularly at that point in said road known as "Lakewood Crossing." Directly opposite this crossing, and in front of a grocery store carried on by plaintiff's husband, was a telephone pole belonging to the defendant. This pole had been there for three years. For several years past and until about two months prior to February 27, 1911, there was a cable box and a ground wire on this pole. The ground wire was for the purpose of protecting the cable and cable box from lightning. The ground wire was an ordinary cable running from the top of the pole down along the side of the pole, having its lower end buried in the ground at the foot of the pole. On or about January 1, 1911, this cable and cable box were removed from this pole by the company; it being engaged at that time in putting the poles and wires and cables along the side of the public road. When the cable and cable box were thus removed from the pole, the ground wire was left swinging therefrom in close proximity to the feed wires of the Georgia Railway & Electric Company. These feed wires were maintained by the electric company upon its line of poles parallel and near to the line of poles of the defendant company, and these feed wires were powerfully charged with electric current. On February 27, 1911, the ground wire of the defendant company had come in contact with the feed wires of the electric company, whereby it became heavily charged with electric current from said wire. The lower end of the ground wire, swinging from the pole, as above de-

scribed, had come in contact with plaintiff's mail box, a galvanized iron R. F. D. box, and this box had become charged with the electric current from said feed wires. On said day the plaintiff went to get her mail from the box, and when she laid her hand upon the box for the purpose of opening it, she received a powerful current of electricity through her hand, arm, and body and sustained various injuries, as described in the petition.

The particular negligence charged against the defendant was as follows: When the defendant's cable and cable box were removed from its pole, as above described, the ground wire was left to swing idly and uselessly from the pole in close proximity to and likely to come in contact with the high-power feed wires of the electric company, and said ground wire was allowed to remain in contact with said feed wires and with plaintiff's mail box. Second, plaintiff was negligent in failing to secure said ground wire on its pole, so as to prevent its coming in contact with the live wires maintained parallel and near to the defendant's line of poles. Third, defendant was negligent in maintaining the ground wire in such a position as that it could and did come in contact with the feed wires of the electric company, thereby becoming charged with electricity. Fourth, defendant was negligent in maintaining the ground wire in such a position as that it could and did come in contact with the feed wires and also with plaintiff's mail box at the same time. Plaintiff did not know of the existence of defendant's ground wire, nor of its contact with the feed wires, nor of its electrified condition, nor of its contact with her mail box, and she had no means of knowing these facts; while the defendant knew, or by the exercise of ordinary diligence could have known, them. A demurrer on general and special grounds was overruled and exceptions pendente lite were preserved.

The evidence in support of the allegations of the petition was, in substance, as follows: In the fall and winter of 1910 and 1911, the East Point road, on which the poles of the defendant company were placed, was being widened by the county of Fulton. At the western edge of the old road—that is, the old road before it was widened—the defendant company and the Georgia Railway & Electric Company had their wires strung along on poles, each separate and apart from the other line; the telephone wires of the defendant company being from 3 to 5 feet directly above the feed wires of the Georgia Railway & Electric Company. When the widening of the East Point road had reached Lakewood Crossing, commonly known as "Knott's Crossing," the road was widened on the western side about 20 feet, and therefore it was necessary for the defendant company and the electric company to move their respective lines of wires and poles to one

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

side or the other of the new road so widened. At this crossing the husband of the plaintiff ran a little grocery store, located on the western side of the road. Directly in front of this store and up against the porch of the same was one of the defendant's telegraph poles. On this pole the plaintiff's son had nailed a galvanized iron R. F. D. mail box, and when the road was widened at this point the grocery store was moved back west, leaving the pole in the road. The mail box had been there for about 2 or 2½ years. On February 27, 1911, the date when the plaintiff received her injury, the greater part of the old lines had been removed by the companies to the side of the new road. There was a section, however, from Knott's Crossing running north for 700 feet which had not been moved. So far as defendant's lines and poles were concerned, this section was absolutely dead, because all its wires were cut and wrapped around the last pole. Directly underneath this section of defendant's wires ran the highly charged feed wires of the Georgia Railway & Electric Company. At the northern end of this section of the defendant's dead wires, there was a guy wire running from the last pole on which defendant's wires were strung to the bottom of the last pole of the defendant's wires at the northern end. This guy wire counterbalanced the stringing of the telephone wires to the south and prevented these wires from sagging down on the feed wires below. On the telephone pole directly in front of the grocery store of plaintiff's husband, on which the mail box was nailed, there was an ordinary copper wire nailed up and down this pole and known as the ground wire. This wire was torn loose at the bottom, and from a point directly above the mail box at the top of the pole this ground wire was stabled to the pole. The purpose of this ground wire was to protect the pole from lightning. There never was a cable box on this pole, and this ground wire never had any connection with the cable which had been removed. About February 24, 1911, the northernmost pole in the dead section of the defendant's poles and wires was accidentally run into and broken off by the county steam roller and to this broken pole was attached the guy wire above described. The evidence does not show that the defendant company had any notice of this broken pole. On Saturday, February 25th, at noon, the plaintiff received some mail out of her mail box, attached to the defendant's pole, without any electric shock. The next day was Sunday, and no mail was delivered. On Monday afternoon, February 27th, between 3 and 4 o'clock, the plaintiff received a violent shock, when she went to open the metal mail box for the purpose of getting her mail. On the same afternoon the defendant sent a squad of men to the scene of the accident to prevent further possible danger to any one else. Upon examination it was discovered that at

a point several poles north of the scene of the accident the defendant company's telephone wires had sagged and had come in contact with the feed wires of the electric company below, and this sagging was the result of the breaking of the pole, above described, and in some unexplained way the current was conveyed from the feed wires to the ground wire, and thence to the plaintiff's mail box. On these facts a verdict was returned in favor of the plaintiff in the sum of \$2,750. The defendant moved for a new trial on various grounds, and to the judgment overruling this motion it excepted.

Smith, Hammond & Smith, of Atlanta, for plaintiff in error. Colquitt & Conyers and Geo. Gordon, all of Atlanta, for defendant in error.

HILL, C. J. (after stating the facts as above). [1] 1. The general demurrer was properly overruled. It was based on the theory that the only reasonable inference from the allegations of the petition is that the mail box of the plaintiff's husband was nailed to the defendant company's pole; that this placing of the box on the pole was done without the defendant's knowledge and consent, either express or implied; that therefore the placing of the box on the pole was an act of trespass; that for this reason the defendant company owed only the duty of not wantonly and willfully injuring the plaintiff; and, as the petition did not allege that this duty was violated, or any facts from which willful and wanton conduct by the defendant company in injuring the plaintiff could be fairly inferred, that no cause of action was set forth. It does not clearly appear from the petition that the mail box was actually on defendant's pole. It might have been on a pole provided by the plaintiff near to the pole of the defendant, near enough to have been within reach of the wire of the defendant company, which was powerfully charged with the electric current from the wires of the Georgia Railway & Electric Company. If more specific information had been desired, or was necessary, as to the exact location of the mail box, it should have been called for by special demurrer. The allegations of the petition were sufficient to withstand a general demurrer.

[2] 2. The grounds of special demurrer to paragraphs of the petition, based upon the theory that these paragraphs are merely conclusions of the pleader, without any allegations of fact to support them, or that the allegations fail to show that defendant knew, or by the exercise of ordinary diligence should have known, of the position of the mail box on the pole, or that plaintiff, by the exercise of ordinary diligence could have discovered the dangerous condition of the wires in proximity to the mail box, contain no substantial merit, and were all properly overruled.

[3] 3. It is contended that the evidence

proved that plaintiff's mail box was on defendant's pole without its knowledge or consent, and that in placing the box on the pole without authority the plaintiff was simply a trespasser, and took the risk incident to the trespass. There was evidence that the mail box had been on this pole for over two years; that it had been seen on the pole by various employes and officials of the defendant company. It did not appear that any objection was ever made to its location. The trial judge, in his instructions, gave the defendant the full benefit of the contention that the plaintiff was a trespasser, charging the law pertinent to that theory. He also properly submitted the contention of the plaintiff that she was a licensee, and the law applicable to that theory. The jury found in favor of the latter theory, and certainly there was evidence to support that conclusion.

[4] 4. Again, it is earnestly insisted that defendant company had no notice, either actual or constructive, of the fateful and dangerous contact of its wire with those of the electric company. According to the evidence, this dangerous contact had not occurred as late as Saturday afternoon, February 25, 1911; for on that day the plaintiff had taken her mail from the box without injury. On Sunday there was no inspection of the situation. The plaintiff was hurt on Monday afternoon, and then, for the first time, the defendant received notice of the dangerous situation, and at once remedied it. This argument is on the assumption that the dangerous contact was caused by the negligent conduct of the county employes in knocking down the defendant's guy post with its steam road roller. The evidence is not entirely clear as to the exact point of dangerous contact between the wire of the defendant company and the wires of the electric company, whereby it became heavily charged with electricity. It was not controverted that the wire of the defendant company, which was in close proximity to the plaintiff's mail box, had in fact come in physical contact with the heavily charged wires of the electric company, whereby the wire of the defendant became dangerously charged with electricity, and that this highly charged wire had, by the negligence of the defendant, been allowed to come in physical contact with the plaintiff's mail box. Assuming that the theory of the defendant as to the point of physical contact between the wires of the two companies and the consequent dangerous condition of the defendant's wire was correct, it was for the jury to determine the issue of notice.

[5] 5. Plaintiff in error insists that there was a material and fatal variance between the allegata and probata as to the point of contact between the "ground wire of the defendant and the 'feed wires' of the railway company." The allegation was that "said ground wire was left to swing idly and uselessly from said pole in close proximity to

and likely to come in contact with the high-power feed wires of the Georgia Railway & Electric Company." The proof shows that the feed wires came in contact with the telephone wires some distance from the pole carrying the ground wire and the mail box; said contact being the result of the steam roller of the county knocking down the defendant's guy post. We do not think this variance material. The place of physical contact was not material. The fact of physical contact which caused the electrical condition of the telephone wire was the material question. The point of danger was the broken ground wire of the defendant, hanging in close proximity to the plaintiff's mail box. This ground wire was in proximity to the feed wires of the electric company, and did actually become charged from the high-voltage wires of the latter. The mail box would not have been electrified and rendered dangerous to the plaintiff but for the fact that the heavily charged and broken ground wire had been allowed to remain in that condition in proximity to the mail box, where it did come in contact with the mail box. The question in a nutshell is just this: The broken end of the ground wire had been negligently left dangerously near to the mail box, and this wire at some point, it would seem immaterial where, came into physical contact with the high-voltage wires of the electric company; the current extending throughout the length of the wire and to the broken end, where it came in contact with the mail box. This question is fully controlled by the decision in *Southern Bell Telephone & Telegraph Co. v. Davis*, 12 Ga. App. —, 76 S. E. 786.

After a most careful consideration of the able arguments of counsel, in connection with the record, we have come to the conclusion that no substantial error of law was committed, and that the judgment refusing another trial should be affirmed.

(73 W. Va. 291)

STATE, to Use of MASON COUNTY
COURT, v. McDERMITT,
Sheriff, et al.

(Supreme Court of Appeals of West Virginia.
April 15, 1913.)

(Syllabus by the Court.)

1. INTEREST (§ 46*)—ACCOUNTS OF RETIRING
SHERIFF—DEMAND.

Interest on balances runs against a retiring sheriff, only from the date of a lawful demand on him for payment to his successor.

[Ed. Note.—For other cases, see Interest, Cent. Dig. §§ 95-105; Dec. Dig. § 46.*]

2. PAYMENT (§ 41*)—APPLICATION—BALANCE
DUE FROM RETIRING SHERIFF.

When a sheriff receives payments from his predecessor on balances against him on settlement, and through ignorance of law or fact applies them, or any portion of them, to other accounts than those directed by him, and afterwards receives other payments on balances,

without direction as to their application, the court, on equitable principles, in a suit by a county court against such ex-sheriff and the sureties on his official bond, for balances due it, and against which such first payments were so misapplied, should apply sufficient of such subsequent payments not otherwise specifically appropriated on the accounts on which the first payments were misapplied to make up the amounts thereof, so as not to disturb settled accounts of the sheriff receiving such payments, and to do justice to all parties concerned.

[Ed. Note.—For other cases, see Payment, Cent. Dig. §§ 115-120; Dec. Dig. § 41.*]

Error to Circuit Court, Mason County.

Action by the State, for use of the County Court of Mason County, against J. O. McDermitt, Sheriff, and others. Judgment for defendants, and plaintiff brings error. Reversed and rendered.

B. H. Blagg, of Heights, and John E. Belier, of Point Pleasant, for plaintiff in error. S. P. Bell and Somerville & Somerville, all of Point Pleasant, for defendants in error.

MILLER, J. This is an action for the use of the county court of Mason county, against McDermitt, late sheriff, and the sureties on his official bond, to recover \$37,585.05, alleged to be due the county from McDermitt on settlement.

By agreement of the parties the case was referred to a commissioner to state an account, and such an account was stated, in two ways, on the different theories of the parties. On the theory that all payments, aggregating \$29,535.26, made by McDermitt to Austin, his successor, were properly applicable on McDermitt's indebtedness to the county court, the commissioner reported a balance due the county, including principal and interest, as of the date of filing his report, of \$8,316.86, or if the court should be of opinion, that interest should run from February 28, 1910, instead of July 7, 1911, the date from which interest had been calculated, that the interest would be \$924.99, instead of \$267.07, included in the balance found.

On the theory that \$10,963.75, of the payments so made should have been applied as they in effect, if not in fact, were applied on account of McDermitt's indebtedness to the boards of education of the several school districts of the county, the commissioner reported as due the county court, principal and interest, if interest should run from July 7, 1911, the sum of \$19,833.60, but if from February 28, 1910, then the balance would be \$21,187.82.

By agreement of the parties the case was tried by the court in lieu of a jury. The only points in controversy on the trial, raised by exception to the report of the commissioner, were as to the application of said \$10,963.75, and the question of interest to which we have referred.

[1] One fact, as reported by the commissioner, is, that the county court, first at a special term held February 28, 1910, and again at a regular term held July 7, 1911, entered an order requiring McDermitt to pay over to his successor the balance due the county. If as claimed the first order entered at the special term, not covering such business, is void, the latter, made at a regular term, is conceded to be valid. The controversy as to the date from which interest should be calculated arises out of the alleged invalidity of the order of February 28, 1910. Interest runs against the sheriff only from the date of a lawful demand on him for payment to his successor. State v. Keadle, 63 W. Va. 645, 60 S. E. 798. Another fact also reported by the commissioner is that none of the boards of education of said county ever made any order requiring McDermitt to pay the balance due them to Austin.

The court below found defendants were entitled to have said sum of \$10,963.75, applied as a credit on McDermitt's indebtedness to the county court, and gave judgment for plaintiff against defendants, for \$8,262.00, with interest and costs, the balance found due, after crediting them also with \$1,205.00, paid by McDermitt since the institution of this suit. To this finding and judgment, the present writ of error applies.

[2] On the principal question, the application of payments, the evidence shows payments by McDermitt to Austin, on and after February 28, 1910, and for which he took receipts, with stipulations as follows: February 28, 1910, \$12,086.97, "to be applied to the balances due from him from the various funds County and Road"; May 18, 1910, \$1,100.06, "to be credited on the various funds due from him"; May 26, 1910, \$1,500.00, "for payment on Robinson, Graham and Waggener Road Fund, up to May 30, 1910"; September 21, 1910, \$3,000.00, "for which I am to credit him as Ex-Sheriff of Mason County"; January 3, 1911, \$1,705.22, "to be credited to him on the account of his settlements as late sheriff"; April 26, 1911, \$848.23, "in various orders to be credited on his indebtedness to the County and Road Funds"; June 3, 1911, \$9,294.78, "to be credited to him on account of his various funds as Sheriff of Mason County, West Virginia."

The commissioner based his report mainly on the fact that the boards of education had never made orders requiring McDermitt to make payments to Austin, but the record of the settlements of Sheriff Austin, with these boards, for the first year of his term, shows that he was charged with the balances due them respectively, according to the last preceding settlements with McDermitt, and several of these accounts show that after thus charging Austin with these balances and with the levies for the year, the accounts

were either overdrawn or would have been overdrawn but for these credits, so that in those cases the boards of education had actually used the money so credited and charged. Sections 139, 140 and 141, chapter 45, Code Suppl. 1909, requires settlements by the sheriff directly with the boards of education of each district, and prescribes how those settlements shall be made, and section 142, of the same chapter, requires additional settlements with the county court for school moneys. So that it appeared to the commissioner and to the court on the trial, that although no orders had been made by these boards of education requiring McDermitt to pay Austin, each had accepted credit in settlement and in some cases actually used all and more than all the money so paid. Were they not thereby forever estopped from denying the legality of such payments? We think so. Acceptance of the credits in this way was justification to Austin for receiving payment and amounted to ratification of payments by McDermitt, requiring no subsequent order on the latter to pay.

But what about the right of McDermitt, as sheriff, to make application of payments? It is argued, without reference to any legal principles we know of, or to any adjudged cases, that being a public officer and the money being public money, he had no right to direct its application. Speaking for myself, I would think he had such right, but it is probably not necessary to decide this question. See Throop on Public Officers, § 218, and 4 Am. & Eng. Ency. Law & Pract. 1104, 1105, which at least imply such authority. If McDermitt had such right, of course Austin could not make a different application. But there were payments more than sufficient in amount to make up the sums credited to the accounts of the school boards, and as to which the receipts make no specific application, and as to which, according to all rules, the creditor has the right to make the application.

The only evidence outside the receipts showing application of payments by McDermitt is his oral testimony. When asked whether in making payments to his successor, he did not state how he wanted them applied, and in most cases take receipts from him, showing how these payments should be applied, his only answer was: "I think so, yes sir." But some of these receipts do not make application, and the witness does not state, outside the receipts, what his directions were, if any, which he only thinks he gave. Now as to the payments of May 16, 1910, made before Austin's first settlement in August, 1910, that of September 21, 1910, that of January 3, 1911, and the one of June 3, 1911, no applications were made, except

that they were to be credited generally on McDermitt's indebtedness to the various funds, or on account of his settlements as late sheriff. Technically speaking we may say that neither Austin nor the county court, or the boards of education, had distinct legal right to apply any of the payments made prior to July, 1910, to the indebtedness to the several boards of education, unless it be that of May 16, for \$1,100.06, the receipt in that case stipulating "to be credited on the various funds due from him"; this might mean pro rata on all. We do know, however, from the receipts, which are not affected by any other evidence, that subsequent payments were made by McDermitt largely in excess of the sums erroneously credited to the boards of education, and as to which no application was made by the debtor, and out of which Austin might have corrected his error in the first instance. Should not the court below on equitable rules applied even in courts of law, have allowed the credits to the boards of education to stand in lieu of others, which Austin would have had the right to make out of these subsequent payments? Evidently the applications of the first payments were made by mistake of fact or law, or both. But being a public officer, and in as much as Austin had paid out on orders of the school boards much if not all the money so erroneously credited to them, and in as much as applications of the last payments had not then been made, the court below, we think, should have made such application thereof as would have been just under all the circumstances, either by allowing the original credits to stand in lieu of the credits which might have been so made out of the subsequent payments, or to have re-stated the account, crediting McDermitt and charging the county court with the first payments, and crediting McDermitt and charging the boards of education with sufficient of the last payments not otherwise appropriated to close those accounts with him. To have pursued the latter course would necessarily have subjected the parties and the court to much annoyance and trouble, wholly unnecessary for any purposes of doing right and justice to the parties. For the general rule which we think applicable in such cases, see 4 Am. & Eng. Ency. Law and Pract. (3d Ed.) 1081 et seq.; 30 Cyc. 1240, text and notes on the Justice and Equity Rule.

We are of opinion, therefore, to reverse the judgment below and enter judgment here in favor of the plaintiff against defendants, McDermitt, principal, and the sureties on his official bond, for the sum of \$19,874.44, with interest from July 2, 1912, till paid, and with costs in the circuit court, and in this court in this behalf expended.

(72 W. Va. 397)

JAEGER v. CITY RY. CO.(Supreme Court of Appeals of West Virginia.
April 15, 1913.)*(Syllabus by the Court.)***1. MASTER AND SERVANT (§ 219*)—STREET RAILROAD EMPLOYE—ASSUMPTION OF RISK—OBVIOUS DANGER.**

Defective construction of a curve in a railway track, discernible only by measurement, calculations, and the application of scientific rules and principles, is not an obvious danger of which the employé of the railroad company is deemed to have knowledge.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. §§ 610-624; Dec. Dig. § 219.*]

2. NEGLIGENCE (§ 108*)—DECLARATION—SUFFICIENCY—THEORY OF ACTION.

It is not necessary, in the statement of a cause of action in a count of a declaration for negligence, to assert a single hypothesis of wrongful action or omitted duty and then exclude every other. It suffices to set forth the act or instrumentality of injury and attribute the injury to the wrongful act, declaring it to have been negligent. This gives the defendant reasonable notice of the ground of liability charged, and complies with the rule requiring certainty to a common intent only.

[Ed. Note.—For other cases, see *Negligence*, Cent. Dig. §§ 174, 175, 179, 180; Dec. Dig. § 108.*]

3. PLEADING (§§ 193, 367*)—DECLARATION—DEFECT IN FORM—DEMURRER—MOTION.

The assertion in a declaration, by a servant against his master for injury by negligence, of a higher degree of duty on the part of the latter than the law imposes, as to provide the servant a safe place to work, instead of a reasonably safe place, is a defect in form rather than substance, remediable by application to the court for a more specific statement of the ground of the action, and does not render the count bad on demurrer.

[Ed. Note.—For other cases, see *Pleading*, Cent. Dig. §§ 425, 428-435, 437-443, 1173-1193; Dec. Dig. §§ 193, 367.*]

4. TRIAL (§ 255*)—INSTRUCTION—NECESSITY OF REQUEST.

Failure of both parties in an action for personal injury to ask for instructions as to the degree of care due from the master to the servant, or the measure of the former's duty, is deemed a waiver of the right to an instruction upon that question, and in such case it is not error for the court to give binding instructions hypothetically submitting to the jury the acts of negligence complained of, without defining the measure of duty on the part of the master.

[Ed. Note.—For other cases, see *Trial*, Cent. Dig. §§ 627-641; Dec. Dig. § 255.*]

5. TRIAL (§ 261*)—REFUSAL OF INSTRUCTIONS.

The trial court may properly refuse instructions drawn in terms so inartificial, inapt, and general as to make them misleading.

[Ed. Note.—For other cases, see *Trial*, Cent. Dig. §§ 484, 660, 671, 673, 675; Dec. Dig. § 261.*]

6. MASTER AND SERVANT (§§ 101, 102*)—DUTY OF MASTER—REASONABLE CARE.

The measure of the duty of a master to his servant is reasonable care, in view of the situation of the parties, the relations they have established, the nature of the business in which the servant is employed, the character of the machinery and appliances used, the surrounding circumstances and conditions, and the

exigencies which require vigilance and attention.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. §§ 135, 171, 174, 178-184, 192; Dec. Dig. §§ 101, 102.*]

*(Additional Syllabus by Editorial Staff.)***7. TRIAL (§ 232*)—INSTRUCTION.**

An instruction need not cover all phases of the case, but may be properly given where it correctly states the law applicable to its subject-matter, and is defective only in the sense of incompleteness.

[Ed. Note.—For other cases, see *Trial*, Cent. Dig. §§ 524, 525; Dec. Dig. § 232.*]

Error to Circuit Court, Ohio County.

Action by Henry Jaeger against the City Railway Company, a corporation. Judgment for plaintiff, and defendant brings error. Reversed and remanded for new trial.

John J. Coniff and Charles J. Schuck, both of Wheeling, for plaintiff in error. John A. Howard and O'Brien & O'Brien, all of Wheeling, for defendant in error.

POFFENBARGER, P. The declaration in this action for damages for a personal injury to a street car conductor, occasioned by derailment of the car on which he was working, contains seven counts, the sufficiency of each of which is challenged by demurrer. The trial court sustained the demurrer as to the third count and overruled it as to all the others. On this writ of error the defendant complains of the rulings on the demurrer adverse to it and the overruling of its objection to certain instructions and its motion to set aside the verdict.

[1] Improper construction of the curve at which the derailment took place, set forth with considerable detail and specification, and operation of the cars thereon, constitute the gravamen of the first and second counts. In connection with this allegation of an unsafe place of work for the plaintiff, the operation of the car over the track so improperly constructed is admitted. On this admission is founded an argument or contention of assumption of risk on the part of the plaintiff, constituting a defense apparent on the face of the counts themselves. A defect in construction of that sort, discoverable only by measurements and the application of scientific rules and principles, is not an obvious one of which an employé must take notice. No palpably improper construction is admitted. These counts say only that the defendant carelessly and negligently constructed the said curve, carelessly and negligently used in the said construction improper and unsafe rails, improper and unsafe guard rails, and carelessly and negligently constructed an irregular, untrue, improper, and unsafe curve. All this may be true and the defect or danger be not open and notorious, so as to attract the attention of the conductor passing over the road in the course of his employment.

[2] Defective equipment of the car in respect to brakes and sand appliances is the ground of negligence asserted in the fourth, sixth, and seventh counts, and failure in respect to the duty of inspection of the track is the charge of the fifth. As the fourth merely alleges defectiveness of the brake, without showing the absence or insufficiency of other safety devices for the purposes for which brakes are used, and the sixth and seventh charge unsuitableness and inadequacy of the same appliances, without an averment of the necessity for such appliances by negation of the use of other appliances for the accomplishment of the purpose for which sand is used, it is insisted that these counts, considered separately and singly, do not make out causes of action. In each instance these counts say the injury resulted from the defect specified. Each sets out a cause of action. The allegation gave the defendant notice, with reasonable certainty, of the acts of negligence charged against it and thus effects the object of pleading. Certainty to a common intent is all the rules require. It is not necessary, in setting forth causes of action, to assert a single hypothesis of wrongful action or omitted duty and then exclude every other, as a jury is required to do in reaching a verdict in a criminal case involving circumstantial evidence. The objection to the fifth count is similar. Denying duty on the part of a railroad operator to have regular and daily inspections of its track made, under any and all circumstances, counsel say no cause of action is alleged in this count. It says the track at the point of the accident descends a long steep grade to a sharp curve on the edge of a dangerous embankment, and charges duty on the part of the defendant to avoid injury to the plaintiff by reason of defective construction or defective and unrepaired condition of the track on said grade, and to employ proper and suitable track inspectors and to inspect carefully and regularly the track on the grade and at the curve, and then avers nonperformance of this duty and consequent injury. There is no suggestion of duty to inspect regularly every foot or inch of the track of a long railroad. On the contrary, there is an averment of duty to take precautions for safety at a particularly dangerous point on the track. The rules, principles, and reasoning found in the opinions in *Hains v. Railway Co.*, 78 S. E. 843, recently decided and not yet officially reported, *Bralley v. Railroad Co.*, 66 W. Va. 462, 66 S. E. 653, and *Veith v. Salt Co.*, 51 W. Va. 96, 41 S. E. 187, 57 L. R. A. 410, fully sustain the action of the court below in holding these criticisms and objections untenable and insufficient.

[3] Most of the counts aver duty on the part of the defendant to maintain a safe place for work by the plaintiff, and safe instrumentalities and appliances with which to work, not mere duty to exercise reasonable

care to provide a reasonably safe place to work and reasonably safe appliances with which to work, the measure of duty prescribed by law, as shown in *Whorley v. Lumber Co.*, 70 W. Va. 122, 73 S. E. 263, and the many cases there cited. This inaccuracy of statement in the declaration is relied upon as ground of insufficiency. All of the counts here considered set forth causes of action. In a substantial sense each of them is good. Each apprises the defendant of an alleged ground of liability. Each may claim a higher duty on the part of the defendant to the plaintiff than the law imposes by the use of general terms, but this is a defect of form rather than substance, and, under our practice as modified by statute, such defects are remediable not by general demurrer, but by application to the court for more specific statements of the grounds of action. *Gartin v. Coal Co.*, 78 S. E. 673, recently decided and not yet reported; *Jacobs v. Williams*, 67 W. Va. 377, 67 S. E. 1113.

[4] Failure to define in the instructions given for the plaintiff the measure of the defendant's duty in accordance with the conclusions stated in *Whorley v. Lumber Co.* is a ground of complaint. There is a like omission in the instructions given at the instance of the defendant and those asked for by the defendant and refused. The failure of the attorneys for each of the parties to ask any instruction on this subject seems to have been either the result of oversight or conviction on their part that the measure of duty was so well understood by the jury that there was no occasion for instructions on that subject. This omission may render some of the instructions incomplete, but the defect is rather a formal one and seems to have been waived.

As the plaintiff did not testify and there is no evidence as to what particular vocations or callings he had capacity for before the accident, exception is taken to that part of instruction No. 2, given for the plaintiff, which authorizes the jury in estimating damages to ascertain how far the injury is calculated to disable him from engaging in those pursuits and occupations, for which, in the absence of such injury, he would have been qualified. This objection is untenable. In the absence of evidence as to his capacity and fitness for particular vocations, the jury could base an estimate upon their common knowledge of the capacity of an ordinary man to follow a great many pursuits. The car on which the plaintiff was working at the time of his injury had formerly been equipped with four sand boxes, two on each end, enabling the motorman to sand both rails of the track at the same time; but about two years before the accident, two of these, one on each end, were removed, leaving means of sanding only one rail at a time, and one issue in the case was whether the defendant had committed an act of negli-

gence in this alteration of the car. Plaintiff's instruction No. 3 embodied this act as one of its elements, and authorized the jury to find negligence on the part of the defendant, if they believed the car had formerly been equipped with proper and adequate appliances for sanding both rails, and the defendant company had removed from it a part of the said sanding appliances, and the removal of that part rendered the remaining sanding appliances inadequate, and the defendant had failed or neglected to restore or replace the parts removed. Plaintiff's instruction No. 4 embodied the same theory of negligence in similar terms. Alleged imposition of too high a degree of duty upon the defendant is the basis of the attack upon both of them, because each fails to submit to the jury whether, notwithstanding the act complained of, the defendant had exercised reasonable care and prudence for the safety of the plaintiff. The degree of care and measure of the defendant's duty constituted a separate and distinct element in the case, and could have been submitted to the jury in independent instructions properly formulated for the purpose and full opportunity was afforded the defendant to obtain them. These instructions had for their purpose a finding by the jury as to whether the appliances were defective and correctly submitted that issue. Hence they are correct and unobjectionable to the extent of their subject-matter.

[7] An instruction need not cover all phases of the case. If it correctly states the law applicable to its subject-matter and is defective only in the sense of incompleteness, it may properly be given. *State v. Kellison*, 56 W. Va. 690, 47 S. E. 166; *State v. Prater*, 52 W. Va. 132, 43 S. E. 230. Both instructions were binding, it is true, but they propounded a question of liability on the theory of inadequate appliances. Their purpose was to submit to the jury whether the appliances were defective. That was one issue in the case. Whether the defendant had exercised reasonable care for the safety of the plaintiff was a separate and distinct issue, although closely related in its nature to the other. On this, both of the parties were content to let the case go to the jury without instruction. Presumptively, therefore, they were satisfied that from the oral argument and otherwise the jury were sufficiently informed as to the degree of care required.

[8] Another ground of complaint is the refusal of the court to give defendant's instruction No. 6, dealing with the removal of the sand boxes. Its general purpose was to submit to the jury the propriety, under all the circumstances, of the removal of the boxes, but the terms in which this portion of it is expressed are inartificial, inapt, and misleading. It would have directed the jury to inquire whether it was "the proper thing" to remove the double sand boxes on the summer cars, and whether these changes were

made according to the judgment, and under the instructions, of the defendant's superintendent. Had this instruction been given, it would have submitted no inquiry as to whether the car was rendered defective or unsuitable for use after the removal of the double sand boxes. It would have required a finding as to whether the removal of the double sand boxes was "the proper thing," a very indefinite inquiry. We do not think the court erred in refusing this instruction.

The derailment and injury complained of occurred on a very steep grade, ranging from 4.65 feet in a distance of 100 feet to 11.74 feet, and at a sharp curve at which the grade was nearly 7 feet in the 100. The average grade was 8.78 feet in every 100 feet. The road ran from the city of Wheeling up a steep hill to a place of amusement, called Mozart Park. Between the sharp curve, at which the derailment took place, and the park, there is at least one other curve on a heavy grade. Over this road in the summer there is very considerable traffic. On certain occasions as many as 29 trips a day were made over it by the single truck open summer cars. When these cars were first put on, they had two sand boxes on each end, operated by the motorman, so as to sand both rails at the same time. They remained in this condition from 1903 or 1904 until 1907, when the boxes were changed. Two of them were removed and placed on the winter cars, leaving one box on each end of the summer cars. This rendered it impossible for the motorman to sand more than one rail at a time. Before the occurrence of the accident here involved there had been two similar accidents at the same place, one by car No. 35 while equipped with four sand boxes, and another by a similar car carrying only one sand box on each end. All the cars were equipped with hand brakes and magnetic brakes, and also with an appliance for reversing the current as a means of checking the speed or stopping them. There is some conflict in the evidence as to whether the accident to the car in 1904, carrying the four sand boxes, was due to incompetency of the motorman. As to the cause of the later accident to the car equipped with only two sand boxes, the testimony is indefinite. The sand tubes were so far in advance of the wheels and trucks that no sand fell on the track while passing over a sharp curve. Whether it was practicable, in view of the brakes and other appliances in front of the wheels, to bring these tubes closer to them, is left in considerable doubt by the evidence. No defect in the construction of the track in the curve or elsewhere is shown, nor is there proof of lack of sufficient inspection of the track or car. The car on which the plaintiff was injured had been inspected and repaired just before it started on the trip on which he was hurt. One accident occurred while the cars were equipped with four

sand boxes, and another occurred when they were equipped with only two sand boxes. On the occasion of the accident involved here, the tracks were wet and slimy, on account of a heavy fog such as the witnesses say often occurred at that place. The motorman lost control of the car while passing through a curve on a steep grade some hundred feet above the curve at which the derailment occurred. In this upper curve the sand boxes dropped no sand on the rails, because the tubes came down too far in advance of the wheels. Both the motorman and other witnesses testify that he used the magnetic brake, and reversed the current in his efforts to check the speed of the car, and get it under control. The magnetic and hand brakes could not be used at the same time. They were not intended to be. No defect in either brake is proven. Some of the witnesses, experienced motormen, but employees of the defendant company, deny that an additional sand box on the front end of the car would have given any better protection than the single sand box; but a civil engineer who had formerly been superintendent of the road and had supervised its construction and equipment and the present superintendent were both of the opinion that two sanded rails would have afforded greater protection than one. The former witness expressed the opinion that the cars should have had double sand boxes on them, but he did this with considerable hesitancy and reluctance, saying he hardly knew how to answer the question, because cars had been operated over the track, both summer and winter cars, with one sand box. Plaintiff had worked for the defendant and run over this steep grade as conductor for a considerable period of time, apparently more than a year. On the morning of the accident he had made two round trips to the park. In this state of the evidence, we are called upon to say whether there is sufficient evidence of negligence to sustain the verdict, and this involves a further inquiry as to whether the employment was obviously hazardous and the plaintiff assumed the risk of injury.

[8] In the relation between master and servant, the principle of waiver has wide scope and operation. In the abstract the master is under absolute duty to furnish the servant a reasonably safe place in which to work and reasonably safe appliances with which to work, but the servant, having knowledge of the failure in these respects, is deemed to have waived performance or rather to have assented to the conditions the master has made. This principle is stated in *Fulton v. Crosby-Beckley Co.*, 57 W. Va. 91, 94, 49 S. E. 1012, 1013, as follows: "As the employee assumes the risk of all known dangers, though attributable to failure of

legal duty in the abstract on the part of the employer, the question of negligence in any given case depends upon the relation which the master and servant, by their conduct and agreement, have established between themselves with reference to the business in which the servant is employed. This waiver on the part of the servant releases the master from much of the burden which the law, but for it, would impose." This conclusion resulted from an examination of many cases. Its application here necessarily results in reversal of the judgment and the granting of a new trial. The conditions under which the plaintiff was working at the time of the accident were those under which he had been working for several months at least. He knew the character of the road, its subsection to foggy and murky weather rendering the track slippery, and the liability of cars on such a road under such conditions to get beyond control, even when operated by the most competent motormen. This danger was not so great as might be supposed, for during the whole period of two years in which cars equipped as the one on which he was working had been used on the road but a single accident had occurred. Within that time from 19 to 29 trips a day had been made over the road during the summer season, amounting in the aggregate to thousands, and the cause of the single accident within that period is not shown to have been lack of additional sanding appliances. On the morning of the accident, under the very same conditions obtaining at the time of its occurrence, he had already made two trips up and down that grade and without accident. On many former occasions he had conducted cars of the company over the road under similar conditions without mishap. He may not have fully realized the danger of working on that road, but the evidence establishes no negligence, no want of reasonable care, on the part of the defendant. No evidence proved, or tended to prove, any connection with the former accident and the lack of additional sanding appliances. Without them the defendant operated cars under all conditions of weather for a period of two years without any accident shown to have been the sequence of lack of sand boxes. Nothing in this long experience indicated necessity for more of them. On the contrary, the defendant's own experience tended to prove lack of necessity therefor. The plaintiff's injury appears to have been very great and his condition to be distressing, but the rules of law cannot be varied or ignored as a means of relief from his misfortune.

As the evidence is wholly insufficient to sustain the verdict, the judgment must be reversed, a new trial granted, and the case remanded.

(72 W. Va. 286)

MINERAL COUNTY COURT v. TOWN OF PIEDMONT.(Supreme Court of Appeals of West Virginia.
April 15, 1913.)*(Syllabus by the Court.)***1. MUNICIPAL CORPORATIONS (§ 57*)—MUNICIPAL POWERS—EXERCISE.**

The exercise of municipal powers, by proper construction, is confined to the territorial limits of the municipality, and are (1) such as are granted by express words; (2) those fairly implied or incident to those expressly granted; and (3) those essential to the declared objects and purposes of the corporation, not simply convenient, but indispensable.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. §§ 144, 148; Dec. Dig. § 57.*]

2. MUNICIPAL CORPORATIONS (§ 226*)—CONTRACTS—BRIDGE IN ANOTHER STATE.

A town or city of this state, within these rules, has no power or authority to enter into a contract with the county court of the county in which it is located to contribute to the expense of building a bridge, without its corporate limits, and which is located wholly within another state.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. §§ 645-650; Dec. Dig. § 226.*]

3. MUNICIPAL CORPORATIONS (§ 249*)—VOID CONTRACTS—LIABILITY OF CITY.

Nor is such a contract or promise of a town or city to contribute to the expenses of building such bridge binding on principles of the common law or on the theory of its obligation to do justice. Receiving no money or property or title thereto from the county which in justice it should restore, and its contract being absolutely void, and not capable under any power of being ratified, it cannot be rendered liable on its void promise.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. §§ 697, 853; Dec. Dig. § 249.*]

Error to Circuit Court, Mineral County.

Action by the County Court of Mineral County against the Town of Piedmont. Judgment for plaintiff, and defendant brings error. Reversed and rendered.

Harry K. Drane, of Piedmont, and Frank C. Reynolds, of Keyser, for plaintiff in error. Charles N. Finnell, of Keyser, for defendant in error.

MILLER, J. In the court below, on facts agreed, plaintiff obtained judgment against defendant, for \$847.80. The cause of action alleged, and on which the judgment is predicated, was, that while plaintiff and the county commissioners of Allegheny County, Maryland, had under consideration the construction, by joint action, of a bridge across the Potomac River, defendant, in consideration that a foot way would be built on each side of the proposed bridge promised and agreed to pay or contribute the sum of five hundred dollars towards the expense thereof; and that at the time of entering into said agreement defendant, by its council, had laid a special levy of ten cents on the hundred dollars, to

pay the same, and that said bridge had been constructed as agreed, and paid for by plaintiff, and that defendant, by its said promise had become bound to pay plaintiff the sum so stipulated, and paid by plaintiff on its account.

The defense was and is that the alleged promise was absolutely void because ultra vires.

The agreed facts admit the contract or promise, substantially as alleged; and also that bridge and abutments are wholly within the County of Allegheny, State of Maryland, and that at the time the bridge was built Ashfield street ran to the bridge and was connected with it, and is the only approach to the bridge from the Town of Piedmont.

[1] A general proposition, well supported by authority, is that the exercise of municipal powers are, by proper construction, confined to the territorial limits of the municipality, and are (1) such as are granted by express words; (2) those fairly implied in or incident to those expressly granted; and (3) those essential to the declared objects and purposes of the corporation, not simply convenient, but indispensable; and that any fair and reasonable doubt concerning the existence of the power should be resolved by the courts in favor of the corporation. 1 Dillon, *Munic. Corp.* (3d Ed.) § 89; *Id.* (5th Ed.) § 237; *Christie v. Malden*, 23 W. Va. 667; *Winchester v. Redmond*, 93 Va. 711, 25 S. E. 1001, 57 Am. St. Rep. 822; *Cooley's Const. Lim.* § 312.

[2] The primary question then is, had defendant, within either of these classes, power to build or to contribute to the expense of building a bridge, which the agreed facts say was located wholly outside its corporate limits, and indeed wholly within another state and county? We are referred to no express power, conferred by charter, or general law, or as incident thereto, nor can we clearly and without doubt imply such power from any of the powers granted, nor can we say that such power is essential to the accomplishment of the declared object and purposes of the municipality. One of the streets of the town, it is true, runs to the bridge, and is connected with it, and is the only approach thereto from the town; and that the bridge is highly convenient and beneficial to the citizens of the town may be admitted. But can it be said that there is any legal obligation on the town, to build or maintain or contribute to the building or maintenance of such a bridge? Certainly not. And mere convenience, according to the authorities cited, and some of the cases soon to be cited, is without the pale of municipal powers, not specifically conferred.

The rules and principles of the authorities cited were applied in *Duncan v. Lynchburg* (Va.) 84 S. E. 964, 48 L. R. A. 331, holding a

city not liable for a nuisance created by the pollution of a stream, by its employes, while operating a rock quarry, outside the limits of the city; and in *Becker v. La Crosse*, 99 Wis. 414, 75 N. W. 84, 40 L. R. A. 829, 67 Am. St. Rep. 874, holding a city not liable for injury sustained by a traveller thereon, on the opposite side of the river, which it spanned, and in the state of Minnesota, although the bridge had been built by it across the river by authority of legislative act. The syllabus of that case is: "A city cannot accept a grant from another state to operate a toll road beyond its limits and the limits of its own state, or be held liable for defects in such road if operated by it, when it is not authorized to do so, by the laws of its own state, although the toll road is made to connect with the city toll bridge that the city has constructed under lawful authority;" and in *Abendroth v. Greenwich*, 29 Conn. 356, holding a city not liable on a contract or promise to pay a certain amount toward the expense incurred in building a bridge connecting it with a town in another state, the undertaking being both without consideration, and beyond its power; and in *Mayor of Albany v. Cunliff*, 2 N. Y. 165, holding a city not liable to one injured by the falling of a bridge built by its officers under a statute not constitutionally passed for want of a two thirds vote.

Plaintiff, however, seeks to support its judgment on principles of the common law, and upon the alleged obligation of the defendant to do justice. It is affirmed that at common law, and independently of statute, a county can expend money for a bridge or highway across a boundary line and beyond it, if regarded necessary for the use and convenience of its citizens. Citing *Washer v. Bullitt County*, 110 U. S. 559, 4 Sup. Ct. 249, 28 L. Ed. 249. In this state, so far as counties are concerned the subject of building bridges is regulated by statute. Chapter 43, Code 1906, Code Suppl. 1909; chapter 38, Acts 1911. By these statutes, counties not magisterial districts or municipalities therein, unless specially required or authorized by statute, may be required to build and maintain bridges. *Hedrick v. County Court*, 77 S. E. 359. Whether a county of this state can be compelled on statutory or common law grounds to build a bridge across a river into another state, is a question not arising and we need not and do not decide it. But certainly *Washer v. Bullitt County*, cited for the proposition, has little, if any, application

to a town or municipality within a county. [3] But can the liability of defendant find support in its obligation to do justice? If the town had received money or property or title thereto from plaintiff, which in justice it ought to restore; or if by virtue of some other power not exercised at the time, its obligation could be ratified or confirmed, and it had done any act amounting to such ratification it might be rendered liable thereby. Besides *Marsh v. Board of Supervisors*, 10 Wall. (U. S.) 676, 19 L. Ed. 1040, relied on, see, also, *Salt Lake City v. Hollister*, 118 U. S. 256, 6 Sup. Ct. 1055, 30 L. Ed. 176; *Maher v. Chicago*, 38 Ill. 266, *Parker v. Philadelphia*, 92 Pa. 401, *Chicago v. McNichols*, 98 Ill. App. 447. The first two cases illustrate as well as any, perhaps, the application of the first of these principles, and *Maher v. Chicago* and *Parker v. Philadelphia*, the application of the latter. But here the town got nothing, not even title to the bridge; that belonged to the two counties, by whose joint act the same was built. Citizens were inconvenienced thereby, but the city got nothing by its promise in the shape of money or tangible property, which it can or can be required to restore. Wherefore the authorities cited do not apply. If it be true that it collected the taxes levied to pay the sum contracted for, the levy was clearly illegal, and if collected and not refunded, the money would go into the general fund, reducing the taxes for subsequent years. In this case the taxes were laid and collected to pay a contract wholly void, and which the town had no power under any circumstances, or by the exercise of any power, to make, distinguishing this case from *Parker v. Philadelphia*, where the contract involved was regarded void because made without a previous appropriation to pay the contract price, and the money paid in on special assessments against property owners was regarded as belonging to the contractor, and the city liable therefor. Such is not the case here. Nor is this such a case as is presented in *People ex rel. Murphy v. Kelly*, 76 N. Y. 475, involving the building of the Brooklyn bridge, by joint action of New York City and the City of Brooklyn, under special act of the legislature.

Upon these principles we are of opinion that the judgment below is erroneous and should be reversed, and a judgment entered here for defendant on the facts agreed, and we will so order.

(162 N. C. 206)

POPE & BALLANCE v. RIGHTER-PARRY LUMBER CO.

(Supreme Court of North Carolina. May 7, 1913.)

BILLS AND NOTES (§ 164*)—NEGOTIABLE INSTRUMENTS—WHAT CONSTITUTES.

Under Revisal 1905, § 2151, providing that an instrument, to be negotiable, must contain an unconditional promise to pay a sum certain in money, an instrument reciting that the maker promised to pay \$2,000, with interest, and that the note was part of the price of timber conveyed to the maker by deed and was subject to the provisions thereof, is not negotiable, being conditional in form, sections 2153 and 2154, defining an unconditional promise to pay and specifying the facts that do not affect the negotiability of an instrument, not curing its defect, and consequently an indorsee takes the instrument subject to all equities between the parties.

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. §§ 411-414, 417; Dec. Dig. § 164.*]

Appeal from Superior Court, Harnett County; Ferguson, Judge.

Action by G. F. Pope and J. H. Ballance, trading as Pope & Ballance, against the Righter-Parry Lumber Company, in which J. F. Sherron intervened. From a judgment against intervenor, he appeals. Affirmed.

Sinclair & Dye, of Fayetteville, for appellant. Clifford & Townsend, of Dunn, for appellees.

CLARK, C. J. The appellant, J. F. Sherron, was permitted to intervene and assert his title to the \$2,000 note signed by K. L. Howard, payable January 1, 1911. There is evidence that he received it before maturity and for value. The note is worded as follows: "\$2,000. Dunn, N. C., January 15, 1909. On January 1, 1911, I promise to pay to the Righter-Parry Lumber Company, or order, two thousand dollars, with interest from date at 6 per cent. per annum; payable at the First National Bank of Dunn, N. C. This note is for part of the purchase price of timber conveyed to the undersigned by the said company by deed of even date herewith; is secured by retention of the title to said timber by said company, and subject to the provisions of said deed. K. L. Howard."

The jury found that the defendant broke his contract with the plaintiff who, under the terms of the deed, was entitled to recover damages therefor. It is admitted in the case agreed that such finding was unexceptionable. The court refused to charge that this note was a negotiable instrument, and therefore that James F. Sherron was holder in due course and held the same free from all equities.

Revisal, 2151, specifies the requirements of a negotiable instrument. The second of these requirements is that it "must contain an unconditional promise or order to pay a

sum certain in money." This note contains the following condition: "And subject to the provisions of said deed." The note being therefore conditional in form and dependent in its provisions upon an outside paper referred to therein was nonnegotiable and his honor properly so held. There is nothing in the provisions of Revisal, 2153 or 2154, which cures this defect or renders the note negotiable, and Sherron took it subject to all equities.

No error.

(162 N. C. 208)

POPE & BALLANCE v. RIGHTER-PARRY LUMBER CO.

(Supreme Court of North Carolina. May 7, 1913.)

APPEAL AND ERROR (§ 595*)—RECORD—TRANSCRIPT.

Where two parties intervened in an action, and the judgment, which was adverse to both, presented only one question for review, only one record is necessary to be sent up, although, where both plaintiff and defendant appeal, each must send up a transcript, and the appeals must be docketed separately.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 2623; Dec. Dig. § 595.*]

Appeal from Superior Court, Harnett County; Ferguson, Judge.

Action by G. F. Pope and J. H. Ballance, trading as Pope & Ballance, against the Righter-Parry Lumber Company, in which F. W. McCurdy intervened. From a judgment denying him relief, intervenor appeals. Affirmed.

Sinclair & Dye, of Fayetteville, for appellant. Clifford & Townsend, of Dunn, for appellees.

CLARK, C. J. The appellant, F. W. McCurdy, presents the same point upon another note in the same cause of Pope v. Lumber Co., above decided. The only difference is as to the amount of the note, which is \$1,000.

We note that separate records were sent up in these two appeals. This was an unnecessary expense, as the appeals are in the same cause and present exactly the same question, though, of course, both parties should appeal. If not, the judgment is suspended only as to the one which appeals (*Rollins v. Love*, 97 N. C. 210, 2 S. E. 166); yet it was not necessary to send up separate records.

It is true that, where both "parties" appeal, a transcript of the record must be sent up by each appellant and the appeals must be docketed separately as distinct cases. This rule cannot be waived by consent of counsel, and, unless there are separate records, the case will not be heard. *Morrison v. Cornelius*, 63 N. C. 346; *Perry v. Adams*, 96 N. C. 347, 2 S. E. 659; *Jones v. Hoggard*, 107 N. C. 349, 12 S. E. 286; *Candle v. Mor-*

ris, 158 N. C. 594, 74 S. E. 98. But this applies where both the plaintiff and the defendant appeal, and therefore present different exceptions, or where the parties appealing, though on the same side, present distinct questions or are antagonistic to each other. It does not apply to this case, where the appellants are not antagonistic and present exactly the same question. However, it has worked no harm to send up two records beyond the unnecessary expense.

Upon the ruling in Sherron's appeal in this case, we find in McCurdy's appeal also no error.

(162 N. C. 209)

AYERS et al. v. BAILEY et al.

(Supreme Court of North Carolina. May 7, 1913.)

1. BANKS AND BANKING (§ 55*)—ACTION BY STOCKHOLDERS—MISJOINDER OF PARTIES.

There was no misjoinder of parties in an action by the stockholders of a bank, of which defendants were officers, which was merged into another bank, to recover amounts which plaintiffs were compelled to pay under their guaranty, in the merger contract, of notes transferred by their bank to defendants' bank and negligently accepted by defendants, in which guaranty defendants failed to join as agreed, all of the parties being necessary parties.

[Ed. Note.—For other cases, see Banks and Banking, Cent. Dig. §§ 99-104; Dec. Dig. § 55.*]

2. ACTION (§ 47*)—MISJOINDER.

An action for breach of an agreement between plaintiffs, stockholders of a bank, and defendants, officers of the bank, by which the latter agreed to guarantee with plaintiffs, notes transferred to another bank, with which their bank was merged, could be joined with another cause of action against defendants for negligently accepting worthless notes while acting as officers of the bank.

[Ed. Note.—For other cases, see Action, Cent. Dig. §§ 469, 470, 472-489; Dec. Dig. § 47.*]

3. DISMISSAL AND NONSUIT (§ 53*) — MISJOINDER—REMEDY.

If several causes of action were joined in an action by several against several others when the actions should have been brought separately, the remedy was to divide the actions, and not to dismiss.

[Ed. Note.—For other cases, see Dismissal and Nonsuit, Cent. Dig. §§ 107-110, 112-114, 118, 120-123; Dec. Dig. § 53.*]

Appeal from Superior Court, Mitchell County; Cline, Judge.

Action by James M. Ayers and others against Isaac H. Bailey and others. From a judgment for defendants, plaintiffs appeal. Reversed.

Black & Wilson, of Bakersville, and Hudgins & Watson, of Marion, for appellants. W. B. Council and M. H. Yount, both of Hickory, for appellees.

OLARK, C. J. The complaint alleges: That the defendants were the officers of the Bank of Mitchell, and as such negotiated the merger of said bank with the Mitchell County Bank, and that, as a part of the contract

of merger and as a consideration and inducement thereto, they contracted with the latter bank that the defendants and plaintiffs, who were all stockholders in said Bank of Mitchell, should guarantee all notes, bonds, and instruments which were transferred by it to said Mitchell County Bank. That the plaintiffs, at the special request of the defendants, as stockholders entered into written agreement, together with one J. B. Boone, to guarantee all such paper and to be liable pro rata among themselves according to the number or value of the shares of stock held by them in the Bank of Mitchell. That the defendants owning the greater amount of stock in said Bank of Mitchell procured these plaintiffs to sign said agreement, upon an agreement with these plaintiffs that these defendants would join in said agreement, and would be responsible pro rata according to the stock held by each of them, and would sign said agreement. But that after obtaining the signatures of these plaintiffs to said agreement, as above alleged, they failed and refused to sign the same and fraudulently delivered the same to said Mitchell County Bank without their signatures. It is further alleged that these defendants, being the officers and chief stockholders in the Bank of Mitchell, and in sole control of the same, took for their own advantage, or by negligence in the discharge of their duties, paper which was not sufficiently secured and knowing that fact transferred and assigned said uncollectible paper to the Mitchell County Bank, which has obtained judgment against these plaintiffs by reason of inability to collect said paper, in the sum of \$6,893.58, which these plaintiffs have paid off pro rata (except W. L. Young who has not yet paid), and this action is brought to recover of these defendants on above grounds the sums due the plaintiffs by the defendants.

[1] The defendants demur because of alleged misjoinder of parties and misjoinder of causes of action. This contention, if sustained would logically require that the plaintiffs, 8 in number, should each bring his action against each of the 3 defendants, making 24 actions. This view was ably presented, but we cannot assent thereto. It is contrary to the entire spirit of our modern procedure (Rev. 469), which forbids multiplicity of actions, and besides it would be almost impossible to adjust the rights of the parties, unless they were all before the court in one action. In Pretzfelder v. Insurance Co., 116 N. C. 491, 21 S. E. 302, there were several insurance policies in different companies, the policies having been taken out at different times, but each containing a provision that the loss should be prorated according to the amount in the several policies. This court held: "It is not only no misjoinder, but essentially proper, that all the companies should be made parties defendant. If each

company should be sued separately, not only would the same propositions of law arise, and the same evidence be gone over in five different actions at the expense of five times the amount of court costs, and much needless consumption of the time of the court, but as the trial would be before five different juries the loss might be assessed at five different amounts."

This case is stronger, for here there is only one contract or agreement, or at any rate only one transaction, that is to be investigated. Besides in this case there are 8 plaintiffs and 3 defendants, making a total of 24 trials of one subject-matter, which ought to be disposed of in one trial and with all the parties in interest on both sides represented. The principle laid down in *Pretzfelder v. Insurance Co.*, has often been affirmed, among other cases in *Cook v. Smith*, 119 N. C. 353, 25 S. E. 958; *Daniels v. Baxter*, 120 N. C. 17, 26 S. E. 635; *Weeks v. McPhail*, 128 N. C. 138, 38 S. E. 292; *Fisher v. Trust Co.*, 138 N. C. 242, 50 S. E. 659. Another case very much in point is *Smith v. Patton*, 131 N. C. 396, 42 S. E. 849, 92 Am. St. Rep. 783, and there are very many others. In *Morton v. Telegraph Co.*, 130 N. C. 299, 41 S. E. 484, relied upon by the defendants, there were three different plaintiffs each suing in a separate right and upon a different cause of action. In *Cromartie v. Parker*, 121 N. C. 204, 28 S. E. 297, also relied upon by the defendants, the complaint set up separate causes of action against several parties, among whom there was no community of interests.

[2] But here the basis of action is an alleged agreement between the plaintiffs and defendants for a pro rata liability in guaranteeing certain paper of the bank which was duly assigned, and apparently a further cause of action against these defendants for mismanagement and negligence as officers of the bank in accepting said worthless paper. *Solomon v. Bates*, 118 N. C. 311, 24 S. E. 478, 54 Am. St. Rep. 725; *Caldwell v. Bates*, 118 N. C. 325, 24 S. E. 481. These causes of action could be properly joined. *Benton v. Collins*, 118 N. C. 196, 24 S. E. 122, which holds that a cause of action in tort can be joined with one to enforce an equitable right, where both arise out of transactions connected with the same subject-matter, which is here liability for the worthless papers taken by the defendants and guaranteed by the plaintiffs, it is alleged, at the request of the defendants, under the agreement set out. See, also, *Daniels v. Baxter*, 120 N. C. 17, 26 S. E. 635. There was not only no misjoinder of parties, but they are all necessary parties.

[3] If there had been a misjoinder of causes of action, the action should have been divided and not dismissed. *Weeks v. McPhail*, 128 N. C. 138, 38 S. E. 292; Rev. 476.

The demurrer should have been overruled.

Should the court find that the demurrer was interposed in good faith, as it doubtless was, the defendants are entitled to answer over Rev. 506.

Reversed.

(162 N. C. 133)

YORKE FURNITURE CO. v. SOUTHERN RY. CO.

(Supreme Court of North Carolina. May 7, 1913.)

1. CARRIERS (§ 35*)—REGULATIONS—VIOLATION—INTERSTATE COMMERCE—TRANSPORTATION OF PROPERTY—CHARGES.

A shipper of an interstate shipment is liable to pay the freight fixed by printed and published schedules of the initial carrier on file with the Interstate Commerce Commission, notwithstanding any stipulations in the bill of lading to the contrary.

[Ed. Note.—For other cases, see *Carriers*, Cent. Dig. § 94; Dec. Dig. § 35.*]

2. CARRIERS (§ 26*)—INTERSTATE COMMERCE—TRANSPORTATION OF PROPERTY—CHARGES.

An initial carrier of an interstate shipment, which furnishes two small cars in lieu of a large car ordered by the shipper, is, by reason of a rule of the Interstate Commerce Commission, limited to the rate applicable to the larger car.

[Ed. Note.—For other cases, see *Carriers*, Cent. Dig. §§ 67-82; Dec. Dig. § 26.*]

Appeal from Superior Court, Cabarrus County; Daniels, Judge.

Action by the Yorke Furniture Company against the Southern Railway Company. From a judgment for plaintiff, defendant appeals. Affirmed.

The jury rendered the following verdict: "(1) Is the defendant indebted to the plaintiff; if so, in what amount? Answer: Yes, \$46.35, with interest from September 30, 1907."

L. C. Caldwell, of Statesville, for appellant.
J. Lee Crowell, of Concord, for appellee.

HOKE, J. The evidence on part of plaintiff tended to show that in January, 1907, plaintiff company, desiring to ship an assortment of furniture from Concord, N. C., to Kansas City, Mo., applied to the agent of defendant company for two 50-foot cars. That these cars were adequate for the purpose and on the route designated, and for cars of that size the proper rate was 88 cents per 100 pounds. That after much delay the agent finally succeeded in obtaining cars for the shipment, but, having been unable to procure cars of the size ordered, supplied four 36-foot cars; this number being required for the goods shipped owing to the smaller size. That, by reason of this change in the size of the cars, the regular freight rate, as shown by the printed and published schedules on file with the Interstate Commerce Commission, was \$1.10½ per 100 pounds, making a difference of \$46.35

on the entire shipment. It was shown further that at the time of shipment the agent of defendant stated that he had been unable to furnish cars of the size ordered, but that the company would protect the shipment at the rate of 88 cents, and this was the rate specified in the bill of lading; the full amount as per scheduled rate having been paid by the plaintiff on arrival of goods at Kansas City.

[1] The action is instituted against defendant, the initial carrier, for the amount paid in excess of 88 cents, to wit, \$46.35. The position insisted on by defendant that, notwithstanding the specifications of the bill of lading, the plaintiff was properly chargeable according to the printed and published schedules of the company on file with the Interstate Commerce Commission is undoubtedly correct (*Texas, etc., Ry. v. Mugg*, 202 U. S. 242, 26 Sup. Ct. 628, 50 L. Ed. 1011); but the charge of the court is in full recognition of this principle, and defendant has been held responsible not so much by reason of the stipulations of the bill of lading but because of its failure to furnish the cars of the capacity ordered and the proper rate chargeable in cars of that size.

[2] Rule 339 of the Interstate Commerce Commission, issued March 9, 1912, supplied us on argument by counsel, seems to be directly applicable to the case, and is as follows: "Upon informal complaints and numerous inquiries it is held that the act of a carrier in furnishing two small cars in lieu of a larger car ordered by the shipper under appropriate tariff authority is binding, at the rate and minimum applicable to the car ordered, upon all the carriers that are parties at the point of origin; the shipper is entitled to all privileges in transit, to reconsignment, and to switching at the same charges as would be applicable under the joint tariff had the shipment been loaded into one car of the capacity ordered; and demurrage will likewise accrue on that basis. If the shipment moves beyond the point to which the joint rate applies, the connecting line or lines are entitled to and should collect their transit, reconsigning, switching, and demurrage charges as provided in their own tariffs. In all cases the initial carrier will be liable for such additional charges as may be imposed on the shipper by reason of its failure to furnish a car of the capacity ordered. Carriers that are parties to the joint rate under which the shipment commences to move may share in such additional expense so incurred by the initial carrier." This rule embodied in the charge of the court announces and approves the position upon which plaintiff's recovery is predicated, and on the facts presented we are of opinion that there has been no error in the disposition of the case.

No error.

(161 N. C. 581)

VIRGINIA & C. S. R. CO. v. SEABOARD AIR LINE R. CO.

(Supreme Court of North Carolina. April 2, 1913.)

1. EMINENT DOMAIN (§ 47*) — CROSSING TRACKS OF OTHER RAILROADS—RIGHT TO CROSS—STATUTES.

Priv. Laws 1903, c. 233, § 2, as amended by Priv. Laws 1907, c. 269, conferred on plaintiff the right to construct, maintain, or operate a railroad with one or more tracks from L. to a point on the main line of the Atlantic Coast Line Railroad, and also from any point on its main or branch lines to any point within the state of North Carolina, with the right to connect its tracks with any other railroad, and to lay down and use tracks through any town or city along its proposed lines with the consent of the corporate authorities thereof. By Priv. Laws 1903, c. 233, § 10, plaintiff was also given the right to cross at grade any other railroad constructed, at any point on its road, and to intersect or join its railroad with any other railroad on the grounds of such other companies, and to build turnouts, sidings, switches, side tracks, or any other conveniences in furtherance of its objects of construction, with all the rights and privileges conferred on railroads by the laws of the state, and section 11, as amended, authorizes condemnation proceedings in case parties cannot agree. Revisal 1905, § 2567 (5) and (6), confers on every railroad the right to construct its road along, or upon any railroad or canal which the route of its road shall intersect, cross, or unite its road with any other railroad previously constructed on the grounds of such other company with the necessary turnouts, sidings, and switches and other conveniences in furtherance of the objects of its construction. Held, that plaintiff railroad company had the right to build a spur track across defendant's existing line of railroad to reach the plant of a cotton mill and lumber company to the end that it might secure freight therefrom, though defendant and another railroad served such plants, and defendant was willing to ship plaintiff's cars over its own tracks to such plants at a reasonable rate.

[Ed. Note.—For other cases, see *Eminent Domain*, Cent. Dig. §§ 107-120; Dec. Dig. § 47.*]

2. EMINENT DOMAIN (§ 47*)—CROSSING OTHER RAILROADS—PLACE.

Though one railroad under its charter and under the general law has the right to condemn a right of way across the tracks of another company, such right must be exercised with due regard to the convenience of both parties, and with as little interference with the defendant's use of its own tracks and facilities as can be obtained without a great increase in the cost and in its convenience to plaintiff.

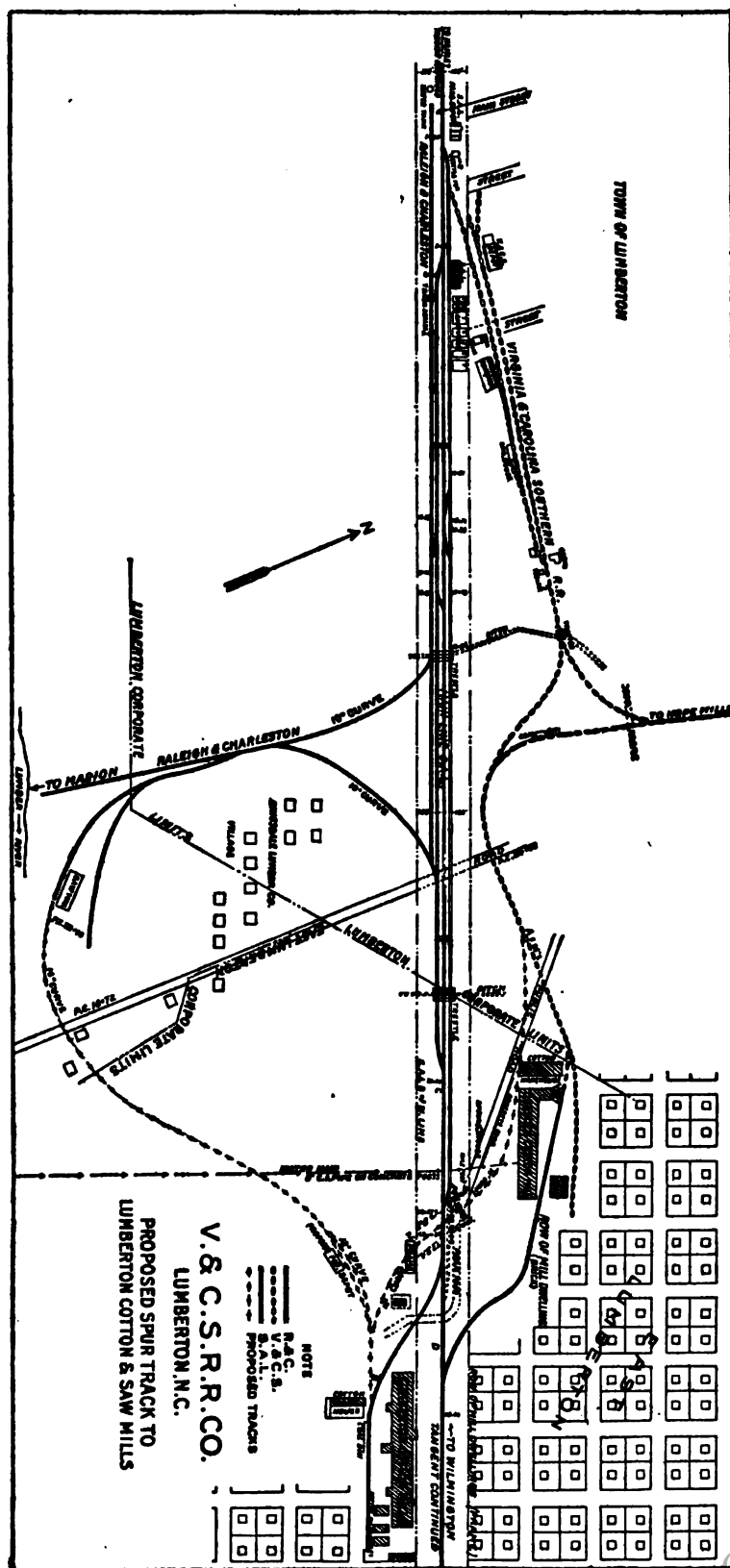
[Ed. Note.—For other cases, see *Eminent Domain*, Cent. Dig. §§ 107-120; Dec. Dig. § 47.*]

Hoke, J., dissenting.

Appeal from Superior Court, Robeson County; Peebles, Judge.

Proceedings by the Virginia & Carolina Southern Railroad Company against the Seaboard Air Line Railroad Company to condemn a right of way across defendant's tracks. From a decree in favor of defendant, plaintiff appeals. Reversed.

The following is a plat of the property in question:



McLean, Varser & McLean, of Lumberton, for appellant. John D. Shaw, of Rockingham, and McIntyre, Lawrence & Proctor, of Lumberton, for appellee.

CLARK, C. J. This is a proceeding by the plaintiff to condemn a right of way across the track of the defendant in order to extend its tracks to the Lumberton Cotton Mills and the Kingsdale Lumber Company plants on the south side of the defendant's track and to make connection with the Raleigh & Charleston Railroad Company's track. The plaintiff has a spur track at Lumberton extending over some 600 yards to the Dresden Cotton Mills on the north side of defendant's track, and it wishes to extend it further to the two plants above named on the south side of defendant's track and to make connection on that side with another railroad as above stated. The petition was granted before the clerk and on appeal before Cooke, Judge, an injunction was refused and the commissioners proceeded to make the condemnation, who assessed defendant's damages at \$600. On the hearing before Peebles, J., on exceptions filed, the jury assessed the damages which the defendant was entitled to recover from the plaintiff at \$300, but the judge reversed the order of the clerk and rendered judgment against the plaintiff. The defendant has itself a spur track to both these plants and the Raleigh & Charleston Railroad has also a spur track to the Kingsdale Lumber Company plant. There is no reason why the plaintiff is not entitled to the same privileges unless under the general law, or under its charter, it does not have the same power in this respect which has been granted to the other two railroads. Indeed, the defendant's brief frankly says that, notwithstanding the voluminous record, "only one question is really presented," and that is whether the plaintiff has a right to build a spur track, across the defendant's line, "to reach a cotton mill and lumber company to the end that it may secure the freights therefrom." The real contest is thus frankly presented, which is whether the plaintiff can interfere with the monopoly of the business from those plants.

The defendant strongly urges that the plaintiff did not need this privilege because the defendant would do the shifting of plaintiff's cars over its own tracks to those points at so reasonable a rate that the plaintiff did not need to build its own track for that purpose. The plaintiff replied that the defendant had been charging most exorbitantly for such service, and in view of this litigation it had reduced its rates, but that it was delaying the plaintiff's cars, on one excuse or another, so as to practically deprive it of the privilege, and that if it was denied the right to build its tracks that the defendant would then again raise its charges as to all interstate cars, which was the bulk of the business, and that no relief could be had. The

defendant, of course, denied any intention to do this. We cannot consider such arguments. The only proposition before us is as to whether the plaintiff has a right to build to those points, and, if so, whether it is a wise expenditure for it to build such tracks is a matter for the consideration of the plaintiff alone, and not for the courts. As a matter of public policy, the state encourages competition among common carriers so that the public may have the resulting benefits. *Industrial Siding Case*, 140 N. C. 239, 52 S. E. 941, and *R. R. Connection Case*, 137 N. C. 1, 49 S. E. 191, which hold that a "railroad is created to subserve primarily the public good and convenience." But we put our decision herein upon the wording of the statute in determining whether the power claimed by the plaintiff is conferred by the statutes.

[1] There is no question as to the right of way, except across the defendant's track, for the plaintiff has acquired the right of way entire except at that point. Neither is there any question as to the consent of the city authorities of East Lumberton, for their ordinance granting the right of way through said town, which lies on both sides of defendant's track, was tendered, but was refused by the judge upon the ground that the sole question was whether the plaintiff had the power, under the statute, to extend its track to the two plants in question, for, if it had, the power to condemn across the defendant's track was a necessary incident.

Private Laws 1903, c. 233, § 2, as amended by Pr. Laws 1907, c. 269, confers upon the plaintiff the right to "construct, maintain, or operate a railroad with one or more tracks from the town of Lumberton to some point on the main line of the Atlantic Coast Line" and "also from any point on its main or branch lines to any point within the state of North Carolina." It is also therein given the power "to connect its tracks with any other railroad and to lay down and use tracks through any town or city along its proposed lines with the consent of the corporate authorities thereof." The plaintiff also has the power, under section 10, c. 233, Pr. Laws 1903, "to cross at grade, or over or under, any other railroad constructed, or that may hereafter be constructed at any point on its road and to intersect, join or unite its line of railroad with any other railroad upon the grounds of such other companies, at any point on its route and to build turnouts, sidings, switches, side tracks or any other conveniences in furtherance of its objects of construction, and may in making intersection or connection with any other railroad have all the rights and privileges conferred upon railroads by the laws of this state." Section 11, c. 233, Laws 1903, as amended by Private Laws 1907, c. 269, further provides: "Whenever, for any cause, this company is unable to agree with the owners of the lands, or any railroad owning any right of way,

or any town or city owning any street or public way over or near which it proposes to extend its road for the purchase of such lands for its depots, roadbeds, quarries or other purposes of the company, the said company may file a petition before the clerk of the superior court," etc. The general act—Rev. § 2567 (5) and (6)—confers on every railroad the power "to construct its road along, or upon any stream of water, street, highway, turnpike, railroad or canal which the route of its road shall intersect or touch." "To cross, intersect, join and unite its railroad with any other railroad before constructed at any point on its route, and upon the grounds of such other company with the necessary turnouts, sidings and switches and other conveniences in furtherance of the object of its construction. And every company, whose railroad is or shall be hereafter intersected by any new railroad shall unite with the owners of such new railroad in forming such intersections and connections and grant the facilities aforesaid, and if the two corporations can not agree upon the amount of compensation to be made therefor, or the points and manner of such crossings and connections, the same shall be ascertained and determined by commissioners to be appointed by the court as provided in this section in respect to acquiring title to real estate."

It seems clear, therefore, that the plaintiff had a right to extend its line southward to any distance or to any point it saw fit, and in so doing to cross the track of the defendant. It also has the right both under the general law and under its charter to extend its track to the plant of the Lumberton Cotton Mills and to the Kingsdale Lumber Company plant and to make connection near by with the Raleigh & Charleston Railroad Company. It has already acquired the rights of way for that purpose and has the permission of the corporate authorities of East Lumberton for that purpose. The right to cross the track of the intervening line of the defendant is also expressly conferred by the statute and is a well-settled proposition of law. Railroad v. Railroad, 83 N. C. 489; Railroad v. Railroad, 104 N. C. 665, 10 S. E. 659; Lumber Co. v. Hines, 127 N. C. 132, 37 S. E. 152.

As the defendant itself has built tracks for all three of these purposes, it is clear that the plaintiff has exactly the same rights and power under the general law, and being besides expressly conferred under the provisions of its charter above set out. The case of Butler v. Tobacco Co., 152 N. C. 416, 68 S. E. 12, 136 Am. St. Rep. 831, relied upon by the defendant, is in no wise in point. In that case the railroad company had its track in the middle of the street. It sought to lay down another and parallel track in the same street "off its right of way," using for part of the way even the sidewalk. This court held that the property owners could not be deprived of the

use of the street, by an unauthorized license by the town authorities to the railroad to build this side track "off its right of way" in order to facilitate the railroad taking freight from an industrial plant. In this case, there is no attempt to appropriate a public street for the use of a common carrier and for the benefit of an industrial plant to the inconvenience of the public.

[2] The defendant urges that it will be a great inconvenience to it for the plaintiff to condemn a right of way across its track at a point where it has a siding, and thus interfere with the use of that siding for shifting and for placing box cars. The plaintiff replies that the defendant has only recently extended its side track to that point and for the purpose of creating this grievance. However that may be, an examination of the map shows that less than 100 yards east of the point where the plaintiff seeks to cross the defendant's track, the defendant's side track ends and a public road crosses the defendant's track at that point. There is no reason, so far as this evidence shows, why the plaintiff cannot extend its track on the north side of the defendant's track before crossing and condemn a right of way just beyond the end of defendant's side track near the point where the public road now crosses. While the plaintiff has a right, both under its charter and the general law, to condemn a right of way across the defendant's track, this right should be exercised with due regard to the convenience of both parties and with as little interference with the defendant's use of its tracks as can be obtained without a great increase in the cost and in its convenience to the plaintiff. We do not see that a requirement that the plaintiff should cross at the point herein suggested will add at all to the length of the plaintiff's proposed extension of its track nor to the cost thereof. If it should, this matter can be considered by the judge and jury in the assessment of damages for crossing at said point. His honor, in consideration of the case, when it goes back, will adjudge as to the feasibility of the suggested alteration in the route of the proposed extension of plaintiff's tracks, calling in the aid of a jury, if necessary.

We need not consider the numerous other exceptions made in this case, for as his honor held, and the briefs for both parties admit, there is but a single point upon which all other matters depend, and that is the one which we have discussed as to the right conferred by statute upon the plaintiff to extend its tracks for the purposes above named.

The ruling of the court below must be set aside, and the cause will be proceeded in as indicated in this opinion.

Reversed.

HOKE, J., dissents.

(102 N. C. 218)

In re SWAIM'S WILL.

(Supreme Court of North Carolina. May 7, 1913.)

WILLS (§ 97*)—FORM OF INSTRUMENTS—SEPARATE SHEETS.

Two sheets of paper written by the same person at the same time and read to the testator as his will, and bearing intrinsic evidence that they constitute one will, and present at the time of execution, are properly probated as the will of testator.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 232, 233; Dec. Dig. § 97.*]

Appeal from Superior Court, Alexander County; Daniels, Judge.

Proceedings for the probate of the will of M. Swaim, deceased. From a judgment for the propounders, the caveators appeal. Affirmed.

A paper writing purporting to be the last will and testament of M. Swaim was offered for probate before the clerk of the superior court of Alexander county, and a caveat was filed thereto. The paper writing consists of one sheet of four pages of legal cap paper, which pages are in the handwriting of J. L. Gwaltney, Esq., and one sheet of four pages, one page of which sheet was written in the handwriting of said Gwaltney, detached; the two sheets never having been fastened together.

Mr. Gwaltney testified that the paper writing was in his handwriting; that it was signed in his presence, and in the presence of Mr. Carson; they saw the testator sign the paper. The paper writing was signed by Mr. Swaim and Messrs. Gwaltney and Carson on the last sheet on the first page thereof as subscribing witnesses. Mr. Gwaltney folded the paper, put it in an envelope, and, his recollection is, wrote across the envelope, "M. Swaim's Will," and then handed it to Mr. Swaim. The signature of Mr. Swaim is on the second or detached sheet.

W. H. Carson testified that he was register of deeds in 1911 for Alexander county, and his name, as appears upon the sheet of paper, was written by himself in Mr. Gwaltney's office in the presence of Mr. Swaim; he signed the paper in his presence and Mr. Gwaltney's. He signed the only sheet that he has any recollection of seeing; it was on the table. He does not remember there being any other sheet there; it might have been or it might not; does not remember seeing but one sheet, and knows nothing about it except the sheet he signed.

Mr. Gwaltney further testified that both sheets were on the table at the time of the signing by the testator and the witness, and that he read both sheets to Mr. Swaim before he signed his name.

The paper begins:

"I, M. Swaim, of the county and state aforesaid, being of sound mind and disposing memory, knowing the uncertainty of life and

the certainty of death, do make, publish and declare this to be my last will and testament in manner and form following, to wit:"

And the last five lines on the fourth page of the first sheet are:

"Item 7. It is my will that after the bequest to my wife has terminated, that all my solvent credits money and effects of every description (including the tract of land on"—

And the first page of the second sheet is as follows:

"which Finly Kerly now lives, containing 130 acres, more or less, and upon which he has been living since the death of my daughter Mag (after the death of the said Finly Kerly) shall be converted into money and so distributed among my children as to make them share equal in my effects.

"Item 8. I hereby constitute my trusted friend, James Watts, my lawful executor, to execute this my last will and testament, and every section and clause thereof according to the true intent and meaning of the same.

"In witness whereof, I have hereunto set my hand and seal, in the presence of J. L. Gwaltney and W. H. Carson, who, at my request, and in my presence, signed their names as witnesses thereto. This July 1st, 1911. All interlineations and erasures made before signing.

"[Signed] M. Swaim. [Seal]

"Witness:

"J. L. Gwaltney.

"W. H. Carson."

It was admitted that Mr. Swaim was of sound mind, and that there was no undue influence, the caveators resting their case upon the position that as there was no signature of the testator or of the witnesses on the first sheet of paper, and as it was not attached to the second, it was no part of the will.

There was a verdict in favor of the propounders, and the caveators appealed from the judgment rendered thereon.

F. A. Linney, of Boone, J. H. Burke, of Taylorsville, and L. O. Caldwell, of Statesville, for appellants. J. L. Gwaltney, of Taylorsville, and W. A. Self, of Hickory, for appellees.

ALLEN, J. We have carefully considered the earnest and learned argument of counsel for the caveators, and recognize the danger of permitting detached papers to be established as one will, but difficulties of administration cannot justify the refusal to exercise jurisdiction, and we find an unbroken line of authority in England and America in support of the doctrine as contended for by the propounders.

In *Bond v. Seawell*, 3 Bur. 1774, Lord Mansfield said: "If the first sheet was in the room at the time when the latter sheet was executed and attested, there would re-

main no doubt of its being a good will and a good attestation of the whole will"—and in *Wilcott's Appeal*, 15 Pa. 281, 53 Am. Dec. 597, in which the writing offered for probate consisted of different pieces of paper, written at different times, the last of which was signed and witnessed, Chief Justice Gibson said: "It is a rudimental principle that a will may be made on distinct papers, as was held in *Earl of Essex's Case*, cited in *Lee v. Libb*, 1 Show. 69. It is sufficient that they are connected by their internal sense by coherence or adaptation of parts."

In 40 Cyc. p. 1093, the author says: "A will need not be written entirely on one sheet of paper, but may be written on several sheets, provided the sheets are so connected together that they may be identified as parts of the same will. Connection by the meaning and coherence of the subject-matter is sufficient, as physical attachment by mechanical, chemical, or other means is not required, although it is sufficient when made"—and in 30 A. & E. 580: "It is a rudimentary principle that a will may be made on distinct papers. It is sufficient that they are connected by their internal sense, by coherence or adaptation." In the case before us every requirement of the law has been complied with. The evidence of Mr. Gwaltney, whose credibility is not challenged, establishes the fact that the two sheets were written at the same time, that both were read to the testator as his will, and were present at the time of the execution, and the papers themselves bear intrinsic evidence that, while separate, they were tacked together in the mind of the testator. On the first page of the first sheet, the testator says, "I, M. Swaim, do make this my last will and testament." The fourth page of that sheet concludes in the middle of an item of the will and of a description of a tract of land, which is concluded on the first page of the second sheet, and both sheets are in the handwriting of the same person.

We find no error.

No error.

(163 N. C. 224)

PEARSON v. HARRIS CLAY CO.

(Supreme Court of North Carolina. May 7, 1913.)

1. MASTER AND SERVANT (§ 269*)—ACTIONS—ADMISSION OF EVIDENCE.

In an employee's action for injuries by falling across a trestle cross-tie by the breaking of a board on which he was standing, evidence that the board had been fixed shortly after the accident, or a new one put in its place, was admissible to show that plaintiff was injured as claimed, which defendant denied.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. § 912; Dec. Dig. § 269.*]

2. APPEAL AND ERROR (§§ 268, 719*)—ASSIGNMENTS OF ERROR—NECESSITY.

Appellant, in an employee's injury action, cannot claim that there was no evidence of neg-

ligence, or that the injury resulted from unavoidable accident, in absence of an exception and assignment of error raising the question.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 1596-1604, 1606, 2968-2982, 3490; Dec. Dig. §§ 268, 719.*]

Appeal from Superior Court, Mitchell County; Cline, Judge.

Action by George Pearson, by his next friend, Frank Pearson, against the Harris Clay Company. From a judgment for plaintiff, defendant appeals. Affirmed.

The plaintiff was employed by defendant to carry dirt in a dump car for the purpose of assisting in laying a railway. In order to do his work, he was required to go upon a trestle with his car to dump the dirt, and while engaged in doing so he stepped upon a plank, laid upon the ties on the outside of the rail or on the outer edge of the trestle, which gave way with him, and he fell across the tie and was badly ruptured. There was evidence that the plank was defective. The plank was placed there for him and his co-servants to stand on when doing their work. Plaintiff testified that "the plank was cross-grained and split off," letting him down on the cross-ties. There were only two issues submitted to the jury; one as to negligence and the other as to damages. It was not contended that plaintiff had been guilty of any contributory negligence. Verdict and judgment for plaintiff, and defendant appealed.

Chas. E. Greene, of Bakersville, and Hudgins & Watson, of Marion, for appellant. John C. McBee, of Bakersville, and Pless & Winborne, of Marion, for appellee.

WALKER, J. (after stating the facts as above). [1] The defendant contended and introduced evidence to show that plaintiff was not injured in the manner stated by him, but that he had been ruptured before the time of the alleged occurrence. The plaintiff was permitted to testify, over defendant's objection, that when he returned to his work after the injury "the plank had been either pulled back and fixed, or a new one put there." The defendant objected to this evidence, and argued here that it was incompetent as tending to show negligence of defendant, under *Lowe v. Elliott*, 109 N. C. 581, 14 S. E. 51, but the court carefully instructed the jury not to consider it in that view, and it was admitted only to show that plaintiff had been hurt in the way described by him, and for this purpose it was clearly admissible. *Dillon v. Raleigh*, 124 N. C. 184, 32 S. E. 548. The very point is decided in *Tise v. Thomasville*, 151 N. C. 281, 65 S. E. 1007, where plaintiff was permitted to show that a hole into which he had fallen, as he had testified, had been filled up after the occurrence, not to prove negligence, but to contradict defendant's assertion that the

hole was not there at the time of the alleged fall; it having been filled up. Besides, Charles Gilbert, the plaintiff's witness, testified that he had "put the plank back and nailed it," and there was no proof that the defendant had done it, so as to imply an admission of negligence on its part. It was surely competent to prove by Charles Gilbert that he had restored the plank and securely fastened it since the occurrence. It not only corroborated the plaintiff, who testified, in his own behalf, to the fact that the plank had been put back in its place and nailed, but it tended to show that plaintiff was injured in the manner described by him, contrary to the defendant's contention that the place was in such a safe condition that plaintiff could not have fallen upon the cross-tie, as he alleges. The rule laid down in *Lowe v. Elliott* is a sound and wholesome one, and should be strictly enforced; but it was adopted to promote justice, not to defeat it, and there is no room in this case for its application. Defendants in negligence cases will not be permitted to avail themselves of the rule for the purpose of preventing a fair and full disclosure of pertinent facts, not tending to establish negligence.

[2] The only exception of the defendant, upon which an assignment of error is based, is to this evidence. Without any exception and assignment of error, it will not be heard to allege that there was no evidence of negligence, or that the injury to the plaintiff was the result of unavoidable accident. *Jones v. High Point*, 153 N. C. 371, 69 S. E. 253, and cases cited.

We find no error in the ruling to which exception was taken.

No error.

(163 N. C. 141)

MOSER et al. v. CITY OF BURLINGTON.
(Supreme Court of North Carolina. May 7, 1913.)

1. MUNICIPAL CORPORATIONS (§ 736*)—TORTS—LIABILITY.

Though a municipal corporation is not civilly liable to individuals for failure to perform, or neglect in performing, duties of a governmental character unless made so by statute, it cannot create or maintain a nuisance causing damage to the property of a private owner without being liable, since the damage is a taking or appropriation of the property for which compensation must be made.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. § 1552; Dec. Dig. § 736.*]

2. MUNICIPAL CORPORATIONS (§ 827*)—EXERCISE OF GOVERNMENTAL POWERS—LIABILITY.

A municipal corporation, empowered to construct and maintain a sewerage system, may not exercise its power in such a way as to create a private nuisance without making compensation for the injury inflicted or being liable in damages therefor or to equitable restraint

in a proper case, and it is a nuisance to pollute a stream by emptying sewage therein.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. §§ 1772-1776; Dec. Dig. § 827.*]

3. MUNICIPAL CORPORATIONS (§ 845*)—EXERCISE OF GOVERNMENTAL POWERS—LIABILITY.

The damages occasioned by a city so maintaining a sewerage system as to create a private nuisance by polluting a stream are confined to the diminished pecuniary value of the property incident to the wrong, and evidence of specific cases of sickness in plaintiff's family may be considered only as tending to establish the existence of the nuisance.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. §§ 1796-1802; Dec. Dig. § 845.*]

4. MUNICIPAL CORPORATIONS (§ 845*)—EXERCISE OF GOVERNMENTAL POWERS—LIABILITY—INSTRUCTIONS.

Where, in an action against a city for damages for maintaining a nuisance created by its sewerage system contaminating a stream, the evidence was conflicting on the questions of nuisance and damages, but there were facts justifying the inference of the existence of an indictable public nuisance and of negligence in the operation of the sewerage plant, an instruction that a verdict for plaintiff and an award of damages would operate to vest perpetually in the city the right to operate and maintain the system in the manner in which it was operated and maintained was erroneous, as a recovery of permanent damages for the entire injury is allowed only on the theory that the work is carefully conducted and properly carried on, and, where there is a default amounting to actionable negligence, there is a new cause of action, and a recovery for permanent damages will not bar it.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. §§ 1796-1802; Dec. Dig. § 845.*]

Appeal from Superior Court, Alamance County; Frank Carter and H. W. Whedbee, Judges.

Action by A. H. Moser and another against the City of Burlington. From a judgment for plaintiffs, defendant appeals. Reversed, and new trial ordered.

There was allegation with evidence on part of plaintiffs tending to show that they were the owners of a tract of land in said county, situate on Little Alamance creek; that the house occupied by plaintiff for a residence was near the stream; there was also a mill on said creek, operated by water power, and a stone dam had been erected across the stream to enable plaintiff to utilize said power, the house referred to being near the pond, etc.; that about one year before action commenced, to wit, in 1909, defendant had installed a sewerage system for the city of Burlington, and in connection therewith had constructed and was operating a disposal plant with septic tank for treatment of sewage before discharging same into said creek, such plant and outlet into the waters of the stream being situate about one and a half miles above plaintiff's property; that, by reason of the existence of said plant and its methods of operation, a large amount

of filth, excrement, and sewage and other offensive substances were daily discharged into the waters of said stream above the home of plaintiff, and, in time of freshet, same was brought down and much of it lodged upon the lowlands along said stream and upon lands of plaintiff, causing most offensive smells, odors, etc., thereby creating a nuisance which rendered home of plaintiff most uncomfortable, threatening the health of his family, and causing great and permanent damage, etc., to the property. A recovery for such permanent damage was sought in the action. The defendant, admitting the erection and operation of the sewerage plant and their intention to continue the same, averred and offered evidence tending to show that the plant in question was a modern and up-to-date plant, entirely adequate for the purpose; that it was properly operated; and that no nuisance had been created by defendants and no appreciable damage done to plaintiff's property.

On issues submitted, the jury rendered the following verdict:

"What permanent damages are plaintiffs entitled to recover of defendant on account of the construction and operation of its said sewerage system and disposal plant? Answer: \$3,000."

Judgment on verdict for plaintiffs, and defendant excepted and appealed.

E. S. W. Dameron and W. H. Carroll, both of Burlington, and Parker & Parker, of Graham, for appellant. Long & Long, of Graham, and A. L. Brooks, of Greensboro, for appellees.

HOKE, J. [1] While the general rule prevails in this state "that, unless a right of action is conferred by statute, a municipal corporation may not be held civilly liable to individuals for failure to perform or neglect in performing duties of a governmental character," it is also well recognized that neither a corporation or other governmental agency is allowed to create or maintain a nuisance causing appreciable damage to the property of a private owner, without being liable for it. As we have recently said in the case of *Hines v. Rocky Mount*, 78 S. E. 510: "To the extent of the damage done to such property, it is regarded and dealt with as a taking or appropriation of the property, and it is well understood that such an interference with the rights of ownership may not be made or authorized except on compensation first made pursuant to the law of the land." This limitation on the more general principle was declared and upheld in a well-considered opinion by Associate Justice Manning in *Little v. Lenoir*, 151 N. C. 415, 66 S. E. 337, and the position is in accord with right reason and the great weight of authority. *Hines v. Rocky Mount*, supra, and cases cited; 3 *Abbott on Municipal Corporations*, § 961; 1 *Lewis, Eminent Domain* (3d Ed.) § 65; *Dil-*

lon on Municipal Corporations, § 1047; *Wood on Nuisances*, § 427; *Joyce on Nuisances*, § 284.

[2] Quoting from *Joyce*, an excerpt approved by the learned judge in *Little v. Lenoir*, the author says: "Though a municipality or other body has power to construct and maintain a system of sewers, and although the work is one of great public benefit and necessity, nevertheless such public body is not justified in exercising its power in such a manner as to create, by a disposal of its sewage, a private nuisance without making compensation for the injury inflicted or being responsible in damages therefor, or liable to equitable restraint in a proper case; nor can these public bodies exercise their powers in such a manner as to create a public nuisance, for the grant presumes a lawful exercise of the power conferred, and the authority to create a nuisance will not be inferred. It therefore constitutes a nuisance to pollute and contaminate a stream by emptying sewage of a city therein, rendering it unwholesome, impure, and unfit for use."

[3] On the question of defendant's liability, the cause has been properly tried in the light of these principles, and, on the question of damages, his honor correctly applied the rule, as it obtains with us, that the damages are confined to the diminished pecuniary value of the property incident to the wrong (*Metz v. City of Asheville*, 150 N. C. 748, 64 S. E. 881, 22 L. R. A. [N. S.] 940; *Williams v. Greenville*, 130 N. C. 93, 40 S. E. 977, 57 L. R. A. 207, 89 Am. St. Rep. 860); the evidence as to specific cases of sickness in plaintiff's family having been admitted and its consideration allowed only as it tended to establish the existence of the nuisance and the amount of damage done to the property.

[4] While the cause, however, has been in the main carefully and correctly tried, we think there must be a new hearing on the issues by reason of the portion of his honor's charge, duly excepted to, as follows: "No matter what the result of this case, the city would not acquire any right to discharge raw or untreated sewage into the stream; but, if the plaintiffs should prevail in this action and have an award of damages, that would operate to vest perpetually in the city of Burlington the right to operate and maintain this sewerage system and disposal plant, in the way and manner in which it is now operated and maintained."

Although the testimony on the part of plaintiffs and defendant is in direct conflict both as to the nuisance and the damage, there are facts in evidence from which the existence of an indictable public nuisance and of negligent methods in the operation of the plant could well be inferred. From the general language of this charge, the jury might very well have concluded that the force and effect of a verdict for plaintiffs would establish and justify the continuance

of both conditions, and that their award of damages should be estimated in view of this result. The right of a plaintiff to recover permanent damages for the entire injury in certain cases is well recognized here. *Harp-er v. Lenoir*, 152 N. C. 728, 68 S. E. 228; *Parker v. Railroad*, 119 N. C. 677, 25 S. E. 722; *Ridley v. Railroad*, 118 N. C. 996, 24 S. E. 730, 32 L. R. A. 708. But, when a work of this character is justified and to be continued by reason of a recovery of permanent damages incident to its erection and main-tenance, the principle is allowed to prevail on the theory that such a work is carefully conducted and properly carried on, and if there is default in this respect, amounting to actionable negligence, this would give rise to a new cause of action and the recovery for permanent damages would not be effective as a protection. *Duval v. Railroad*, 77 S. E. 311 (present term). And, in view of all the facts in evidence, we think the portion of the charge referring to the verdict was not suffi-ciently restrictive as to its effect on the right of plaintiffs as individual litigants, and that the minds of the jury were allowed too wide a range in their estimate of the amount of damages, and to such an extent that the charge should be held for reversible error. We are confirmed in this view by the very great difference, as shown in the record, be-tween the amount allowed in the present ver-dict and the award of a former jury on the same issue and substantially the same state of facts, giving indication that the directions excepted to very likely had controlling effect to defendant's prejudice.

We are of opinion that defendant is en-titled to a new trial of the cause, and it is so ordered.

New trial.

WALKER and ALLEN, JJ., concur in re-sult.

(162 N. C. 133)

KIGER v. LIIPFERT SCALES CO.

(Supreme Court of North Carolina. May 7, 1913.)

1. MASTER AND SERVANT (§§ 101, 102*)—INJURIES TO SERVANT—SAFE PLACE AND APPLIANCES.

A master is bound, in the exercise of rea-sonable care, to provide a safe place for his employés to work and safe appliances with which to do the work, and, if the machinery and appliances are more or less complicated, employers are bound to supply such as are known and approved and in general use.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. §§ 135, 171, 174, 178-184, 192; Dec. Dig. §§ 101, 102.*]

2. MASTER AND SERVANT (§§ 125, 129*)—INJURIES TO SERVANT—OBLIGATION OF MASTER.

A master is not an insurer of the safety of his employés, but is only bound to exercise that degree of care that a man of ordinary prudence, charged with a similar duty, would exercise under like conditions, and if proper machinery and implements have been provided,

and a defect occurs or exists which results in injury to an employé, he cannot recover in the absence of proof that the defect was the proximate cause of the injury and that the employ-er had actual or constructive notice of its ex-istence.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. §§ 243-251, 257-263; Dec. Dig. §§ 125, 129.*]

3. MASTER AND SERVANT (§ 293*)—INJURIES TO SERVANT—INSTRUCTIONS.

Where there was evidence, in an action for injuries to an employé by the alleged involunta-ry operation of a machine, from which the jury could have found that such operation was caused by a defect of which defendant did not know and had no reasonable opportunity to learn, it was error to charge that the proposition for the jury was whether the machine was out of or-der on account of its being in improper condi-tion and whether plaintiff, while attempting to use it, was injured on account thereof, as such instruction might have misled the jury to be-lieve that responsibility would attach if the machine was defective without more.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. §§ 1148-1156, 1158-1160; Dec. Dig. § 293.*]

4. NEGLIGENCE (§ 121*)—RES IPSA LOQUITUR—EFFECT.

The doctrine *res ipsa loquitur* is only ef-fective to carry the case to the jury on the is-sue of negligence, and does not relieve the court of the duty to charge the jury on the consti-tuent features of the law of negligence, as ap-plied to the facts in evidence.

[Ed. Note.—For other cases, see *Negligence*, Cent. Dig. §§ 217-220, 224-228, 271; Dec. Dig. § 121.*]

Appeal from Superior Court, Forsyth County; Allen, Judge.

Action by Geoule Kiger against the Lip-pert Scales Company to recover damages for personal injuries. Judgment for plaintiff, and defendant appeals. Reversed and re-manded.

Manly, Hendren & Womble and Watson, Buxton & Watson, all of Winston-Salem, for appellant. Benbow & Hall and Jones & Patterson, all of Winston-Salem, for ap-pellee.

HOKE, J. There was evidence to show that on the 25th of April, 1910, plaintiff, an employé of defendant company, had his hand severely and permanently injured while engaged in operating an Adams Duplex Lump Machine. Without going into a minute de-scription, this is a machine used in the pro-cess of manufacturing plug tobacco, by which the tobacco is made into lumps preparatory for its subsequent pressure into the plugs. It weighs about 2,300 pounds, is 4 feet, 6 inches high in all, has a base of 22x36 inches and 33 inches from the floor, has a surface like a table 22x42 inches. On this surface are two cells or hoppers into which the tobacco is put by hand, and there are also about two drop blocks or plungers, which are raised and lowered alternately as the power is applied, fitting into the hoppers or cells and supplying the pressure required to make the tobacco into lumps; one block being down

when the other is raised, etc. The power is applied by a contrivance beneath the table and is controlled by a lever having a handle affixed to the side of the machine, and, when the machine is in proper condition, the power will only operate and the position of the block change when the operator lifts the lever four inches and pulls it two; unless this is done the machine does not "repeat" but holds its position and no injury could result. The evidence of plaintiff tended to show that on the day of the injury, and soon after he commenced working the machine, it had an uncertain movement and the blocks would change position without moving the lever. That he called the attention of the boss or foreman to this and was told that the machine was all right, to go back to work. That he went back and, in the attempt to operate the machine further and by reason of such an eccentric movement, his hand was caught and crushed by one of the blocks and held until the bolts could be removed. The evidence of defendant tended to show that the machine was a proper one for the work and was in perfect condition. That it worked true both before and after the injury, and that from its construction, and in the condition it was then shown to be, the power could not be applied nor the position of the blocks changed except by moving the lever in the regular way. That plaintiff had made no complaint whatever of any eccentric or irregular movement of the machine, and that he was injured while engaged in conversation with a girl at the time and not properly attentive to the work or the position of his hands.

On this evidence chiefly relevant to the question presented, the court charged the jury as follows: "That if you find by the greater weight of the evidence, the burden being upon the plaintiff to establish that (the defendant put the plaintiff to work on a machine which was out of order, and by reason of its being out of order, and by reason of the failure of the defendant to provide him with a machine in proper condition, the plaintiff was injured in the manner contended for by him, then the plaintiff was injured by the negligence of the defendant in putting him to work at a machine that was out of order). If the plaintiff fails to satisfy the jury by the greater weight of the evidence that he was injured on account of a failure of the defendant to provide him with a machine in proper condition for the work which he was placed there to do, then the jury should answer the first issue, 'No'; I say, if he fails to satisfy the jury by the greater weight of the evidence. It is a clear proposition for you to determine according to the weight of the evidence. Was that machinery out of order, and, on account of its being in improper condition, was the plaintiff, while attempting to take out a plug of tobacco, injured on account of the

dropping of the weight when it ought not to have dropped, and its dropping on account of defect about the machine?"

[1] It has been repeatedly held in this state that, in the exercise of reasonable care, employers of labor are required to provide for their employes a safe place to do their work and appliances safe and suitable to do the work in which they are engaged. And as a feature of this obligation in the operation of mills and other plants, where the machinery is more or less complicated, such employers are held to the duty of supplying machinery and implements which are known, approved, and in general use. *Hicks v. Manufacturing Co.*, 138 N. C. 325, 50 S. E. 703; *Marks v. Cotton Mills*, 135 N. C. 287, 47 S. E. 432; *Lloyd v. Hanes*, 126 N. C. 359, 35 S. E. 611; *Witsell v. Railroad*, 120 N. C. 557, 27 S. E. 125.

[2] In the application of the more general principle, it is also well established here and elsewhere that an employer is not an insurer of the employes' safety. In the discharge of the duty, he is held only to that degree of care that a man of ordinary prudence should exercise under like conditions and charged with a similar duty; and if, when proper machinery and implements have been provided, a defect occurs or exists which results in injury to an employe, it is necessary to show, in order to fix liability, that the defect was a proximate cause of the injury and that the employer had actual or constructive notice of its existence. *Mincey v. Railroad* (present term) 77 S. E. 673; *Pritchett v. Railroad*, 157 N. C. 88, 72 S. E. 828; *Blevins v. Cotton Mills*, 150 N. C. 493, 64 S. E. 428; *Nelson v. Tobacco Co.*, 144 N. C. 418, 57 S. E. 127; *Carnegie Steel Co. v. Byers*, 149 Fed. 667, 82 C. C. A. 115, 8 L. R. A. (N. S.) 677. In *Mincey's Case*, Associate Justice Walker for the court said: "The duty of the master to provide reasonably safe tools, machinery, and place to work does not go to the extent of a guaranty of safety to the employe, but does require that reasonable care and caution be taken to secure such safety." In *Pritchett's Case*, Associate Justice Allen thus correctly states the principle: "The burden was on the plaintiff to prove that the place where he was at work was unsafe, and that the defendant knew it to be so, or that it could have discovered it in the exercise of ordinary care." And in *Blevins v. Cotton Mills* and *Nelson v. Tobacco Co.*, supra, it was held: "In an action for damages sustained by an employe, alleged to have been caused by a defect in a machine at which he was at work in the course of his employment, it is necessary for him to show that his injury was caused by the defect, and that the employer had actual notice thereof, or constructive notice, implied by failure to exercise reasonable inspection or care, or from the length of time the defective condition had previously existed."

[3] In the charge of his honor in the first issue, and on the facts in evidence, we do not think there has been a correct application of the principle. Both in the direct charge and in the closing explanation the impression may very well have been made on the mind of the jury that responsibility would attach if the machine was defective without more. Thus after saying that if injury occurred by reason of a failure to provide plaintiff with a machine in proper condition, the court proceeds: "It is a clear proposition for you to determine according to the weight of the evidence. Was that machinery out of order, and on account of its being in improper condition was the plaintiff, while attempting to take out a plug of tobacco, injured on account of the dropping of the weight when it ought not to have dropped, and its dropping on account of defect about the machine?" True, the plaintiff testified that he notified the foreman of this defect, but this was expressly denied by defendant's witnesses; there was testimony also that both before and after the occurrence the machine was found to be in good shape and worked properly, and, if there was a defect causing the injury, there were facts in evidence from which it could be a permissible inference that the irregular or eccentric movement was from a defect of which the employer did not know and had no reasonable opportunity to learn.

[4] We are not inadvertent to the doctrine of *res ipsa loquitur*, which may have been present in this case, and which seems to have been properly stated by his honor; but, "if the facts in evidence call for its application, its effect is only to carry the case to the jury on the issue" (*Ross v. Cotton Mills*, 140 N. C. 115, 52 S. E. 121, 1 L. R. A. [N. S.] 298), and does not relieve of the requirement that, in charging the jury on the issue, the constituent features of the law of negligence, as applicable to the facts in evidence, should be correctly given.

We are of opinion that the defendant is entitled to have his cause tried before another jury, and it is so ordered.

New trial.

(162 N. C. 217)

MABRY v. BROWN.

(Supreme Court of North Carolina. May 7, 1913.)

1. WILLS (§ 693*)—CONSTRUCTION—POWER TO CONVEY.

A devise to testator's wife of all his property remaining after the payment of his debts and funeral expenses, with power of disposing of the same as the wife may deem best, followed by a direction that all property undisposed of by the wife at her death shall be equally divided among his children, gives to the wife a power to appoint absolutely the fee, and the exercise of the power by a sale vests in the pur-

chaser the fee subject to the payment of the debts.

[Ed. Note.—For other cases, see *Wills*, Cent. Dig. §§ 1655-1661; Dec. Dig. § 693.*]

2. WILLS (§ 693*)—CONSTRUCTION—POWER TO CONVEY.

Where testator directed his executors to pay his debts and funeral expenses, and gave all his property to his wife with power to dispose of the same as she might deem best, and authorized his executors to sell any part of the estate to carry out the purposes of the will, the executors need not join the wife in a conveyance by her; the clause conferring power on the executors being limited to conveyances necessary to pay debts and funeral expenses.

[Ed. Note.—For other cases, see *Wills*, Cent. Dig. §§ 1655-1661; Dec. Dig. § 693.*]

3. WILLS (§ 827*)—CONSTRUCTION—LIABILITY FOR DEBTS.

Every testamentary gift is subject to the payment of testator's debts.

[Ed. Note.—For other cases, see *Wills*, Cent. Dig. §§ 2139, 2140; Dec. Dig. § 827.*]

Appeal from Superior Court, Cabarrus County; Webb, Judge.

Action by J. F. Mabry against Missouri F. Brown. From a judgment for defendant, plaintiff appeals. Affirmed.

This is a controversy without action, submitted by the parties upon an agreed state of facts, as follows: R. A. Brown died in the year 1907, leaving a will with these provisions:

"1. My executors, hereinafter named, shall give my body a decent burial, suitable to the wishes of my friends and relatives, and pay all funeral expenses, together with all my just debts, out of the first moneys which may come into their hands belonging to my estate.

"2. I give, devise and bequeath to my beloved wife, Missouri, all of my property of every description and kind, both real and personal, with the power of disposing same as she may deem best.

"3. I hereby direct that all of my property, both real and personal, undisposed of by my beloved wife at her death, be divided equally among my children, share and share alike.

"4. I hereby authorize and empower my executors, hereinafter named, to sell or otherwise dispose of any part of my estate to carry out the intents and purposes of this my last will and testament, and make a good and sufficient conveyance for same.

"5. I hereby constitute and appoint my beloved wife, Missouri, and my two sons, Lewis A. and J. Leonard Brown, my lawful executors, to all intents and purposes, to execute this my last will and testament, according to the true intent and meaning of the same, and every part and clause thereof, hereby revoking and declaring utterly void all other wills and testaments by me heretofore made."

Defendant sold a part of the land so devised to her to the plaintiff, and tendered a deed duly executed by herself individually

and in her capacity as executrix, and by Lewis A. and J. Leonard Brown as executors of the will. The plaintiff declined to accept this deed, alleging that it was imperfect and insufficient to convey a good title, as the deed was not signed or executed by the children of R. A. Brown, as individuals, who, it is asserted by the plaintiff, took in remainder under the will, and therefore their joinder in the deed, as parties thereto, is necessary to pass the title. The court held that this was not the case, but that Missouri F. Brown took such an estate under the will that she could by her own deed convey a good and indefeasible title in the lot which she had sold to the plaintiff. Judgment was entered accordingly, and plaintiff appealed.

L. T. Hartsell, of Concord, for appellant.
Morrison H. Caldwell, of Concord, for appellee.

WALKER, J. (after stating the facts as above). It is provided by statute that, when there is a devise of real estate to any person, the same shall be construed to be in fee simple, unless the devise shall in plain and express words show, or it shall plainly appear by the will or some part thereof, that the testator intended to pass an estate of less dignity. Revisal, § 3138; *Whitfield v. Garris*, 134 N. C. 27, 45 S. E. 904. It was argued by her counsel from this provision that defendant acquired a fee simple absolute by the terms of the will, and that the limitation over to the testator's children, being repugnant to the estate so devised, is void. This court has stated that the purpose of that statutory provision is to establish a rule as between the heir and the devisee in respect to the beneficial interest of the latter. *Alexander v. Cunningham*, 27 N. C. 430.

[1] But we can decide the case without giving any opinion upon this important question; for, whether a fee simple absolute passed to the defendant or not, it is undoubtedly true that plaintiff acquired a good title by the exercise of the express and unlimited power of disposition and control. It seems to us that the very question now presented to us for decision was before the court in *Roberts v. Lewis*, 153 U. S. 367, 14 Sup. Ct. 945, 38 L. Ed. 747. In that case the devise was to the testator's wife of all his estate, real and personal, with power to dispose of the same as to her shall seem most meet and proper, so long as she remained his widow, but upon the express condition that, if she married again, all of the estate devised and bequeathed to her, or whatever remained, should go to his surviving children. The court held, following and approving a decision of the state court in a similar case (*Little v. Giles*, 25 Neb. 321, 41 N. W. 192): "That the intention of the testator was to empower his widow to convey all of his real

and personal estate, if she saw fit to do so, and, as she had exercised this right and power before her remarriage, the grantee under her deeds acquired all the title of the testator to such lands." The court further said: "It is unnecessary to express a positive opinion upon the question whether under this will the widow took an estate in fee; for, if she took a less estate with power to convey in fee, the result of the case, and the answers to the questions certified, must be the same as if she took an estate in fee herself." The two cases are sufficiently alike in their facts for the application of the same principle to both. If the widow in this case did not acquire a fee simple absolute by the devise, she at least got a fee simple, which was defeasible only by her failure to exercise the power, and, having exercised the power by selling and conveying to the plaintiff, the limitation over was thereby defeated, and of no effect, as to the lot conveyed. The subject is fully discussed and with great clearness in 30 Am. & Eng. Enc. of Law (2d Ed.) pp. 736-739, and in the notes a vast array of cases will be found. It is there said that, where the quantity of the estate is devised definitely and specifically, the rule that a devise coupled with an unlimited power of disposition and control carried an absolute interest in the property has no application, and only a life estate coupled with a power of disposal passes. This power, it has been adjudged, is only co-extensive with the estate which the devisee takes under the will. It is clear, however, that by appropriate expressions of intent the power will not refer merely to the life interest of the first taker, but will give him a life estate coupled with a power to dispose of the entire estate absolutely.

In *Troy v. Troy*, 60 N. C. 624, where it appeared that property was devised to testator's wife for life, with remainder to his son, coupled with an express power to sell all or any part of the property in the exercise of her judgment, the terms of the will showing a clear intention on the part of the testator to confer upon the wife a general power of disposition, this court held that it was a power appurtenant to the life estate, and the estate created by its exercise took effect out of the life estate as well as out of the remainder, which was legally equivalent to saying that the exercise of the power by the widow defeated the remainder, and passed the absolute fee to the purchaser from her. If such is the law with regard to an estate for life, the same result must follow where there is no restriction as to quantity of the wife's estate, but she takes an estate of indefinite duration, whether it be the beneficial interest absolutely in fee or not, which we do not decide. The case of *Troy v. Troy* was cited with approval in *Parks v. Robinson*, 138 N. C. 269, 50 S. E. 649, and *Herring v. Williams*, 158 N. C. 1, 73 S. E. 218. In the latter case

this court, by Justice Brown, said that where "there is a devise for life with language which expressly gives the devisee a general power to dispose of both real and personal property," or where "the devise is not limited to a life estate, but the property is devised absolutely, with a provision that what remains at the death of the devisee shall go to certain designated persons," the exercise of the power, express or implied, will defeat the remainder, and vest the fee in the appointee under the power or purchaser, citing *Troy v. Troy*, supra. The cases of *Wright v. Westbrook*, 121 N. C. 155, 28 S. E. 298, *Stroud v. Morrow*, 52 N. C. 463, *Little v. Bennett*, 58 N. C. 156, *Gifford v. Choate*, 100 Mass. 343, and *Barford v. Street*, 16 Vesey, 134, are strong authorities for the position that the exercise by Mrs. Brown of the power conferred upon her by the will defeats the limitation over to the children and passes the fee to the purchaser. In the first case cited the suit was for the specific performance of a contract to convey, and involved the ability of W. A. Wright and his wife, the vendors, to convey a good title to Westbrook, the vendee, the same question we have here. But our case is stronger than those in favor of the defendant, for in some, if not all, of those cases a life estate only was devised to the donee of the power. The question in this case is fully considered in the recent case of *Chewning v. Mason*, 158 N. C. 578, 74 S. E. 357, 39 L. R. A. (N. S.) 805. See, also, *Patrick v. Morehead*, 85 N. C. 62, 39 Am. Rep. 684. The devise in *Barford v. Street*, supra, was in trust for a married woman during her life, and after her decease to convey (and so forth) according to her appointment, with a limitation over, in case of her death in the lifetime of the testator, or in default of appointment by her. With reference to these facts the Master of the Rolls (Sir Wm. Grant) said: "What do you contend to be the nature and extent of her interest? An estate for life, with an unqualified power of appointing the inheritance, comprehends everything. What induced me at first to doubt was the indication of an intention in the codicil that the estate should remain in the trustee for the life of the plaintiff, with powers to her, inconsistent in a great degree with the supposition of her having, or being able to acquire, the absolute interest. But I do not think I can by inference from thence control the clear and express words by which the power is given to the devisee to dispose of this estate in her lifetime by any deed or deeds, writing or writings, or by her last will and testament. How can the court say that it is only by will that she can appoint? By her interest she can convey her life estate. By this unlimited power she can appoint the inheritance. The whole equitable fee is thus subject to her present disposition. The consequence is that the trustee

must convey the legal fee according to the prayer of the bill." It will be observed that the case goes beyond what is necessary for us to decide, but it clearly and conclusively determines the question now raised in favor of the sufficiency of defendant's deed to pass the fee absolutely. The case of *Smith v. Bell*, 6 Pet. (U. S.) 63, 8 L. Ed. 322, has no bearing upon the point, and, besides, it has been criticised and doubted in more recent cases. *Gifford v. Choate*, supra; *Parks v. Robinson*, supra.

But, looking at this will with the view of ascertaining the intention of the testator therefrom, it appears to us very clearly that his wife was the chief object of his bounty. He evidently reposed the greatest trust and confidence in her, and believed that she would carry out his wishes with respect to their children, and would be influenced by the same motives as he would have been if living. He therefore gave her unlimited power and control of his estate, subject to the payment of his debts and funeral expenses. We cannot conceive of any more appropriate words to express the idea of an unrestricted power of disposition than those he used in his will. It was certainly intended that she should have a beneficial interest, and with reference to a power of appointment, where such an interest is given, Chief Justice Pearson said in *Troy v. Troy*, supra: "A power of this description is construed more favorably than a naked power given to a stranger, or a power appendant, because, as its exercise will be in derogation of the estate of the person to whom it is given, it is less apt to be resorted to injudiciously than one given to a stranger, or one which does not affect the estate of the person to whom it is given." Upon a consideration of the whole will, we conclude that Mrs. Brown, if she did not acquire an absolute estate in fee, was given a power to appoint absolutely in fee, and the exercise of the power will vest in the purchaser such an estate. *Troy v. Troy*, supra; *Alexander v. Cunningham*, supra. What will be the result if Mrs. Brown dies without having fully exercised the power as to all of the property we need not say, as that question is not before us. Nor can we undertake to decide matters relating to the title of other persons who have bought from her, as they are not parties to this suit, and will not be bound by our decision.

[2] Before taking leave of the case, we may remark, with propriety, that it is not necessary for the executors to join in the deed. The will does not provide that they shall unite with Mrs. Brown in making any sale of the land or in exercising the power. The fourth clause evidently refers to the first, as it is the duty of the executors to pay the debts and funeral expenses, and, if necessary, to sell the property or so much thereof as may be required for that purpose.

McDowell v. White, 68 N. C. 65. We have said that Mrs. Brown's power of disposition under the will is subject to the payment of the debts of the testator, so that the purchasers from her will, of course, take subject to the incumbrance.

[3] If they would have a clear title, they must be sure that the debts and other liabilities are paid, for a man is required to be just before he is generous, and his gifts, by will or otherwise, are made subject to the payment of his debts, and in this case he has expressly directed that they must first be paid.

Affirmed.

(94 S. C. 406)

CLEVELAND & WILLIAMS v. BUTLER.
(Supreme Court of South Carolina. April 30, 1913.)

1. CONTRACTS (§ 346*)—RECOVERY ON QUANTUM MERUIT—CONFORMITY TO PLEADING.

A suit on an express contract does not admit of recovery on a quantum meruit.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. §§ 1714, 1718-1751; Dec. Dig. § 346.*]

2. WORK AND LABOR (§ 22*)—COMMISSIONS OF BROKER—PLEADINGS.

A complaint in an action by brokers for commissions for affecting an exchange of real estate which alleges an agreement by defendant to pay \$500 for the services by the broker, and that defendant aided by the broker exchanged real estate, and as a reward for his services the broker became entitled to the commission of \$500, and that the services rendered are reasonably worth such sum, states a cause of action on a quantum meruit after disregarding allegations as to the agreement to pay a specified commission, and authorizes a recovery on a quantum meruit.

[Ed. Note.—For other cases, see Work and Labor, Cent. Dig. § 41; Dec. Dig. § 22.*]

3. PLEADING (§ 406*)—RULINGS ON PLEADINGS—OBJECTIONS—WAIVER.

Defendant, who proceeded without objection with the trial of issues raised by a complaint stating a cause of action on quantum meruit after striking out a cause of action on an express contract, thereby waived the objection that the complaint stated a cause of action on an express contract, so that there could be no recovery on a quantum meruit.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 1355-1359, 1361-1365, 1367-1374, 1386; Dec. Dig. § 406.*]

4. BROKERS (§ 53*)—COMMISSIONS—WHEN EARNED.

A broker employed to procure an exchange of real estate is entitled to his commission where he is the efficient or procuring cause of the exchange, though the actual agreement therefore is made without his aid by the owner, and a broker is deemed the procuring cause where his intervention is the foundation on which the negotiations resulting in an exchange are begun.

[Ed. Note.—For other cases, see Brokers, Cent. Dig. § 74; Dec. Dig. § 53.*]

Appeal from Common Pleas Circuit Court of Greenville County; R. W. Memminger, Judge.

"To be officially reported."

Action by Cleveland & Williams against P. S. Butler. From a judgment for plaintiff, defendant appeals. Affirmed.

McCullough, Martin & Blythe, of Greenville, for appellant. J. R. Martin, of Greenville, for respondent.

WOODS, J. The plaintiffs, real estate brokers, recovered a judgment against the defendant for services performed in effecting for him an exchange of certain lots in the suburbs of the city of Greenville known as "Donwood" for a peach farm in Georgia. There are a number of exceptions, but the appeal turns on two positions taken by defendant's counsel: First, that the complaint states a cause of action on an express contract exclusively, and that the plaintiff having, in the course of the trial, announced his abandonment of that cause of action, he could not recover on a quantum meruit; second, that there was no testimony supporting any cause of action either on an express contract or a quantum meruit.

[1, 2] The general rule is well established that a suit on an express contract does not admit of recovery on a quantum meruit. *King v. Western Union Telegraph Company*, 84 S. C. 73, 65 S. E. 944. But the rule is not applicable to this case. After alleging the agreement by defendant to pay \$500 for the services, and the performance of the services by the plaintiff, the complaint concluded: "Defendant P. S. Butler, assisted and aided by plaintiff as aforesaid, exchanged the above-named 'Donwood' property with the said parties for the Georgia lands and plaintiff in compliance with said contract and as a reward for its services became entitled to its commission of five hundred (\$500) dollars. That demand has been made upon the defendant herein for the five hundred (\$500) dollars for its services rendered as aforesaid, but the defendant has refused, and still refuses, to pay said \$500 or any amount thereof, and the same is justly due and owing to plaintiff, the services rendered being reasonably worth the commission agreed upon and claimed."

The circumstances of the abandonment of the cause of action on the express contract is shown by the following extract from the record:

"Q. How long had you worked on this deal? (Objected to by Mr. Blythe: This is a suit upon a specific contract, alleging that the contract was to do a certain thing for a certain amount of money, and the question is has the contract been complied with.)

"Court: That wouldn't be relevant on the contract. You have to stand or fall by one or the other. If you want to stand on the contract, you can't introduce testimony as to the value of the work. If you abandon the contract, then you can introduce that testimony. We had the same case up at

Walhalla last week about trying to get in on both grounds.

"By Mr. Martin: May it please the court, we will stand on the quantum meruit proceeding and abandon the contract. If it is the ruling of the court, we will sue on the quantum meruit. Q. You can state that now?

"By Mr. Blythe: I want to add another objection on the ground that there is no evidence that Mr. Williams has ever rendered a service in the sale or exchange of the property.

"The Court: That is for the jury to determine, I should think.

"A. Well, I started working the 1st of November, and the deal was closed up along towards the 20th of December."

Examination of the complaint will show that, if all the allegations as to the agreement of the defendant to pay a commission of \$500 be struck out, it would contain a perfectly good statement of a cause of action on the quantum meruit. Construing the complaint liberally, as we must, it thus appears that when the plaintiff abandoned and thus, in effect, struck out all the allegations as to the express contract, he still had before the court a complaint stating a cause of action for the reasonable value of his services to the defendant.

[3] But if we leave this reasoning out of view, and look at the matter from another standpoint, the unsoundness of appellant's position will be apparent. When plaintiff's counsel announced the abandonment of the cause of action on an express contract, the defendant's counsel should have moved to dismiss the complaint, as having left in it no cause of action. Instead of doing that, counsel made no objection to the trial of the issue of quantum meruit, and no objection to the testimony offered on that issue, until he moved for a nonsuit at the close of plaintiff's testimony. That issue was tendered him in open court, and he accepted it by his failure to object and by his acquiescent participation in the trial of that issue. This course indicated a waiver of the objection that the complaint stated no cause of action on the quantum meruit.

The first position cannot be sustained, therefore, for two reasons: First, because, after the allegations of the complaint as to the express contract had been struck out by the abandonment of that cause of action without objection, there was left in the complaint a good statement of a cause of action on the quantum meruit; and, second, because, even if this had not been so, the defendant waived the point by proceeding with the trial of the issue of the quantum meruit without objection.

[4] As to the second point, no analysis is necessary to show that there was evidence tending to establish the right of the plaintiff

to recover under the settled rule thus stated by the court in *Goldsmith v. Coxe*, 80 S. C. 341, 61 S. E. 555: "But the rule of reason, which seems to be supported by practically all the authorities on the subject, is that the broker is entitled to his commissions, if during the continuance of his agency he is the efficient or procuring cause of the sale, though the actual agreement for the sale is made by the owner without the aid of the broker; and the broker will be regarded the procuring cause if his intervention is the foundation upon which the negotiations resulting in the sale is begun."

Affirmed.

GARY, C. J., and HYDRICK, WATTS, and FRASER, JJ., concur.

(114 S. C. 107)

JAMES v. GRAHAM et al. (two cases).

(Supreme Court of South Carolina. April 25, 1913.)

1. SHERIFFS AND CONSTABLES (§ 98*)—WRIT OF ASSISTANCE—EXECUTION.

A writ of assistance will not justify an officer in putting out of possession a person who was neither a party to the suit nor named in the writ.

[Ed. Note.—For other cases, see *Sheriffs and Constables*, Cent. Dig. §§ 143-157; Dec. Dig. § 98.*]

2. SHERIFFS AND CONSTABLES (§ 97*)—ABUSE—LIABILITY OF OFFICER.

An officer who abuses the process under which he assumes to act by committing an act not warranted thereby ceases to act under and by virtue of the process, and becomes a trespasser ab initio and liable as such.

[Ed. Note.—For other cases, see *Sheriffs and Constables*, Cent. Dig. §§ 137-141; Dec. Dig. § 97.*]

3. SHERIFFS AND CONSTABLES (§ 113*)—ABUSE—LIABILITY OF OFFICER.

It was the duty of the sheriff in executing a writ of assistance in an action to foreclose a mortgage given by a tenant in common to place the purchaser in possession of every part of the land jointly with the other tenants, but he could not remove the other tenants holding under a title independent of the mortgagor, and, where he did so, he was liable as a trespasser.

[Ed. Note.—For other cases, see *Sheriffs and Constables*, Cent. Dig. §§ 186-191; Dec. Dig. § 113.*]

4. PROCESS (§ 171*)—ACTIONS FOR ABUSE OF PROCESS—INSTRUCTIONS.

In an action for ejecting tenants in common from land under a writ of assistance in an action to foreclose a mortgage given by another of the tenants, instructions that if a trespass was committed in the name of another or professedly in his interest, and he subsequently ratified it by claiming a benefit thereunder, he would be bound by the act to the same extent as if he had expressly authorized it, and that if an officer, in executing a writ of assistance, wrongfully seized the property of a stranger to the writ, and the person at whose instance it was issued after knowledge of the facts did not disavow the act, but permitted the property seized to remain under seizure for his benefit, he was liable as a cotrespasser with the officer, were not erroneous as misleading the jury to

believe that the purchaser was liable as a trespasser, even if the sheriff followed the direction of the writ, and merely placed him in possession jointly with the other tenants.

[Ed. Note.—For other cases, see Process, Cent. Dig. § 259; Dec. Dig. § 171.*]

5. PROCESS (§ 170*)—ABUSE OF PROCESS—PERSONS LIABLE.

The purchaser at a foreclosure sale was liable jointly with the sheriff for the wrongful ejection of the mortgagor's cotenants under a writ of assistance where he was present, claimed and received the exclusive possession of the whole property as if he were the sole owner thereof, his acts showing that he was acting in concert with the sheriff, and confirming, ratifying, and approving them.

[Ed. Note.—For other cases, see Process, Cent. Dig. § 258; Dec. Dig. § 170.*]

Appeal from Common Pleas Circuit Court of Florence County; J. W. De Vore, Judge.

Two actions by G. W. James and by A. Sexton James both against George J. Graham and another. From judgments for plaintiff in each action, defendants appeal. Affirmed.

J. P. McNeill, of Florence, and Louis W. Gilland, of Kingstree, for appellants. W. F. Clayton and J. W. Ragsdale, both of Florence, for respondents.

WATTS, J. These two cases involve the same issues, and were heard together.

Plaintiffs-respondents sought damages against the defendants-appellants for wrongful ejection of respondents from the estate lands of S. C. James, in which they had an interest, as tenants in common, under a writ of assistance issued in the case of J. C. Lynch against Thomas James, a cotenant, directing Geo. J. Graham, as sheriff of Williamsburg county, to enter upon said premises and eject Thomas James and all persons claiming under him in possession thereof. It appears that after action for partition of S. C. James estate lands were bought and his pendens duly filed therein. Thomas James mortgaged the entire tract of land to J. C. Lynch, who foreclosed his mortgage without making the other heirs of S. C. James parties to the foreclosure proceedings, and purchased the lands at sheriff's sale under said proceedings. Possession of the premises being refused, J. C. Lynch procured the writ of assistance from the circuit court, and George J. Graham, as sheriff of Williamsburg county, forcibly dispossessed the respondent, the appellant J. C. Lynch being present at the time, and placed Lynch in possession, which possession Lynch retained to the exclusion of the respondent. After suit brought and issue joined by the parties respondents and appellants, the case was tried before Judge De Vore and a jury, and resulted in a verdict in favor of each of the respondents in the sum of \$500. After entry of judgment, appellants appealed, and ask reversal of same on five exceptions.

The first and second exceptions impute error on the part of his honor in his charge

to the jury, and they will be considered together.

The first exception alleges error in charging the jury as follows: "I charge you gentlemen, as a matter of law, if these parties were in possession at the time the sheriff and other defendant, J. C. Lynch, went there, claiming it in their own right and in possession under their own right and claim and not through Tom James, that the sheriff nor the defendant Lynch, neither of them, had any authority under this writ of assistance to eject them." Whereas, it is respectfully submitted that he should have charged that under the writ of assistance the sheriff should have ejected from the premises any and all persons who in any wise interfered with or hindered the placing of the defendant J. C. Lynch in full and complete possession of the premises."

Second exception: "Because his honor erred, it is respectfully submitted, in refusing the defendant's third request to charge, which is as follows: 'Under the writ of assistance the sheriff was directed to place the defendant J. C. Lynch in possession, and under this order of the court he was empowered to dispossess and eject, if necessary, any other person who might be found in possession of the property or any part thereof.' Whereas, his honor, it is respectfully submitted, should have charged, as requested, as being within the proper interpretation of the law."

In the case of *Ex parte Jenkins*, 48 S. C. 332, 26 S. E. 689, Chief Justice McIver says: "It seems to us clear, both upon principle and authority, that there was error in the order appealed from, in so far as it affected the appellant George M. Hogg, because he was not a party to either of the actions for foreclosure, nor did he go into possession under either of the parties to such actions while the same were pending. As was said by Mr. Justice Field in delivering the opinion of the Supreme Court of the United States in the case of *Terrell v. Allison*, 21 Wall. at page 291 [22 L. Ed. 634]: 'A writ of assistance is undoubtedly an appropriate process to issue from a court of equity to place a purchaser of mortgaged premises under its decree in possession after he has received the commissioner's or master's deed, as against parties who are bound by the decree, and who refuse to surrender possession pursuant to its direction or other order of the court. The power to issue the writ results from the principle that the jurisdiction of the court to enforce its decree is coextensive with its jurisdiction to determine the rights of the parties, and to subject to sale the property mortgaged. * * * But,' the learned justice adds, 'the writ of assistance can only issue against parties bound by the decree, which is only saying that the execution cannot exceed the decree which it en-

forces, and that the owner of the property mortgaged, which is directed to be sold, can only be bound when he has had notice of the proceedings for its sale, if he acquired his interest previous to their institution, is too obvious to require either argument or authority. It is a rule as old as the law that no man shall be condemned in his rights of property, as well as in his rights of person, without his day in court—that is, without being duly cited to answer respecting them, and being heard or having an opportunity of being heard thereon.”

In the same case it was held, under the case of *Boynnton v. Jackway*, 10 Paige (N. Y.) 307: “That a tenant of the mortgagor, who went into possession prior to the commencement of the action for foreclosure, and was not a party thereto, ought not to be ejected on a writ of assistance. Hence the usual practice is to make such tenant a party to the action for foreclosure, in order that the purchaser may readily acquire possession.”

[1] Now a writ of assistance will not justify an officer in putting out of possession a person who was neither a party to the suit nor named in the writ. *Brush v. Fowler*, 36 Ill. 53, 85 Am. Dec. 382.

[2] Action for trespass lies against an officer for abuse of process, where he assumes to act under a process, which does not authorize the acts done. If an officer armed with a writ abuses it by the commission of any act not warranted by the process, he ceases to act under and by virtue of the process, and thereby becomes a trespasser ab initio. *Breck v. Blanchard*, 20 N. H. 323, 51 Am. Dec. 222; *Snydacker v. Brosse*, 51 Ill. 357, 99 Am. Dec. 551.

[3] It is the duty of the sheriff in execution of the writ to place the purchaser on foreclosure of a mortgage of an estate in common in possession of every part and parcel of the land jointly with the other tenants in common, but in the execution of the writ the sheriff cannot remove any part of the tenants in common who hold under a title independent of him through whom the purchaser claims. *Freeman's Notes to Wilson v. Polk*, 51 Am. Dec. 156. Here in the case under consideration we see that the respondents were not parties to the foreclosure suit brought by Lynch against Thomas James, and therefore not bound by the judgment in that action, and they do not claim under or from Thomas James, but hold their title independent of Thomas James, and from another source, and they never before these proceedings had an opportunity to set up their rights which they now claim.

These exceptions are overruled.

[4] The third and fourth exceptions will be considered together. The third is: “Because his honor erred it is respectfully submitted in charging the jury plaintiff's second request as follows: ‘You are instructed as a matter of law that if an act of trespass is committed in the name of another

person or professedly in the interest of such other person, and the latter subsequently ratified the act by claiming any benefit under it, he would be bound by the act to the same extent as if he had expressly authorized it before it was done, the effect of such charge being either to deprive the defendant J. C. Lynch of his individual interest in the premises which was admitted to be three-sevenths thereof, and to subject him to liability for the alleged trespass by reason of claiming or accepting any benefits therein; also, that such charge being in effect an instruction to the jury that the defendant J. C. Lynch could not claim the benefits or enjoy the possession of any portion of the property under his legal rights as tenant in common with the plaintiffs without rendering himself liable for punitive damages as a trespasser.’”

“(4) Because his honor erred it is respectfully submitted in charging plaintiff's third request as follows: If an officer in executing a writ of assistance wrongfully seizes the property of a stranger to the writ, and the person at whose instance the writ was issued after knowledge of the facts does not disavow the act of the officer, but permits the property seized to remain under seizure for his benefit, he is liable as a cotrespasser with the officer, whereas he should have refused such request for reasons assigned under the third exception, and also being in effect an instruction to the jury that the sheriff was not authorized to seize the property under the writ, even though no ejectment was made, thus misleading the jury, and prejudicing them against the defendants' rights.”

We do not think these exceptions can be sustained. The jury could not have inferred from them that Lynch could not have been put in possession of the property, to wit, the share he had purchased, the property of Thomas James, and enjoy that possession as a cotenant with the other owners of the property without rendering himself liable as a trespasser, if the sheriff had followed the direction of the writ of assistance which commanded him: “That you eject therefrom the said Thomas James defendant herein and any person since the commencement of this action who has been in the possession of the said premises or any part thereof under him and retains the same or any part thereof as against the plaintiff J. C. Lynch, and that you place the said J. C. Lynch or his assigns in full, peaceable, and quiet possession of the premises without delay and him the said J. C. Lynch in possession thereof from time to time maintain, keep, and defend or to be kept maintained and defended according to the tenor and the intent of said judgment.”

This court held in *Ex parte Qualls*, 71 S. C. 93, 50 S. E. 648, that, where parties are properly before the court by reason of being parties to the suit originally or have become parties to the suit, they are answerable to

the jurisdiction of the court of equity in that suit, and are controlled by the equity therein, and the court says: "What is the power of the court of equity in such case? As is said by Rorer in his book on Judicial Sales, in paragraph 230: The equitable powers of a chancery court when once in possession of the case, and jurisdiction has attached by proper service, are sufficiently broad and searching to reach all the equities and liabilities of all the parties, and will settle, dispose of, and enforce the whole in one suit." In 17 Ency. of Law (2d Ed.) p. 1014, the authority says: "The purchaser at a judicial sale has a clear right to the possession of the property sold as against all the parties to the proceedings in which the sale is made, and this right the courts will summarily enforce by writ of assistance or in some appropriate manner. But where the person in possession is not a party to the suit nor a pendent lite purchaser, and holds the property adversely, he cannot be deprived of possession in this summary way." As is said by Mr. Rorer in his work on Judicial Sales at paragraph 162: "In judicial sales by courts of ordinary chancery jurisdiction the better course is for the decree or order of sale to include also an order to put the purchaser in possession to save a resort to an action at law for that purpose. But, whether there be such an order inserted in the decree or not, the court has full power to enforce its sale by putting the purchaser into possession of the premises against the possession of the party to the suit or any one holding under such party who comes into possession during the pendency of the suit, and refuses to render up the premises to the purchaser."

[5] The sheriff not only put Lynch into possession of his share, but ousted all the other tenants in common with him, and put him in possession of the whole premises. Lynch was present and claimed all, not that which he was entitled to alone, but the whole, and received the possession of the whole and the benefit of the unlawful and wrongful dispossession and exclusion of the parties who were in possession of it, and not parties to the suit between Lynch and Thomas James, and did not claim from Thomas James, but from a separate and independent source. There was a complete ouster of the respondents and Lynch placed by the sheriff in exclusive possession of the whole property as if he were the sole owner thereof and not as a cotenant along with them put in possession of his part, and respondents were forcibly ejected. Lynch's acts show that he was acting in concert with the sheriff and confirming, ratifying, and approving the same, and the results of the action inured to his benefit.

We see no error on the part of his honor as complained of, and these exceptions are

overruled. We understand that exception 5 is not urged by the appellants.
Judgment affirmed.

GARY, C. J., and WOODS, HYDRICK, and FRASER, JJ., concur.

(94 S. C. 158)

MAY et al. v. THOMAS et al.

(Supreme Court of South Carolina. March 27, 1913.)

1. WILLS (§ 1*)—RIGHT TO WILL—NATURE OF RIGHT.

The right to pass property by will is not a natural or constitutional right, but is solely derived from the statute (Civ. Code 1912, § 3563), providing that any person having right or title to any lands, tenements, or hereditaments may dispose of them by will in writing except as therein prescribed, and hence, the right being conferred by the Legislature, it has power to place such restrictions thereon as it sees fit.

[Ed. Note.—For other cases, see Wills, Cent. Dig. § 1; Dec. Dig. § 1.*]

2. LIFE ESTATES (§ 25*)—LEASE—RIGHTS OF REMAINDERMEN.

Civ. Code 1912, § 3496, provides that if any person shall rent or hire lands of a tenant for life, and such tenant for life dies, the lessee shall not be dispossessed until the crop of that year is finished, he or she securing the payment of the rent when due. *Heid.*, that where a tenant for life has rented the estate, and dies, the remaindermen are not entitled to possession until the end of the year, but are entitled to compel the lessee to secure the rent for the unexpired portion of such year.

[Ed. Note.—For other cases, see Life Estates, Cent. Dig. § 47; Dec. Dig. § 25.*]

3. LIFE ESTATES (§ 2*) — LEASE BY LIFE TENANT—STATUTES—VALIDITY.

Civ. Code 1912, § 3496, providing that, if a life tenant who has leased lands dies, the lessee shall not be dispossessed until the crop of the year is finished, he or she securing payment of the rent when due, is constitutional, though construed to render the remaindermen subject to the lease for the remainder of the year.

[Ed. Note.—For other cases, see Life Estates, Dec. Dig. § 2.*]

Gary, C. J., and Hydrick, J., dissenting.

Appeal from Common Pleas Circuit Court of Union County; Geo. W. Gage, Judge.

Suit by Jeannette Hill May and others against Margaret S. Thomas and others. Judgment for defendants, and plaintiffs appeal. Modified.

The following are the master's report, decree, and exceptions referred to in the opinion:

Master's Report.

"This is the second report made in this case; the first report being dated June 20, 1910, and being on file in the office of the clerk of the court for this county, which report determined among other special matters under the order of reference the interests of the various parties to this action. The second and final reference herein I held on the

24th day of January, 1911, and this is a report thereon.

"George W. Hill held a life estate in the lands described in the complaint herein, the partition of which and the rents and profits of which are at issue in this case. The question of partition, interests of the parties, etc., has already been settled under my previous report, and the matter of accounting for rents and profits was heard by me at the above-mentioned reference held on the 24th day of January, 1911.

"George W. Hill died on the 2d day of May, 1909. Some years previous to his death his daughter, Mrs. Margaret S. Thomas, and others purchased his life estate in certain tracts of land involved in this suit. The status of these parties other than Mrs. Thomas will not be considered in this report, as they were not made parties to this suit.

"George C. Wood, a son-in-law of George W. Hill, held from Mr. Hill a lease of other lands in which Mr. Hill had not been divested of his life estate up to the time of his death. This lease by its terms covered the year 1909, and provided that Mrs. W. B. May, a daughter, and Reuben S. Thomas, a son-in-law of Mr. Hill, should have such lands for use as George C. Wood saw fit to let them have. Under this arrangement there was assigned to Mrs. May a seven-horse farm, which she rented out with the exception of a one-horse farm managed by her husband, W. B. May; and to Reuben S. Thomas a two-horse farm which he rented out. Wood himself worked on shares with his tenants a six-horse farm and rented out $7\frac{1}{2}$ -horse farms, one of which it seems that he personally managed.

"Just here it might be well to state that it appears from the testimony that in all these transactions Geo. C. Wood was acting for his wife, Mrs. Ruth Hill Wood, W. B. May for his wife, Mrs. Jeannette Hill May, and Reuben S. Thomas for his children, Guy Hill Thomas and Roland Farr Thomas. So hereafter in this report these representative parties will be referred to in order to simplify matters, and the court will understand that they are referred to in such representative capacity.

"I think that there can be no doubt that up to the 1st of May, 1909, Mrs. Margaret S. Thomas was protected in the holding of the land under her charge by the life interest therein of George W. Hill, which interest she had purchased. Again George C. Wood, W. B. May, and Reuben S. Thomas were protected for the same period under the lease of George W. Hill to George C. Wood. So for the first third of the year 1909 the question is easily disposed of. However, then arises a complication as to the interest of the parties in possession, who are remaindermen, and others who are also remaindermen, as to what shall be the basis of accounting as to rents and profits by those in possession—the parties in possession and other remainder-

men being tenants in common. The positions of the parties to this suit are very much at variance, and I cannot accept in full the contentions of any one of them.

"It seems to be a well-settled principle of law in this state that where the tenant in common is in possession of lands and his holding is not tortious, and there is no ouster—and in this case there is no evidence of tortious holding or ouster—that tenant in common is liable to account to his cotenants only for their pro rata share of the net profits arising from his use and occupation of the premises actually utilized by him or under his management. He would be held accountable for rental value only when his use and occupation is tortious. This seems to be the law as recognized in this state. *Jones v. Massey*, 14 S. C. 307; *Cain v. Cain*, 53 S. C. 355, 31 S. E. 278, 69 Am. St. Rep. 863.

"However, when one tenant in common leases the premises to a stranger and collects rents thereon, such tenant in common must account to the other tenants in common for the rents so collected. He becomes a trustee to this extent for the benefit of all.

"It is conceded by all interested, I believe, that, where there are several tenants in common, each is entitled to cultivate his pro rata share of the lands owned jointly independently of the others. In this case this principle applies to the year 1910, where all the tenants in common had an opportunity of proceeding on this plan at the beginning of the year; and it appears that the parties to this suit did that for the year 1910, and there is no ground for contention as to the rents and profits for that year. However, for the year 1909 at the beginning Geo. W. Hill, the life tenant, was alive; and at his death in May after the year was considerably advanced some of the remaindermen were in possession and were cultivating the lands. It was then too late for all the remaindermen to take charge of their pro rata shares, and the statutes of this state protecting a person who had gone into possession under the life tenant would have prevented such a procedure. So plainly there was no equal opportunity to all the cotenants or remaindermen in 1909, and in law and equity the same principle cannot be applied to 1909 as to 1910.

"In the case at issue, immediately upon the death of George W. Hill, the title of the lands in question vested in the remaindermen, and they became tenants in common. The parties in possession were protected for one-third of the year—up to the 1st of May, 1909—by the life estate of and the lease from George W. Hill. But from that time on they became accountable to all the tenants in common upon the principles already set forth.

"To take them up in order:

"Mrs. Margaret S. Thomas must account for 6,650 pounds of cotton collected in 1909

as rent from tenants, less a deduction of one-third on account of her right to the life estate up to the death of George W. Hill by reason of purchase. She should be credited with taxes paid as follows: 1909, \$86; 1910, \$70.64.

"Geo C. Wood held 13½-horse farms. Six of these he cultivated himself with laborers on shares of crops and on them made no profit, and consequently cannot be held liable thereon to the other cotenants of his wife. Seven and one-half horse farms he rented and collected rents thereon to the extent of 7,500 pounds of cotton, for which he must account, less a deduction of one-third on account of the lease from George W. Hill which was good and valid for the first third of the year. He should be credited with taxes paid to the extent of \$187.04; funeral expenses of Geo. W. Hill, \$80; one-half cost of drainage lands as required by the county commissioners \$12.50; also, I think it proper to allow him \$16.66 (two-thirds of \$25, the value of services as testified of managing a one-horse farm) for management of one of these 7½-horse farms which he worked himself and on which he made the rent.

"W. B. May had a seven-horse farm, one of which he worked himself and on which he made the rent, and rented out the others to six others. He collected 7,000 less 338 pounds of cotton in rents for which he must account, less a deduction of one-third on account of the lease from Geo. W. Hill to George C. Wood. He should be credited with one-half the cost of drainage required by the county commissioners \$12.50, insurance paid on buildings \$20, town taxes paid in Carlisle \$1.50, and an allowance of \$16.66 (two-thirds of \$25) for management of the farm he worked and on which he made the rent.

"Reuben S. Thomas held a two-horse farm from which he collected in rents 2,000 pounds of cotton, for which he should account, less one-third deduction under the lease from Geo. W. Hill to Geo. C. Wood.

"The testimony is uncontradicted that 1,000 pounds of lint cotton is the standard rent for a one-horse farm in the community where the lands in question are located, and the parties renting out the lands testified that they rented it for that standard rent. It is admitted that the cotton to be accounted for shall be so done at the price of 12½ cents per pound. Of course, the amounts to be accounted for by the various parties mentioned are to be paid into the general fund for distribution, and they are to be credited with or to receive back from the fund their pro rata shares.

"I herewith transmit to the court the testimony and exhibits introduced at the reference held on the 24th day of January, 1911."

Decree.

"This is a contest betwixt the heirs at law of the late Geo. W. Hill, deceased, about a

division between them of the rents off the estate lands for the year 1909-1910. More particularly, the contest is betwixt the widow and children of his dead son, Roland, on the one side, and three living daughters on the other side. These daughters are Mrs. Margaret S. Thomas, Mrs. Wood, and Mrs. May. All parties have excepted to the report of the special master, and the exceptions are too numerous to set out here. But there are few issues of law, and practically no issues of fact.

"The late George W. Hill held only an estate for his own life in the lands in issue. He died May 2, 1909. He had theretofore sold his life estate in a part of his lands to Margaret S. Thomas et al., and he had theretofore leased his life estate in the balance of the land to Geo. C. Wood, the husband of his daughter, Ruth, for the year 1909 for \$150.00. Thereupon Wood, pursuant to a suggestion in the lease from Hill, assigned to Mrs. May a seven-horse farm; and to Reuben Thomas' children (the grandchildren of Hill) a two-horse farm, and Wood reserved for himself a six-horse farm and a 7½-horse farm.

"The issue is this: Are the tenants under the life tenant liable to pay the remaindermen a reasonable rent for the last eight months of 1909, or simply a two-thirds of what they had contracted with Geo. W. Hill to pay for the year? The master found for the former view, and the defendants and some of the plaintiffs contest that view; it is really contested by these children and remaindermen who happened to be in possession as tenants under Hill. It is a pure accident that the undertenants happen to be remaindermen; and they will be dealt with as undertenants when it comes to their liability to account for rent. Had Hill leased the land to a stranger for 1909 for \$150, then plainly under the statute Hill's estate would have been entitled to collect from that stranger as much as \$150 of that sum for rent. Code of Law No. 2408.

"Before the statute, and by the law, when the life tenant died amid the year, the rent due to him was not enforceable at all if the undertenant was ousted by the remaindermen. The ground of that novel holding was that the contract was entire and the rent must be entire; it was not then believed that a half a loaf was better than no loaf at all. The act to mend that mischief embodied in No. 2908-9 of the Code of Laws, came from England and was written into our statutes; and it provides that which the executor of the life tenant may collect from the undertenant for rent from the life tenant who had died amid the year, and it provides nothing more. These two sections, about one matter, make no reference to any right or remedy of the remaindermen touching the rent to accrue for that part of the year after the death of the life tenant—eight months in the case at bar. Under that statute, therefore, the re-

maindermen could collect no rent for eight months of 1909. But another statute was enacted later, in 1789, and it had reference principally at the start to the hiring out of slaves. The dead bones of slavery are imbedded all through our law. The statute, though impaired, rented lands along with slaves; and it provides that an undertenant who had leased lands for a life tenant, dead amid the year, should not be deposed therefrom until the crop of that year had been harvested; and that the undertenant should secure to the remainderman (1 Strob. Eq. 58) the payment of the rent when due. The statute did not declare that the life tenant, acting for himself and the remaindermen, might make a lease for a year at a fixed rent, of which the executor of the life tenant (dead amid the year) should have so much of that rent, and the remaindermen should have so much of that rent.

"Indeed, it is doubtful if a life tenant could be thus empowered to bargain away the rights of the remaindermen. When the remaindermen came into their own, the undertenant had one of the two courses open to him; he might make new terms with the remaindermen for the eight months yet to lapse, or he might quit the premises; he could not be dispossessed if he offered to do the former, for that is the mandate of the statute. As I read his report, the master was particularly charged with the undertenant according to the foregoing principles; and I am content to adopt his findings. And in the year 1910 I see no reason to dissent from the master.

"It is therefore ordered that the report of the special master be confirmed."

Exceptions of Edith L. Hill et al.

"You will please take notice that the defendants, Edith Lyles Hill, Roland Glenn Hill, Hamilton Hill, and Coleman Lyles Hill, except to and will move the Supreme Court to modify the decree of his honor, Geo. W. Gage, in the above-entitled cause upon the following grounds, exceptions and assignments of error, to wit:

"(1) That his honor, the presiding judge, erred in finding as a matter of fact that the special master in his report of March 16, 1911, held that the parties to his action who were in the occupation of the land here involved for the year 1909 were liable to account to the remaindermen for two-thirds of the rental value of the said land for the year 1909; whereas, his honor should have found and held that the special master in his said report erroneously held that the parties who were in the use and occupation of the said land for the year 1909 were liable to account to the remaindermen as tenants in common for two-thirds of the rents and profits received from said land during the year 1909.

"(2) That his honor, the presiding judge,

erred in overruling the exceptions of the defendants Edith Lyles Hill, Roland Glenn Hill, Hamilton Hill, and Coleman Lyles Hill to the said report of the special master, which exceptions were as follows, to wit:

"(a) That the referee erred in finding as a matter of fact that these defendants had an equal opportunity with the other tenants in common to use and occupy their pro rata part of the real estate involved for the year 1910, and in holding as a matter of law that the other cotenants were not liable to account to those defendants for any part of the rental value or rents and profits received by them from the lands during the year 1910, whereas, he should have held that the evidence establishes that these defendants did not have an equal opportunity to so use and occupy their pro rata portion of the said land, but were, in effect, ousted from the use and occupation of said land during the year 1910; that practically all of the available lands were taken into possession and rented out to third parties by the other cotenants, without the consent of these defendants; and that thereby the said cotenants became legally liable, as trustees, to account to these defendants for their pro rata part of the rents and profits so collected and received.

"(b) That the special master erred in holding that the plaintiff Mrs. Ruth Hill Wood by and through her husband, Geo. C. Wood, was not liable to account for two-thirds of the rental value of a six-horse farm cultivated by the said Geo. C. Wood, with laborers on shares of crop, during the year 1909, in finding and holding that the said Geo. C. Wood made no profit in the cultivation of the said farm, and in holding as a matter of law that the alleged fact that he made no profit would release him from any liability to account for the rental value of the said farm to the other cotenants of his said wife; whereas, he should have held that the said Geo. C. Wood, for his wife, Mrs. Ruth Hill Wood, one of the plaintiffs, was in the use and occupation of said farm, not as a tenant in common, who was liable to account by and under the rule of rents and profits, but as an ordinary tenant in the use and occupation of real estate belonging to third parties, for which he was accountable for the rental value.

"(c) That the special master erred in holding that the plaintiffs Mrs. Jeannette Hill May and Mrs. Ruth Hill Wood were entitled to a credit of \$16.66 each for the value of services rendered by their husbands W. B. May and Geo. C. Wood in managing two one-horse farms during the year 1909.

"(d) That the special master erred in failing to hold as a matter of law that the parties to this action who were in the use and occupation of the land involved during the year 1909, were liable to account to the remaindermen for two-thirds of the rental

value of the premises so used and occupied by them during the same year, 1909.

"(e) That the said special master erred in failing to find as a matter of fact that the plaintiff Mrs. Jeannette Hill May and the defendant Mrs. Margaret S. Thomas were in the use and occupation of, and received the rents and profits from, more than their respective pro rata shares of the land during the year 1910, and that they should account for and pay over to their cotenants any amount in excess so collected and received."

Exceptions of Margaret S. Thomas.

"You will please take notice that the defendant Margaret S. Thomas expects to and will appeal from the decree of his honor, Judge George W. Gage, made in this case, and will move the Supreme Court to overrule and modify the said decree on the following exceptions and assignments of error, to wit:

"(1) Because the circuit judge erred in sustaining and affirming the report of the special master in so far as the special master found and held that the defendant Margaret S. Thomas was liable to account to her cotenants for two-thirds of the rents received by her for the part of the Hill estate by her during the year 1909. Margaret S. Thomas had purchased her father's life estate in about 500 acres of the 2,500 acres owned by him for life, and had been occupying and using it for many years, and was so doing when he died in May, 1909. Upon his death she with her cotenants became the absolute owners of the entire estate, including the tract occupied by her. It was error upon the part of the master to charge her with rents for the balance of the year, and the circuit judge committed error in sustaining the master in so holding.

"(2) The circuit judge erred in treating Margaret S. Thomas as tenant of George W. Hill during the part of the year 1909 until his death in May and as the tenant of her cotenants for the balance of the year after his death. She was the undisputed owner of the life estate in the land occupied by her so long as her father lived, and she was in no sense his tenant. Sections 2408, 2409, and 2410 of the Code had no application to her occupancy. These sections only apply to tenants or persons holding a life estate in cases where the life estate ends in the midst of the crop year. And these sections only apply as between undertenants of the holder of a life estate and the remaindermen.

"(3) The circuit judge erred in holding that Margaret S. Thomas, the sole holder and owner of the life estate and cotenant in the remainder, and in possession of no more than her reasonable portion of the land, was liable to account to the other cotenants to make them equal when it was not her fault that they did not occupy their portion of the land or collect their portion of rents.

"(4) The circuit judge erred in overlooking and not duly considering the fact that Margaret S. Thomas did not occupy more than her reasonable share of the land in 1909, and that, if the other cotenants did not get their full share of the land or rents for the year 1909, it was not her fault, but their negligence or misfortune. The master and circuit judge concur in holding that Mrs. Margaret S. Thomas was not liable to account for rents for 1910, when she occupied the same land she occupied in 1909.

"(5) The circuit judge erred in practically holding Mrs. Margaret S. Thomas accountable for the negligence or misfortune of her cotenants in not collecting their share of the rents or occupying their share of the land in 1909 by charging Mrs. Margaret S. Thomas with rents collected by her in 1909 and not charging her for 1910, when she occupied the same land and collected practically the same rents each year.

"(6) It is error of law to compel Mrs. Margaret S. Thomas to account for rents for 1909 when she went into possession as owner of the life estate at the beginning of the year, and continued in possession as a cotenant after the death of her father of her reasonable portion of the land."

Plaintiffs Appellants' Exceptions.

"Plaintiffs appellants except to the decree of his honor, Judge Gage, herein, because his honor erred therein:

"(1) In failing to pass upon and sustain the exceptions of plaintiffs to the second report of the special master, numbered, respectively, 4, 5, 6, 7, 10, 12, and 15, which are as follows:

"(4) In not finding, holding, and reporting that Jeannette Hill May, Ruth Hill Wood, Margaret S. Thomas, and the widow (Edith Lyles Hill), and children of Roland G. Hill, deceased (as one unit), were entitled to and owned one $\frac{60}{324}$ interest in all the land partitioned, and that Mrs. S. Lou Crawford (representing Sallie G. Willard) and R. S. Thomas, as guardian and guardian ad litem of Roland Farr, and Guy Hill Thomas were each entitled to $\frac{42}{324}$ part thereof.

"(5) In not finding, holding, and reporting that there were $34\frac{1}{2}$ one-horse farms on all the land owned in common, and of this number the plaintiffs Jeannette H. May and Ruth H. Wood were each entitled to $6\frac{1}{4}$ farms, and in not reporting the total number of farms on the land, and the number each cotenant was entitled to the use of as his or her share.

"(6) In not finding, holding, and reporting that three of the farms on the common land were in the possession and control of others than the cotenants for the year 1909, to wit, two in the possession of J. Ed. Gregory, and one in possession of Charner Dawkins, as purchaser of the life estate of G. W. Hill therein, and of which the plaintiffs had no possession or control.

"(7) In not finding, holding, and reporting that the rents for the year 1909 on these three farms was not paid; that the cotenants did not reside on the land (Edith Lyles Hill and the children of Roland G. Hill and Mrs. Lou Crawford, representing Sallie G. Willard), allowed the same to go uncollected and to be lost, and made no effort to collect the same, and thereby lost the same as lost through their neglect, and failure to look after their interests.'

"(10) In not finding, holding, and reporting that none of the other cotenants made any demand on the plaintiffs or R. S. Thomas for security for the payment of the rent provided for in the said lease, or for possession of any part thereof, or for an agreement to pay any other rent than agreed to be paid by them in said lease for that year or served any notice of any kind relating thereto.'

"(12) In failing to find and report the large loss accruing and falling upon Ruth H. Wood and her husband from the operating and carrying on of the farming operation on the excess over his share of said land, to wit, \$226.38, and in not finding, holding, and reporting that they should be given credit therefor in accounting.'

"(15) In not holding and reporting that under the evidence and the facts of this case there is nothing due to any of the cotenants by plaintiffs or R. S. Thomas; and in not stating the accounts between the cotenants and filing the same with his report.'

"These exceptions make the points, respectively, that the master erred in not finding and reporting the respective interests of the remaindermen, in the said land, to wit, as specified in said exception, the number of one-horse farms of tillable land on the entire place (to wit, 34½), and that Jeannette Hill May and Ruth Hill Wood were each entitled to 6½ one-horse farms; and the number of farms (one horse) each remainderman was entitled to the use of; that three one-horse farms of said land were not on the land used by cotenant remaindermen, but in the possession of strangers, over which plaintiffs had no control; that the rents of these three farms was not paid; that the nonoccupying cotenants neglected to collect the same and made no effort to collect the same, and should be charged with the same in an accounting; that none of the remaindermen make any demand on the remaindermen in possession at the death of G. W. Hill for any security, for the rent, or for possession of any part of the land held by them, or for any new agreement as to the rent of the same; that Ruth Hill Wood through the agency of her husband lost the \$226.38 on the land farmed by her on said place for 1909.

"These were material matters in the case without passing upon which no final determination or rights could be had, the evidence was uncontradicted and undisputed to

sustain the facts alleged, and as the master failed to pass upon them, and they were before the court on exceptions, the court should have passed upon them and sustained the exceptions, and this court should do so.

"(2) In not stating the undisputed fact as found by the special master, that W. B. May and Geo. C. Wood in all matters relating to this land were acting for and represented their wives, Jeannette Hill May and Ruth Hill Wood. The master's report shows this finding and report.

"(3) In misstating the issues between the cotenants in possession of part of the common land for 1909, and the other remaindermen, by omitting entirely to mention and consider and pass upon the rights of those in such possession as cotenants, because, he says, it was an accidental thing.

"(4) In holding and stating that one of two courses was open to the cotenants, holding under the lease from the life tenant, when the remaindermen came into their own; he (they?) could either make new terms with the remaindermen, or he could quit the premises; he could not be dispossessed, if he did the former; it being submitted that this is an erroneous statement of the rights of any tenants, much less a cotenant, under section 2410, 1 Code Laws, in this: That he places the whole duty of action on the tenant in possession, and takes all duty of action and all responsibility from the remaindermen, thus wrongfully limiting the rights of the tenant and extending the rights of the remaindermen.

"(5) In not passing upon and sustaining plaintiffs' exceptions 2, 3, 8, and 9 to the special master's report, which are as follows:

"(2) In finding and reporting substantially that the occupying cotenants were for that year (1909) tenants of all the cotenants, and must account to the nonoccupying cotenants as such upon a basis of perfect equality.

"(3) In finding and reporting that the cotenants occupying or residing on the common land during the year 1909, after the death of G. W. Hill, as tenants of all the cotenants liable to account to the other cotenants for all the rents and profits received by each, from the land he or she worked or used, at the usual rents per horse farm for that section, upon an exact basis of equality, and without allowing the tenants residing thereon credit for the full value of their services in attending to and carrying out the working of the lands used by him or her for that year, including the liabilities attaching hereto.'

"(8) In not finding, holding, and reporting that Jeannette Hill May, Ruth H. Wood, and their husbands, plaintiffs, and R. S. Thomas, for his infant children, held the lands for which they were severally possessed of the common land for the year 1909, under and by virtue of a written lease from

G. W. Hill, the life tenant of the land; and that, as against the other cotenants, they were entitled to hold the said lands for the remainder of the year 1909, after the death of the life tenant, at the rent specified and agreed to be paid therein, and to account for the two-thirds thereof, only to the other cotenants, and that in the absence of any demand for security continuing to hold thereunder and under the terms thereof for the payment of the said rent on them, by the other cotenants, such right was waived, and they acquiesced in the said holders under the lease, continuing to hold thereunder and under the lease.

"(9) In not finding, holding, and reporting that by the terms of the said lease the said plaintiffs and the said R. S. Thomas were to pay as rent for the land occupied by them the sum of \$150 for the year 1909 and also to pay such further sum as was reasonably sufficient to support the said G. W. Hill for that year—that is, to furnish them with a support—and that two-thirds of such amount would be and was the amount for which they would be liable to account in this action, subject to all proper credits."

"These exceptions make the points that the special master erred holding that the cotenants in possession of part of the land at the death of the life tenant, under lease from him, were liable to the remaindermen as tenants, for the full usual rent of all the land held by them (1,000 pounds lint per one-horse farm) for the remainder of the year (1909); and in not holding that they were tenants under their said lease and could be held only for two-thirds of the rent agreed to be paid therein, \$150, and a support for the life tenant.

"(6) In not holding that under section 2410, 1 Code Laws, the cotenants in possession are only liable to hold to the remaindermen for two-thirds of the rent agreed to be paid by them in the lease from the life tenant, Geo. W. Hill.

"(7) In not passing upon and sustaining plaintiffs' exceptions 1, 11, and 13 to the special master's report which are as follows:

"(1) In finding and reporting that for the year 1909 the principle that one cotenant cannot be held accountable to his cotenants, except for the excess of his or her share of the common property worked or used by him or her, did not apply to this case for the year 1909, but that the cotenants in possession at the death of G. W. Hill must account for all the rents and profits received by him or her for that year to the other cotenants upon an even and equal basis, whether he or she worked more or less than her fair share of the said land for that year."

"(11) In not finding, holding, and reporting that even if under any view plaintiffs and R. S. Thomas under and by virtue of their written lease and under the terms and conditions thereof, and that all rights thereunder were availed by the death of G. W.

Hill, the life tenant, in May, 1909, that then the plaintiffs and R. S. Thomas were in possession of the land as tenants in common, and not as renters of the other cotenants, and that as tenants in common so holding they were and could be only liable to account for the rent and profits of such part of said land as was used and rented by each severally in excess of his or her share of all the common land subject to all proper credits and allowances."

"(13) In not holding and reporting that as tenants in common in possession the plaintiffs M. S. Thomas and R. S. Thomas should and could only be held to an account for the rents and profits of the land used in excess of their respective shares, and not for the rental value."

"These exceptions make the points that the special master erred in holding that the general rule of law that a cotenant in possession can only be held for rents and profits of the common land used by him in excess of his proper share thereof does not apply to the cotenants in possession of this land at the death of Geo. W. Hill, the life tenant; and in not holding that, if the lease was destroyed by the death of the life tenant, the said remaindermen were in possession as cotenants, and should only be required to account according to that rule.

"(8) In not holding that, if the lease under which the remaindermen held at the time of the death of G. W. Hill, was destroyed or rendered invalid in any way or for any cause, the remaindermen in possession of part of the land for the year 1909 were in of their new right, held as tenants in common, and as such each could be held to account only for rents and profits of and for whatever amount of the land he or she used in excess of his own proper share; and for only two-thirds thereof, in this case, being allowed all proper expenditures for the common good or property.

"(9) In not passing upon and sustaining plaintiff's fourteenth exception to the special master's report, which is as follows:

"(14) In not finding, holding, and reporting that as between plaintiff and R. S. Thomas, the parties holding under the lease of G. W. Hill, they having all acquiesced in the holding by them under the terms of said lease, there could be no accounting for any excess of shares used by either, and that in any event there should be an accounting between them, only two-thirds of the agreed rent to be paid under the said lease."

"This exception makes the point that in any event no accounting for rents and profits can be held and had between the parties holding and using the land for 1909 under the lease, they accepting the benefits thereunder by mutual agreement and standing together, and making no such claim of right at any time.

"(10) In not holding that the remainder-

men and cotenants not in possession of any of the lands must account and be held responsible for the rents of the J. Ed. Gregory and Dawkins tracts for the year 1909, as lost to them through their own negligence and carelessness, in every phase of the case, and in any form of accounting.

"(11) In sustaining the special master's report."

J. Clough Wallace, of Union, for appellants.
J. L. Glenn and J. H. Manon, both of Chester,
and P. D. Barron, of Union, for respondents.

FRASER, J. This is an appeal from decree of his honor, Judge Gage, confirming the report of J. G. Hughes, Esq., special master, made in the case, and for a proper understanding of the case the report of the master, the decree of Judge Gage and exceptions thereto should be set out in the report of the case. We think it unnecessary to take up the exceptions seriatim, as we think the decree in the main should be confirmed, but with this modification: Those holding under the lease made by life tenant could only be held to account for the rent provided to be paid in said lease. Section 3496, 1 Code of Laws 1912 (New Code), provides: "If any person shall rent or hire lands of a tenant for life, and such tenant for life dies, the person hiring such land shall not be dispossessed until the crop of that year is finished, he or she securing the payment of the rent when due." In this case the remaindermen were bound by the contract made by the life tenant. Where a life tenant makes a contract for the lease of his life estate for a valuable consideration, then the remaindermen are bound by the contract made by the life tenant, and can collect the rent only provided for in that contract. This is a remainder under a will. Section 3563 of the Code of 1912 reads as follows: "Any person having right or title to any lands, tenements, or hereditaments, whatsoever (persons of unsound mind and infants excepted), may dispose thereof by will, in writing, at his or her own free will and pleasure, except as hereinafter provided; but all wills or testaments made of any lands, tenements, or other hereditaments, by any person within the age of twenty-one years, idiot, or by any person de non sane memory, shall not be taken to be good and effectual in law."

[1] The power to make a will is statutory. The statute provides who may make a will and who may not. It says how it shall be executed, and how revoked. It provides that certain dispositions of property shall be void. It provided that a certain estate that had theretofore been a life estate should thereafter be a fee simple. The right to make a will is not a natural right. The natural right to control property dies with the possessor. It is not a constitutional right. It is not mentioned there. Though of ancient

origin, the right is a creature of statute, and may be abridged at any time by the law-making power.

[2] When this will was made, when it became of force, and when these remainders arose, this statute was in force. Therefore the will and all rights under it came into existence subject to the statute. At the time the rights vested they vested subject to the statute. Remainders could be forbidden. The same power that created a fee in all of those lands devised, in which the estate was not inconsistent with a fee, could have provided that in every event and in defiance of the limitation the first taker should take a fee and declare all remainders void. It did not declare the remainder void, but it said to the remainderman, "You cannot get possession of agricultural lands until the end of the year." If the statute had the right to prevent the disposition altogether, it certainly had the right to postpone the exercise of the right of possession. The difficulty, however, is not in the postponement of the possession without the consent of the remainderman, but that the rent should be fixed by the life tenant, and not by the "consent" of the remaindermen. If the law can withhold the land, it can also withhold a mere incident like rent. If the life tenant cannot make a binding contract for rent, neither can he make a contract that withholds the land itself. It is said that the tenant must pay a reasonable sum for the use and occupation. Who is to say what is a reasonable sum? Manifestly the courts must fix the amount. If the remainderman has a constitutional right upon which he is entitled to stand, then that constitutional right is "consent." The court cannot supply the want of consent if the right of consent exists. As to public policy, on the one hand, some life tenants may let their estates at unreasonably small rents. On the other, the income to be derived from property held by life tenants would be nothing if, upon the death of the life tenant, the tenant for a year must make a new contract with an unknown and unknowable remainderman, whose demands are limited only by his conscience and that may be elastic. Thus the life tenant, the immediate object of the testator's bounty, may be deprived of the entire benefit of a valuable estate.

[3] The remainderman takes the estate subject to the burden of a lease (that cannot exceed a year), and the statute that imposes the burden is in all respects fair and entirely constitutional. After the life tenant dies, the remainderman can require the tenant to secure the payment of the rent when due. In this case the tenants under the life tenant are liable to pay the remaindermen two-thirds of what they had contracted with George W. Hill, the life tenant, to pay for the year.

It is the judgment of this court that the

decree of the circuit judge be modified in accordance with the views indicated herein.

Judgment modified.

WOODS and WATTS, JJ., concur.

GARY, C. J. I dissent, and concur in the dissenting opinion of HYDRICK, J.

HYDRICK, J. (dissenting). I cannot assent to the proposition that the remaindermen are bound by the lease made by the life tenant. If they are so bound, it is only by virtue of the statute, for it cannot be on account of any privity of contract or estate. There is no doubt that the estate of a life tenant terminates with his life. Necessarily any grant or lease made by him must also terminate upon his death. This being so, at common law, upon his death, the remainderman was entitled to immediate possession. This frequently resulted in great inconvenience and hardship where the life tenant died after his undertenant had prepared for, or perhaps had planted and had in course of cultivation, the crops of the year for remedy of which in 1789 the Legislature enacted a statute with regard to slaves and lands hired or rented from life tenants, which, omitting parts not pertinent to the present inquiry, reads: "If any person shall die after the 1st day of March, in any year, the slaves of which he or she was possessed, whether held for life or absolutely, and who were employed in making a crop, shall be continued on the lands, which were in the occupation of the deceased, until the crop is finished, and then be delivered to those who have the right to them. * * * And if any person shall rent or hire lands or slaves of a tenant for life, and such tenant for life dies, the person hiring such land or slaves shall not be dispossessed until the crop of that year is finished, he or she securing the rent or hire when due." 5 Stat. 111. The last sentence of this statute, with the words making it applicable to the hiring of slaves stricken out, now appears as section 3493, Civil Code 1912, and is the statute upon which the appellants base their contention that the remaindermen are bound by the contract made by the life tenant. The effect of such a construction of the statute is to enable the life tenant by leasing the property to practically continue his estate therein through the year in which he dies. Such effect cannot be given to the statute without making it unconstitutional, for, in that event, the remainderman is deprived of his property without his consent, and without due process of law. It simply allows one man to barter away the rights of another without his knowledge or consent. It is directly in conflict with the principle decided in *Oureton v. Railway*, 59 S. C. 371, 37 S. E. 914, and the cases following it, which hold that a life tenant can convey no greater interest than he has in the premises, and that to allow a

deed from the life tenant to a railway corporation for a right of way through the land in which he has only a life estate to have the effect of foreclosing the rights of the remaindermen to compensation for the right of way would violate that provision of the Constitution which says "that private property shall not be taken for private use, without the consent of the owner, nor for public use, without just compensation being first made therefor." Article 1, § 17.

Now, unquestionably the remainderman is the owner after the expiration of the life estate, and it is inconceivable that the Legislature would attempt to make contracts made by the life tenant, without the knowledge or consent of the remainderman, and perhaps greatly against his interest, binding upon him. Such legislation would violate the fundamental principles of right, and therefore such a construction of the statute must be avoided; for it is well settled that in construing a statute that construction which will render it unconstitutional must be avoided, if possible. This may be done in construing this statute without violating any right or rule of construction.

Another principle of construction that may be invoked is that, where a statute is in derogation of common law and of common right, it must be strictly construed. The statute in question clearly impairs the common-law rights of remaindermen. *Huff v. Latimer*, 83 S. C. 260, 11 S. E. 758. Therefore, when the statute says that the tenant shall not be dispossessed, he securing the rent when due, what rent is meant, and to whom is it to be secured? That question was answered in *Freeman v. Tompkins*, 1 Strob. Eq. 53, 58, where the court said: "When the act says the hirer shall secure the payment of the rent and hire, it means that he shall secure to the remainderman the proportion of it which arises after the accrual of the remainder. The proportion arising in the terms of the life tenant is already secured to him by the contract of hiring." But how does rent accrue to the remainderman? Certainly not under the contract made by the life tenant, for to that the remainderman is neither party nor privy. It accrues by virtue of an implied promise on the part of the undertenant, who remains in possession, under the protection of the statute, and uses the remainderman's property to pay him a reasonable rent therefor.

This case falls squarely within the provisions of section 3503, Civil Code 1912, which was enacted before the section we are considering. It provides for the recovery by the landlord of a "reasonable satisfaction" for the use and occupation of lands, etc., where the agreement is not by deed. This ground of recovery was enforced in *Freeman v. Tompkins*, *supra*. In that case Mary Freeman, the life tenant of certain slaves, died in May, having possession of the slaves. After her death, her trustee took charge of

them and retained them for several years. The question was whether, under the statute, her estate was entitled to the use of the slaves for the portion of the year after her death without compensation to the remaindermen. It will be observed that, under the first sentence of the act above quoted, her representatives had the right to use the slaves until the crop was finished, and nothing is said about compensation. The court held, however, that her estate was liable for a reasonable hire. At page 59 of 1 Strob. Eq., the court said: "It is plain that the Legislature looked to the injury which would result from interrupting the planting operations after that season when preparations for the crop are usually in progress, and intended to secure against the consequences of a sudden change of the right of property by the death of the party, in faith of whose title the crop was set. As a matter of convenience it was provided that in all cases where the crop was superintended by the executor of the decedent it should constitute assets in his hands. But it by no means follows that when it is raised by means of slaves or lands which, on the death of his testator, become the property of a remainderman, these shall be used without compensation. Certainly the act does not 'continue the estate of the life tenant,' as it is expressed in *Leverett v. Leverett* [2 McCord, Eq. 84] 'to the end of the year.' There can be no doubt that, if it were necessary to vindicate the title to the property (the land for instance), the suit must be brought in the name of the remaindermen. The only object of the statute was to prevent great injury from the loss of a crop planted, and to obviate the difficulty of employing laborers after the beginning of the planting season. This is an essential benefit to the estate of the life tenant; *though that estate, into whose service the remainderman's property is pressed, should be compelled to pay an equivalent for the services rendered.* [Italics added.] And it is no greater hardship that the life tenant's estate should pay for these services than a person to whom he hires the property, which is expressly provided for in the statute." By parity of reasoning neither the estate of the life tenant nor his undertenant should be allowed to have the use of the remainderman's land without rendering a fair equivalent. If we hold that the remainderman is bound by the contract of the life tenant made upon valuable consideration, it will frequently result in the loss of practically a whole year's rent to the remainderman. Suppose the life tenant should lease the premises in consideration of his own maintenance and support by the lessee? Now, that is a valuable consideration. Yet, if the remainderman is bound by it, he could not dispossess the undertenant upon the death of the life tenant, nor could he collect any rent for the use of his

property for the balance of the year. Considerations of blood and affection may, and frequently do, cause the life tenant to lease the premises at a merely nominal rent, and that is practically the case here, for, as gathered from the record, the consideration of the lease was \$150 and the support of the life tenant, while the testimony shows that the rental value of the property is upwards of \$4,000. Surely the Legislature did not contemplate or intend such consequences; and, when read in the light of the then existing law and the evils which it was intended to remedy, the language of the statute does not warrant an interpretation which will lead to any such result.

One who goes into possession under a life tenant is charged with notice of his landlord's title, and that it is liable to terminate at any moment. If it terminates in the midst of the year, the statute saves him from being dispossessed, and there is no hardship in holding him responsible to the remainderman for a reasonable rental after the death of his landlord. The statute does not compel him to retain the possession. He may quit without liability to the remainderman. And that, too, goes to show that the remainderman ought not to be bound by the contract because the tenant is not, and mutuality is wanting. Usually his own interest would impel the tenant to remain in possession; but, if he does, it is of his own free will, and he should therefore be held thereby to an implied promise to pay the remainderman a reasonable rent. The foregoing views are supported by authority. *Hoagland v. Crum*, 113 Ill. 385, 55 Am. Rep. 424; *Guthmann v. Vallery*, 51 Neb. 824, 71 N. W. 734, 86 Am. St. Rep. 475; *Williams v. Caston*, 1 Strob. 130.

GARY, C. J., concurs.

(72 W. Va. 228)

WILLIAMSON v. GLEN ALUM COAL CO.
et al.

(Supreme Court of Appeals of West Virginia.
April 15, 1913.)

(Syllabus by the Court.)

1. FALSE IMPRISONMENT (§ 7*)—WARRANT CHARGING NO OFFENSE.

Where the act charged in a warrant issued by a justice amounts to no criminal offense, arrest and imprisonment under such warrant is illegal, and those who actively direct and cause the same are liable in the action for false imprisonment.

[Ed. Note.—For other cases, see False Imprisonment, Cent. Dig. §§ 5-61, 79; Dec. Dig. § 7.*]

2. FALSE IMPRISONMENT (§§ 4, 13*)—ILLEGAL ARREST.

Illegal arrest and imprisonment, regardless of malice or probable cause, will sustain the action for false imprisonment.

[Ed. Note.—For other cases, see False Imprisonment, Cent. Dig. §§ 6, 7, 16, 31, 59; Dec. Dig. §§ 4, 13.*]

3. FALSE IMPRISONMENT (§ 23*)—EVIDENCE—RECORD OF ARREST.

The record of the case in which the arrest and imprisonment occurred, on appeal from the justice, showing the procedure therein and the dismissal thereof, is admissible as evidence tending to prove illegality of the arrest and imprisonment.

[Ed. Note.—For other cases, see False Imprisonment, Cent. Dig. § 100; Dec. Dig. § 23.*]

Error to Circuit Court, Mingo County.

Action by Simeon Williamson against the Glen Alum Coal Company and others. Judgment for plaintiff, and defendants bring error. Affirmed.

Sheppard, Goodykoontz & Scherr, of Williamson, for plaintiffs in error. Marcum & Marcum, of Huntington, for defendant in error.

ROBINSON, J. Defendants, a coal company and its special police officer, caused and procured the arrest and imprisonment of plaintiff. Averring that the arrest and imprisonment were illegal, plaintiff sought damages by this action. He has judgment. What we shall say in a general way will sufficiently cover the points of error assigned.

The declaration plainly sets forth a case of false arrest and imprisonment. The evidence quite as plainly proves such a case. It fully warrants the verdict on which the judgment was entered. Nor do we find error in any ruling of the court during the trial.

[1] That plaintiff committed no offense for which he could lawfully be arrested and imprisoned is clearly disclosed. He did nothing but throw an advertising hand bill into a lot, at one of the residence properties of the coal company. This may have been a technical civil trespass, but it was no criminal offense. Yet he was arrested on the spot, taken before a justice at the office of the coal company, fined, and in default of payment sent to the county jail. He was released from the imprisonment by the writ of habeas corpus. Whether a warrant of any kind existed at the time of the hearing before the justice appears from the facts and circumstances proved to have been an open question for jury determination. Defendants' evidence tends to prove the existence of a warrant, but there are circumstances tending otherwise. Conceding that there was such a warrant as the one which defendants relied on at the trial of this action, we find that it furnishes no justification for the arrest and imprisonment. It is wholly irregular and void. It charges no criminal offense. It vouches no jurisdiction of the justice in the premises. It charges plaintiff with an act which is no criminal offense under the laws of this state. Its charge is that plaintiff "did commit a *misdr* by trespassing on real estate by scattering bills on

the property of the Glen Alum Coal Company against the peace and dignity of the state." Plainly no criminal offense is stated here—no jurisdiction of the justice shown. "It does not follow that, because plaintiff was a trespasser in the eye of the law relating to a civil action for damages against him, he was guilty of a criminal offense." *Davis v. Railway Co.*, 61 W. Va. 250, 56 S. E. 401, 9 L. R. A. (N. S.) 993. So there was absolutely no warrant of law backing the arrest and imprisonment of plaintiff. No wonder that he was speedily released by the writ of habeas corpus.

"The constituent elements of false imprisonment are, first, the detention or restraint, and second, the unlawfulness of the detention or restraint." 12 Amer. & Eng. Enc. Law, 733. Now, as against defendants, both these elements convincingly appear. That plaintiff was arrested and imprisoned at their active instigation and procurement is not contradicted; that it was done illegally cannot be gainsaid from the record. "If no crime is charged, or if the act charged amounted to no crime for which arrest may be lawfully made, the arrest is illegal," 2 Amer. & Eng. Enc. Law, 900; Newell on Malicious Prosecution and False Imprisonment, 67, 89; *Coffin v. Varilla*, 8 Tex. Civ. App. 417, 27 S. W. 956; *State v. Leach*, 7 Conn. 453, 18 Am. Dec. 113; *Duckworth v. Johnston*, 7 Ala. 578; *Moore v. Watts*, 1 Ill. (Breese) 42; *Shergold v. Holloway*, 2 Strange, 1002; 1 Chitty on Pleading, 184.

Where the warrant is irregular and void, or where it is irregular though not void but is afterwards quashed or set aside for irregularity, the prosecutor is liable to the action for false imprisonment. 2 Tucker's Commentaries, 71; Newell, 90. The so-called warrant in this case charged no offense and was void on its face. This alone made defendants, who actively instigated, directed, and procured the arrest and imprisonment of plaintiff under it, liable in trespass. The warrant was so grossly irregular as to be promptly set aside on a hearing in habeas corpus, and to call for a dismissal of the charge on appeal from the justice.

[2] This was not a case of malicious prosecution. Malice or probable cause were not necessarily pertinent to it. The illegal arrest and imprisonment, regardless of malice or probable cause, will sustain the action. *Parsons v. Harper*, 16 Grat. (Va.) 64. The instructions relating to malice and probable cause which were asked by defendants were not fitting to the case as made by the pleadings and evidence, and were properly refused. Nor do we find error in the exclusion of the two other instructions asked by defendants, and in the giving of the instruction for plaintiff.

[3] The record of the case in which the arrest and imprisonment occurred, on ap-

peal from the justice, showing the procedure therein and the dismissal thereof, was admissible as evidence tending to prove illegality of the arrest and imprisonment. *Parsons v. Harper*, supra.

An order affirming the judgment will be entered.

(72 W. Va. 301)

POLLEY v. GILLELAND.

(Supreme Court of Appeals of West Virginia.
April 15, 1913.)

(Syllabus by the Court.)

1. FERRIES (§ 14*)—ESTABLISHMENT—INTERVENTION.

Where the proprietor of a ferry has failed to exercise his franchise for the time prescribed by section 1, chapter 44, Code 1906, and by disuse and force of the statute the same has been discontinued, he has no right thereafter to intervene, as contestant, in a proceeding by another to establish a ferry at or near the same place.

[Ed. Note.—For other cases, see *Ferries*, Cent. Dig. §§ 23-33; Dec. Dig. § 14.*]

2. APPEAL AND ERROR (§ 1010*)—FINDING—ESTABLISHMENT OF FERRY.

A case in which the evidence fully supports the finding and judgment below that there was public need or necessity for the establishment of a ferry at the place designated in the application.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 3979-3982, 4024; Dec. Dig. § 1010.*]

3. FERRIES (§ 20*)—FRANCHISE—TERMINATION.

Where a ferry franchise has by disuse been lost or discontinued by operation of section 1, chapter 44, Code 1906, quo warranto, or proceeding under section 12 of said chapter is unnecessary. The discontinuance has become complete and effectual without judgment of ouster.

[Ed. Note.—For other cases, see *Ferries*, Cent. Dig. §§ 60-66; Dec. Dig. § 20.*]

4. FERRIES (§ 20*)—FRANCHISE—TERMINATION—DISUSE.

Where the franchise granted authorizes the proprietor to operate a steam ferry, the subsequent discontinuance of such ferry, and the indifferent use of a skiff ferry under circumstances showing bad faith, and a purpose to deprive the public of the benefits of the ferry established; will not preserve the right and save the ferry established from the discontinuance imposed by the statute.

[Ed. Note.—For other cases, see *Ferries*, Cent. Dig. §§ 60-66; Dec. Dig. § 20.*]

5. FERRIES (§ 14*)—PROCEEDINGS TO ESTABLISH—INTERVENTION—COLLATERAL ATTACK ON FRANCHISE.

Where the proprietor of such discontinued ferry intervenes to oppose the establishment of another ferry at or near the place of the old, and the court, on his petition and answer, is called upon to determine whether he is such person with such right as entitles him to oppose the establishment of such new ferry, its judgment thereon denying him that right does not amount to a collateral attack upon his right.

[Ed. Note.—For other cases, see *Ferries*, Cent. Dig. §§ 23-33; Dec. Dig. § 14.*]

Poffenbarger, P., dissenting.

Error to Circuit Court, Ohio County.

Petition by Albert Polley for the privilege of establishing a ferry, and Robert M. Gilleland intervenes as contestant. Judgment for petitioner, and contestant brings error. Affirmed.

McCamie & Clarke, of Wheeling, for plaintiff in error. John P. Arbenz and Joseph Handlan, both of Wheeling, for defendant in error.

MILLER, J. The judgment of the circuit court, pronounced February 4, 1910, and to which the present writ of error applies, affirmed the judgment of the Board of Commissioners of Ohio County, of April 7, 1909, whereby the right and privilege was granted to Polley, the petitioner, to establish a steam ferry across the Ohio River, at or near the foot of Forty-third Street, in the City of Wheeling, to continue for the period of fifty years from that date.

Gilleland, claiming to be the owner by purchase in 1898, of a ferry right or franchise at or near the same point, granted to Richard Hutchinson, November 9, 1868, on petition filed, was made defendant to contest the right of petitioner to establish a new ferry at the place proposed.

The record of the proceedings before the Board of Commissioners is voluminous. Many points of error are presented in elaborate briefs of counsel, most of which, as we view the case, are immaterial and to which we need give no consideration.

[1] The court below, affirming the judgment of the Board of Commissioners, in a written opinion filed and made part of the record, found as a fact, that the contestant, Gilleland, had abandoned his right and was not such a person as had right to complain of the judgment of the Board of Commissioners.

The order of the Board of Commissioners, of November 9, 1868, on which contestant's alleged right or franchise is based, is as follows: "Monday. November 9th, 1868. Ordered on the petition of Robert Hutchinson that the order of this board entered on the 22nd day of February, 1868, allowing Daniel Detweiler to establish a steam ferry between the Washington Mill and a point opposite on the Ohio side be vacated and annulled, and this board being satisfied of the necessity of establishing a ferry at that place, it is ordered that Richard Hutchinson be granted leave to establish a steam ferry across the Ohio river at or near the Washington Mill and below the same any place within one half mile to a point on the opposite side of the river in Ohio."

Section 1, chapter 44, Code 1906, relating to ferries, toll bridges, water courses, and mills, provides: "1. Every ferry established and not discontinued before this chapter takes effect may continue to be kept; and

the rates of ferriage at every such ferry shall be according to the laws thereto, so far as the same are not altered by or under some provision of this chapter, or some act of the legislature hereafter passed. But if any such ferry, or any ferry that may be hereafter established, be disused for two years and six months, and any part of said time be after this chapter takes effect, it shall, by reason of such disuse, be ipso facto discontinued, without any judicial or other proceeding for that purpose."

The last clause of this section, "without any judicial or other proceeding for that purpose," was added by chapter 159, Acts 1882. Its evident purpose was to do away with the necessity, after the time specified, of judicial ascertainment, by quo warranto or other proceeding, that such ferry right or franchise had been discontinued or abandoned. Disuse thereof for two years and six months, as prescribed, operates in law a discontinuance or abandonment of such franchise. Once there has been such disuse for the period stipulated the discontinuance or forfeiture becomes complete, by operation of law, and the right of the owner is gone, and his right to intervene as contestant, in a subsequent proceeding by another applicant for a like franchise, is taken away; his right then is no different from that of any other citizen. *Williamson v. Hays*, 25 W. Va. 609.

But contestant in his answer alleges that he is still the owner of the Hutchinson ferry, and that he has never ceased to operate the same, by himself or by lessees under him, and that he has right to intervene and oppose the establishment of the proposed ferry by petitioner, and being such owner, among other defenses he affirms two propositions: First, that as there is a ferry about a half mile above the proposed location, at Twenty-fifth Street, and one at Benwood, some two or three miles below, the latter also owned and operated by him, there is no public need or necessity for the additional ferry at Forty-third Street. Second, that there is no showing of disuse or abandonment of his ferry, and that whether or not contestant has by disuse discontinued or abandoned his ferry, his right cannot be collaterally inquired into, but only upon a direct proceeding, as by quo warranto, or under section 12 of said chapter.

[2] On the first proposition the Board of County Commissioners, and the circuit court on appeal, found as a fact, and we think on competent legal evidence, not including the petitions of citizens filed with the petition, which were objected to, that there was public need or necessity for a steam ferry at Forty-third Street. Contestant was not operating such a ferry at that point. The skiff ferry referred to had, as the evidence tends to show, for a time, been operated at a loss to him, and for most of the time had yielded him a mere nominal rental, and at the time of the application was in fact yielding him

no rental whatever. It is unnecessary for us to detail the evidence on which the finding of the Board of County Commissioners and the circuit court were based. It is sufficient to say that it fully supports the conclusions reached, and we could not, on well established rules of practice, reverse the judgment on this score.

[3, 4] The second proposition is the one mainly relied on. As already indicated we do not think that where loss of the right has been incurred, under section 1, quo warranto or any proceeding under section 12 is necessary. It will be observed that it is the disuse of the franchise, and not the mental intention to abandon, that works the discontinuance, or legal abandonment of the ferry. The Hutchinson franchise, as the order shows, was to operate a steam ferry, and the evidence shows that a steam ferry was operated, with an appropriate wharf or landing, and a bell for signaling, from about the time of the grant, by contestant's predecessors up until July, 1898, when he purchased the same. After Gilleland's purchase he never operated a steam ferry at that point, and the boat which is said to have been condemned as unfit for use as a ferry was dismantled, the engine and boiler removed, and the boat and floats used in connection therewith were permitted to float or drift away. Thereafter only a skiff was operated at that point, for the transfer of persons only, but in the most indifferent manner, for most if not all the time under leases to others, and for three years preceding the application of petitioner the skiff ferry was operated by the witness Mrs. Mays, for two years under contestant, for a nominal rental, but thereafter, and from October 16, 1908, the end of her second year, to April, 1909, the time she gave her testimony, she had operated the skiff in like manner, regardless of Gilleland, from whom she had declined to accept a lease or contract. The business had run down at that time, as she testifies, so that it yielded only from forty to fifty cents income per day, and this was the only evidence of the existence of any ferry at that point at the time of petitioner's application. The disuse of a steam ferry, the kind of a ferry actually authorized, is fully established; and we think the evidence of intent to abandon or disuse any kind of a ferry, except as a mere sham, by operating in the indifferent way shown a skiff ferry, and not in good faith but to deprive the public of the benefits of the ferry originally established, is fully shown.

If, therefore, this were a proceeding by quo warranto, or under section 12 of said chapter, to declare the ferry franchise of the contestant at an end, we think the evidence would satisfy a judgment of ouster. Much reliance is placed by contestant's counsel on *Douglass' Appeal*, 118 Pa. 65, 12 Atl. 834, for the proposition that the maintenance of

the skiff ferry was, under the circumstances, a substantial compliance with the requirements of the statute, and saved the ferry from disuse, and discontinuance by operation of law. That decision was predicated upon the fact that there was proof of no public demand for transportation, and no evidence of bad faith to the state or the public. Here the evidence is to the contrary. And as the court below pertinently says, in its opinion, under our statute it is not left to the judgment of the proprietor as to what kind of a boat, or with what number of persons he shall operate his ferry. The court must by its order granting the franchise or some subsequent order prescribe the kind of boat to be used.

[5] But inasmuch as contestant denied discontinuance by disuse, and set up in his answer an existing right to the Hutchinson ferry, it is affirmed that the judgment below amounted to collateral attack on that franchise, and that the court was bound to accept without further inquiry his claim of right quoad this proceeding. But did the judgment and proceedings below amount to collateral attack? We think not. On the intervention of the petitioner, was the court not bound to determine from the facts whether he was such a person or stood in such relation to the subject matter of the proceeding, as entitled him by such intervention to defeat the establishment of the proposed ferry? We think it was. The effect of the judgment of the Board of County Commissioners and of the circuit court, was not to declare a forfeiture or oust the contestant of any rights he had under the Hutchinson franchise. Their effect was simply to hold that the contestant was not such a person as had the right to oppose or defeat the grant to petitioner. This principle, as we interpret his opinion, was the one announced by Judge Tucker, in *Trent v. Cartersville Bridge Co.*, 11 Leigh, 521. That was an injunction suit by the bridge company against Trent and others, to enjoin them from operating a private ferry, to the detriment and injury of the bridge company, as alleged owner of an old ferry franchise. The court below perpetuated the injunction. Judge Tucker says: "I am clearly of opinion that the decree should be reversed. The appellees rest their complaint, and ask relief in equity, upon two separate and distinct rights and franchises: 1. Upon their rights as ferry owners; and 2. Upon their chartered rights as a bridge company. As to the first; it will not be necessary to rest my opinion of their pretensions, either upon the ground of jurisdiction, or upon the supposed forfeiture of their franchise. That, it is admitted, can only be declared on a quo warranto, or some other similar proceeding. But whether the franchise be forfeited or not, it has been confessedly disused; and, considering the question as entirely distinct from

and without reference to the bridge, it may be asked, whether the owner of a ferry, who has altogether abandoned the use of it, and who has entirely cast off from himself the duties incident to his privileges, can come into a court of equity, with any title to its countenance, aid or protection? His privileges are given as compensation for the duties and burdens imposed upon him; and when he has utterly disused his ferry, and no longer performs the consideration, what claim can he have in equity to the enforcement of exclusive rights? Nay more; as from disuse of the ferry he can make no profit from it, any violation of his franchise, if it be injuria, at least is not damnum. Will a court of equity, then, which only interferes upon the principle of preventing irreparable mischief, interfere where the party sustains no mischief at all? It may, indeed, well be doubted, whether even an action at law could be sustained by a ferry owner, who had abandoned and put down his own ferry."

The inquiry in that case was as much collateral as in this. The court there determined adversely to the contentions of the petitioners that they were the owners of a ferry franchise, with right to prevent others from operating a ferry on practically the same location. That was not a direct proceeding to forfeit the old right, but it was necessary in that case as in this for the court to determine the rights of the plaintiffs or contestant. Contestant concededly had no monopoly or exclusive franchise under the old Hutchinson grant, and the principle enunciated in *Williamson v. Hays*, supra, and *Ferry Co. v. Russell*, 52 W. Va. 356, 43 S. E. 107, is, not that a proprietor of a ferry franchise may be admitted to oppose the establishment of another ferry, simply to protect his pecuniary interests or right, but only to the extent that that interest involves his ability to properly and efficiently perform his duties to the public under his franchise. If he is not performing that duty and not exercising that right in the interest of the public, on what theory or principle can he be admitted to oppose the grant of a franchise to another who will serve the public? We know of no rule or principle justifying such a position. We think the judgment below was right and should be affirmed, and we will so order.

POFFENBARGER, P. (dissenting). I am unable to agree with my Associates as to the result in this case and would reverse the judgment. In my opinion, the two basic propositions of the decisions are wrong, namely: (1) That only a limited or special ferry franchise was held by Gilleland; and (2) that he had abandoned it for a period of two years and so lost it by operation of law. I think the grant of a right "to establish a steam ferry," by a court or tribunal having power to grant a ferry franchise and prescribe the kind of boats or craft to be used in the exer-

cise thereof, constitutes such a grant and prescribes or requires the use of a steam vessel in the exercise thereof at one and the same time and in the same terms. The general terms of the order were adopted for mere convenience. I think the order carried the right to transport passengers by skiff, when the circumstances required no heavier or more powerful or expeditious craft, and required the maintenance of a steam vessel for use when the circumstances demanded its use. The franchise or privilege and the instrumentalities for its exercise are naturally different things and the statute treats them so. I do not think it contemplates the grant of a special or limited right to ferry, or a division of the privilege among two or more persons, a skiff ferry to one, a rope ferry to another and a steam ferry to a third.

If this construction is right, there was no abandonment for a period of two years, nor perhaps any at all. I do not think the motive of operating the skiff in recent years is material. That travelers were transported across the river with a skiff, in the exercise of the ferry privilege and claim of title thereto, effectually precludes the theory of abandonment, whatever the motive may have been. To abandon within the meaning of the statute is to cease to use the franchise. Use of it with some improper motive is use nevertheless.

There was cause for revocation after notice, as provided by the statute, but the county court did not resort to that method of extinction of the old franchise, the only one provided by law, in the absence of abandonment.

(73 W. Va. 260)

MOORE v. MOORE.

(Supreme Court of Appeals of West Virginia.
April 15, 1913.)

(Syllabus by the Court.)

1. CONTINUANCE (§ 6*)—GROUNDS—SPECIFIC PERFORMANCE.

The bill, alleging, inter alia, purchase of real estate under a verbal contract with defendant, possession, and improvements by virtue thereof, seeks specific performance of the contract averred. Defendant's demurrer thereto being overruled, on the last day of the term next ensuing the institution of the suit, he by answer, then filed, denied all material averments of the bill, and, for good cause shown by affidavit, also filed, moved for a continuance, which being denied, the court thereupon, and on depositions previously taken and filed by plaintiff, granted the relief sought. The action of the court thereon, under the circumstances, held erroneous.

[Ed. Note.—For other cases, see Continuance, Cent. Dig. §§ 6-11, 16, 33, 35, 117; Dec. Dig. § 6.*]

(Additional Syllabus by Editorial Staff.)

2. SPECIFIC PERFORMANCE (§§ 42, 47*)—VERBAL CONTRACTS FOR SALE OF LAND—POSSESSION AND IMPROVEMENTS.

Courts usually scrutinize with care cases wherein specific performance of the contract for sale of realty is sought, especially those in-

volving verbal contracts even when accompanied by a part performance; and for possession or improvements to relieve from the rigidity thereby imposed and take the contract out from under the statute of frauds, the possession must be pursuant to and under the contract of purchase, and the improvements must be valuable and permanent.

[Ed. Note.—For other cases, see Specific Performance, Cent. Dig. §§ 124, 129, 133, 132; Dec. Dig. §§ 42, 47.*]

Appeal from Circuit Court, Barbour County.

Bill by M. C. Moore against Emery C. Moore. From a decree for plaintiff, defendant appeals. Reversed and remanded.

Wm. T. George and Leroy V. Holsberry, both of Philippi, for appellant. Warren B. Kittle, of Philippi, for appellee.

LYNCH, J. The bill alleges that, by virtue of a verbal contract for the purchase of real estate, plaintiff is entitled to a decree requiring defendant specifically to perform the same. It avers possession of the lands under the contract, and improvements thereon.

The record does not show the date of the process to answer; but it does show that it was returned, duly executed, at May rules, 1910, and the bill filed and decree nisi thereon at July rules, and defendant's appearance noted thereat, but for what purpose is not shown. The bill was set for hearing at August rules. The plaintiff then promptly proceeded with the taking of depositions in support of the averments of the bill, which were completed and filed in the clerk's office August 31st. Defendant by counsel appeared and cross-examined the witnesses. The first term of the court thereafter began September 27th, and ended October 6th. Some time during the term, the date not appearing, defendant demurred to the bill. The court did not rule thereon until the last day of the term, and apparently after 10 o'clock at night, because by the final and only decree in the cause an affidavit was filed, indorsed: "Filed October 6, 1910, at 10 o'clock p. m."

The court overruled the demurrer, whereupon defendant at once tendered his answer, which the court permitted him to file, and by which he denied the existence of the contract averred, possession and improvements thereunder, as well as other material averments of the bill. He asserts that the possession relied upon by plaintiff was as tenant by sufferance, and not under any contract of sale or purchase, and that the improvements averred in the bill were trifling, not exceeding \$50 in value, and made out of timber taken from the lands by defendant's permission. At the same time, defendant moved the court for a continuance of the cause, in order to afford him opportunity to take proof in rebuttal of that offered by plaintiff. In support of his motion, defendant also tendered an affidavit, which the court permitted him to file. This motion the court denied, and refused to continue the cause.

Although counsel for both parties discuss in their briefs other questions arising on the record, it is not now deemed essential to refer thereto or to discuss the same, except in so far as they relate to the sufficiency of the bill on demurrer and to defendant's motion for a continuance. The demurrer is not entirely without merit, although properly overruled. There is therefore no error in the action of the court thereon. But the conclusion here reached is that the court erred in refusing to grant defendant's motion to continue the cause.

[2] Courts usually scrutinize with care cases wherein specific performance of contracts for the sale of real estate is sought, and especially those involving verbal contracts even when accompanied by part performance—possession and improvements. *Gallagher v. Gallagher*, 31 W. Va. 9, 5 S. E. 297; *Miller v. Lorentz*, 39 W. Va. 160, 19 S. E. 391; *McCully v. McLean*, 48 W. Va. 625, 37 S. E. 559; *Knight v. Knight*, 51 W. Va. 518, 41 S. E. 905; *Bell v. Whitesell*, 64 W. Va. 1, 60 S. E. 879; *Pickens v. Stout*, 67 W. Va. 422, 68 S. E. 354; *Plunkett v. Bryant*, 101 Va. 814, 45 S. E. 742; *Martin v. Martin*, 112 Va. 731, 72 S. E. 680. Otherwise, such contracts are within the express terms of the statute of frauds. Possession, in order to relieve from the rigidity thereby imposed, must be pursuant to and under the contract of purchase. *Gallagher v. Gallagher*, *supra*; *Miller v. Lorentz*, *supra*; *Woods v. Stevenson*, 43 W. Va. 149, 27 S. E. 309; *Land Co. v. Thornburg*, 46 W. Va. 99, 33 S. E. 103. And the improvements asserted and relied on must at least be valuable and permanent. Trifling improvements or inexpensive repairs will not avail. *Gallagher v. Gallagher*, *supra*; *Peery v. Elliott*, 101 Va. 709, 44 S. E. 919.

[1] It cannot be said, under the circumstances detailed, that defendant purposely attempted to delay the final determination of the litigation. He could with propriety, and perhaps did, rely upon the demurrer to the bill. He did not know, and could not anticipate, the court's ruling thereon. Immediately thereafter his answer was filed. Of course, the statute (section 53, c. 125, Code 1906) provides that "at any time before final decree a defendant may file his answer, but a cause shall not be sent to the rules or continued because an answer is filed in it, unless good cause be shown by affidavit filed with the papers therefor." The evident purpose of the statute was and is to speed all litigated causes; and this purpose can be impeded only for cause shown satisfying the conscience of the court.

In his affidavit, the defendant says he was advised by counsel, before the beginning of the term, that the local custom and practice with respect to controverted chancery causes was to answer at the first term and prepare for submission on the merits by the succeeding term, and that he relied on this in-

formation; also that, if the cause is continued, he can, as he verily believes, produce and obtain testimony, the effect of which would in law entitle him to a favorable decision; that he had no knowledge the cause would be pressed for hearing at the first term; that his chief counsel was and continued absent from the state during the taking of plaintiff's depositions; and that he only secured other counsel to appear and cross-examine plaintiff's witnesses. He relies on these facts in support of his motion. In the case of *Myers v. Trice*, 86 Va. 835, 842, 11 S. E. 428, 430, it is said: "A continuance may be granted not only for the absence of a party or his counsel from unavoidable circumstances, but for honest mistake, or anything amounting to a serious surprise; and if there is no sufficient reason to induce the belief that the alleged ground of the motion is feigned a continuance should be granted, rather than to seriously imperil the just determination of the cause by refusing it." From the character of the case itself, the proceedings therein heretofore detailed, and defendant's affidavit, not in any wise controverted, the conclusion seems fair and reasonable that defendant was entitled to a continuance of the cause, and that it was error in the circuit court to deny his motion, and at the same time, in a final decree as upon the merits, grant the relief prayed for in the bill.

The decree of the circuit court is therefore reversed, and the cause remanded, with leave to the defendant to take and file his proof preparatory to a final submission of the cause on its merits.

(72 W. Va. 263)

PAULL v. PITTSBURGH, W. & K. R. CO.
(Supreme Court of Appeals of West Virginia.
April 15, 1913.)

(Syllabus by the Court.)

1. CONTRACTS (§§ 9, 108*)—VENDOR AND PURCHASER (§ 15*)—VALIDITY.

An oral agreement between vendor and vendee, entered into at the time or prior to the grant, though not expressed therein, whereby the vendee agrees to pay, as further consideration therefor, the difference between the sum stated in the grant and that thereafter paid by the latter for other lots designated in the agreement, the purchase of which the grantee then had in contemplation, and some of which he did subsequently purchase at an advanced price, is not void for uncertainty, want of consideration, or as against public policy.

[Ed. Note.—For other cases, see *Contracts*, Cent. Dig. §§ 10-20, 498-503, 505, 507-511; Dec. Dig. §§ 9, 108;* *Vendor and Purchaser*, Cent. Dig. § 16; Dec. Dig. § 15.*]

2. VENDOR AND PURCHASER (§ 312*)—CONTRACT—CONSTRUCTION—ACTION FOR PRICE.

It is not necessary that the vendor should defer action to recover the difference in price until the vendee has purchased all the lots designated, but he may elect to rely on any one of the purchases made prior thereto.

[Ed. Note.—For other cases, see *Vendor and Purchaser*, Cent. Dig. § 917; Dec. Dig. § 312.*]

2. VENDOR AND PURCHASER (§ 814*)—ACTION FOR PRICE—DECLARATION.

A declaration which substantially, though not in technical terms, avers a promise by the grantee to pay the grantor, as further consideration for the grant of land, the difference between the sum actually paid therefor and that thereafter paid for other lots designated by both, the purchase of which the grantee then had in contemplation as necessary for his use, and some of which he did thereafter purchase at an advanced price, is not defective on demurrer for failure to allege a promise by defendant.

[Ed. Note.—For other cases, see *Vendor and Purchaser*, Cent. Dig. §§ 920-927; Dec. Dig. § 314.*]

Error to Circuit Court, Ohio County.

Action by Lee S. Paull against the Pittsburgh, Wheeling & Kentucky Railroad Company. From a judgment for defendant, plaintiff brings error. Reversed and remanded.

Russell & Russell, of Wheeling, for plaintiff in error. J. B. Sommerville, of Wheeling, for defendant in error.

LYNCH, J. The plaintiff sues in assumption to recover of defendant \$5,000 damages for breach of contract. Succinctly stated, the contract averred is that plaintiff, a married woman, her husband joining, conveyed to defendant a lot in Wheeling, for \$660 actually paid, with the further oral agreement that in the event defendant purchased any other of the lots described in the declaration as contiguous to or near the lot conveyed by her it would pay her as further compensation the difference between \$660 and the sum, whatever it might be, at which defendant should purchase any one of the other lots; the difference to be determined by the price per front foot. The breach alleged is that the defendant did purchase two additional lots, one of Hazlett and another of Driehorst, for which it paid Hazlett \$1,858.34 or \$49.34 per front foot, and Driehorst \$1,417.79 or \$49.32 per front foot, and its failure to pay plaintiff such additional sum. The lots are contained within what is denominated as the "strip," which embraces the lot the purchase of which defendant then had in contemplation as necessary for its use. An original and an amended declaration were filed, to each of which the defendant demurred, but assigned on the record no grounds therefor. The court sustained each of the demurrers, and finally dismissed the action with costs to defendant. A writ of error ensued.

In defendant's brief, the invalidity of the contract averred is urged, for the reason that it is void for uncertainty, want of consideration, and as against public policy. It is also asserted that the declaration is defective because of its failure to allege a basis for the determination of the amount claimed thereby, and to aver a promise by defendant

to pay plaintiff the sum, recovery of which is sought.

[1, 2] The uncertainty urged is that the prices of the lots within the strip not yet purchased by defendant are not ascertained, because if purchased they may exceed those paid Hazlett and Driehorst. The contract stated in the declaration applies not to all, but to any, of the lots that should be purchased by defendant. Having elected to sue, as with propriety she might, for the difference between the price paid her and that paid either Hazlett or Driehorst, she thereby precluded herself from again suing to recover any sum in excess of that now claimed. She is bound by her election. Nor is this a matter or cause of which the defendant can reasonably complain. It inured to its benefit.

An agreement, though not in writing, made by a grantee at the time of sale and conveyance of land, to pay therefor a sum in addition to that expressed in the deed, is valid, binding, and enforceable. *Nickerson v. Saunders*, 36 Me. 413, cited with approval in *Pierce v. Weymouth*, 45 Me. 481. If a contract designates a method whereby the price can be definitely ascertained, even from a contingency, it is not thereby rendered uncertain. Where a contract for the sale of a village lot provided that the price should be the same as that paid for the first lots which should be sold in the vicinity, and lots adjoining the one in question were sold before the commencement of the action, it was held that the contract was thus rendered certain. *Cunningham v. Brown*, 44 Wis. 72, 78. If a purchaser of real estate agrees that if he should not build thereon but resell it he would pay the vendor the profits thereby realized, the agreement is not uncertain or without consideration. *Bourne v. Sherrill*, 143 N. C. 381, 383, 55 S. E. 799, 118 Am. St. Rep. 809. The following authorities sustain the validity of the agreement stated in the declaration: *Wehner v. Bauer* (C. C.) 160 Fed. 240; 1 *Elliot* on Contracts, 312, note 97; *Michael v. Foil*, 100 N. C. 178, 6 S. E. 264, 6 Am. St. Rep. 577; *Caldwell v. School District* (C. C.) 55 Fed. 372; *Miller v. Kendig*, 55 Iowa, 174, 7 N. W. 500; *Lungerhausen v. Crittenden*, 103 Mich. 173, 61 N. W. 270; *Seagrave v. Clark*, 177 Mass. 93, 58 N. E. 233. The authorities cited by defendant's counsel (*Burks v. Stam*, 35 Mo. App. 455; *Gelston v. Sigmund*, 27 Md. 334; *Foster v. Mining Co.*, 68 Mich. 188, 36 N. W. 171; *Pulliam v. Schimpf*, 109 Ala. 179, 19 South. 428; and *Culver v. Culver*, 39 N. J. Law, 574) do not announce legal propositions opposed to the views now asserted. In fact, they do not discuss the propositions now involved.

Nor do the authorities relied upon by defendant show the contract void as against public policy. The defendant insists that in effect the contract is fraudulent because

the manifest purpose thereof was its use as an inducement to other lot owners to sell and convey their lots for the price named in plaintiff's deed. How plaintiff could reap any benefit or profit from the inducement on others, if successful, is not obviously apparent. If her neighbors received the same price, or prices at the same rate per front foot, in what respect is her interest advanced? The authorities cited by defendant hold that contracts actually fraudulent are void and unenforceable. By what process of reasoning is that conclusion applicable to this case? It is not admitted on demurrer, nor does it arise upon the mere agreement of parties for an increased price.

[3] The declaration is not defective in either respect asserted by defendant. It does definitely aver a method by which the exact sum demanded thereby is ascertainable, in fact ascertained—the difference between the sum paid plaintiff and the prices paid by defendant for lots purchased by it within the strip. The agreement, being valid, as evidently it is in view of the authorities cited, and the event on which it was contingent having occurred, furnishes a basis from which the jury may readily determine the extent of plaintiff's recovery.

The declaration also substantially avers a promise by defendant to pay plaintiff the additional compensation for her lot. There is, it is true, no express averment of a promise in the technical sense. But, after stating in detail by clear and unambiguous terms the contract for further compensation, defendant's purchase of the Hazlett and Drie-horst lots, and subsequently of other lots within the "strip," the declaration avers that thereby "it was provided that the said defendant should pay to the said plaintiff the sum of \$660 as part of the consideration for the property so to be conveyed as aforesaid, and also that the defendant should pay to the plaintiff any further amount which might be necessary to make the price per front foot the same as the defendant should thereafter pay to the owners of any of the other portions" within the "strip," and, further, "that under and by virtue of the said contract the said defendant became liable to pay" the difference; concluding with an averment of the usual request by plaintiff therefor and refusal by defendant. The contract is stated throughout, not by way of recital, as in *Mold & Foundry Co. v. Steel & Iron Co.*, 62 W. Va. 288, 57 S. E. 826, but as a positive agreement for further compensation for plaintiff's property. This substantially avers a promise, sufficient to comply with the requirements of good pleading. To hold otherwise would sacrifice substance to dry, technical forms. In *Wolf v. Spence*, 39 W. Va. 491, 20 S. E. 610, cited, an action to recover the value of certain machinery, the infirmity in the declaration was its fail-

ure to aver in express terms an agreement that the machinery would perform the work for which it was intended. In *Wald v. Dixon*, 55 W. Va. 191, 46 S. E. 918, the declaration states no promise or agreement by Dixon to reimburse plaintiff for any of the work for the value of which he sought to recover in the action. *Bannister v. Coal & Coke Co.*, 63 W. Va. 502, 61 S. E. 338, holds that a declaration in assumpsit, which avers that defendant "agreed" to pay plaintiff a sum certain for things done by him under contract therefor, sufficiently alleges a promise. And *Stopper v. McGara*, 66 W. Va. 403, 66 S. E. 698, holds that, "generally, a count in assumpsit, which shows that what is equivalent to a promise has taken place, is good without the use of the word promise"—citing 2 Enc. Pl. & Pr. 997; 1 Chit. Pl. 301; Hogg's Pl. & Forms, § 84.

For the reasons stated herein, the judgment of the circuit court is vacated and annulled, the demurrer overruled, and the action remanded for issue and trial.

(72 W. Va. 323)

ROANE LUMBER CO. v. LOVETT.

(Supreme Court of Appeals of West Virginia.
April 22, 1913.)

(Syllabus by the Court.)

1. NEW TRIAL (§ 40*)—GROUNDS—ERRORS IN INSTRUCTIONS.

A trial court may set aside a verdict for errors in rulings upon instructions, though no exceptions to such rulings were taken before rendition of the verdict.

[Ed. Note.—For other cases, see *New Trial*, Cent. Dig. §§ 62-66; Dec. Dig. § 40.*]

2. EVIDENCE (§ 266*)—DECLARATIONS—ADMISSIBILITY.

A declaration or utterance of a party to a transaction marking the time thereof and made to a stranger to the transaction is admissible in evidence to identify the time or fact, and, if the testimony of the declarant, respecting the time or fact, is contradicted, to corroborate him; but such declaration is not evidence of the transaction itself or the date thereof.

[Ed. Note.—For other cases, see *Evidence*, Cent. Dig. §§ 1051, 1052, 1054-1056, 1058-1060; Dec. Dig. § 266.*]

Error to Circuit Court, Lewis County.

Action by the Roane Lumber Company against H. E. Lovett, administrator. Judgment for plaintiff, and defendant brings error. Reversed, and judgment for defendant.

Williams, Scott & Lovett, of Huntington and W. G. Bennett, of Weston, for plaintiff in error. Brannon & Stathers, of Weston, for defendant in error.

POFFENBARGER, P. Claiming the right to recover from J. T. Lovett \$213.68 as an overpayment to him on account of purchase money for lumber, or, in other words, for a shortage in the lumber, the Roane Lumber Company sued him before a justice of the peace and recovered a judgment for said

sum, from which Lovett appealed. On the trial in the circuit court, there was a verdict for the defendant, which the court set aside. Later, after the death of Lovett and revival against his administrator, the case was submitted to the court in lieu of a jury, upon the evidence adduced upon the first trial, which had been made part of the record for the purposes of an application for a writ of error, by proper bills of exception, and the court rendered a judgment for the plaintiff. The administrator seeks reversal thereof and also of the order setting aside the verdict, reinstatement of the verdict, and judgment thereon.

[1] The vital inquiry here is whether the trial court erred in setting aside the verdict. If it did, the order setting it aside will have to be reversed, with reinstatement of the verdict, and judgment upon it for the defendant will follow, together with reversal of the judgment rendered for the plaintiff. In support of the motion to set aside the verdict, six grounds of error were assigned: Admission of improper evidence for the defendant, rejection of proper evidence offered by the plaintiff, refusal to give proper instructions asked for by the plaintiff, the giving of improper instructions asked for by the defendant, insufficiency of the evidence to sustain the verdict, and violation of instructions of the court in the rendition of the verdict.

In the bill of exceptions, the court certified the failure of the plaintiff to make any objection to the rulings on instructions or take any exceptions thereto, until after the jury had rendered its verdict. If the court based its action upon the rulings respecting instructions, the failure to object or except until after the verdict might not be material upon the present inquiry, for a trial court can no doubt set aside a verdict of its own volition upon its own motion, if it perceives error in the instructions which misled the jury. The province of the court goes beyond action as umpire in a mere game or contest between the parties litigant. Its proper function is to effectuate right and justice between them within the limits of legal rules and principles. *Thomp. Trials* (2d Ed.) § 2711; *McCabe v. Lewis*, 76 Mo. 301; *Hensley v. Davidson*, 135 Iowa, 106, 112 N. W. 227, 14 Ann. Cas. 62; *Weber v. Kirkendall*, 44 Neb. 766, 63 N. W. 35; *Railway Co. v. Donovan*, 110 Mich. 173, 68 N. W. 115; *Ellis v. Ginsburg*, 163 Mass. 143, 39 N. E. 800; *Richmond v. Wardlaw*, 36 Mo. 313.

The court refused but one instruction asked for by the plaintiff, and that was obviously bad. The bill of exceptions does not show any instructions at all given for the defendant. If the plaintiff was prejudiced by the giving of any erroneous instruction against him so as to warrant the court in setting aside the verdict, such instruction should have been made a part of the record. Five instructions given for the plaintiff seem to have submitted to the jury fairly and ful-

ly its right to recover. Nothing perceived in the rulings on instructions justifies the ruling on the motion to set aside the verdict.

[2] A supposed error in the admission of evidence for the defendant appears to have been the ground upon which the court based its action in respect to the result of the first trial. This related to a minor and subsidiary issue as to the time of the making of the contract for the sale of the lumber; Lovett claiming it to have been made on Friday or Saturday, November 13 or 14, 1905, notwithstanding the receipt given by him was dated on Monday, November 16, 1905. He claims the voucher and receipt were prepared on Friday or Saturday, and he began hauling the lumber on Monday, but took the precaution to obtain payment and sign the receipt on Monday, before any lumber was actually delivered. On the other hand, Rinehart, the officer of the company through whom the sale was made, and one Moore, a purchasing agent, claim the sale was actually made and the voucher and receipt prepared on Monday. The main issue in the case was whether or not the purchaser had the right, under the contract, to reinspect and remeasure the lumber; the assertion of this claim being denied by the defendant. He had had the lumber inspected and classified, for the purpose of a sale to other parties, about two years before the sale to plaintiff. Having the certificate of that inspection or a copy thereof, he claims the measurements and classification of that instrument shown by these papers were used in the negotiation of the sale to the plaintiff, and adopted and made the basis of the contract. Plaintiff wholly denies this, and Moore gave it as his recollection that it was understood that the lumber was to be regraded. This conflict in the testimony involved contradiction as to the time, places, and circumstances of the negotiations. In this connection the defendant was permitted to testify to a declaration made to his daughter on Friday or Saturday that he had that day made a sale of the lumber, and the daughter was permitted to testify to the like declaration and to fix the time by reference to the date of a confidential announcement of the wedding of a friend, which she was authorized to make public on the following Tuesday evening. She was also permitted to file a copy of the wedding announcement as a part of her deposition.

The obvious purpose of this testimony was to corroborate and sustain Lovett's testimony as to the time and circumstances of the consummation of the sale against the contradictory testimony of Rinehart and Moore. The declaration was not offered for the purpose of proving the same to have been made on Friday or Saturday; nor was it competent evidence for that purpose. Nevertheless, it had a natural tendency to corroborate the statement of Lovett as to the time of the sale. It was a verbal act; a

circumstance sustaining the testimony of Lovett against the attack made upon it by the testimony of plaintiff's witnesses. It did this by its tendency to prove his credibility. Such evidence is not obnoxious to the hearsay rule, nor excluded by it, because it is not testimonial evidence—not evidence adduced for the purpose of proving the facts in issue. Wig. Ev. §§ 416, 1791. In the former section the author says: "It often happens that a place or a time is marked significantly by an utterance there or then occurring, so that the identification of it may alone be made, or best be made, by permitting the various witnesses to mention the utterance as an identifying mark. The utterance, not being used as an assertion to prove any fact asserted therein, is not obnoxious to the hearsay rule, and may therefore be proved like any other identifying mark." Declarations of this kind were admitted in *Rex v. Richardson*, 2 Cox, Cr. 361; *Barrow v. State*, 80 Ga. 194, 5 S. E. 64; *State v. Dunn*, 109 Iowa, 750, 80 N. W. 1068; *Stewart v. Anderson*, 111 Iowa, 329, 82 N. W. 770; *Earle v. Earle*, 11 Allen (Mass.) 1; *Commonwealth v. Sullivan*, 123 Mass. 221; *People v. Mead*, 50 Mich. 229, 15 N. W. 95; *Agulino v. Railroad Co.*, 21 R. I. 263, 43 Atl. 63; *Hill v. North*, 34 Vt. 616; *Weeks v. Lyndon*, 54 Vt. 640; *State v. Young*, 67 Vt. 450, 32 Atl. 251; *Wilkins v. Metcalf*, 71 Vt. 103, 41 Atl. 1035. The admissibility of such evidence for purposes of identification or corroboration is asserted in *Railroad Co. v. Stimpson*, 14 Pet. 453, 10 L. Ed. 535; *Thompson v. Bank*, 111 U. S. 529, 4 Sup. Ct. 689, 28 L. Ed. 507; *Card v. Foot*, 56 Conn. 369, 15 Atl. 371, 7 Am. St. Rep. 311; *Ross v. Bank*, 1 Aikens (Vt.) 43, 15 Am. Dec. 664; *Wetmore v. Mell*, 1 Ohio St. 26, 59 Am. Dec. 607; *Craven v. State*, 49 Tex. Cr. R. 78, 90 S. W. 311, 122 Am. St. Rep. 799. The daughter's testimony to this declaration, as well as the defendant's, was admissible. The witness also had a clear and undoubted right to refer to the marriage announcement and other circumstances enabling her to fix the date of the declaration. Neither this fact nor the declaration itself were admissible to prove that a sale was made or the terms of the sale. The sale, its terms and time, depended for proof on other evidence, but the declaration was admissible for corroborative purposes, and the plaintiff had the right to have the court limit it to such purpose by an instruction to the jury.

The verdict is not contrary to the evidence nor to the instructions of the court. The evidence adduced on the vital question whether Lovett sold the lumber upon the inspection made by Hill for the purpose of a sale to other parties which had not been consummated, without any right on the part of the purchaser to regrade it, under a different set of inspection rules, was oral and directly con-

flicting. It depended upon the credibility of the witnesses, and there were no controlling facts admitted or clearly established by evidence. Under such circumstances, a trial court cannot properly set aside a verdict. *Coalmer v. Barrett*, 61 W. Va. 237, 56 S. E. 385; *Fulton v. Crosby & Beckley Co.*, 57 W. Va. 91, 49 S. E. 1012. Admitted facts seem rather to sustain the testimony of Lovett. The lumber had been formerly inspected and a certificate of inspection was given, showing exactly the same number of feet and classification as the voucher and receipt given by Lovett to the plaintiff. On that basis the lumber had been actually paid for and taken away several months before notice of shortage or demand for repayment on account thereof.

Our conclusion is to reverse the judgment for the plaintiff rendered on the 27th day of May, 1910, and the judgment of June 7, 1909, setting aside the verdict of the jury, reinstate the verdict, and render judgment for the defendant in conformity therewith.

LYNCH, J., absent.

(72 W. Va. 326)

SHINN et al. v. O'GARA COAL MINING CO.
(Supreme Court of Appeals of West Virginia.
April 22, 1913.)

(Syllabus by the Court.)

1. LIFE ESTATES (§ 28*)—ACTION BY LIFE TENANT.

A life tenant has such interest as entitles him to sue for the forfeiture imposed on an adjoining owner or tenant by section 7, chapter 79, Code 1908, for mining for coal within five feet from the division lines.

[Ed. Note.—For other cases, see *Life Estates*, Cent. Dig. §§ 16, 21, 54-56; Dec. Dig. § 28.*]

2. LIFE ESTATES (§ 28*) — ACTION BY LIFE TENANT—JOINDER OF REMAINDERMEN.

And such life tenant may join with the reversioners or remaindermen in such action, and a declaration so joining them is not bad on demurrer for misjoinder of parties.

[Ed. Note.—For other cases, see *Life Estates*, Cent. Dig. §§ 16, 21, 54-56; Dec. Dig. § 28.*]

Error to Circuit Court, Harrison County.

Action by Mary R. Shinn and others against the O'Gara Coal Mining Company. Judgment for defendant, and plaintiffs bring error. Reversed and rendered.

Davis & Davis and Osman E. Swartz, all of Clarksburg, for plaintiffs in error. John Bassel, of Clarksburg, for defendant in error.

MILLER, J. The demurrer to the declaration was sustained and there was a final judgment of nil capiat, to which the present writ of error applies.

Plaintiffs, the life tenant and remaindermen, joined in an action of trespass on the case to recover of defendant the penalty or forfeiture imposed by section 7, chapter 79,

Code 1906. That section provides: "No owner or tenant of any land containing coal shall open or sink, or dig, excavate or work in any coal mine or shaft, on such land, within five feet of the line dividing said land from that of another person or persons, without the consent, in writing, of every person interested in, or having title to, such adjoining lands in possession, reversion, or remainder, or of the guardians of any such persons as may be infants. If any person shall violate this section, he shall forfeit five hundred dollars to any person injured thereby who may sue for the same."

[1] Two grounds of demurrer have been argued, and submitted, (1) that the life tenant has no such interest as entitles her to maintain the action; and, (2) that the life tenant and remaindermen cannot join in such action. A sufficient answer to the first proposition, it seems to us, is that the act enjoined cannot be done without the consent in writing of *every person interested in, or having title to* such adjoining lands *in possession, reversion, or remainder*, and that the person offending shall forfeit five hundred dollars to *any person injured thereby who may sue for the same*. Certainly the persons whom the statute assumes will be injured by the forbidden act are those whose consent in writing is required as a condition of doing the thing otherwise prohibited. These persons are every one interested in, or having title to, the land in possession, reversion, or remainder. Certainly a life tenant in possession is within the plain terms and meaning of the statute, and one of those whose consent is necessary, and who is entitled to sue. And we have decided that the owner of a vein of coal without ownership of the surface is also within the terms of the statute. *Gawthrop v. Fairmont Coal Co.*, 68 W. Va. 650, 70 S. E. 556. The language of the law we think too plain for controversy. Right and remedy are both given by statute; neither depend on the rules and principles of the common law.

[2] But can the life tenant and remaindermen join in the action? The court below evidently concluded that they could not, on principles of the common law. Suits for wrongful acts of a temporary character interfering with the beneficial use and enjoyment of the property, and diminishing the value of the possessory interest, can, in general, be maintained only by the tenant in possession; while on the other hand if the injury be of a permanent nature causing damage to the inheritance then the reversioner alone can maintain the action. 1 *Addison on Torts*, 429, 430; 3 *Rob. Pract.* 416; 2 *Washburn on Real Prop.* section 1517.

But here neither the right nor remedy depend upon the common law. Both are conferred by statute, and the beneficiaries are so clearly designated as to leave nothing for inference or controversy. Nor does the stat-

ute conferring right and remedy necessarily imply any physical invasion of the beneficial use or enjoyment of the property by the tenant in possession, or actual damage to the inheritance, other than a violation of statutory rights, as a condition precedent to the right of action. The injury contemplated and giving right of action is the injury done the parties by a violation of the statute. *Mapel v. John*, 42 W. Va. 30, 24 S. E. 608, 32 L. R. A. 800, 57 Am. St. Rep. 839. This right of action is not the ordinary *qui tam* action given by some statutes, but one coupled with an interest in the land or property affected, and not affecting the public in general. And while it does not otherwise necessarily imply actual injury done, the right is given as a protection to the estates and interests in land and to those persons described who have been or may be actually injured by a violation of the statute, and to no one else. We need not say whether less than the whole number interested can sue for the forfeit, but a fair construction of the statute, we think, admits of but one recovery, and as all have right, all may, if they so elect, as they have in this case, join in the action, and there is no misjoinder.

These views lead to a reversal of the judgment below and we will enter here such judgment as we think the court below should have entered, overruling the demurrer and ruling defendant to plead to issue.

LYNCH, J., absent.

(72 W. Va. 316)

SEHON v. BLOOMER et al.

(Supreme Court of Appeals of West Virginia.
April 22, 1913.)

(Syllabus by the Court.)

1. HUSBAND AND WIFE (§ 113*) — SEPARATE ESTATE OF WIFE—CONTINGENT REMAINDER.

A contingent remainder, created by will probated before the act establishing separate estates of married women took effect, and vesting thereafter in a woman who was married before the act was passed, and so continued until the vesting of the estate, is her separate property.

[Ed. Note.—For other cases, see *Husband and Wife*, Cent. Dig. § 394; Dec. Dig. § 113.*]

2. TAXATION (§ 699*) — REDEMPTION FROM TAX SALE—LIMITATIONS.

One who claims the right to redeem land from a tax sale, as the grantee of a married woman and her husband, of land not her separate estate, is barred of his right at the end of one year after it accrued to him.

[Ed. Note.—For other cases, see *Taxation*, Cent. Dig. §§ 1402-1405; Dec. Dig. § 699.*]

Appeal from Circuit Court, Raleigh County.

Bill by Edmond Sehon against George C. Bloomer and others. Decree for defendants, and plaintiff appeals. Affirmed.

Campbell, Brown & Davis, of Huntington, and John E. Blake, of Madison, for appellant. McOrperry & Patterson and McGinnis & Hatcher, all of Beckley, for appellees.

WILLIAMS, J. Suit by Edmond Sehon against George C. Bloomer and a number of other defendants to redeem land in Raleigh county from a tax sale and conveyance. The cause was heard upon the bill, answers, and general replications, and upon an agreed statement of facts; and on July 11, 1911, plaintiff's bill was dismissed, and he has appealed.

The deed to Bloomer, the tax purchaser, bears date the 24th of April, 1875. The interest sought to be redeemed is the one-seventh of one-third, or the one twenty-first, undivided interest in the land which was sold. Plaintiff claims said interest by deed from Hannah Augusta Bowen and Thomas Bowen, her husband, bearing date the 26th day of September, 1895. Mrs. Bowen is the daughter of Robinson Stuart, and married Thomas Bowen in 1866, and ever since then has been living with her husband in the state of Virginia.

Plaintiff contends that, at the time the land was conveyed to him, his grantor had a right to redeem, because she was under disability of marriage, and by virtue of section 30, c. 31, Code 1906, could redeem within one year after the removal of her disability. As her grantee, he claims that the right to redeem passed to him, and continues so long as his grantor is under disability. It is essential to determine, first, whether the estate of Mrs. Bowen was her common-law or her separate estate, because there is no saving in favor of married women in respect to redeeming their separate estates. If the land was her separate estate, her right of redemption expired one year after the tax sale.

Mrs. Bowen is one of seven children of Robinson Stuart, Sr. She acquired title under the will of her grandmother, Elizabeth Stuart, made in 1859. The clause of the will creating the estate in question reads as follows: "2nd. I will to Henry Stuart and Thomas Bradford in trust for my son Robinson Stuarts wife and his family, the tract of land on which my said son now resides, also the tract of land called the Henning place and when Robinson cease to have a family to his heirs forever. One third of my Raleigh lands and the lands on the Nicholas Road to be held in trust by said trustee for the same purpose and to go in the same way."

[1] The land on which Robinson Stuart lived was in Greenbrier county, but the land in question, the "Raleigh lands," is made subject to the same trust and limitation. It is clear that the will itself does not create a separate estate in the remainder. Did the married women's act, which took effect April 1, 1869, operate to make it Mrs. Bow-

en's separate estate? The answer to this question depends upon the time when title vested in her. If it vested before the statute took effect, then the statute did not operate to convert it into a separate estate. *Wyatt v. Smith*, 25 W. Va. 813; *Central Land Co. v. Laidley*, 32 W. Va. 134, 9 S. E. 61, 3 L. R. A. 826, 25 Am. St. Rep. 797; *Pickens v. Kniseley*, 36 W. Va. 794, 15 S. E. 997; and *Laidley v. Central Land Co.*, 30 W. Va. 505, 4 S. E. 705. The will created a freehold estate in trust for Robinson Stuart's wife and his family. The purposes of the trust were completed in 1876, when Robinson Stuart ceased to have a family; his wife having died in 1864. But he was then living, and the limitation to "his heirs" did not vest, if the word "heirs" was used by the testatrix in its technical sense, because of the legal maxim, "Nemo est hæres viventis."

In 1876 Robinson Stuart brought a suit in the circuit court of Greenbrier county against the trustees and his seven children to have the will construed. The circuit court held, in effect, that the children of Robinson Stuart took a vested estate in remainder upon the death of the testatrix, and confirmed a partition of the lands amongst them. But, on appeal to this court, the decree was reversed and the partition annulled. The mandate and opinion of this court in that case, we think, determine that the remainder limited to the heirs of Robinson Stuart was contingent upon his death. See *Stuart v. Stuart*, 18 W. Va. 675. Robinson Stuart was living when that case was decided, and it does not appear that he is not still alive. The remainder was contingent, because his heirs were not ascertainable until his death. The court construed the words "his heirs" to mean, not children or heirs apparent, but technical heirs, those on whom the law casts the descent of his property at his death. In discussing this point, at page 689 of 18 W. Va. of the opinion, Judge Green uses the following language: "It is contended that this means 'to his heirs apparent'; that is, to his then children. But, after a careful consideration of the question and of the whole will, I am forced to give to the words 'his heirs forever' the usual technical meaning of such words. And to conclude that the meaning of the testatrix is that on his death the property shall go to such persons and in such proportions as real estate owned by him would descend to such persons, as at the death of William R. Stuart, Sr., answer the description of his heirs."

It is is true the learned judge also says, beginning at bottom of page 691 of 18 W. Va., that the children of Robinson Stuart were entitled to occupy the land in joint tenancy between the time of the ending of the trust, which was when he ceased to have a family, in 1876, and his death. But he seems to have put that right upon the ground of their having inherited from their mother

the share which she took in fee under the will, and not because of any estate which the will had vested in them at that time. In concluding his opinion, at page 692 of 18 W. Va., he says that at the death of William R. Stuart, Sr., the estate of the children in the lands will terminate, and, quoting his language: "In lieu of it will arise a springing devise in favor of all persons, who would be heirs of William R. Stuart at his death, including these children, and, if any of them be dead, their descendants, but including also any other children of William R. Stuart, Sr., whom he may have living at his death." Robinson Stuart is the same as William R. Stuart. His death was a condition precedent to the vesting of the remainder, and not a condition subsequent, divesting a vested estate. Not having a vested estate in the land at the time the statute creating separate estates in married women took effect, that statute operated to make it Mrs. Bowen's separate estate, whenever title thereto vested in her, if indeed it has yet vested; a circumstance depending upon the death of Robinson Stuart, a fact not in evidence. And, being her separate estate, the statute takes away her right to redeem after one year from the tax sale.

[2] But, if we should be wrong in the foregoing view of the case, there is another reason why, we think, plaintiff cannot now redeem. Supposing it was Mrs. Bowen's common-law estate, and that she was under disability of marriage, which has continued until now, still it is not she who is seeking to redeem. It is her grantee who acquired her right by deed from her in 1895, 14 years before he brought this suit. Can he claim the benefit, for so long a time, of the saving in her favor? We think not. The saving is a personal right, and is intended only for those persons who are under disability and named in the statute. The moment Mrs. Bowen parted with her right in the property, the disability was, in effect, removed, and all saving because thereof came to an end. It was then the duty of her grantee, the plaintiff, to act before one year from the time of his conveyance expired. It is true the statute (section 30, c. 31) permits the heir or assignee of one under disability to redeem, but such right is given for one year only "after the removal of such disability"; and the passing of title, whether by grant or inheritance, operates to remove the disability. The right of property in the disabled party, to protect which the saving was made, has passed, and therefore there is no reason for withholding the operation of the statute of limitation. A grantor under disability can no more confer the personal right, given on account of disability, than she can confer the disability itself. It is purely a personal, not a property, right, and therefore not transmissible.

We have found but three decisions by any

of the courts of the country on this question, two by the Supreme Court of Iowa, and one by the Supreme Court of Mississippi. Those cases construe statutes of the respective states, both of which are like our own, in respect to the suspension of limitation upon right to redeem land from tax sale by one under disability. They are directly in point, but in direct conflict with each other. The Supreme Court of Mississippi, the decision being rendered by one judge only, in *McNamara v. Baird*, 72 Miss. 89, 16 South. 384, holds that: "The time for redemption accruing to the heir of an infant begins to run from the time when the infant would have attained his majority had he lived." But the Supreme Court of Iowa takes the opposite view. In two apparently unanimous decisions rendered by a court composed of five judges, one in 1878 and the other in 1892, after the personnel of the court had wholly changed, that court held that: "An action by the heir of a minor to redeem from tax sale must be commenced within one year after the death of the minor." *Gibbs v. Sawyer*, 48 Iowa, 443, and *McGee v. Bailey*, 86 Iowa, 513, 53 N. W. 309. In the latter case the heir who sought to redeem was himself an infant.

Our conclusion is that the right to redeem land from a tax sale, reserved by the statute to a married woman in respect to her common-law estate, passes to her grantee, but must be exercised by him within one year after he has received his deed.

Decree is affirmed.

(72 W. Va. 340)

WISEMAN v. CRISLIP et al.

(Supreme Court of Appeals of West Virginia.
April 22, 1913.)

(Syllabus by the Court.)

1. DEEDS (§ 97*)—CONSTRUCTION — DESCRIPTION.

Of two descriptions of land in a deed, one of which is capable of complete and exact application to a subject-matter and the other not, the former is accepted as correct and the latter rejected as erroneous, unless something in the deed, read in the light of the situation and circumstances of the parties, discloses intent inconsistent with such construction.

[Ed. Note.—For other cases, see *Deeds*, Cent. Dig. §§ 267-273, 434-447; *Dec. Dig.* § 97.*]

2. REFORMATION OF INSTRUMENTS (§ 6*)—DEEDS OF MARRIED WOMEN.

In the absence of statutory enlargement of the common-law powers of married women, respecting dispositions of their real estate, equity will not reform the deed of a married woman so as to make it include land it should have embraced, but, by reason of mistake, did not.

[Ed. Note.—For other cases, see *Reformation of Instruments*, Cent. Dig. §§ 5-19; *Dec. Dig.* § 6.*]

3. HUSBAND AND WIFE (§ 187*)—REFORMATION OF INSTRUMENTS—DEEDS BY MARRIED WOMEN—VALIDITY.

Notwithstanding the married woman statutes of this state, the contractual powers of

married women respecting conveyance of their real estate are limited in the exercise thereof to a particular and exclusive mode and quoad such estate they have not the contractual powers of *femes sole*, wherefore equity will not correct a mistake in the deed of a husband and wife, conveying only land of the former, so as to make it include lands of the latter, in the absence of a written contract for the sale of her land, executed in the manner prescribed by the statute.

[Ed. Note.—For other cases, see *Husband and Wife*, Cent. Dig. §§ 722, 723; Dec. Dig. § 187.*]

Appeal from Circuit Court, Roane County.

Bill by Henry A. Wiseman against Cyrus A. Crislip and others. From a decree for plaintiff, defendants appeal. Reversed, and bill dismissed.

Walter Pendleton, of Grantsville, and Thos. P. Ryan, of Spencer, for appellants. J. M. Harper and Geo. F. Cunningham, both of Spencer, for appellee.

POFFENBARGER, P. The bill filed in this cause, for reformation of a deed, so as to make it include 50 acres of land, alleged to have been included in the contract of sale, but admittedly not included in the deed, proceeds upon two alternative theories: Equitable title in the male defendant, by reason of his alleged purchase of the additional land claimed, or title in the female defendant, a married woman, and a contract of sale thereof on her part, with intent to include it in the deed and a right of reformation against her so as to obtain the benefit of the alleged contract. The former theory rests upon the contention that the judicial sale at which C. A. Crislip became purchaser included two tracts of land, one of 200 acres and another of 50 acres, under a designation of one tract of 200 acres; there having been a previous sale of 16 acres out of the 200 acres, and one of 35 acres, not shown to have come out of the 200-acre tract or the 50-acre tract, but supposed to have been taken out of one or the other of them. The question thus presented is the construction of the decree of sale under which C. A. Crislip purchased, viewed in the light of the decree confirming it and such other portions of the record of the suit as are available; practically all of the papers having been lost or destroyed, possibly destroyed by fire. The 50-acre tract and the 200-acre tract were conveyed to Lemuel Crislip on December 2, 1865, the former by Abner Suttle and wife and the latter by Eli Perkins and wife. They were adjoining tracts and seem to have been parts of a larger tract of 400 acres. They are known, respectively, as the Suttle tract and the Perkins tract. On April 13, 1880, Lemuel Crislip conveyed to his son, John L. Crislip, two tracts of land, containing, respectively, 16 acres and 35 acres. Admittedly the 16-acre parcel was a portion of the 200-acre Perkins tract; but it does not appear from what land the 35 acres was taken.

On the 22d day of October, 1880, Lemuel Crislip executed to B. F. Armstrong, trustee, a deed of trust, conveying to him by metes and bounds the Perkins tract of 200 acres in trust to secure a debt to V. S. Armstrong and W. W. Riley, executors of the will of L. C. Stewart, deceased. This deed of trust did not include the Suttle 50-acre tract. On the 10th day of October, 1883, Lemuel Crislip executed a deed by which he conveyed to his daughter, Margaret J. Crislip, certain lands, describing them as follows: "Being the same land conveyed by Eli Perkins and wife, recorded in Book No. 2, page 540, and Abner Suttle and wife in Book No. 2, page 539, to said Lemuel Crislip, party of the first part, except the land conveyed to John L. Crislip by the said party of the first part heretofore containing about 16 acres to the place of beginning." The original deed is not produced, and it is said it cannot be found. The description is taken from an attested copy from the deed book in which it was recorded. As originally recorded, the deed, although professing to convey the two tracts of 200 acres and 50 acres, purported to convey only 200 acres, and, by an erasure and alteration made in the deed book, it purports, as recorded now, to convey 250 acres. When, how, and by whom this alteration was made is not shown. There is no proof of the allegation that it was done by C. A. Crislip, and he denies all knowledge of it. The alteration may be a mere correction of an error in recording the deed. However, the deed undoubtedly conveyed to Margaret J. Crislip the Perkins 200-acre tract and the Suttle 50-acre tract, whether they were described as containing in the aggregate 200 acres or 250 acres. In 1885 Reed and Peebles, judgment creditors of Lemuel Crislip, instituted a suit in equity against him, his codebtor, J. B. Ward, and others, to subject the land of the said Crislip, including that conveyed to Margaret J. Crislip, to the payment of the judgment.

The cause was referred to a commissioner, who reported that the deed of trust held by Armstrong and Riley constituted "the first lien on the tract of 200 acres of land mentioned in the deed of Lemuel Crislip to B. F. Armstrong, trustee, bearing date the 22d day of October, 1880," and which was "filed as Exhibit No. 5 in" the "cause, and also being the tract of 200 acres of land mentioned in the deed of Lemuel Crislip to Margaret J. Crislip, bearing date on the 10th day of October, 1883, and being Exhibit No. 1 filed with the papers of" the "cause"; that plaintiffs' judgment was the second lien in priority on the 200 acres of land and the first lien on a tract of 20 acres mentioned in the deed from Lemuel Crislip to M. J. Crislip, bearing date January 1, 1885. He further reported a debt due to J. A. A. Vandale, secured by a deed of trust, as constituting a first lien on

a tract of 118 acres of land and a debt due to A. L. Vandale, secured by a deed of trust, as a second lien on said 118 acres, and the plaintiff's judgment as the third lien on that tract. He further found and reported that the consideration of the conveyance to Margaret J. Crislip of October 10, 1883, was her assumption of the debts and liabilities of the firm of Crislip and Vandale, and all debts and mortgages and liabilities of the said Lemuel Crislip. This report was confirmed and a decree of sale, conditioned on nonpayment of the debts by Lemuel Crislip or some one for him, was entered in the following terms: "That J. G. Schilling and Geo. F. Cunningham, who are hereby appointed special commissioners for that purpose, either of whom may act, shall sell the tract of about 20 acres of land mentioned in Exhibit No. 2 of the papers of this cause and the tract of 200 acres of land mentioned in Exhibit No. 1 of the papers of this cause, and the tract of 118 acres mentioned in Exhibits Nos. 6 and 7 of the papers in this cause. * * * Such sale to be made in the following order: The tract of about 20 acres of land to be first offered and sold, and if that does not bring enough to pay off and discharge amounts decreed the plaintiff, principal, interest, and costs, then the tract of 200 acres of land shall be next offered for sale and sold, and if said tract of land shall not bring enough to pay off and discharge and satisfy the amount decreed to B. S. Armstrong and W. W. Riley, executors, etc., and also, together with the proceeds of sale of the 20-acre tract, pay off and discharge the amount decreed to the plaintiffs, then the tract of 118 acres shall be next offered and sold." At the sale under this decree C. A. Crislip became the purchaser of the 200-acre tract of land at the price of \$1,700 and the 20-acre tract at the price of \$21. For some reason the 118-acre tract seems not to have been sold, and there is no reference in any of the decrees to the 50-acre tract *eo nomine*.

Crislip, the purchaser of the 200-acre tract, took no deed for it. He subsequently sold and conveyed to Wiseman, and Geo. F. Cunningham, one of the commissioners who made the sale, joined in the deed to Wiseman, though J. G. Schilling alone had been directed to execute the deed on payment of the purchase money. The deed conveys only the Perkins tract. Wiseman claims Crislip sold him both as containing about 200 acres, and has sued for reformation of the deed. The court below, granting the prayer of his bill, reformed the deed so as to make it include the Suttle tract.

[1] Assuming the deed from Lemuel Crislip to Margaret J. Crislip, dated October 10, 1883, to have been at first correctly recorded and to have described the land thereby conveyed as containing 200 acres, as and for the aggregate residue of the Perkins 200-acre tract and the Suttle 50-acre tract, as con-

tended by counsel for the appellee, we have thus far some foundation in the record for the view that the circuit court may have intended by its decree a sale of such residue of such 200 acres, or, to be more accurate, we have some evidence of intent to decree such a sale. The deed from Lemuel Crislip to Margaret J. Crislip is not, however, the instrument by which title was passed to Cyrus A. Crislip. The muniments of title immediately involved are the decree under which he purchased and the confirmed sale thereunder. The decree describes the tract of land ordered to be sold as the tract on which Armstrong and Riley, executors, had their deed of trust, and that was incontrovertibly the Perkins 200-acre tract only. The land ordered to be sold is further described as being the 200 acres of land mentioned in the deed from Lemuel Crislip to Margaret J. Crislip, filed in the papers in the cause as Exhibit No. 1. That deed may be read as having described two 200-acre tracts; the Perkins tract conveyed to Lemuel Crislip and by him subsequently conveyed to Margaret J. Crislip being one, and the aggregate residue of the two tracts conveyed by Lemuel Crislip to Margaret J. Crislip described in that deed as containing 200 acres. If the land decreed to be sold was the 200 acres described in the deed from Lemuel Crislip to Margaret J. Crislip by reference to the deed to Lemuel Crislip for the Perkins tract, then the decree correctly recited, found, and adjudicated that the Armstrong and Riley deed of trust was a lien thereon, but if the 200 acres referred to in the decree was 200 acres composed of the residues of the Perkins tract and the Suttle tract, defined as one, the Armstrong and Riley deed of trust was not a lien on the whole thereof, and the recitals of the decree, its finding and adjudication, were wrong. Moreover, the Reed and Peebles judgment would have been the first lien on the Suttle tract instead of the second. If, on the other hand, the 200-acre tract mentioned in the decree and ordered to be sold is regarded as the Perkins tract only, the decree is consistent in all respects, for the Armstrong and Riley deed of trust was the first lien on that tract, the Reed and Peebles judgment was the second lien thereon, and it had been conveyed to Margaret J. Crislip by Lemuel Crislip by the deed of October 10, 1883. Thus we have two descriptions, one of which corresponds exactly with a subject-matter and the other of which does not. In such cases the rule of law is plain. The description answering or capable of full and complete application to the subject-matter and therefore apparently correct must be accepted and the erroneous one rejected. "If there is any land wherein some of the demonstrations are true and some false, only those lands shall pass wherein the demonstrations are true, or, in other words, where the grantor in a deed owns lands which comply with all the particulars

of the description, the deed passes title to those lands only, although it may appear that the grantor intended other premises to pass also, which were included within only a part of the description." 4 A. & E. Enc. L. 799. *Barbour et al. v. Tompkins*, 58 W. Va. 588, 52 S. E. 713, 8 L. R. A. (N. S.) 715. "The description the most certain is to be adopted where two descriptions in a deed do not agree." *Devlin on Deeds*, § 1013d. To the same effect see 13 Cyc. 630.

That in the conveyance by Lemuel Crislip to Margaret J. Crislip the latter assumed the payment of the indebtedness of the former and the firm of which he was a member, as consideration, is a circumstance relied upon as conflicting with the conclusion here announced. It is, however, somewhat remote and clearly inconclusive. The decree deals with one 200-acre tract of land, treating it as the tract mentioned in the deed from Lemuel Crislip to B. F. Armstrong, trustee, and also as the tract of 200 acres in the deed from Lemuel Crislip to Margaret J. Crislip. There is but one 200-acre tract of land which answers the description, and that is the Perkins tract. It is also the only tract which corresponds with other recitals and adjudications found in the decree. There is no description by metes and bounds nor otherwise than by reference to documents, and this description so clearly defines the land sold as the Perkins 200-acre tract that mere extraneous evidence and circumstances cannot be permitted to overthrow it. The decree had not enforcement of payment of the consideration for its primary object. The purpose of the suit was the enforcement of liens independent of the agreement to pay debts, and that agreement did not in any way affect the validity or relation of the liens.

[2, 3] The title to the 50-acre tract of land being thus found to be in Margaret J. Crislip, a married woman, the remaining inquiry is whether or not reformation of the deed can be had as to her. She joined her husband, C. A. Crislip, in the deed to Wiseman conveying the Perkins tract. That deed conveyed none of her land. It conveyed only a tract of land, the equitable title to which was in her husband, C. A. Crislip. She entered into no written contract of any kind or character for the conveyance of any of her land, unless the deed of the husband in which she joined can be considered as such contract. All that is relied upon in this connection is an alleged verbal contract of sale. A married woman cannot bind herself to convey her land in that way. *Simpson v. Belcher*, 61 W. Va. 157, 56 S. E. 211; *Amick v. Ellis*, 53 W. Va. 421, 44 S. E. 257; *Rosenour v. Rosenour*, 47 W. Va. 554, 35 S. E. 918; *Moore v. Ligon*, 30 W. Va. 146, 3 S. E. 572. Nor if it is deemed to have been intended to convey her land, but not to have done so because of a mistake, can reformation thereof be had against her, unless the

recent married woman's statute has altered her status in this respect. "Although the courts have entertained different views as to whether or not a suit to reform will lie as against a married woman, it is now pretty well settled that, in the absence of power conferred by statute putting a married woman on an equal with *femes sole* as respects property or capacity to contract, a mistake in a written instrument will not be reformed as against them." 34 Cyc. 959. This text is sustained by *Martin v. Hargardine*, 46 Ill. 322; *Hutchings v. Huggins*, 59 Ill. 29; *Building Ass'n v. Scanlan*, 144 Ind. 11, 42 N. E. 1008; *Shroyer v. Nickell*, 55 Mo. 264; *Bank v. Schmidt*, 6 Mont. 609, 13 Pac. 382; *Carr v. Williams*, 10 Ohio, 305, 36 Am. Dec. 87; *Purcell v. Goshorn*, 17 Ohio, 105, 49 Am. Dec. 448; *Petesich v. Hambach*, 48 Wis. 443, 4 N. W. 565; *Conrad v. Schwamb*, 53 Wis. 372, 10 N. W. 395; *O'Malley v. Ruddy*, 79 Wis. 147, 48 N. W. 116, 24 Am. St. Rep. 702. See 42 Cent. Dig. § 114. The married woman's statute in this state has not changed a married woman's status in respect to capacity to convey her real estate. Some of the decisions already cited were rendered after the passage of that act. She cannot convey except in the manner prescribed by statute; nor can she bind herself to convey, except by a contract executed and acknowledged in the statutory form prescribed for her acknowledgment of deeds. By an express provision of section 3 of chapter 66 of the Code, amending chapter 109 of the Acts of 1891 and chapter 3 of the Acts of 1893, her power of disposal over her real estate is thus limited. Nothing in said chapter, as amended by the recent acts here referred to, manifests any intent to enlarge her powers respecting her real estate. She may make contracts binding her estate, but the provision relating to her power of disposal of her separate real estate is the same as it was in the act of 1866. The present statute makes a judgment at law against her a lien on her land, and thus varies and extends remedies against her, but this does not put her on an equal footing with *femes sole* as to her lands. Formerly it was necessary to proceed in equity to charge her separate estate with her debt, but she could contract debts for which her separate estate was liable to be so charged. *Radford v. Carwile*, 13 W. Va. 572. Such variation and extension of the remedy does not enlarge her contractual powers. This section of the statute must be read in connection with the provision of section 3 to which reference has been made and in subordination thereto.

This conclusion harmonizes with views expressed and principles stated in *Kellar v. James*, 63 W. Va. 139, 142, 59 S. E. 939, 940 (14 L. R. A. [N. S.] 1003), a case involving the construction in general of the married woman's statute. In that case we said: "The liberal rule of construction only re-

quires that a statute be so enforced as to carry into effect the will of the Legislature as expressed in the terms thereof, and give, not stintedly or niggardly, but freely and generously, all the statute purports to give. This stops far short of carrying the statute to purposes and objects entirely beyond those mentioned in it. One object of these statutes is to enable a married woman to have the absolute, free, and unrestrained control of her property and power to make contracts respecting it and to vindicate her property and contract rights by action in the courts of the state as if she were a feme sole. For the accomplishment of these purposes, the statute should be liberally construed. She is subjected, by this same law, to the reciprocal right extended to others to sue her in the courts as if she were a feme sole, and, for the effectuation of this purpose, the statutes should be liberally construed. So in respect to all the other rights and liabilities expressly given and imposed by this law. The evils intended to be suppressed and the purposes and objects to be promoted are all mentioned in the statutes, and the rule of liberal construction requires no more than that they shall be so interpreted and applied as to suppress the named evils and effectuate the specified purposes and objects. It does not authorize the court to add other supposed evils, purposes, and objects."

As the title to the land in controversy is held by Mrs. Crislip, a married woman, living with her husband, against whom reformation of the deed so as to include it cannot be decreed, the decree complained of must be reversed, and the bill dismissed, with costs.

WILLIAMS, J. I concur in the decision for the reason that the description of the land in the deed embraces no part of the wife's land. There having been no previous written contract of sale by the wife, there is no evidence that it was her intention to convey any part of her land. An oral contract by a married woman for the sale of her land is void.

But I do not agree to the limited purpose and effect which the opinion seems to give to section 3, c. 66, Code 1906. That statute empowers a married woman to contract respecting her land, and to convey the same, but prescribes the manner of her doing so. The limitation is upon the form or manner only of executing the contract, not upon its effect and the rights of the contracting parties, when properly executed. It must be in writing and be signed by the husband, unless she is living separate and apart from him. But, if it is executed in the manner prescribed, it is as binding upon the contracting parties, and is subject to the same remedies for reformation and specific performance, at the suit of either contracting

party, as if it had been made by a man or a feme sole. Because the statute says she may contract (that is, she may make an executory, or an executed, contract) "in the manner and with the like effect as if she were unmarried." Her contract, executed in the manner prescribed, confers the same rights and is susceptible to the same remedies as like contracts executed by unmarried women, else it would not have "like effect." Of course, if the requirement of the statute, respecting formality of execution, has not been complied with, the courts would have no power to supply such omission, because to do so would be to make a contract. But if a married woman, her husband joining, has executed a contract for the sale of her land, and she thereafter follows it up by executing a deed in which her husband joins, and the deed happens not to conform to the contract, or if she has executed such a contract, and thereafter refuses to comply with it by executing a proper deed, there is certainly no reason, satisfactory to my mind, why equity should not correct the deed in the one instance, and compel its execution, in the other, just as in other cases. Any other view of the statute would encourage the commission of wrongs by shielding the fraudulent and erroneous deeds of married women and by converting their contracts into options. The Legislature certainly had no intention that the statute should have such an effect.

The great weight of authorities from other states, construing similar statutes, the terms of some of which are less comprehensive than ours respecting the contractual rights of married women concerning their separate estate in lands, supports this view. See the following: *Lewis v. Ferris* (N. J. Ch.) 50 Atl. 630; *Stevens v. Holman*, 112 Cal. 345, 44 Pac. 670, 53 Am. St. Rep. 216; *Herring v. Fitts*, 43 Fla. 54, 30 South. 804, 99 Am. St. Rep. 108; *Hamar v. Medsker*, 60 Ind. 413; *Snell v. Snell*, 123 Ill. 403, 14 N. E. 684, 5 Am. St. Rep. 526 (but the Illinois statute is broader than ours); *Gardner v. Moore*, 75 Ala. 394, 51 Am. Rep. 454; 26 A. & E. E. L. 99; 34 Cyc. 859.

(72 W. Va. 321)

TOLLEY et al. v. PEASE et al.

(Supreme Court of Appeals of West Virginia.
April 22, 1913.)

(Syllabus by the Court.)

1. **BOUNDARIES (§ 43*) — ESTABLISHMENT — JUDGMENT—DISCLAIMER.**

Where in ejectment the issue is the location of the true division line between the parties, and defendant enters a disclaimer of all beyond a fixed line designated on the map of the official surveyor, upon a verdict simply for defendant the court may properly enter judgment establishing as the true division the line beyond which defendant disclaimed.

[Ed. Note.—For other cases, see *Boundaries*, Cent. Dig. § 208; Dec. Dig. § 43.*]

2. BOUNDARIES (§ 41*) — ESTABLISHMENT — FOLLOWING COURSES AND DISTANCES.

Though in ejectment parol evidence is sometimes admissible to prove marked trees which are not in the courses or termini of lines to be the true lines intended, yet where the deed plainly calls for the lines by courses and distances, and distinctly for stakes, not marked trees, as the termini thereof, and there is no such approximation thereto in the courses or the lengths of the lines sought to be established by marked trees as to warrant any presumption that they are boundaries of the land, the jury may properly be instructed to disregard the marked trees and to follow the courses and distances called for in the deed.

[Ed. Note.—For other cases, see *Boundaries*, Cent. Dig. §§ 205-207; Dec. Dig. § 41.*]

Error to Circuit Court, Raleigh County.

Action by C. W. Tolley and others against William Pease and others. Judgment for defendants, and plaintiffs bring error. Affirmed.

J. E. Summerfield, of Beckley, and E. O. Phlegar, of Pueblo, Colo., for plaintiffs in error. McCreery & Patterson, of Beckley, for defendants in error.

ROBINSON, J. The action is ejectment. Plaintiffs failed, and bring error.

The issue at the trial was reduced to a narrow one, defendants having disclaimed all beyond a line M. to E. on the official surveyor's map. So the issue was whether that line was the true division line between the parties, or whether it was another line parallel thereto as claimed by plaintiffs.

[1] According to the deed on which plaintiffs relied this division line was not governed in its location by natural landmarks or monuments directly on it, but must be located solely by various courses and distances calling for stakes, and running from natural objects in distant parts of the survey of plaintiffs' tract, except that one end of the line should conform to the line of an adjoiner. Plaintiffs, however, sought to have certain marked trees recognized as controlling the boundaries, though the deed called for no such monuments, but only for stakes, in relation to the lines which plaintiffs claimed should be located by marked trees. In order to reach the marked trees several courses and distances set forth in the deed must be materially changed, thereby giving plaintiffs a much more extended boundary of land than a survey according to usual methods and rules would give them.

The testimony of the official surveyor, as well as that of two other surveyors who located the line by survey, establishes that the line M. to E. is the boundary line of plaintiffs' land according to proper survey from the calls of plaintiffs' deed. As to this there is indeed no contradiction.

The jury found a verdict simply for defendants, but in view of the disclaimer, that verdict virtually said that the line M. to E. was the true division line. The judgment

entered on the verdict, recognizing that line as the true one between the parties is not erroneous, as plaintiffs insist, because the verdict did not designate the line directly. As we have said, in the light of the disclaimer entered of record the effect of the finding of the jury was to establish that line.

[2] An instruction told the jury that plaintiffs were bound by the calls in the deed on which they relied and that in arriving at the true boundary line between plaintiffs and defendants the jury must be governed by the calls in the deed, and that the plaintiffs could not change the calls in the deed to show that those calls meant something other than what was set forth in the deed, but in running the calls and lines the rules for the proper surveying of the land must be adhered to. Plaintiffs say that this instruction took from the jury all consideration of marked trees by which plaintiffs would locate the calls mentioned in the deed. They maintain that marked trees may so influence the location of lines called for in a deed as in a sense to change them from what is set forth therein. That this is sometimes true can not be denied. Under evidence properly tending to connect marked trees with the survey from which the deed was made, the instruction would be erroneous. "When a deed mentions the course and distance of a line, without any other description thereof, parol evidence is admissible to prove marked trees, not in the course or termination of that line, to be the true line intended." *Baker v. Seekright*, 1 Hen. & M. (Va.) 177. "To pursue the proper descriptions of our land boundaries would render men's titles very precarious, not only from variations of the compass, but that old surveys were often inaccurate; and mistakes often made, in copying their descriptions into the patents; leaving out lines, and putting north for south, and east for west; and in copying those descriptions into subsequent conveyances: Whereas, the marked trees upon the land remain invariable, according to which neighbors hold their distinct lands. On this ground, our juries have uniformly, and wisely, never suffered such mistakes, when proved, to be departed from, because they do not agree exactly with descriptions in conveyances." *Herbert v. Wise*, 3 W. Va. 240. "In an action of ejectment parol evidence is admissible to prove that the calls for course and distance in a deed are mistaken, and do not designate the true boundary of the land intended to be conveyed." *Elliott v. Horton*, 28 Grat. (Va.) 766. "The Virginia cases have given much weight to marked lines, corresponding in age as near as may be with the date of the deed, and in the main agreeing with courses and distances, found on the ground, though the corner trees, not to be found or ascertained by evidence, are called for in the instrument, or though

inconsistent with points in a plat referred to, especially if comporting with natural objects mentioned." 2 Enc. Dig. Va. & W. Va. 585.

But in this case there is another phase to the subject. The testimony by which plaintiffs would in a sense change the lines called for in the deed does not come up to the standard of legal weight sufficient to give it such effect. The deed distinctly calls for stakes, not marked trees as controlling the location of the lines. Of course after the lapse of so many years from the date of the deed the stakes cannot be found if indeed they ever were placed on the ground. Plaintiffs have no right to go to marked trees by the terms of the deed, for the deed does not call for such objects on the disputed line and the lines leading to it in each direction from known and designated starting points. Indeed the call for stakes supports a presumption that marked trees have nothing to do with the survey. But under principles which we have quoted, plaintiffs might show by pertinent parol testimony that marked trees bore relation to the lines of the survey from which the deed was made. Yet in order to do so, other reasonable principles would have to be observed. "The mere circumstance that lines and corners are known to have been run or marked, or are found marked near where the courses and distances mentioned in the deed run, is not conclusive that they are the lines and corners of the land referred to in the deed. And when there is no such approximation in the courses or length of the lines, or the marks on the corners, to the description in the deed, as to warrant the presumption that they are the boundaries of the land to which the deed relates, such marked lines should be disregarded." *Western Mining, etc., Co. v. Coal Co.*, 8 W. Va. 406. Now, plaintiffs' claims are grossly inconsistent as to many lines with what a survey from the calls of the deed unquestionably proves. Three surveys agree that a proper survey according to the deed locates the disputed line as M. to E. There is no evidence to the contrary. Then can this well proved location of the line from the calls of the deed be affected by testimony in relation to other corners and marked trees which do not approximate the survey made from the deed? As to plaintiffs' claims, there is no such approximation in the courses, the lengths of the lines, or the marks on the trees, to the description in the deed as to warrant any presumption that they are boundaries of the land to which the deed relates. Since there is no such approximation, the marked lines cannot in law be regarded. Plaintiffs' evidence, in view of what the deed calls for, is by no means sufficient to raise a presumption that the lines and corners which plaintiffs claim have anything to do with the land described in the deed. A verdict based

on that evidence could not rightly stand. True, one of the plaintiffs testified that he was present at the survey before the deed was made and that the surveyor ran to the trees which plaintiffs claim as corners. But he does not know that the calls then run went into the deed. It is clear from the deed and the survey made therefrom that such survey as this plaintiff says he saw made was not used for the description in the deed. "Lines and corners may be marked with the purpose to adopt them in a contemplated deed; but afterwards the marked lines and corners may be abandoned, and mere courses and distances from certain objects or points may be substituted." *Western Mining Co. v. Coal Co.*, supra. Plainly all that which plaintiffs rely on to throw the lines where a survey does not take them is not of the legal character to change any call of the deed. The facts proved by plaintiffs afford no legally recognized presumption that the line must be located other than where the deed locates it. The evidence relied on by plaintiffs does not bring the case within any principle whereby a call of the deed may be controlled by marked trees or made to conform thereto. The instruction, therefore, was not erroneous as applied to this case. Under the legal import of the evidence, it was a proper direction to the jury.

In view of the conclusion which we have reached as to the insufficiency of the testimony on which plaintiffs sought to rely, to change the plainly stated calls of the deed, it would seem that other questions raised by the assignments of error become immaterial and demand no discussion. The judgment will be affirmed.

(129 Ga. 714)

LAMBERT v. SHELFER.

(Supreme Court of Georgia. April 18, 1918.)

(Syllabus by the Court.)

INJUNCTION (§ 35*) — TRESPASS — TITLE OR POSSESSION.

The plaintiff, who sought injunctive relief against certain alleged acts of trespass, failing upon the hearing of the case to show either title or possession in himself, was not entitled to an injunction, and the granting of the same was error.

[Ed. Note.—For other cases, see Injunction, Cent. Dig. § 77; Dec. Dig. § 35.*]

Error from Superior Court, Haralson County.

Suit by E. A. Shelfer against W. T. Lambert. Judgment for plaintiff, and defendant brings error. Reversed.

H. J. McBride, of Tallapoosa, for plaintiff in error. Jas. Beall and R. W. Adamson, both of Carrollton, for defendant in error.

BECK, J. Shelfer brought his equitable petition against Lambert, seeking an injunction against the latter to restrain him from

entering upon and cutting timber upon a designated lot of land. The petition set up title and possession in the plaintiff. The court below upon the interlocutory hearing found that neither the plaintiff nor the defendant had title, but granted an injunction restraining both parties from trespassing on the land or committing any waste whatever on the same, until further order.

Under the ruling in the case of *Downing v. Anderson*, 128 Ga. 373, 55 S. E. 184, and other cases there cited, we are of the opinion that the court below erred in granting the injunction sought by the plaintiff against the defendant. The plaintiff failed to show either title or possession. While he testified in broad and general terms that he had entered into possession at a date prior to the alleged acts of trespass on the part of the defendant, and had put his agent in possession, and that the latter had continued in possession from that date, the undisputed evidence in the case shows that the only acts upon the part of the plaintiff and his alleged agent, indicating possession, were the clearing of a small part of the land whereon a house might be erected, the placing there of a very small quantity of building timber, and the posting of certain notices warning the public not to trespass on the land. No part of the land was inclosed by the plaintiff or placed under cultivation, nor was any building erected on the land in which one might dwell. In the case of *Downing v. Anderson*, supra, it was held that the plaintiffs failed to show prior possession, although they made an affidavit in which they asserted, upon information and belief, that their agent had erected houses on certain numbered lots, and that he was in actual possession of these lots; the real truth of the matter clearly appearing to be, from the evidence of persons acquainted with the facts, that at some time between the date of the plaintiffs' purchase and the filing of their petition their agent caused to be erected a house on two of the lots and a small one-room shanty on another of the lots, that one of the houses had been occupied some time before the granting of the restraining order, but that the shanty had never been occupied at all; and in the decision it was said: "The erection of the shanty on one of the lots in controversy did not have the legal effect of placing the plaintiffs in actual possession of that lot, since a 'mere entry, unaccompanied by an actual occupancy, is no possession at all,' and the building of the shanty indicated merely a purpose to occupy. *Flannery v. Hightower*, 97 Ga. 604 [25 S. E. 371]. So far as the other lot (No. 4) is concerned, there seems never to have been even an actual entry upon it by the plaintiffs or their agent. A plat of the lot to which they assert ownership, under the deeds introduced in evidence, shows that they are joined together, though neither of the lots on which the alleged trespass oc-

curred immediately adjoins lot No. 124, on which the house actually occupied was erected. At most, the plaintiffs can claim to be only in constructive possession of the lots upon which the timber is being felled. *Johnson v. Simerly*, 90 Ga. 612 [16 S. E. 951]. The evidence demanded a finding that the plaintiffs have never been in actual possession of either of these lots." In the instant case it is equally clear that the plaintiff had never been in possession of the land in controversy. And whether the defendant Lambert is a wrongdoer relatively to the true owner of this land, Shelfer, who had neither title nor possession, failed to show any right to an injunction restraining the defendant from committing the alleged trespasses.

Judgment reversed. All the Justices concur.

(129 Ga. 806)

JAMES v. JAMES.

(Supreme Court of Georgia. April 18, 1913.)

(*Syllabus by the Court.*)

TEMPORARY ALIMONY.

Under the evidence there was no abuse of discretion in granting temporary alimony.

Error from Superior Court, Jenkins County; B. T. Rawlings, Judge.

Action by Sadie James against J. P. James. From an order granting temporary alimony, defendant brings error. Affirmed.

Wm. Woodrum, of Millen, for plaintiff in error. Dixon & Dixon, of Millen, for defendant in error.

LUMPKIN, J. Judgment affirmed. All the Justices concur.

(129 Ga. 742)

WILSON v. DUFFEY.

(Supreme Court of Georgia. April 18, 1913.)

(*Syllabus by the Court.*)

1. REVIEW ON APPEAL.

The only error of law alleged is that the court committed error in instructing the jury as set forth in the excerpt from the charge. This instruction was not error for any reason assigned.

2. SUFFICIENCY OF EVIDENCE.

The verdict was supported by the evidence, and the court did not err in refusing a new trial.

Error from Superior Court, Henry County; R. T. Daniel, Judge.

Action between G. R. Wilson and Lem Duffey. From the judgment, Wilson brings error. Affirmed.

E. M. Smith and Brown & Brown, all of McDonough, for plaintiff in error. E. J. Reagan and J. F. Wall, both of McDonough, for defendant in error.

HILL, J. Judgment affirmed. All the Justices concur.

(140 Ga. 13)

CURRY v. JACKSON NAT. BANK.

(Supreme Court of Georgia. May 13, 1913.)

*(Syllabus by the Court.)***REVIEW ON APPEAL.**

The majority of the court are of the opinion that there was sufficient evidence to support the verdict rendered in this case.

Beck and Atkinson, JJ., dissenting.

Error from Superior Court, Butts County;

R. T. Daniel, Judge.

Action between Annie E. Curry and the Jackson National Bank. From the judgment, Curry brings error. Affirmed.

C. L. Redmon, of Jackson, and O. M. Duke, of Flovilla, for plaintiff in error. H. M. Fletcher, of Jackson, for defendant in error.

BECK, J. Judgment affirmed.

BECK and ATKINSON, JJ., dissent. The other Justices concur.

(139 Ga. 776)

MOYE v. PAUL.

(Supreme Court of Georgia. April 18, 1913.)

*(Syllabus by the Court.)***DUE PROCESS OF LAW.**

This case is controlled by the decision in *Fortune v. Braswell*, 77 S. E. 818.

Error from Superior Court, Randolph County; W. C. Worvill, Judge.

Action between A. J. Moye and W. H. Paul. From the judgment, Moye brings error. Reversed.

M. C. Edwards, of Dawson, and R. L. Moye, of Cuthbert, for plaintiff in error. Jas. W. Harris, of Cuthbert, for defendant in error.

LUMPKIN, J. Judgment reversed. All the Justices concur.

(140 Ga. 15)

EDWARDS v. WYSONG & MILES CO. et al.
(Supreme Court of Georgia. May 13, 1913.)

*(Syllabus by the Court.)***INTERLOCUTORY INJUNCTION.**

Under the pleadings and evidence, the refusal to grant an interlocutory injunction was not error.

Error from Superior Court, Haralson County; Price Edwards, Judge.

Action by J. S. Edwards, trustee, against the Wysong & Miles Company and others. From an order refusing an interlocutory injunction, plaintiff brings error. Affirmed.

Lloyd Thomas, of Tallapoosa, Walter Matthews, of Buchanan, and Jas. Beall, of Carrollton, for plaintiff in error. H. J. McBride, of Tallapoosa, for defendants in error.

LUMPKIN, J. Judgment affirmed. All the Justices concur.

(139 Ga. 813)

ALEXANDER v. STATE.

(Supreme Court of Georgia. April 18, 1913.)

*(Syllabus by the Court.)***1. VOLUNTARY MANSLAUGHTER.**

Under the evidence, there was no error in omitting to charge on the subject of voluntary manslaughter.

2. SUFFICIENCY OF EVIDENCE.

The evidence supported the verdict, and there was no error in overruling the motion for a new trial.

Error from Superior Court, Pike County; R. T. Daniel, Judge.

Clarence Alexander was convicted of murder, and brings error. Affirmed.

J. J. Flynt, of Griffin, and H. O. Farr, of Barnesville, for plaintiff in error. E. M. Owen, Sol. Gen., of Zebulon, J. W. Wise, of Fayetteville, and T. S. Felder, Atty. Gen., for the State.

LUMPKIN, J. Judgment affirmed. All the Justices concur.

(140 Ga. 12)

TATUM & GARY et al. v. WELSH et al.

(Supreme Court of Georgia. May 13, 1913.)

*(Syllabus by the Court.)***INTERLOCUTORY INJUNCTIONS.**

Under the pleadings and evidence, the court did not err in granting an interlocutory injunction.

Error from Superior Court, Polk County; Price Edwards, Judge.

Action by Tatum & Gary and others against O. N. Welsh and others. From an order refusing an interlocutory injunction, plaintiffs bring error. Affirmed.

Lipscomb & Willingham and Nathan Harris, all of Rome, and B. E. Tatum, of Chattanooga, Tenn., for plaintiffs in error. Jno. K. Davis, W. K. Fielder, and Bunn & Trawick, all of Cedartown, for defendants in error.

ATKINSON, J. Judgment affirmed. All the Justices concur.

(140 Ga. 14)

DEWBERRY v. STATE.

(Supreme Court of Georgia. May 13, 1913.)

*(Syllabus by the Court.)***REVIEW ON APPEAL.**

There was no complaint that any error of law was committed upon the trial. The evidence warranted the verdict, and the court did not err in refusing a new trial.

Error from Superior Court, Fulton County; W. E. Thomas, Judge.

Oscar Dewberry was convicted of crime, and brings error. Affirmed.

Calhoun & Connally, of Atlanta, for plaintiff in error. Hugh M. Dorsey, Sol. Gen., and W. J. Laney, both of Atlanta, and T. S. Felder, Atty. Gen., for the State.

FISH, C. J. Judgment affirmed. All the Justices concur.

(129 Ga. 740)

PHILLIPS v. ATKINSON.

(Supreme Court of Georgia. April 18, 1913.)

*(Syllabus by the Court.)***1. EXECUTORS AND ADMINISTRATORS (§ 195*)—ALLOWANCE FOR SUPPORT—TWO SETS OF CHILDREN.**

Where property of a decedent is set apart as a year's support for the widow and her minor child by the decedent, and separate property is set apart for the support of a minor child of the decedent by a former marriage, the estates in the property so set apart are separate. Civ. Code 1910, § 4046.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. § 724; Dec. Dig. § 195.*]

2. EXECUTORS AND ADMINISTRATORS (§ 195*)—ALLOWANCE FOR SUPPORT—TWO SETS OF CHILDREN.

In such a case, if the minor child of the widow dies, the property set apart to the widow and such child vests in the widow alone for her support (Miller v. Ennis, 107 Ga. 663, 34 S. E. 302); and an equitable action will not lie against the widow, at the instance of the decedent's child by the first marriage, for recovery of a distinct interest in the property set apart to the widow and her child, and mesne profits.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. § 724; Dec. Dig. § 195.*]

Error from Superior Court, Butts County; R. T. Daniel, Judge.

Equitable action by Monroe Phillips, as guardian, against Lottie C. Atkinson. Judgment for defendant, and plaintiff brings error. Affirmed.

Monroe Phillips, as guardian of Elizabeth Atkinson, a minor, instituted an equitable action against Mrs. Lottie C. Atkinson for the purpose of having title to undivided interests in certain real estate and personal property decreed to be in the ward, for an accounting as to rents, etc., for a judgment for the amount to which the ward might be equitably entitled, and for general relief. The petition alleged, in substance, that T. P. Atkinson died intestate, leaving property consisting of undivided interests in described real estate and personal property. The sole heirs at law were the defendant, Mrs. Lottie C. Atkinson, a posthumous child, Tommie Atkinson, and petitioner's ward, Elizabeth Atkinson, a child of a former marriage. The widow became administratrix of the estate, and made application to the court of ordinary for a year's support. The whole of the estate was set apart for such purpose. In setting it apart \$500 in money and half of the kitchen furniture were set apart for the plaintiff's ward, while the rest of the estate was set apart for the defendant and the child, Tommie Atkinson. The latter died after the property was so set apart, leaving no debts other than for funeral expenses, physician's bills, or the like, and without heirs at law, except her mother and petitioner's ward. The defendant assumed exclusive possession and ownership of all of

the property set apart to her for the use of herself and her child, Tommie, and appropriated the rents, issues, and profits thereof to her own use, denying that the plaintiff's ward had any interest therein. No attack was made on the judgment setting apart the year's support, but its validity was conceded, and the plaintiff's action was predicated on the rights alleged to exist thereunder. The action was dismissed on general demurrer, and the plaintiff excepted.

A. Y. Clement, of Monticello, for plaintiff in error. H. M. Fletcher, of Jackson, for defendant in error.

ATKINSON, J. Judgment affirmed. All the Justices concur.

(129 Ga. 735)

CENTRAL OF GEORGIA RY. CO. v. BARTLETT.

(Supreme Court of Georgia. April 18, 1913.)

*(Syllabus by the Court.)***APPEAL AND ERROR (§ 977*)—REVIEW—DISCRETION OF COURT.**

There being no complaint of any error of law committed on the trial, and the evidence being sufficient to support the verdict, the discretion of the judge in refusing a new trial will not be disturbed.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3860-3865; Dec. Dig. § 977.*]

Error from Superior Court, Carroll County; R. W. Freeman, Judge.

Action by T. E. Bartlett, by next friend, against the Central of Georgia Railway Company. Judgment for plaintiff, and defendant brings error. Affirmed.

Hall & Cleveland, of Griffin, J. E. Hall, of Macon, and R. D. Jackson, of Carrollton, for plaintiff in error. G. W. Merrell and S. Holderness, both of Carrollton, for defendant in error.

ATKINSON, J. Judgment affirmed. All the Justices concur.

(129 Ga. 743)

STUDDARD v. HAWKINS.**HAWKINS v. STUDDARD.**

(Supreme Court of Georgia. April 18, 1913.)

*(Syllabus by the Court.)***1. APPEAL AND ERROR (§ 1195*)—LAW OF THE CASE—PREVIOUS DECISION.**

Questions of law decided by the Supreme Court in a case must, upon another hearing, be treated as settled as to that case. But if the judgment of this court is one of reversal, and upon another trial the facts are materially different from those on which the decision was based, the former ruling will not be conclusive of the case.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4661-4665; Dec. Dig. § 1195.*]

2. APPEAL AND ERROR (§ 1195*)—CONTRACTS (§ 305*)—EVIDENCE (§ 445*)—LAW OF THE CASE—FORMER DECISION—PAROL EVIDENCE—WAIVER.

But rulings to the effect that a certain contract for the purchase of land, which was required by law to be in writing, and which has been construed by this court to provide for payment "presently," could not be altered by a parol contract, and that parol evidence was not admissible to show a valid agreement changing such written contract, do not prevent the party against whom such rulings were made from pleading by amendment that within the time for making payment for the land under the contract, under the former decision of this court, the vendee offered to do so, and the vendor by parol waived the making of payment at that time and induced the purchaser to delay such payment or a formal tender until a later day, that the purchaser acted on the faith of such conduct, and that the vendor was estopped from taking advantage of the delay so caused, and from declaring that the original contract was not binding because of failure on the part of the purchaser to comply therewith.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4661-4665; Dec. Dig. § 1195;* Contracts, Cent. Dig. §§ 1398, 1399, 1400, 1463, 1464, 1467-1475; Dec. Dig. § 305;* Evidence, Cent. Dig. §§ 2052-2065; Dec. Dig. § 445.*]

3. SPECIFIC PERFORMANCE (§§ 98, 101*) — RIGHT OF ACTION—DEFENSES.

The petition, as amended, was not subject to demurrer on the grounds that it set out no cause of action, and that it sought to change a written contract for the sale of land by parol agreement.

[Ed. Note.—For other cases, see Specific Performance, Cent. Dig. §§ 245-248, 290, 295, 311-317; Dec. Dig. §§ 93, 101.*]

4. SPECIFIC PERFORMANCE (§ 116½*)—PETITION—AMENDMENT.

There was no error in allowing the amendment to the plaintiff's petition in which waiver and estoppel were set up.

[Ed. Note.—For other cases, see Specific Performance, Cent. Dig. § 375; Dec. Dig. § 116½.*]

Error from Superior Court, Morgan County; J. B. Park, Judge.

Action by J. F. Studdard against C. M. Hawkins. Judgment for defendant, and plaintiff brings error, and defendant files cross-bill. Reversed on the main bill, and affirmed on the cross-bill.

Studdard filed his equitable petition against Hawkins, seeking to obtain a decree for specific performance of a contract, and for other relief. The memorandum of the contract was as follows:—

"Rutledge, Ga., April 15, 1905.

"Received of John F. Studdard twenty-five dollars, closing purchase of the Hanleiter place, containing 187.8 acres one tract and one 4 acres more or less, at \$15.00 per acre.

his
"C. M. X Hawkins.
mark

"Contract made and signed in presence of F. W. Oxford, N. P. & Ex. Off. J. P."

The case has been twice before the Supreme Court, and will be found reported in 132 Ga. 265, 63 S. E. 852, 131 Am. St. Rep. 190, and 136 Ga. 727, 71 S. E. 1112; on each

occasion the judgment being reversed. When the case again came on for trial, counsel for the plaintiff offered the following amendment to the petition. "And now comes the petitioner, and strikes all amendments of paragraph 5 of the petition, heretofore allowed, and in amendment of said paragraph alleges: On the afternoon said contract of sale was made, and presently thereafter, plaintiff, being ready and able to pay the balance of the purchase money therein mentioned, in parol offered to the defendant to go to his bank nearby, where the money was deposited, and pay the same. The defendant did not repudiate his obligation under said contract, but did waive the time of payment, and the essentiality of the time thereof, and in parol appointed a later date on which he would receive said payment. But for said waiver and appointment of a later day petitioner would then and there have tendered to defendant the balance of said purchase money. Relying on said waiver and appointment, he waited until the appointed day and then formally tendered, as set out in paragraph 5, the sum there stated. Defendant had in the meanwhile received by petitioner's consent the rents on said land for 1905, which occurred since said sale and which belonged to petitioner, a sum of \$250, and the amount tendered was more than the full balance of purchase money with interest thereon from the time it was due under said contract. To induce petitioner to delay formal tender as aforesaid, and then to insist that the delay forfeited petitioner's contract, would be for defendant to commit a fraud upon petitioner and his rights under said contract; and defendant is estopped to question the timeliness of said tender." This amendment was allowed over objection, but subject to demurrer. Defendant then demurred to the petition as amended, on the ground that it set out no cause of action, and did not allege facts sufficient to authorize a recovery. He specially demurred to the amendment, on the ground that it sought to add to or vary the written contract set out in the original petition. The presiding judge sustained the demurrer to the petition as amended, "as it set forth no cause of action, upon the decision of the Supreme Court in this case." The plaintiff excepted to the sustaining of the demurrer; and the defendant filed a cross-bill of exceptions, assigning error on the allowance of the amendment.

Samuel H. Sibley, of Union Point, for plaintiff in error. F. C. Foster, E. H. George, and K. S. Anderson, all of Madison, for defendant in error.

LUMPKIN, J. (after stating the facts as above). This case is an old acquaintance. It is before us for the third time. It appeared for the first time in 132 Ga. 265, 63 S. E. 852, 131 Am. St. Rep. 190, and for the second

time in 136 Ga. 727, 71 S. E. 1112. When it was returned to the superior court the last time, the plaintiff amended by withdrawing certain previous amendments to the petition and filing another. The presiding judge allowed this amendment over objection, and then dismissed the petition as amended on demurrer, on the ground that it set out no cause of action, under the former rulings of this court.

[1] 1. Points decided by the Supreme Court in a case must upon another hearing be treated as settled. *Willingham v. Sterling Cycle Works*, 113 Ga. 593, 39 S. E. 314. If, however, a reversal is granted by this court, and upon another trial the facts are materially different from those on which the first decision was based, the former ruling cannot control the case, as it would not be applicable to new and different facts. *Allen v. Schweigert*, 113 Ga. 69, 38 S. E. 397. In *McWilliams v. Walthall*, 77 Ga. 7, it was held that a final judgment, affirmed by this court, concludes the parties, not only as to facts formerly pleaded, but also as to those which were then known or might have been known by the use of proper diligence. But this does not support the contention that a ruling that a certain parol evidence was not admissible to vary a written contract is a conclusive adjudication that a plea of waiver or estoppel cannot be filed, though it may involve some of the same facts.

[2] 2, 3. The case reported in 132 Ga. was brought up on a bill of exceptions complaining of the overruling of a motion for a new trial. An effort was made to review rulings of the presiding judge in overruling a demurrer to the petition and in allowing an amendment. But it was held that such rulings could not be made grounds of a motion for a new trial, and that grounds complaining of them could not be considered. So that no decision was made by this court as to whether the petition and the amendments made thereto were demurrable. It was held that the legal import of the written contract for the sale of the land, as to which specific performance was sought, was that the balance of the purchase money should be paid "presently," and that evidence of a prior and contemporaneous parol agreement that such balance was to be paid at a subsequent definite time was not admissible to vary the legal import of the writing that such payment was to be made "presently." It was also held that with such a written contract "a mere parol agreement between the parties to the writing, made subsequently to its execution and delivery, fixing a subsequent time for the balance to be paid, was not admissible to illustrate the time within which the balance was to be paid," and that a contract which must, under the statute of frauds, be in writing, and which accordingly is put in writing and duly executed, cannot be subsequently modified by a parol

agreement. Still further it was held that mere nonaction does not constitute such performance of a contract as will take a parol contract out of the statute of frauds. From this synopsis it will be seen that no ruling was made on the sufficiency of the allegations, nor any reference made to waiver or estoppel. The case turned on the construction of the written contract, and the admissibility of evidence to vary it by a parol agreement or contract. The trial judge admitted evidence that, after the paper was signed, the parties agreed that the time of payment of the balance of the purchase money was to be the first of the following December. In so ruling he stated that he admitted the evidence "as illustrating whether or not the tender made in December was made in a reasonable time." Under the construction placed by this court on the written contract, this was held to be error, and to this the statement as to "illustrating" the time of payment referred. Presumably no ruling was invoked on the subjects of waiver and estoppel. Certainly this court made none.

When the case was here the second time, the expression employed in the former decision that the written contract provided for payment "presently" was considered and held not to mean "within a reasonable time," but immediately, now, at once. But in both decisions care was taken not to state that the word "presently" or its synonyms should be given a reasonable and substantial construction, in view of the thing to be done, and not be considered as equivalent to instant. On the second trial an amendment to the petition was allowed over objection on the ground that "it sought by parol to add to or vary the terms of the written contract." Error was assigned on such ruling. Chief Justice Fisk so stated in the opinion, and held that, as it did not appear that the transaction set forth was in parol, the court below did not err, adding, "This on the theory that the amendment sought to set out a written agreement between the parties, extending the time for the payment of the balance on the purchase money." While some of the allegations in the former amendment were quite similar to those in the one now before us, it is evident that the amendment then considered was treated by counsel and the court as pleading a contract fixing a new time of payment; and no ruling was made on any question of waiver or of estoppel. The judgment was reversed on the evidence.

On the last trial the plaintiff offered an amendment striking all previous amendments to the fifth paragraph of the petition, and setting up that presently after the contract was made he offered to pay the balance of the purchase money, but the defendant waived the time of payment and appointed a later day therefor; that, in reliance on such waiver, the plaintiff did not at once

make tender of the money, but delayed doing so until the time which the defendant appointed; that for the defendant to induce the plaintiff to delay making a formal tender until that time, and then insist that the delay forfeited the plaintiff's rights under the contract would work a fraud on him; and that the defendant was estopped to question the timeliness of the tender. This plea does not set out or rely on any contract, written or in parol, as binding on the parties to vary the terms of the written instrument, but a delay in making payment or tender, induced by the vendor, whose conduct operated as a waiver or estoppel.

A new contract fixing a new date for performance and a waiver of performance at the time fixed in the original contract, or an estoppel which prevents the setting up of noncompliance within the time fixed, are not the same thing. In the case of a new contract or the modification of an existing one both parties are bound by the terms of the new contract, and have a right to insist on the new date fixed therein for performance. In the case of a waiver the original contract remains; the purchase money is due; the seller merely waives strict enforcement as to time, so as to prevent him from declaring a forfeiture on account of a past failure. Generally he may still demand and require compliance with the contract upon reasonable notice. In the case of an estoppel in pais, by reason of his conduct or acts, he will not be allowed to claim that there has been a failure in compliance by the other party, so as to relieve him. Waiver and estoppel are often similar; but, while the words are frequently used as equivalent terms, they are not identical. Where the law requires a contract to be in writing, under the decisions of this court it cannot be modified by a binding parol contract. But strict performance as to time may be waived by parol, at least if made before default, and relied on by the other party. 9 Cyc. 608; 36 Cyc. 699; 39 Cyc. 1341, 1349, 1350; 40 Cyc. 254 et seq. And this is true whether the payment is to be made "presently" or at a fixed date in the future.

When time is of the essence of the contract, if, after the time for performance is passed, by consent one of the parties complies with its terms, an equitable proceeding for specific performance will lie. *Moody v. Griffin*, 60 Ga. 459. And, though time for payment of the purchase money may be of the essence of the contract, it has been held that it may be waived by conduct of the payee, such as suing for the purchase money, instead of treating the contract as at an end. *Jordan v. Rhodes*, 24 Ga. 478; *Stewart v. Ellis*, 130 Ga. 685 (3), 61 S. E. 597. It is unnecessary in the present case to decide whether, after breach of a contract in which time is of its essence, an agreement to waive

the breach, not supported by a consideration (in the broad sense of Civil Code, § 4242), and not acted upon by the party committing the breach, where no change of situation has resulted, and where neither estoppel nor the doctrine of election of remedies is involved, will be binding. See in this connection *Alabama Construction Co. v. Continental Car & Equipment Co.*, 13 Ga. 365 (8), 370, 62 S. E. 160; *Hardwood Lumber Co. v. Adams & Steinbrugge*, 134 Ga. 821, 826, 68 S. E. 725, 32 L. R. A. (N. S.) 192; *Cook v. Crocker*, 53 Ga. 66; *Morgan v. Perkins*, 94 Ga. 353, 21 S. E. 574, where there was a parol extension of time for cutting timber, and the timber was in fact cut; 40 Cyc. 263 et seq., and citations.

In this case it was alleged that, before the time for payment or tender under the contract had passed, the vendor induced the purchaser to delay making payment, and that in reliance upon this the latter made no tender. While the vendor continued to cause the purchaser to delay, he could not also take advantage of such delay. A party to a contract cannot cause a breach or delay in compliance by the other, and then set up the breach or delay so caused as freeing him from the contract. *Hartford Fire Ins. Co. v. Amos*, 98 Ga. 533, 25 S. E. 575; *Am. Ins. Co. v. McVickers*, 135 Ga. 119, 68 S. E. 1026; *Small Co. v. Liberty Mills*, 137 Ga. 565 (1, b), 73 S. E. 846; *Underwood v. Farmers' Joint-Stock Ins. Co.*, 57 N. Y. 501; *Insurance Co. v. Eggleston*, 96 U. S. 572, 24 L. Ed. 841; 39 Cyc. 1349, supra; 16 Cyc. 805. The case is now before us on the sustaining of a demurrer to the petition as amended. What the evidence may have shown on former trials cannot be invoked on the consideration of this demurrer. The allegations of the petition must be assumed to be true for the purpose of the present hearing. We have endeavored to show that the former rulings of this court do not conclude the question now made. From what has been said it follows that the presiding judge erred in sustaining the demurrer.

[4] 4. It also follows that there was no error in allowing the amendment, over objection, on the ground that it sought to add to or vary the terms of the written contract sued on.

Judgment reversed on the main bill of exceptions, and affirmed on the cross-bill. All the Justices concur.

(129 Ga. 301)

PRATER et al. v. BARGE et al.

(Supreme Court of Georgia. April 18, 1913.)

(Syllabus by the Court.)

1. APPEAL AND ERROR (§ 458*)—REFUSAL OF INTERLOCUTORY INJUNCTION—REVIEW—SUPERSEDEAS.

When a judgment refusing an interlocutory injunction is brought to the Supreme Court for

review, the trial judge is authorized to grant a supersedeas upon such terms as may by him be deemed necessary to preserve the rights of the parties until the judgment of the Supreme Court can be had. Civ. Code 1910, § 5602. It is left, however, in the sound legal discretion of the judge to grant or refuse it. *West v. Shackelford*, 138 Ga. 163, 74 S. E. 1079.

(a) The judge did not abuse his discretion in refusing to grant a supersedeas in this case.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2223, 2224; Dec. Dig. § 458.*]

2. EXCLUSION OF EVIDENCE.

There was no error in rejecting the evidence which the court excluded.

3. INTERLOCUTORY INJUNCTION.

Under the pleadings and evidence there was no abuse of discretion in refusing to grant the interlocutory injunction as prayed.

Error from Superior Court, Fulton County; J. T. Pendleton, Judge.

Action by V. A. Prater and others against J. J. Barge and others. From an order refusing an interlocutory injunction, plaintiffs bring error. Affirmed.

Phil W. Davis, of Boston, Mass., and J. S. James, of Atlanta, for plaintiffs in error. L. Z. Rosser and P. H. Brewster, both of Atlanta, for defendants in error.

ATKINSON, J. Judgment affirmed. All the Justices concur.

(139 Ga. 795)

GRESS v. ROBERTS.

(Supreme Court of Georgia. April 18, 1913.)

(Syllabus by the Court.)

1. TRESPASS (§ 30*) — EVIDENCE — RATIFICATION.

Where an owner of land conveys green timber suitable for sawmill purposes, and his vendee contracts with one to manufacture it into lumber, and in the contract refers to the conveyance from his vendor for description of the timber conveyed, and the contractor cuts and removes dead timber from the land, in an action by the owner of the land against his vendee for the trespass of the contractor there can be no recovery unless it be shown that the vendee authorized or ratified the trespass of the contractor.

(a) The evidence was insufficient to connect the vendee with the trespass of the contractor.

[Ed. Note.—For other cases, see Trespass, Cent. Dig. § 69; Dec. Dig. § 80.*]

2. EVIDENCE (§ 317*) — DECLARATIONS OF THIRD PARTY.

Testimony of the contractor to the effect that he cut all the timber, and the testimony of another as to his declarations, made dum ferret opus, that he claimed the right to cut the dead timber, would be competent if the defendant's connection with the trespass be shown; otherwise the testimony would be irrelevant.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 1174-1192; Dec. Dig. § 317.*]

Error from Superior Court, Berrien County; W. E. Thomas, Judge.

Action by M. V. Gress against Stephen Roberts. From the judgment, Gress brings error. Reversed.

Knight, Chastain & Gaskins, of Nashville, for plaintiff in error. Hendricks & Christian, of Nashville, for defendant in error.

EVANS, P. J. Stephen Roberts conveyed to Morgan V. Gress "all and singular the timber suitable for sawmill purposes growing" on certain land. Gress filed a petition against Roberts to enjoin him from cutting and removing the timber embraced in his conveyance, and Roberts by way of cross-petition alleged that Gress was cutting and removing the dead timber on the land, which was not included in his lease. On exception to the grant of an interlocutory injunction, the timber lease from Roberts to Gress was construed to convey to the vendee only the green timber which at the date of the lease was suitable for sawmill purposes. Roberts v. Gress, 134 Ga. 271, 67 S. E. 802. In his cross-petition Roberts claimed damages of Gress for a trespass, which was alleged to consist in cutting and removing the dead timber from the land; and on the issue thus made a verdict was returned in favor of Roberts. The court refused a new trial, and the movant excepted.

[1] 1. The dead timber was cut by Carter and Lewis, and the controlling point in the case is the liability of Gress for their trespass. It appears from the record that the timber lease from Roberts to Gress was dated October 16, 1902, and 10 years were allowed by it for the cutting and removal of the timber. Afterwards Gress contracted in writing with Carter and Lewis "to cut all timber suitable for sawmill purposes into lumber for the benefit of the said party of the first part on the following described leases, to wit: Lease from Stephen Roberts to Morgan V. Gress, dated Oct. 16, 1902, to timber" on the locus in quo, and lease from another person to timber on certain land lots, and also timber on other land lots not included in the aforementioned leases. It was further provided that Carter and Lewis were to manufacture the timber into lumber, and ship the lumber to Gress upon specified terms. There was no evidence tending to show Gress' connection with the trespass of Carter and Lewis beyond his contractual relation with them. A fair construction of the contract of Gress with Carter and Lewis is that he contracted with them to manufacture into lumber certain timber owned by him. In describing the timber on the Roberts land he expressly referred to timber suitable for sawmill purposes as embraced in his lease from Roberts. His contract with Carter and Lewis authorized them to cut from the Roberts land only such timber as was conveyed by Roberts to Gress. If they cut timber not embraced in the contract, they had no authority under the contract for their act. They were independent contractors, and Gress is not responsible for their trespass, unless he adopted or ratified it. *Parker v.*

Waycross & Florida R. Co., 81 Ga. 387, 8 S. E. 871. It was not shown that any lumber manufactured from dead trees was received from Carter and Lewis by Gress, or, if any was received that Gress knew or had notice that the same was manufactured from timber cut on the Roberts land. There was a total lack of evidence to show that Gress ever knew of or ratified the trespass of Carter and Lewis, and the verdict is without evidence to support it.

[2] 2. The testimony of Carter to the effect that his firm cut all the timber suitable for sawmill purposes, and the testimony of Roberts that Carter declared, while engaged in cutting the dead timber, that he had a lease to it and was going to cut it, would have been admissible if the evidence had connected Gress with the trespass; but, in the absence of such proof, the testimony was irrelevant.

Judgment reversed. All the Justices concur.

(129 Ga. 724)

BEUCHLER v. GEORGIA RY. & POWER CO.

(Supreme Court of Georgia. April 17, 1913.)

(Syllabus by the Court.)

1. EMINENT DOMAIN (§ 52*)—CONDEMNATION FOR POWER COMPANIES—PROTECTION OF MILLS AND FACTORIES.

In extending the power companies generating electricity for public use the right to condemn rights of way or other easements on the lands of others, in order to run lines of wire, maintain dams, etc., the statute (Civ. Code 1910, §§ 5240-5242) declares that such power of condemnation shall not be used to interfere with any mill or factory actually in operation. The protection accorded to mills and factories extends to appurtenances necessary to their operation, but not to property from which the crude material is taken for supplying such mill or factory.

[Ed. Note.—For other cases, see Eminent Domain, Cent. Dig. §§ 121-130; Dec. Dig. § 52.*]

2. DENIAL OF INTERLOCUTORY INJUNCTION SUSTAINED.

There was no abuse of discretion in refusing an interlocutory injunction.

Error from Superior Court, Fulton County; W. D. Ellis, Judge.

Action by C. H. Beuchler against the Georgia Railway & Power Company. Judgment for defendant, and plaintiff brings error. Affirmed.

Atkinson & Born and Smith & Hastings, all of Atlanta, for plaintiff in error. H. H. Dean, of Gainesville, and King, Spalding & Underwood, of Atlanta, for defendant in error.

EVANS, P. J. The plaintiff in error is the owner of a lot of land containing a granite deposit. The granite is quarried and is crushed into stone of small size and into sand by a rock crusher located on the prem-

ises and near the quarry. The crusher is a machine capable of crushing about 120 tons of rock per day, and is unsheltered by any house or other structure. It is operated by a portable steam engine of 20 horse power, which is inclosed in a very crude shed. The defendant in error is a corporation operating a plant for generating electricity, and proposes to condemn the right to stretch its wires over the premises, by virtue of the Civil Code, §§ 5240-5242.

The plaintiff in error seeks to enjoin such condemnation, on the ground that the maintenance of wires heavily charged with electric current over his premises will interfere with the operation of his rock crusher. On an interlocutory hearing the court refused an injunction.

[1] The statute (Civil Code, §§ 5240-5242) confers on a corporation owning or controlling a water power in this state, or a location for a steam plant, and operating a plant for generating electricity by water or steam power, to be used for lighting towns or cities or supplying motive power to railroads or street car lines, or supplying light, heat, or power to the public, the right to condemn rights of way or other easements upon the lands of others, in order to run lines of wire, maintain dams, flow-back water, or for other uses necessary to these purposes; but it is declared that the power of condemnation "shall not be used to interfere with any mill or factory in actual operation." The plaintiff's contention is that the quarry is incidental to and part of his milling business; that in blasting pieces of stone may be thrown against the wires, causing them to break and fall, to the injury of the persons working in the quarry; and therefore that the stringing of wires heavily charged with electricity will interfere with his mill or factory. On the other hand, the condemnor contends that the wires are to be strung overhead at such distance from the ground, and more than 100 feet from the quarry; that the operation of the quarry will not be interfered with; that the only chance of breaking the wires would be from the careless mining of the stone; that the quarrying of stone to obtain crude material is not accessory to or a part of its milling or manufacture into an article of commercial use; and that a rock crusher of the character described is not such a mill or factory as is contemplated by the statute. The testimony of both sides revolved around the point of possible injury to persons engaged at work in the quarry. The exact location of the crusher relatively to the proposed course of the wires is made to appear only by photographs; and as the testimony does not disclose that the operation of the crusher, independently of the quarry, will be affected by the stringing of the wires the legal questions presented are whether this rock crush-

er is such a mill or factory as is contemplated by the statute, and whether the quarry is a part of the mill.

[2] We do not deem it necessary to decide whether the "mill or factory" referred to in the statute was intended to apply to such a combination of crude structure and portable machinery as the record discloses this rock crusher to be. However that may be, clearly it was not the legislative intent, in exempting mills and factories from the operation of the statute, that such exemption should extend to the protection of the quarry from which the rock is obtained, which is taken to a rock crusher to be crushed into smaller pieces. The operation of a flouring mill has no connection with the cultivation of the wheat used in milling the flour. A yarn or cloth factory is a thing apart from fields given over to the cultivation of the cotton which is manufactured into the yarn or cloth. A quarry is a work for the excavation of stone or mineral; the conversion of such stone or mineral by milling into a commercial article is no part of the business of quarrying, nor vice versa. The statute is designed to protect a mill or factory which is in actual operation. This protection extends to all appurtenances necessary to the operation of a mill or factory, such as the maintenance of a dam in a case where water is the propelling power, and similar adjuncts. But it does not extend to an exemption from condemnation of property from which the crude material is taken to supply a mill or factory, and to be converted into a commercial article. We therefore think that under the evidence the court did not abuse his discretion in refusing an injunction.

Judgment affirmed. All the Justices concur.

(139 Ga. 741)

DUNN et al. v. EVANS et al.
(Supreme Court of Georgia. April 18, 1913.)

(Syllabus by the Court.)

1. DEEDS (§ 68*)—VALIDITY—COMPETENCY TO EXECUTE.

In an action to set aside an alleged deed, on the ground that the grantor at the time of executing the instrument was without sufficient mental capacity to make a deed, and on the further ground that the grantor was induced to execute the instrument by fraud and undue influence, it was not error, while instructing the jury on the subject of mental capacity to make a deed, for the court to charge: (a) "I charge you that it does not require a high degree of mental power to make a deed. One who has sufficient mental ability to comprehend what he or she is doing, and to understand the nature of the act, and the consequences of the act, has the capacity to make a deed." (b) "If you believe Mrs. Patillo had mental capacity sufficient to comprehend what she was doing, and to understand the nature of her act, and the consequences of her act, then, gentlemen, I charge you to find that she was a sane person, and was capable of making the deed, and on that issue find against the plaintiffs." *De Nieff v. Howell*, 138 Ga. 248, 75 S. E. 202. Other

portions of the charge, unexcepted to, dealt with the subject of fraud and undue influence.

[Ed. Note.—For other cases, see *Deeds*, Cent. Dig. §§ 149-155; Dec. Dig. § 68.*]

2. DEEDS (§ 17*) — CONSIDERATION — SUFFICIENCY—GIFT.

The deed was executed by a mother in favor of her daughter, and contained no recital as to consideration other than: "This is a deed of gift." Under such circumstances it was not error to charge: "I charge you, gentlemen of the jury, that you cannot set aside this deed for want of consideration; for a deed of gift from the mother to the daughter would be based upon a good consideration, and the deed would be good, whether there was any money consideration or not, provided you believe that she had the capacity to make the alleged deed, and that it was her free and voluntary act."

[Ed. Note.—For other cases, see *Deeds*, Cent. Dig. §§ 26-37; Dec. Dig. § 17.*]

3. NEW TRIAL (§ 128*) — MOTION — SUFFICIENCY.

A ground of a motion for new trial, complaining of a ruling of the judge in admitting testimony in evidence, is insufficient which fails to set forth the objection urged thereto, and to show that it was made at the time the evidence was offered. *Hill v. Chastain*, 138 Ga. 750, 75 S. E. 1130. Relative to some of the testimony set forth in the eighth amended ground of the motion for new trial, there was a statement that it was objected to at the time it was offered, on the ground that it stated the substance of conversations and transactions with deceased persons; but so much of the evidence as was so objected to was not of the character complained of. Relative to the remainder of the testimony set forth in the eighth amended ground, and all of the testimony set forth in the seventh and ninth grounds, there was no statement as to what ground of objection was urged to it.

[Ed. Note.—For other cases, see *New Trial*, Cent. Dig. §§ 257-262; Dec. Dig. § 128.*]

4. VERDICT SUSTAINED.

The evidence was sufficient to support the verdict, and the discretion of the trial judge in refusing a new trial will not be disturbed.

Error from Superior Court, Henry County; R. T. Daniel, Judge.

Action between Mrs. A. E. Dunn and others and Mrs. M. E. Evans and others. From an adverse judgment, the parties first named bring error. Affirmed.

Napier, Wright & Cox, of Atlanta, and Brown & Brown, of McDonough, for plaintiffs in error. E. M. Smith, and E. J. Reagan, both of McDonough, for defendants in error.

ATKINSON, J. Judgment affirmed. All the Justices concur.

(139 Ga. 810)

HAMMONTREE v. HAMMONTREE.
(Supreme Court of Georgia. April 18, 1913.)

(Syllabus by the Court.)

1. DIVORCE (§ 268*)—ALIMONY—ENFORCEMENT — GROUNDS FOR CONTINUANCE — ABSENT WITNESS.

On the hearing of a rule to attach a husband for nonpayment of alimony previously awarded to his wife, to which the respondent filed an answer, alleging infidelity on the part of his wife, and praying a revocation of the

order awarding alimony, there was no error in overruling a motion for a continuance because of the absence of a witness, living in a county other than that where the hearing was had, who, it is claimed, would testify that while the husband and wife were living together she sought to have an operation performed upon her to produce an abortion.

[Ed. Note.—For other cases, see Divorce, Cent. Dig. §§ 754, 755; Dec. Dig. § 268.*]

2. NONPAYMENT OF ALIMONY.

Under the evidence there was no error in making the rule absolute.

Error from Superior Court, Pickens County; W. A. Morris, Judge.

Action by Mattie Hammontree against Caleb Hammontree. Judgment for plaintiff, and defendant brings error. Affirmed.

F. C. Tate, of Atlanta, Jno. S. Wood, of Jasper, and Chas. H. Griffin, of Marietta, for plaintiff in error. Isaac Grant, of Jasper, for defendant in error.

LUMPKIN, J. Judgment affirmed. All the Justices concur.

(139 Ga. 781)

SHERMAN v. LANE.

(Supreme Court of Georgia. April 18, 1913.)

(Syllabus by the Court.)

1. WITNESSES (§ 141*)—COMPETENCY—TRANSACTIONS WITH DECEASED—EMPLOYÉ.

In a suit brought against an administrator upon an open account, to recover the value of lumber alleged to have been contracted for by the administrator's intestate with the plaintiff, and to have been delivered, but not fully paid for, it is error to allow an employé of the plaintiff, who witnessed the contract of purchase and sale of the lumber, to testify for the surviving party as to the contract. Civ. Code 1910, § 5858, subd. 5.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. §§ 576-579; Dec. Dig. § 141.*]

2. APPEAL AND ERROR (§ 1051*)—HARMLESS ERROR—ADMISSION OF EVIDENCE.

But where, in such a case, the original books of account of the plaintiff are admitted in evidence, after proper foundation laid in accordance with Civ. Code 1910, § 5769, and no evidence is offered by the defendant, a verdict for the plaintiff for the amount shown by such books to be due is demanded, and the illegal admission of other testimony is harmless error. See Bailey v. Barnelly, 23 Ga. 582.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4161-4170; Dec. Dig. § 1051.*]

3. DENIAL OF NEW TRIAL SUSTAINED.

The other grounds of the motion for a new trial are without merit.

Error from Superior Court, Early County; W. C. Worrill, Judge.

Suit by J. P. Lane against Walter Sherman, administrator. Judgment for plaintiff, and defendant brings error. Affirmed.

Rambo & Wright, of Blakely, for plaintiff in error. R. H. Sheffield, of Blakely, for defendant in error.

HILL, J. Judgment affirmed. All the Justices concur.

(139 Ga. 806)

BARROW v. BARROW.

(Supreme Court of Georgia. April 18, 1913.)

(Syllabus by the Court.)

DIVORCE (§ 235*)—ALIMONY—REVIEW—INSUFFICIENT RECORD.

Where a bill of exceptions complains of a judgment allowing temporary alimony and counsel fees, and it appears therefrom that the evidence submitted upon the hearing consisted only of affidavits made by named persons, some in behalf of the petitioner and some for the respondent, and such evidence is neither incorporated in the bill nor referred to therein and attached thereto as an exhibit properly authenticated, and no brief of the evidence has been approved and filed, so as to become a part of the record, but such documentary evidence is merely specified by the excepting party as a part of the record to be sent up to this court by the clerk of the trial court, the judgment will be affirmed, as without such evidence this court cannot determine the question whether the judge erred in rendering the judgment complained of; and such affidavits, not being a part of the record in the case, cannot be specified and sent to this court as such. Silvey v. Brown, 137 Ga. 104, 72 S. E. 907.

[Ed. Note.—For other cases, see Divorce, Cent. Dig. § 768; Dec. Dig. § 235.*]

Error from Superior Court, Tattnall County; W. W. Sheppard, Judge.

Action by Mrs. Lee Barrow against L. L. Barrow for divorce. From a judgment allowing temporary alimony and counsel fees, defendant brings error. Affirmed.

Anderson & Girardeau, of Claxton, and H. H. Elders, of Reidsville, for plaintiff in error. Way & Burkhalter, of Reidsville, for defendant in error.

HILL, J. Judgment affirmed. All the Justices concur.

(139 Ga. 736)

VAUGHN v. WRIGHT.

(Supreme Court of Georgia. April 18, 1913.)

(Syllabus by the Court.)

1. REPLEVIN (§ 61*)—BAIL TROVER—PETITION—ALLEGATION OF DEMAND—NECESSITY.

Where a petition in an action of trover alleges that the defendant is in possession of the property sued for, and it does not appear that he lawfully acquired the possession, it is not necessary to allege that the plaintiff before the suit was brought demanded possession of the defendant, and that he refused to comply.

[Ed. Note.—For other cases, see Replevin, Cent. Dig. § 223; Dec. Dig. § 61.*]

2. REPLEVIN (§§ 1, 4*)—BAIL TROVER—PROPERTY SUBJECT—TAX RECEIPTS—NATURE OF ACTION.

Trover may be maintained for the wrongful conversion of every species of personal property which is the subject of private ownership, and which belongs to the plaintiff and is of some value to him, though it may have no commercial value. Accordingly trover lies for the recovery of tax receipts alleged to be of value to plaintiff.

[Ed. Note.—For other cases, see Replevin, Cent. Dig. §§ 1, 4-19, 21-26; Dec. Dig. §§ 1, 4.*]

Error from Superior Court, Monroe County; R. T. Daniel, Judge.

Action by Nettie Vaughn against Frank Wright. Judgment for defendant, and plaintiff brings error. Reversed.

R. L. Williams, Jr., of Macon, for plaintiff in error. Willingham & Willingham, of Forsyth, for defendant in error.

FISH, C. J. On August 7, 1911, Nettie Vaughn brought trover and bail against Frank Wright. The substance of the petition, so far as now material, was as follows: Defendant is in possession of three tax receipts given by Hill, as tax collector of Monroe county, to Lloyd, and transferred by him to plaintiff. The "receipts were given for money paid as taxes on Monroe county, Georgia, property." One was for \$21.97 for taxes for 1901; another was for \$17.80 for taxes for 1902; and the other for \$33.20 for taxes for 1903. Plaintiff "claims title to aforesaid property." Defendant refuses to deliver the receipts to plaintiff, or to pay her the value thereof. The receipts "are worth their face value; that is, the amounts for which they were given, plus the interest at 8 per cent. that has accumulated since they were given to the present time, that is, \$72.97 and \$51 interest." The petition was demurred to on several grounds. The demurrer was sustained, and the plaintiff excepted.

Counsel for the defendant concede in their brief that the demurrer raised only two material questions, viz.: (1) Did the petition allege a demand for the property, made on the defendant before the institution of the action? (2) Was the subject-matter of the suit such things of value as trover would lie for their recovery?

[1] 1. On the trial of an action of trover it is not necessary to prove any conversion of the property, where the defendant is in possession when the action is brought. Civil Code, § 4483. The purpose of proving a demand by the plaintiff, and a refusal by the defendant, to deliver the property for the recovery of which trover is brought, is to show a conversion. *Grant v. Miller*, 107 Ga. 804, 33 S. E. 671. And where it appears that the defendant was in possession of the property at the time the action was instituted, and it does not appear that he lawfully obtained the possession, it is not necessary to prove a demand and refusal prior to the suit; it has been held to be otherwise, however, if the defendant was lawfully in possession of the property, and no actual conversion was proved. *Loveless v. Fowler*, 79 Ga. 134 (3), 4 S. E. 103, 11 Am. St. Rep. 407; *Baston v. Rabun*, 115 Ga. 378, 41 S. E. 568. The petition in the case at bar alleged the defendant to be in the possession of the property, and it did not appear that he lawfully obtained the possession. It follows, therefore, that it was not necessary to allege that, before the suit was brought, the plain-

tiff had demanded the property of the defendant, and that he had refused to deliver it.

[2] 2. Were the tax receipts for which the action was brought such things of value as could be recovered in trover? Trover may be maintained for the wrongful conversion of any species of personal property which is the subject of private ownership, where the person instituting the suit is the owner of such property and entitled to the possession thereof. *Graham v. Smith*, 100 Ga. 434, 28 S. E. 225, 40 L. R. A. 503, 62 Am. St. Rep. 323; 28 Am. & Eng. Enc. Law, 647. In *Long v. McIntosh*, 129 Ga. 660, 59 S. E. 779, 16 L. R. A. (N. S.) 1043, 12 Ann. Cas. 263, it was held: "Trover may be maintained by the maker of a promissory note against the payee, after the same is fully paid, if the payee, having the note in his possession, refuses to deliver it to the maker upon demand, or if, after payment, the payee disposes of the note." In the opinion it was said: "The contention that trover will not lie for a promissory note after payment is based on the idea that it is no longer of value. This, we think, is not sound in principle. * * *

After maturity, or even after payment, it is still valuable as evidence. If suit should be brought upon it, the production of it by the payee or transferee would make a prima facie case, if it were not canceled. On the other hand, its possession by the maker would be valuable evidence to show payment. So that a note, even after payment, has a value as evidence. It is property and valuable to the owner, although it may not have a market value. In *Moody v. State*, 127 Ga. 821, 56 S. E. 993, a written notice which was fastened to a telegraph pole and which warned trespassers against hunting or fishing on land was held to be property which might be the subject of malicious mischief. Suppose, instead of a promissory note, upon payment of the debt, the debtor should receive a receipt, and this should be stolen or wrongfully converted, would there be any doubt of its value as evidence, and that the owner might recover it in an action of trover? In *Fullam v. Cummings*, 16 Vt. 697, it was held that where a debtor had made copies of the creditor's accounts against him, and the creditor had got possession of such copies and refused to redeliver them, the debtor might bring an action of trover therefor." It was further said: "But, where it [the note] has been paid, its amount will furnish no measure of damages. In that event, the damages recoverable would be those actually resulting from the conversion; and, if a money verdict was asked and no special damages shown, probably the damages recoverable would be nominal." There are a number of cases wherein it has been held that articles of no commercial value may be recovered in trover. Among such cases are the following: *Earle v. Holderness*, 6 Barn. & Cress. 462, wherein a batch of let-

ters was recovered in trover; so in *Clendon v. Dinneford*, 5 C. & P. 13, a recovery in trover for nominal damages was allowed for the conversion by the defendant of certain letters written to the plaintiff by a young lady to whom he was paying his addresses, and also two books containing his answers to such letters "and other observations." Again in *Oliver v. Oliver*, 11 C. B. (N. S.) 139, it was held that the receiver of a letter has a sufficient property in the paper upon which it is written to entitle him to maintain detinue for it against the sender, into whose hands it has come as a bailee. The Supreme Court of the United States, in *Teal v. Felton*, 12 How. 284, 13 L. Ed. 990, held that where a postmaster refused to deliver a newspaper upon which there was an "initial," unless the person to whom it was addressed would pay letter postage, the postmaster was liable in an action of trover. In *Drake v. Auerbach*, 87 Minn. 505, 35 N. W. 367, it appears that pending a controversy between the plaintiff and defendants over the cost of constructing a building by plaintiff for defendants, they requested that he furnish to them his vouchers, which he could not do, as they had been destroyed by fire. He procured, however, duplicate or copy vouchers, which he delivered to them, together with a general statement of expenditures, and an affidavit of its correctness by his bookkeeper. Upon refusal of the defendants to return all of these documents to the plaintiff, it was held that he was entitled to recover the same in an action of claim and delivery, which is a modification of the common-law action of replevin. In the opinion it was said: "These papers have no market value, and the customary rule in replevin cannot be adopted when measuring their worth. They have a peculiar value to plaintiff, governed largely by his needs and the purposes for which they may be utilized. In such cases, as in actions for conversion of property of like character, much must be left to the sound discretion of the jury, and it is not error to allow the owner to recover their value to him, even if they are of trifling value to others." The court cited the case of *Bradley v. Gamelle*, 7 Minn. 331 (Gil. 260), wherein it was held: "Where the owner of Sioux half-breed script is wrongfully deprived of the same, he may recover the value of the same to him, although the script being unassignable is valueless in the hands of third persons, and notwithstanding duplicates might be obtained from the land office at Washington on proof of loss of originals. A wrongdoer will not be permitted to assert such a defense." Our statutory action of trover lies where detinue, replevin, or trover lay at common law. *Delaney v. Sheehan*, 138 Ga. 513, 75 S. E. 632.

We have no hesitancy in holding, both upon principle and authority, that under the

allegations of the petition in the case at bar the plaintiff was entitled to recover the tax receipts for which the action was brought. While we do not perceive how such receipts have any face value, or why they should be worth the amounts which they indicate were paid as taxes, the fact that they may be overvalued in the petition does not necessarily indicate that they are of no value to the plaintiff, even though they may have no commercial value. According to the petition, the receipts were the property of the plaintiff. They were of some value to her. They were in possession of the defendant when the suit was brought. She desired to obtain possession of them. Defendant refused to deliver them to her, and in our opinion she was undoubtedly entitled to recover them. Accordingly the court erred in sustaining the demurrer to the petition and in dismissing the case.

Judgment reversed. All the Justices concur.

(129 Ga. 801)

WOOTEN et al. v. WALDREP et al.
(Supreme Court of Georgia. April 18, 1913.)

(Syllabus by the Court.)

APPEAL AND ERROR (§ 1010*)—JUDGMENT—EVIDENCE.

The case was tried, by consent, before the judge without a jury. No error of law is complained of. The evidence is conflicting, and sufficient to support the judgment rendered.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 8979-8982, 4024; Dec. Dig. § 1010.*]

Error from Superior Court, Fulton County; J. T. Pendleton, Judge.

Action between W. J. Wooten and others and M. H. Waldrep and others. From an adverse judgment, the parties first named bring error. Affirmed.

McMillan & Erwin, of Clarkesville, for plaintiffs in error. I. H. Sutton, of Clarkesville, and A. E. Wilson and A. E. Ramsaur, both of Atlanta, for defendants in error.

EVANS, P. J. Judgment affirmed. All the Justices concur.

(129 Ga. 733)

BURROW v. SOUTHERN RY. CO. et al.
(Supreme Court of Georgia. April 18, 1913.)

(Syllabus by the Court.)

1. SEARCHES AND SEIZURES (§ 8*)—ACTION—RIGHT OF RECOVERY.

On the trial of an action for an alleged unlawful search of the plaintiff's dwelling, illegal arrest, false imprisonment, and assault and battery, after instructing the jury to the effect that, if the plaintiff did not consent that his house be searched, and both the defendants participated in the search, there being no contention that they had a search warrant, the jury would be authorized to find for the plaintiff such a sum as would compensate him for an

unlawful search, it was reversible error for the judge to add to such instruction the following: "That is, provided you find that the imprisonment was false." Plaintiff's right to recover for an unlawful search was not dependent upon a subsequent false imprisonment.

[Ed. Note.—For other cases, see Searches and Seizures, Cent. Dig. § 6; Dec. Dig. § 8.*]

2. CRIMINAL LAW (§ 207*)—PRELIMINARY EXAMINATION—JURISDICTION—COMMITMENT.

The court did not err, on the trial of an action of the character referred to in the preceding note, in instructing the jury to the effect that, while a magistrate of one county of this state may lawfully issue a warrant against a person charged with committing a crime in another county thereof, he has no authority in such a case to hold a court of inquiry to determine whether or not the accused shall be committed; this authority being vested only in a magistrate of the county wherein the crime is charged to have been perpetrated. Pen. Code 1910, §§ 909, 919, 920.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 414, 418, 440, 472-475; Dec. Dig. § 207.*]

3. INSTRUCTIONS.

Nor were the other instructions complained of erroneous for any reason assigned.

4. APPEAL AND ERROR (§ 1078*)—BRIEF—ASSIGNMENT OF ERROR—ABANDONMENT.

The assignment of error upon the refusal to strike a designated part of the answer of the defendant corporation, not being referred to in the brief for plaintiff in error, is considered as abandoned.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4256-4261; Dec. Dig. § 1078.*]

Error from Superior Court, Paulding County; Price Edwards, Judge.

Action by Will Burrow against the Southern Railway Company and others. Judgment for defendants, and plaintiff brings error. Reversed.

A. L. Bartlett, of Dallas, for plaintiff in error. Maddox, McCamy & Shumate, of Dalton, and A. J. Camp and C. D. McGregor, both of Dallas, for defendants in error.

FISH, C. J. Judgment reversed. All the Justices concur.

(139 Ga. 314)

PRESLEY v. JONES & OGLESBY.

(Supreme Court of Georgia. April 18, 1913.)

(Syllabus by the Court.)

EXCEPTIONS, BILL OF (§ 58*)—SERVICE—SUFFICIENCY.

Where there was indorsed on the bill of exceptions an entry, signed by counsel for the plaintiff in error, stating: "I hereby certify that I have served J. M. Moon, attorney for defendant in error, with a copy of the bill of exceptions and certificate of court, by mailing him a copy of the same at Cartersville, Georgia, on the 29th day of November, 1912"—and no other service, or acknowledgment or waiver of service, appears, the writ of error will be dismissed on motion.

[Ed. Note.—For other cases, see Exceptions, Bill of, Cent. Dig. §§ 100-106; Dec. Dig. § 58.*]

Error from Superior Court, Gordon County; A. W. Fite, Judge.

Action between W. L. Presley and Jones & Oglesby. From the judgment, Presley brings error. Dismissed.

J. M. Lang, of Calhoun, for plaintiff in error. J. M. Moon, of Cartersville, for defendant in error.

LUMPKIN, J. Where a litigant has obtained a judgment in the trial court, and it is sought to reverse such judgment, the statute requires service on the opposite party or his attorney to be made in the manner therein pointed out. Civil Code, § 6180. It is important that the adverse party or his counsel should be served, so that they may know of the exception taken to the judgment and the effort to reverse it. If service of bills of exceptions generally were permitted to be made by mailing a copy to counsel, it would doubtless frequently happen that cases would be heard in this court without any knowledge on the part of the litigant or counsel interested in sustaining the judgment. The Legislature have not thought it desirable to risk to the uncertainties of the mail the serving of bills of exceptions upon parties in this state; nor is there any provision for traversing such an entry and the hearing of evidence by this court as to whether a paper so mailed was received. In only one case have they provided that mailing a notice shall be sufficient service of a bill of exceptions to authorize this court to take jurisdiction. Such a provision is made in case of a nonresident of the state, who is not represented by counsel, so that he may be served with a copy of the bill of exceptions. Civil Code, § 6181. In that event the clerk, upon request of counsel suing out the bill of exceptions (not the attorney himself), is required to give notice to the nonresident defendant by mailing a letter addressed to him at his post office. This was not allowed as being the most desirable method of service, but as matter of necessity, where it could not otherwise be perfected; and it is declared that the judgment made shall bind the defendant so far as his assets in this state are concerned. No such necessity existed in the case under consideration, and the service was not made in the manner which the statute requires. Albritton v. Tygart, 77 S. E. 28.

Writ of error dismissed. All the Justices concur.

(139 Ga. 732)

TRIPPE v. W. J. BELL & CO.

(Supreme Court of Georgia. April 18, 1913.)

(Syllabus by the Court.)

1. PRINCIPAL AND AGENT (§ 159*)—LIABILITY OF AGENT—TORTIOUS ACT—CONVERSION.

The substance of the material allegations of a petition brought by Bell & Co. against Trippe was as follows: Sheffield delivered to the defendant, who as weigher had charge of a public warehouse for the storage of cotton, a

certain bale of cotton, described by weight and a number marked thereon, and received from defendant a warehouse receipt for the same, which next day he transferred in writing to the plaintiff, who has since retained its possession. Subsequently the defendant, without legal authority, delivered the cotton to one Singletary, knowing that the latter did not own it, but that Sheffield or his assignee did. On account of these facts the cotton had been lost to the plaintiff, and he had been damaged thereby to the amount of its value, which was set forth. *Held*, that a motion made at the trial to dismiss the petition upon the ground that it did not set forth a cause of action was properly overruled, as the alleged conduct of the defendant amounted to a conversion (*Liptrot v. Holmes*, 1 Ga. 381), and he was liable for his tortious act, though done in the capacity of agent (Civ. Code 1910, § 3613).

[Ed. Note.—For other cases, see *Principal and Agent*, Cent. Dig. §§ 590-612; Dec. Dig. § 159.*]

2. TRIAL (§ 234*)—INSTRUCTIONS.

A charge was not erroneous, on the ground that "under the pleadings and the evidence [it] did not state correctly the law governing the case," wherein the judge specifically set forth the allegations of the petition as above summarized, and instructed the jury that, if under the evidence they believed these allegations to be true, then they would be authorized to find in favor of the plaintiff.

[Ed. Note.—For other cases, see *Trial*, Cent. Dig. §§ 534-538, 566; Dec. Dig. § 234.*]

3. VERDICT SUSTAINED.

The evidence authorized the verdict, and the court did not err in refusing a new trial.

Error from Superior Court, Early County: W. C. Worrill, Judge.

Action by W. J. Bell & Co. against W. H. Trippe. Judgment for plaintiff, and defendant brings error. Affirmed.

Rambo & Wright, of Blakely, for plaintiff in error. R. H. Sheffield, of Blakely, for defendant in error.

FISH, C. J. Judgment affirmed. All the Justices concur.

(129 Ga. 776)

GRAY v. COLLINS et al.

(Supreme Court of Georgia. April 18, 1913.)

(Syllabus by the Court.)

1. FRAUDULENT CONVEYANCES (§§ 278, 308*)—CANCELLATION OF INSTRUMENTS—HUSBAND AND WIFE—BURDEN OF PROOF—QUESTION FOR JURY—SUFFICIENCY OF EVIDENCE.

The evidence examined, and *held* to have made issues that should have been submitted to a jury.

(a) Where a transaction between a husband and wife is attacked for fraud by the creditors of the husband, the onus is on the husband and wife to show that the transaction was fair.

[Ed. Note.—For other cases, see *Fraudulent Conveyances*, Cent. Dig. §§ 801, 802, 923-940; Dec. Dig. §§ 278, 308.*]

2. PLEADING (§ 259*)—ANSWER—AMENDMENT.

Matters which are defensive to the plaintiff's action may be averred in amendment to the answer, even though such matters may be insufficient to afford the affirmative equitable relief therein prayed.

[Ed. Note.—For other cases, see *Pleading*, Cent. Dig. §§ 783-792; Dec. Dig. § 259.*]

3. FRAUDULENT CONVEYANCES (§ 286*)—ADMISSIBILITY OF EVIDENCE—HUSBAND AND WIFE.

Where a wife executes to her husband a deed to her land under the belief that she is giving a security deed to another to procure money for her own benefit, and this deed is not recorded until after credit is extended to the husband, in the absence of evidence that the credit was extended on the husband's ostensible ownership of the land, it is competent for the wife to show that the deed to her husband was procured by imposition.

[Ed. Note.—For other cases, see *Fraudulent Conveyances*, Cent. Dig. §§ 822-825, 827-834, 863-866; Dec. Dig. § 286.*]

Error from Superior Court, Early County: W. C. Worrill, Judge.

Action by A. H. Gray, trustee, against E. S. Collins and others. Judgment for defendants, and plaintiff brings error. Reversed.

Rambo & Wright and C. L. Glessner, all of Blakely, for plaintiff in error. Pope & Bennett, of Albany, and B. R. Collins and W. G. Park, both of Blakely, for defendants in error.

EVANS, P. J. The trustee in bankruptcy of the estate of E. S. Collins brought a petition against the bankrupt, his wife, Mrs. Emma T. Collins, and his son B. R. Collins, praying for the cancellation of certain deeds, and a decree that the title to the land therein described is in the bankrupt as against his creditors, whose debts were in existence at the time the conveyance from the bankrupt to his son was executed, to wit, October 14, 1908. On the trial it appeared that Mrs. Emma T. Collins was the owner of a tract of land which she conveyed on November 30, 1901, to her husband by warranty deed upon an alleged consideration of \$500. This deed was not recorded until October 14, 1904. Intermediate between the execution and record of the deed E. S. Collins purchased certain cotton-gin machinery from the Liddell Company, giving his notes therefor, reciting that they were given for the purchase of the machinery, with reservation of title in the vendor until the full payment of the purchase price. Suit was brought on these notes on June 23, 1908, and judgment was obtained on October 9, 1909. On December 20, 1906, E. S. Collins conveyed the land by warranty deed to his wife, reciting a consideration of love and affection; and this deed was recorded on January 17, 1907. Mrs. Collins on December 28, 1906, conveyed the land, by warranty deed, reciting a consideration of love and affection, to her son B. R. Collins, who on the same day conveyed the land to his father, E. S. Collins, by deed reciting a consideration of love and affection. Both of these deeds were recorded on December 28, 1906. On October 14, 1908, E. S. Collins conveyed the land to B. R. Collins, who on the same day conveyed it to Emma T. Collins; both deeds reciting a consideration of love and affection, and

both being recorded December 14, 1908. E. S. Collins was adjudged a bankrupt on his voluntary petition in December, 1909, and has not been discharged. The plaintiff is his duly appointed trustee.

[1] Mrs. Emma T. Collins testified by interrogatories and subsequently by deposition. In her first testimony she said she went into possession of the land soon after she purchased it, that her husband looked after it for her, and that she became indebted to the Bank of Blakely through D. W. James. She had no recollection of having executed any papers to James, but signed a paper to the Bank of Blakely. She did not recall making a deed to her husband in 1901; her husband never paid or promised to pay to her any money for the land, nor did she expect him to pay for the land. She knew her husband bought the gin outfit from the Liddell Company, and at that time he owned no land, but he did own some personal property of small value. She did not execute a deed to her son; that is, she did not know that she did. She signed some papers without looking over them. Having confidence in her husband, she signed some paper at his request, thinking it was a mortgage. Her husband represented that the purpose of signing the papers which she executed was to get money with which to pay D. W. James, and she signed the paper without reading it. It was not until after the institution of the present suit that she knew that she had made a deed to her son, and that he, in turn, had conveyed the land to her husband. It was not her purpose to make a deed of gift to her son, so that he could make a similar deed to her husband, and, if such deeds be construed to be gifts, she desired to revoke them. In the signing of these deeds she had absolute confidence in her husband, was under his influence in matters of this kind, and signed the deeds because he told her to sign them. In her deposition she testified that since her testimony was taken by interrogatories she had been informed by her husband that she did execute the deed of November 30, 1901; but she deposed that no consideration passed from him to her. Her husband always managed her property; she has from time to time executed mortgages at his request to meet expenses incurred for her when he operated her farm; she had absolute confidence in him, and implicitly relied on his judgment, honor, and integrity to make the necessary financial arrangements for her farming operations; at his instance and request she signed the deed of November 30, 1901, believing at the time, because he "requested" (represented?) to her that it was a mortgage to borrow money for the purpose of paying expenses and operating her farm for the year 1902 as well as to pay her past-due obligations; she did not execute the deed so as to permit him to embark in business and secure credit from third persons;

after his retirement from business in 1887, he looked after her farm, and did not operate any business of his own until he began the ginning business in 1904; he has never obtained any credit on her land with her consent or knowledge; she was not advised or informed of the execution of the deed from him to herself in 1906, and has never seen it, and first heard of its existence since this suit was brought.

B. R. Collins testified: He is an attorney at law, and had charge of the transaction to secure a loan from the Southern Mortgage Company. He represented the company in connection with another attorney in the matter of securing loans. There was a past-due indebtedness of his mother to the Bank of Blakely. In the negotiation of the loan it was necessary for her to sign the papers before an officer with a seal, which would necessitate her coming to Blakely at different times. He conferred with his associate, who was a more experienced attorney, and he suggested the course which was pursued, viz., to have his mother make a deed to him, and he, in turn, make a deed to his father, who would negotiate the loan in his own name, and, after the loan was negotiated, his father could reconvey the land to him, and he to his mother, and thereby revest her with the title without impairing her title to the land. This suggestion was acted on; and this is the reason for the execution of the deeds made in 1906 and 1908. The witness knew nothing of the deed dated in 1901 until the deed of his father reconveying the land to her was made. The main purpose of the whole transaction was to get the loan for his mother without the necessity of her being inconvenienced in making trips to sign the different papers before an officer with a seal; he did not intentionally perpetrate a fraud on his mother in procuring the deeds, but, if he misrepresented matters to her, it was because he was under the wrong impression by reason of his associate counsel's advising him at the time how to fix up the papers, and if he said anything further at all than what his associate counsel had advised he did misrepresent it to her. He made no willful or fraudulent misrepresentation, but acted in good faith. The deeds are in his father's handwriting; his father was advised of the plan suggested by his associate counsel, who was representing the Liddell Company at the time; and the witness told the circumstances to his mother. He explained to his associate counsel that it would be a serious disadvantage to his mother to come to Blakely to sign the various papers pertaining to the negotiation of the loan, and his associate counsel said, "Well secure the loan in your father's name; have the title put into him. I think when he comes in I can fix the deed." He told his associate counsel that his mother had already conveyed the land to his father, who replied, "That

is no good," and advised the reconveyance of the land to his mother and the other conveyance referred to.

E. S. Collins testified that he never represented to the Liddell Company or any one else that he owned the land. About the time that his wife executed the deed of 1901 he told her that she would have to give the land as security for a loan from the Bank of Blakely, but when she signed the deed he did not tell her whether it was a deed or mortgage, though she thought it was a mortgage. He undertook to secure a loan from Mr. Weathers, and turned the deed over to him, who had it put on record.

On this evidence a verdict was directed for the defendants.

1. We think the court should have submitted the issues to the jury. At the time the debt of the Liddell Company was contracted by E. S. Collins, the paper title to the land was in him. On December 20, 1906, he reconveyed the land to his wife, who six days later conveyed it to her son, who on the same day conveyed it to the bankrupt. About two years thereafter, and while the suit of the Liddell Company was pending against him, E. S. Collins conveyed the land to his son, who, in turn, conveyed it to his mother. The defendants in their testimony undertook to explain these transactions. It is not contended that any of these deeds were executed upon a valuable consideration. The deed of 1901 was alleged to have been procured by imposition, and the deeds of later date are alleged to have been executed so as to save Mrs. Collins the inconvenience of making various trips in the negotiation of a loan on the land, which was procured by her husband for her benefit. At the time of the execution of the first deed her husband was possessed of but little property, and was being sued by the Liddell Company when the later deeds were executed. The insolvency of the defendant E. S. Collins at the time of these later conveyances was fairly inferable from the evidence. The deeds purport on their faces to be gifts from the grantor to the grantee. It was for the jury to say whether these deeds were made for the purpose of delaying or defeating the bankrupt's creditors, or as contended by the defendants. *Blackburn v. Lee*, 137 Ga. 265, 73 S. E. 1. The parties to the transactions are husband, wife, and son. A wife may give property to her husband. She may also contract with him; but, when a transaction between husband and wife is attacked for fraud by the creditors of either, the onus is on the husband and wife to show that the transaction was fair. Civil Code, § 3011. Transactions between husband and wife and near relatives, to the prejudice of creditors, are to be closely scanned and their bona fides clearly established. *Booher v. Worrlin*, 57 Ga. 235; *Smith v. Wellborn*, 75 Ga. 790. It was there-

fore erroneous for the court to direct a verdict.

[2] 2. Mrs. Collins was allowed to amend her plea by alleging the circumstances attending the execution of the various deeds as testified to by her, and praying for their cancellation. It was urged that no sufficient cause for the cancellation of the deeds was averred. Even if it be admitted that the matters pleaded were insufficient for the affirmative relief prayed by her, still they were relevant as explaining the various transactions relied on by the plaintiff as constituting fraudulent transfers of the debtor's property.

[3] 3. With respect to the deed from Mrs. Collins to her husband executed in 1901, which was not recorded until after the debt to the creditor was created, in the absence of testimony authorizing an inference that credit was extended on the faith of the husband's ostensible ownership, it was competent to show that it was without consideration, and executed under circumstances negating any intention to put the title in the husband. If the creditor did not extend credit to the husband on the faith of his ostensible ownership of the land, he cannot object to the assertion of the wife's equity in the land.

Judgment reversed. All the Justices concur.

(139 Ga. 732)

BROOKS v. WINKLES.

(Supreme Court of Georgia. April 18, 1918.)

(Syllabus by the Court.)

1. COVENANTS (§ 102*)—ACTION ON WARRANTY—RIGHT OF RECOVERY.

In an action on a general warranty of title to land against the claims of all persons, an eviction or equivalent disturbance by an outstanding paramount title must be shown, to entitle the plaintiff to recover. *Darley v. Mallary*, 136 Ga. 345, 71 S. E. 471.

[Ed. Note.—For other cases, see Covenants, Cent. Dig. §§ 157-168; Dec. Dig. § 102.*]

2. COVENANTS (§ 88*)—ACTION ON WARRANTY—RIGHT OF RECOVERY—NOTICE.

If in such a case the plaintiff relies upon ouster in consequence of legal proceedings, it must appear that the warrantor had notice thereof and an opportunity to defend. Civil Code 1910, § 4197. See *Clements v. Collins*, 59 Ga. 124; *Haines v. Fort*, 93 Ga. 24 (3), 18 S. E. 994.

[Ed. Note.—For other cases, see Covenants, Cent. Dig. §§ 97, 98; Dec. Dig. § 88.*]

3. COVENANTS (§ 89*)—EXECUTION (§ 190*)—CLAIM OF THIRD PERSONS—PARTIES—ACTION ON WARRANTY.

The defendant in execution is not a party to a statutory claim case, where the only issue made is the ordinary one between the plaintiff in execution and the claimant. *Anderson v. Wilson*, 45 Ga. 27; *Central Bank v. Georgia Grocery Co.*, 120 Ga. 883, 884, 48 S. E. 325. Not being a party himself, he cannot vouch his warrantor in such a case, so as to give him an opportunity to defend his title, and conclude

him by a verdict and judgment that the property is not subject to the execution.

[Ed. Note.—For other cases, see Covenants, Cent. Dig. § 99; Dec. Dig. § 89; * Execution, Cent. Dig. § 565; Dec. Dig. § 190.*]

4. EXECUTION (§ 275*)—LEVY—VALIDITY.

Where an ordinary execution against two or more defendants is levied upon land, and the entry of levy does not show whose property the land was levied on, the levy is insufficient, and, unless amended, a sale made thereunder will not divest the title of the real owner of the land. *Cooper v. Yearwood*, 119 Ga. 44, 45 S. E. 716.

[Ed. Note.—For other cases, see Execution, Cent. Dig. §§ 16, 148, 345, 791-796; Dec. Dig. § 275.*]

5. COVENANTS (§ 122*)—BREACH OF WARRANTY—RIGHT OF RECOVERY.

Accordingly, on the trial of an action for alleged breach of a general warranty of title to land, the refusal to grant a nonsuit was error, where the only evidence in behalf of the plaintiff, the warrantee, showed the following facts, viz.: An execution in favor of the officers of court and against the warrantee and another was levied upon the land purchased by the warrantee from his warrantor with a covenant of general warranty, the levy, however, not stating as whose property the land was levied on; a statutory claim was filed thereto by a third person; the warrantor was subpoenaed by the warrantee as a witness for the plaintiffs in execution and, on the trial of the usual issue in the claim case, testified in their behalf; and a verdict was rendered finding the property not subject, and a judgment in accordance therewith was entered.

(a) It is not necessary to decide in this case whether the facts that a warrantor is subpoenaed by his warrantee in a case to which the latter is a party, and appears and testifies therein, constitute, without more, sufficient notice to vouch the warrantor, so as to require him to defend his title.

[Ed. Note.—For other cases, see Covenants, Cent. Dig. § 224; Dec. Dig. § 122.*]

Error from Superior Court, Haralson County; Price Edwards, Judge.

Action by S. J. Winkles against H. L. Brooks. A nonsuit was refused, and defendant brings error. Reversed.

Griffith & Matthews, of Buchanan, for plaintiff in error. J. S. Edwards and W. P. Robinson, both of Buchanan, for defendant in error.

FISH, C. J. Judgment reversed. All the Justices concur.

(139 Ga. 729)

MONROE et al. v. ESTES.

(Supreme Court of Georgia. April 18, 1913.)

(Syllabus by the Court.)

WATERS AND WATER COURSES (§ 179*)—MILL PURPOSES—ACTION FOR DAMAGES—INSTRUCTION.

In a suit by one millowner against a lower millowner on the same stream to recover damages alleged to have been sustained in consequence of the raising of the height of a dam by the lower millowner so as to back the water in the stream to a height that interfered with the operation of the plaintiff's mill, the court erred in charging the jury that, "if at any time this water was off the wheel [of the plaintiff's mill],

the defendants would have no right to put it back on her, although previous to this time it may have been on her; that is the rule that will govern you in that respect;" there being evidence from which the jury would have been authorized to find that for more than 20 years the dam of the lower millowner had been erected and maintained at such a height as to back the water up to its present level before the erection of the upper mill, and that if there had been a subsidence of the waters in the millpond, so that the flowage backward did not affect the wheel of the upper millowner, such subsidence was in consequence of leakage; that the raising of the water had been caused, not by raising the height of the lower dam, but by the repairing thereof; that the lowering of the level of the water had been temporary, caused by use of the water or leakage, and not for such a length of time as would cause a loss of the easement by abandonment or forfeiture by nonuser under the provisions of the Civil Code 1910, § 3644.

[Ed. Note.—For other cases, see Waters and Water Courses, Cent. Dig. §§ 244-250, 256-259, 263, 284; Dec. Dig. § 179.*]

Error from Superior Court, Haralson County; Price Edwards, Judge.

Action by Millie Estes against Mrs. M. C. Monroe and others. Judgment for plaintiff, and defendants bring error. Reversed.

J. S. Edwards and Griffith & Matthews, all of Buchanan, and H. J. McBride, of Tallapoosa, for plaintiffs in error. Jas. Beall and B. F. Boykin, both of Carrollton, for defendant in error.

BECK, J. This was a suit to recover damages alleged to have been caused by the act of a lower millowner in backing water by raising the height of a dam, so as to cause it to interfere with a wheel which furnished the power by which the plaintiff's mill was operated. The defendants answered, in substance, that the dam had not been raised beyond the height at which it had formerly been built and maintained for a long period before the erection of the plaintiff's mill; that, while leakage in the lower dam had been stopped to a certain extent, the repairs did not raise the waters to the height of the original dam. And it was also contended by the defendants, as shown by the evidence, that, if there had been a subsidence of the water as raised by the original dam, it was caused by leakage; and it was insisted that by repairing the old dam they had not raised the water by several inches as high as they had a right to raise it, when the capacity of the original dam is taken into consideration. There was evidence which would have authorized the jury to find that the dam of the lower millowner as originally built was of such a height that it would have raised the water in the stream upon which the mills of both the plaintiff and the defendants were located as to cause the waters to rise to a height of as great or greater than that to which they were raised after the repairs of the lower dam, which are complained of in the plaintiff's petition. While there is a

conflict of evidence upon this issue, the jury would have been authorized by the evidence to find with the defendants as to this contention. And there was also evidence tending to show that the dam of the lower owner had been maintained for more than 20 years prior to the erection of the mill of the plaintiff. That being true, the court erred in charging the jury that, "if at any time this water was off the wheel [of the plaintiff's mill] the defendants would have no right to put it back on her, although previous to this time, it may have been on her; that is the rule which will govern you in that respect." If the defendants had maintained the lower dam for a period of 20 years at a certain height and with a certain capacity, and had raised the water in the stream up to the capacity of the dam, they would have acquired a prescriptive right to back the water in the stream to the full capacity of the dam thus maintained. *Baker v. McGuire*, 53 Ga. 245; 40 Cyc. 676. The proposition of law stated in the excerpt quoted is essentially erroneous, in that it was the duty of the jury in following these instructions to find for the plaintiff, even though they believed from the evidence that the lower dam had been maintained for the prescriptive period at such a height as to give it a capacity to back water upon the wheel of the plaintiff's mill, if at any time, on account of leakage and a want of repairs, the dam of the lower owner had failed to raise the water to the full height of the dam and to the extent of its capacity, and thereby lowered the water in the stream so that the flowage of it backward would not interfere with the mill of the plaintiff; whereas the true doctrine is that if, because of not keeping a dam in repair and because of a consequent leakage, the capacity of the dam and the height to which it can raise water is decreased, the owner of such a dam has a right to repair it and stop the leakage so as to cause it to raise the water to the level of the top of the dam, provided, of course, he has previously, by prescription or otherwise, acquired the right to erect the dam to its original height and to maintain the water at its present level, and has not lost this easement by abandonment or nonuser for a sufficient time to show abandonment. This is distinctly ruled in the case of *Baker v. McGuire*, supra; and the principle which we have stated is discussed in that case and in other cases cited in 9 *Michie* (Ga. Dig.) 346. Another part of the court's charge, in substance embodying the same principle as that contained in the excerpt discussed above, is, of course, subject to the same criticism.

Except as indicated in the foregoing, the other assignments of error are without merit, and no discussion of them is required.

Judgment reversed. All the Justices concur.

(12 Ga. App. 686)

TOLBERT v. STATE. (No. 4777.)

(Court of Appeals of Georgia. May 6, 1913.)

(Syllabus by the Court.)

1. BASTARDS (§ 42*) — PROCEEDINGS — WARRANT.

A warrant issued by a justice of the peace, directing that the putative father of a bastard child be brought before him, is not invalid because it fails to direct that the alleged father be brought before the magistrate issuing the warrant, or some other justice of the peace. Penal Code 1910, § 1331.

[Ed. Note.—For other cases, see *Bastards*, Cent. Dig. §§ 111-113; Dec. Dig. § 42.*]

2. BASTARDS (§ 82*) — PROCEEDINGS — ORDER FOR SECURITY—SUBSEQUENT ORDER.

Where, upon the trial of such a warrant, the magistrate adjudges that the person brought before him is the father, he may be required to give security in terms of the law for the maintenance and education of the child until it arrives at the age of 14 years, and also the expenses of lying-in with such child, boarding, nursing, and maintenance while the mother is confined by reason thereof. Penal Code 1910, § 1332. It is no objection to an order requiring such security to be given that the order merely directed the bond to be given in terms of the law without naming the sum or reciting that it should be made payable to the ordinary of the county. An order of a magistrate, which recites that the accused was required to give a bastardy bond, that he failed and refused to do so, and that he was recognized in a given sum to the superior court, is a valid order. *McCalman v. State*, 121 Ga. 491, 49 S. E. 609.

[Ed. Note.—For other cases, see *Bastards*, Cent. Dig. §§ 201, 205; Dec. Dig. § 82.*]

3. BASTARDS (§ 24*)—PROCEEDINGS—DEFENSE—PROSECUTION FOR SEDUCTION.

The only issue involved in the trial of a bastardy case being whether the accused is the father of the bastard child, and whether he failed and refused to comply with a valid order requiring him to give security in terms of the law, it is immaterial that the mother of the child may have caused a warrant to be sued out, charging the accused with seduction, and abandoned a prosecution under such warrant. Even an acquittal under an indictment charging seduction would be no defense in a bastardy case. *McCalman v. State*, supra.

[Ed. Note.—For other cases, see *Bastards*, Cent. Dig. §§ 45-47; Dec. Dig. § 24.*]

4. BASTARDS (§ 69*)—ARGUMENT OF COUNSEL—OMISSION IN STATEMENT.

While the failure of the defendant in a criminal case to make to the court and jury a statement in his own behalf is not a matter which counsel for the state has the right to comment upon in his argument to the jury, yet where the defendant does make a statement, and therein fails to deny a material fact brought out in the testimony for the state, such an omission of the accused to make denial is a legitimate subject-matter of comment before the jury. The accused has the right to rest his case upon the evidence, and the fact that he does so cannot be argued to his disadvantage; but, if he undertakes to make a statement at all, counsel have a right to comment, not only upon the statement as made, but upon any omission of the accused to deny a material fact brought against him in the testimony.

[Ed. Note.—For other cases, see *Bastards*, Cent. Dig. §§ 178, 181-184, 187; Dec. Dig. § 69.*]

5. BASTARDS (§ 73*)—NEW TRIAL—GROUNDS.

The conduct of the court in reprimanding counsel for the accused for indulging in conversation which the court deemed an interference with an orderly trial was not cause for a new trial, there being nothing in the action of the court which tended to prejudice the accused.

[Ed. Note.—For other cases, see Bastards, Cent. Dig. §§ 189, 190; Dec. Dig. § 73.*]

6. BASTARDS (§ 69*)—APPEAL—GROUND FOR REVERSAL—REFUSAL OF SECOND STATEMENT.

The refusal of the court to permit a defendant in a criminal case to make a second statement will in no case require a reversal of the judgment overruling a motion for new trial, unless the record discloses that, if permitted to make the additional statement, he would have stated something material to his defense.

[Ed. Note.—For other cases, see Bastards, Cent. Dig. §§ 178, 181-184, 187; Dec. Dig. § 69.*]

7. BASTARDS (§ 67*)—CONTINUANCE—GROUNDS—ABSENT WITNESS.

It is not error to refuse to continue a case in order to procure the testimony of a witness who resides beyond the jurisdiction of the court.

[Ed. Note.—For other cases, see Bastards, Cent. Dig. §§ 179, 180; Dec. Dig. § 67.*]

8. BASTARDS (§ 55*)—EVIDENCE—RELEVANCY.

In the trial of a bastardy case, evidence that the father of the woman has a sufficient amount of property to support his family is irrelevant.

[Ed. Note.—For other cases, see Bastards, Cent. Dig. § 153; Dec. Dig. § 55;* Seduction, Cent. Dig. § 76.]

9. ATTORNEY AND CLIENT (§ 86*)—STATEMENT OF COUNSEL—BINDING EFFECT ON ACCUSED.

In the investigation of a bastardy warrant before a justice of the peace, a statement made by counsel for the accused, in his presence, that the accused would refuse to give the bastardy bond, is to be treated as a statement of the accused himself, unless he then and there repudiates the attorney's authority to make the statement.

[Ed. Note.—For other cases, see Attorney and Client, Cent. Dig. §§ 155-160; Dec. Dig. § 86.*]

10. BASTARDS (§ 55*)—EVIDENCE—RELEVANCY.

In the trial of a bastardy case, evidence is irrelevant that more than one warrant directing that the accused be brought before him was issued by the committing magistrate.

[Ed. Note.—For other cases, see Bastards, Cent. Dig. § 153; Dec. Dig. § 55;* Seduction, Cent. Dig. § 76.]

11. BASTARDS (§ 59*)—EVIDENCE—ADMISSIBILITY.

In the trial of such a case, testimony that the woman had previously given birth to another bastard child is inadmissible.

[Ed. Note.—For other cases, see Bastards, Cent. Dig. §§ 161-164; Dec. Dig. § 59.*]

12. BASTARDS (§ 65*)—PROSECUTION—SUFFICIENCY OF EVIDENCE.

In view of the fact that there was positive evidence that the accused was the father of the bastard child, and that he refused to comply with a valid order of the justice of the peace requiring him to give a bastardy bond, there is no merit in the contention that the verdict was without evidence to support it.

[Ed. Note.—For other cases, see Bastards, Cent. Dig. §§ 154, 175-177; Dec. Dig. § 65.*]

Error from Superior Court, Douglas County; Price Edwards, Judge.

Sam Tolbert was convicted in a bastardy case and he brings error. Affirmed.

J. S. James, of Atlanta, for plaintiff in error. J. R. Hutcheson, Sol. Gen., of Douglasville, and E. S. Griffith, of Buchanan, for the State.

POTTLE, J. Judgment affirmed.

(12 Ga. App. 663)

BINION v. CENTRAL OF GEORGIA RY. CO. (No. 4,660.)

(Court of Appeals of Georgia. May 6, 1913.)

(Syllabus by the Court.)

RAILROADS (§ 355*)—TRIAL (§ 139*)—INJURY TO PERSON ON TRACK—NONSUIT—"SWITCHYARD DOCTRINE."

Applying the principle of the decision of the Supreme Court in Wright v. Southern Railway Co., 139 Ga. 448, 77 S. E. 384, to the facts in the present record, it was error to grant a nonsuit.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 1220-1227, 1235; Dec. Dig. § 355;* Trial, Cent. Dig. §§ 332, 333, 338-341, 365; Dec. Dig. § 139.*]

Error from City Court of Savannah; Davis Freeman, Judge.

Action by James Binion against the Central of Georgia Railway Company. Judgment for defendant, and plaintiff brings error. Reversed.

Osborne & Lawrence, of Savannah, for plaintiff in error. H. W. Johnson, of Savannah, for defendant in error.

POTTLE, J. The plaintiff's son, a boy of tender years, was killed by one of the locomotive engines of the defendant at a point on one of the defendant's main line tracks. In order to reach the main line, the boy had crossed several tracks adjacent to the main line, which were constantly being used by the company for switch and storage purposes. The main line track was also used for switching. There was a path on each side of the main line and in the middle of the track, and this path was used constantly by people going across to the shops. The traveling public also used it as a footway. The boy was killed in the nighttime at a point on the main line near the location of a side track which extended from the main line to the property of a manufacturing company. A nonsuit was ordered upon the application of what has come to be known as "the switchyard doctrine." This doctrine is that there can be no implied license to the public to use the track of a railroad company within the limits of its switchyard. The doctrine has been held by this court not to apply to a case where there is only one track, which is the main track of the company, although this track may be partly within the yard limits, and occasionally used in connection with the switchyard. See Wil-

liams v. Southern Ry. Co., 11 Ga. App. 305, 75 S. E. 572. In the present case the main line upon which the boy was killed was in close proximity to a number of other tracks which were used for switching and storage purposes. But there was evidence from which the jury could find that the point where the boy was killed was not within the limits of a switchyard property. There was also evidence from which the jury could find that the public had an implied license to use the main line track as a footway at the point where the boy was killed. The decision of the Supreme Court in the case of *Wright v. Southern Ry. Co.*, 139 Ga. 448, 77 S. E. 384, seems to us to be in principle controlling. In reference to the place where the plaintiff's daughter in that case was killed, the Supreme Court said: "At the time of the fatal injury, the deceased was walking upon one of the main line tracks of the defendant, but within its switching yard limits, where the evidence tended to show that many persons were accustomed to walk each day longitudinally along the track to and from their work, without objection from the employes of the defendant." The company relied on the same defense as the defendant does in the present case, to wit, that the deceased had no express license to be within its switchyard limits, that there could be no implied license to be there, and that therefore he must be regarded as a trespasser. After stating that there was evidence to show that pedestrians in considerable numbers were accustomed to walk along and upon the tracks of the defendant within its switchyard limits, the Supreme Court propounded the following as the controlling question: "Can it be said as a matter of law, where both the plaintiff and the defendant were negligent, that the defendant owed no duty to pedestrians within its described switching yard limits, other than not to injure them wantonly after discovering them in a perilous position? Or was the defendant company in such circumstances bound to anticipate that pedestrians were likely to be on the track, and charged with the duty of exercising ordinary care to prevent their injury?" The court answered the question by holding that it was for the determination by the jury whether the company's employes were under a duty to look out for the deceased, and whether they used ordinary care to prevent injury to her.

While it may be conceded that the facts in the present record do not make as strong a case for the plaintiff, when considered by the jury, as did the facts in the case above referred to, still the rule is that if there is any evidence which would, upon the application of legal principles, entitle the plaintiff to recover, the case is one for the determination by a jury, and cannot be disposed of by a nonsuit. The place where the plaintiff's

son was killed was hazardous in the extreme; and it was necessary for him to cross several dangerous tracks before he got upon the main line where he was killed. He had no right to go under or over the wire fence which was strung along the road, and he had no right to cross the intervening tracks. If he had been killed while at a place where he had no right to be, his status would have been that of a trespasser. But if he had an implied license to be upon the main line track, and to walk down the path by the side of or between the tracks, the fact that he may have been a trespasser in reaching the point where he impliedly had a right to be would not defeat his right to recover. It was immaterial how he got there. The important question is, Did he have a right to be there? The evident purpose of the Supreme Court in the case cited above was to limit the switchyard doctrine to switchyards proper, and to tracks which were constantly being used as switch tracks. They doubtless did not intend to hold, nor do we, that a person could have an implied license to use a track in a switchyard proper, which was being constantly used for switch purposes merely because it was occasionally used as a main line. Under the ruling of the Supreme Court, when applied to the facts in the present case, the plaintiff is entitled to have the jury determine the following question: Did his son have an implied license to be at the place where he was killed; and, if so, was his death due to a lack of ordinary care on the part of the defendant's servants? If the plaintiff's son was killed within the limits of a switchyard proper, and on a track which was being constantly used for switching purposes, there can be no recovery. If, on the other hand, the place of the homicide was not within the limits of a switchyard proper, and was at a place where the plaintiff's son had an implied invitation to be, and if the proximate cause of his death was the negligence of the company's servants in failing to anticipate his presence and be on the lookout for him, the plaintiff will be entitled to recover.

Judgment reversed.

(12 Ga. App. 661)

J. H. HICKS & SON v. S. G. MOZLEY & CO. (No. 4,636.)

(Court of Appeals of Georgia. May 6, 1913.)

(Syllabus by the Court.)

1. LANDLORD AND TENANT (§ 223*)—RENT—BUILDING DESTROYED BY FIRE—ACTION—SET-OFF.

Where, in a contract of lease, there is no stipulation relieving the lessee from the payment of rent in the event a building on the rented premises is destroyed by fire, the lessee cannot set off against the rent the value of a building which he voluntarily erected on the rented premises to take the place of the one destroyed by fire. A transferee of the lease

stands, as to this matter, upon the same footing as the original lessee. Civil Code 1910, § 3711.

[Ed. Note.—For other cases, see Landlord and Tenant, Cent. Dig. §§ 885-893; Dec. Dig. § 223.*]

2. EVIDENCE (§ 178*)—SECONDARY EVIDENCE—LEASE.

There being evidence that the original lease had been delivered to the defendants, and that at a previous trial of the case one of the defendants had testified that the lease had been destroyed, it was not erroneous to admit secondary evidence of the contents of the lease.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 414; Dec. Dig. § 178.*]

3. LANDLORD AND TENANT (§ 231*)—EVIDENCE—IMPROVEMENTS.

It was not prejudicial to admit testimony that the plaintiffs, who were the original lessees, had, after the execution of the lease, made improvements on the rented premises; this testimony being offered to explain why the defendants, who were the transferees of the lease, had agreed to pay the plaintiff a sum in addition to the amount of rental stipulated in the lease. Nor was it prejudicial error to charge the jury upon this subject.

[Ed. Note.—For other cases, see Landlord and Tenant, Cent. Dig. §§ 926-934; Dec. Dig. § 231.*]

4. APPEAL AND ERROR (§ 730*)—ASSIGNMENTS OF ERROR—SUFFICIENCY.

An assignment of error upon a charge as a whole, on the ground that it was argumentative and unduly stressed the contentions of one of the parties, presents no question for decision. The trial was free from prejudicial error, and the evidence authorized the verdict.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3013-3016; Dec. Dig. § 730.*]

Error from Superior Court, Cobb County; N. A. Morris, Judge.

Action by S. G. Mozley & Co. against J. H. Hicks & Son. Judgment for plaintiffs, and defendants bring error. Affirmed.

Griffin & Johnson, of Marietta, for plaintiffs in error. Mozley & Moss, of Marietta, for defendants in error.

POTTLE, J. Judgment affirmed.

(13 Ga. App. 634)

OGLESBY et al. v. STATE. (No. 4,763.)
(Court of Appeals of Georgia. May 6, 1913.)

(Syllabus by the Court.)

1. RIOT (§ 1*)—ELEMENTS OF OFFENSE—CONCERT OF ACTION.

Two persons were convicted of riot. The evidence for the state shows that the accused went to the home of their father; and, while one of them was engaged in a controversy with their mother, the father approached and directed that the controversy cease. Thereupon the other son, who was standing by, directed his brother to run for his gun, saying that he had his own gun, and at the same time indulging in violent, profane, and abusive language, accompanied by threats to kill their father, and telling his brother that when he got the gun they would shoot their father. The son to whom the direction was given went away and shortly returned with his gun, and while the other son was still present used toward his fa-

ther violent, profane, abusive, and threatening language, which was heard two or three hundred yards away. Held, that a common intent and concert of action were sufficiently shown, and that the conviction of both of the accused was authorized. Penal Code 1910, § 360; Green v. State, 109 Ga. 536, 35 S. E. 97; Grier v. State, 11 Ga. App. 767, 76 S. E. 70.

[Ed. Note.—For other cases, see Riot, Cent. Dig. §§ 1-5; Dec. Dig. § 1.*]

For other definitions, see Words and Phrases, vol. 7, pp. 6240-6242.]

2. CRIMINAL LAW (§§ 730, 800*)—APPEAL—HARMLESS ERROR—INSTRUCTIONS.

No material error of law was committed. The trial judge having once rejected testimony that one of the accused whipped his wife, and, when the evidence was again offered, having stated in the hearing of the jury that he would instruct them to disregard it, his failure thereafter to expressly give such an instruction is not cause for a new trial. The evidence other than the prisoner's statement demanded the conviction, and the charge on the subject of riot was sufficient, in the absence of request for more specific instructions. Nor was it reversible error that the trial judge charged the jury to ascertain whether the inmates of the house were put in fear by the conduct of the accused, without explaining what degree of fear the law requires.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1693, 1808-1810, 1812; Dec. Dig. §§ 730, 800.*]

Error from City Court of Millen; Thos. L. Hill, Judge.

Charles Oglesby and another were convicted of riot, and they bring error. Affirmed.

G. C. Dekle, of Millen, for plaintiffs in error. W. Woodrum, Sol., of Millen, for the State.

POTTLE, J. Judgment affirmed.

(13 Ga. App. 687)

SMITH v. STATE. (No. 4,699.)

(Court of Appeals of Georgia. May 6, 1913.)

(Syllabus by the Court.)

1. ASSAULT AND BATTERY (§ 97*)—SHOOTING—VERDICT—VALIDITY.

A verdict finding one guilty of "the unlawful shooting at another" is not a nullity, but is to be construed as a conviction of the statutory offense described in section 115 of the Penal Code of 1910.

[Ed. Note.—For other cases, see Assault and Battery, Cent. Dig. § 151; Dec. Dig. § 97.*]

2. CRIMINAL LAW (§§ 1162, 1166½, 1169, 1171*)—APPEAL—HARMLESS ERROR.

The admission of testimony in reference to the absence of the accused at a previous term of the court, and of the indictment which had been returned at that court and subsequently nol prossed, and the argument of counsel for the state in replying to the objections of the accused to the evidence, and the statements of the trial judge in ruling upon the objections, were not of such prejudicial nature as to require a new trial.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 754, 3085, 3088, 3114-3123, 3126, 3127, 3130, 3137-3143; Dec. Dig. §§ 1162, 1166½, 1169, 1171.*]

3. CRIMINAL LAW (§ 1160*)—SHOOTING—MOTION FOR NEW TRIAL.

A special ground of a motion for a new trial, which is disapproved by the trial judge, cannot be considered.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 3064; Dec. Dig. § 1160.*]

4. ASSAULT AND BATTERY (§ 92*)—SHOOTING—SUFFICIENCY OF EVIDENCE.

The evidence authorized the verdict.

[Ed. Note.—For other cases, see Assault and Battery, Cent. Dig. §§ 137-139; Dec. Dig. § 92.*]

Error from Superior Court, Effingham County; K. J. Hawkins, Judge.

J. H. Smith was convicted of unlawfully shooting at another, and he brings error. Affirmed.

H. B. Strange, of Statesboro, and J. H. Smith, of Eden, for plaintiff in error. N. J. Norman, Sol. Gen., and P. W. Meldrim, both of Savannah, for the State.

POTTLE, J. The accused was indicted for assault with intent to murder one Dewitt, and the jury returned a verdict in the following language: "We, the jury, find the defendant guilty of the unlawful shooting at another." A motion for new trial was overruled, and the accused excepted.

[1] 1. It is argued in the brief of counsel for the plaintiff in error that the verdict is a nullity, and amounts to an acquittal. Counsel seeks to raise this question under the general assignment in the motion for new trial, that the verdict is contrary to law. The point might well be disposed of by the observation it cannot be raised in this way. It should have been reached by a motion to arrest the judgment of conviction, or, at least, by a direct attack, on this ground, upon the verdict in the motion for new trial. But, aside from this, the point is without merit. Any person is guilty of unlawful shooting at another when he shoots not in his own defense or under circumstances of justification. Penal Code, § 115. Verdicts are to have a reasonable intendment, and, since it is unlawful to shoot at another when it is not done in self-defense or under other circumstances of justification, a verdict of guilty of "unlawful shooting at another" will be construed to mean guilty of shooting at another not in self-defense or under circumstances of justification. Indeed, counsel for plaintiff in error so construed the verdict, because in his bill of exceptions it is recited that the jury returned "a verdict of guilty of shooting another not in his own defense."

[2] 2. The accused was a practicing attorney and judge of the city court of the county in which he was tried. He was arrested on August 30, 1910, under a warrant which had been issued the day before, and gave bond for his appearance before the justice of the peace for a preliminary hearing. No commitment trial was ever had, and at the October term, 1910, of Effingham superior court, the

accused was indicted for assault with intent to murder. He gave bond on October 15, 1910. At the next term another true bill charging the same offense was found, and at the April term, 1911, the accused was tried, and a nolle prosequi entered upon the first indictment, upon the statement of the solicitor general that he had understood some objection would be offered to that indictment, and for that reason the second true bill had been found. Over objection of counsel for the accused, the court permitted the introduction in evidence of the first indictment, and also allowed testimony that the accused had absented himself from court at the October term, 1910, that a search had been made for him at his home, and he could not be found, and that he had been seen driving in a buggy through the swamp of the Ogeechee river in Bryan county. The accused returned after the adjournment of the court, and gave bond for his appearance at the April term. When the evidence before mentioned was offered, one of the counsel for the state, in replying to the objections of counsel for the accused, stated in substance that the evidence was relevant because the accused was a member of the bar, and it was usual for members of the bar to be in attendance on the court, that the sheriff had searched for him and had not found him, and that he had been seen while court was in session driving through the river swamp in an adjoining county. The court remarked, "That is on the idea of flight."

The accused claimed that he had no business of any consequence in court, and had gone fishing; that he had given no bond for his appearance at the October term of court, and, in fact, had not been indicted; that he did not wish to be tried at that term, because he was apprehensive that he could not get a fair trial; that he knew another judge would preside at the April term, and he preferred to go to trial before that judge. The language used by state's counsel in replying to the objections of the accused was not so prejudicial as to require a new trial, neither will the statement of the trial judge have this effect. Evidently the judge's statement was in the nature of an inquiry to counsel as to whether or not the evidence offered was to show flight. Ordinarily remarks of counsel in replying to objections of the adversary and statements made by the court in ruling upon such objections will not be cause for a new trial. If the argument of counsel upon such objections are likely to be such as to unfairly prejudice the accused, the trial judge will, generally in the interest of fairness, send the jury out. All these things, however, are matters in his discretion. They come within what has been aptly termed the "police power" of the court; and the action of the judge will not be controlled except in the case of flagrant abuse.

The accused, not having been indicted, was under no legal obligation to attend the October term of court. His absence ought not to have been counted against him, unless there had been some proof that he was attempting to evade a trial. That he had such an intent cannot be assumed merely from his absence, when no indictment had been returned against him, and he had as much right as any other citizen to be absent from the court. In view of the fact that a warrant had been issued for his arrest, and that he knew the grand jury would likely consider the accusation against him, together with the fact that he was a member of the bar usually in attendance upon the court, his absence would justly give rise to the suspicion that he was at least not anxious to face his accusers and stand a trial at the October term of court. Indeed he himself says in his statement in explanation of his absence that he preferred to be tried at the succeeding term of the court, which he knew would be presided over by a judge other than the one presiding at the October term. When the fact of the accused's absence is considered in the light of the explanation offered by him and in connection with the fact that he had never been indicted, we hardly think there was enough to justify an inference of flight. Flight generally carries with it the suggestion of an attempt to evade some of the court's processes. The accused had already been arrested under the warrant, had given bond for his appearance before the committing magistrate, and had never been given a preliminary hearing. He could not be said to be a fugitive from justice merely because he went into an adjoining county while the court was in session. In view, however, of the evidence in the case, we do not think the admission of the testimony on the theory of flight was so harmful as to demand the granting of a new trial. The guilt of the accused was clearly established. And it will not be assumed that the jury were influenced to convict him by the testimony in reference to his absence from court to which the indictment was returned. If the case were a close one, the admission of this evidence might be ground for a new trial. But the verdict of guilty of the statutory offense of shooting at another was as favorable to the accused as he could have rightly anticipated under the evidence. The reviewing court will order a new trial only for errors which are prejudicial in their nature.

[3] 3. In the sixth ground of the motion an attack is sought to be made on the indictment because of the manner in which the grand jury was drawn, but the court declines to certify this ground, "for the reason that the points therein were not made upon the trial of the case, and the facts of which the court knows nothing about." The trial was had before Judge Hawkins, and the matter

referred to in the sixth ground of the motion is in reference to the conduct of Judge Sheppard. In view of the judge's refusal to approve this ground, it cannot be considered. We may say, however, in passing that we know of no reason why the judge cannot call a special term of court for the purpose of drawing a jury. Section 4876 of the Civil Code provides that the judges of the superior courts are authorized to hold special terms for the trial of criminal cases or the disposition of civil cases at discretion, and to compel the attendance of jurors of the previous term or to draw new jurors. The language of the statute is broad, and it seems to us that the court may transact any business during a special term it could transact at a regular term.

[4] 4. There is no merit in the assignment that the verdict is without evidence to support it. According to the testimony of the prosecutor, he was unarmed, and was shot twice by the accused—once from the rear when he was going from the accused. According to the evidence which the jury had the right to accept, the shooting was without legal justification. There were conflicts in the evidence, but the verdict settled these against the accused. The jury so far accepted his version of the transaction as to reduce the offense to a felony of less degree than the one for which he was indicted and the trial judge imposed a misdemeanor punishment. The trial judge has approved the verdict; and, no errors of law having been committed, this court cannot interfere.

Judgment affirmed.

(12 Ga. App. 676)

SPIERS v. HUBBARD. (No. 4,714.)

(Court of Appeals of Georgia. May 6, 1913.)

(Syllabus by the Court.)

1. SALES (§ 479*)—RIGHT OF ACTION.

Where a series of promissory notes is given for the purchase price of personal property, maturing at different dates, in each of which it is stipulated that title to the property is reserved in the vendor until the note is paid, the vendor, on default in payment of any of the notes, may elect to rescind the sale and sue in trover for the property or its value. This is true even though there be no stipulation therein giving the vendor the option, upon default in the payment of any of the notes, to declare the whole debt due.

[Ed. Note.—For other cases, see Sales, Cent. Dig. §§ 1418-1432, 1434-1438; Dec. Dig. § 479.*]

2. TROVER AND CONVERSION (§§ 4, 22*)—"CONVERSION"—DEFENSES.

Any use of the property of another, without his consent and inconsistent with his right of possession, is a conversion. And such an appropriation of the property is none the less a conversion because the user, after taking possession of the property and converting it to his own use, informs the owner that he will deliver it to him on demand. Delivery of the property on demand would not cure the unlaw-

ful conversion, but would go simply in mitigation of damages.

[Ed. Note.—For other cases, see *Trover and Conversion*, Cent. Dig. §§ 25-27, 152-162, 167-169; Dec. Dig. §§ 4, 22.*

For other definitions, see *Words and Phrases*, vol. 2, pp. 1562-1570; vol. 8, p. 7618.]

3. TROVER AND CONVERSION (§ 89*)—EVIDENCE—ADMISSIBILITY.

There was no error in the admission of evidence or in the charge of the court. The judgment overruling the motion for new trial is reversed solely because, under the pleadings and the evidence, the defendant was entitled to recover of the plaintiff damages for the unlawful conversion.

[Ed. Note.—For other cases, see *Trover and Conversion*, Cent. Dig. §§ 229-231; Dec. Dig. § 39.*]

Error from City Court of Elberton; Geo. C. Grogan, Judge.

Action by M. J. Hubbard against E. H. Spiers. Judgment for plaintiff, and defendant brings error. Reversed.

W. D. Tutt, of Elberton, for plaintiff in error. A. C. Wheeler, of Gainesville, and Ward & Payne, of Elberton, for defendant in error.

POTTLER, J. Hubbard sold to Spiers a number of articles of machinery, comprising a part of a laundry outfit, and took from Spiers a series of promissory notes for the purchase price, maturing at different dates, in each of which it was stipulated that title to the property sold was retained in the vendor until payment of the note. There was no provision therein giving the seller the right to declare the whole debt due upon default in payment of a part of the purchase price. The notes were for \$150 each. Spiers paid \$100 on the first note, and, after the maturity of the second note and default in the payment thereof, Hubbard brought trover for the property. It appears that Spiers had purchased from another person other articles necessary to be used in the operation of the laundry. Hubbard replevied the property in the trover case and took possession of the property, including that which Spiers had purchased from another person. The jury found for the plaintiff, who elected to take the property and its hire, accounting to the defendant for the sum which had been paid on the purchase price.

[1] 1. The first question which arises is whether the plaintiff could maintain trover at all. The general rule is that where property is sold and a series of notes taken for the purchase price, and title reserved in the vendor, he may rescind and recover the property in trover upon default in the payment of any part of the purchase price. *Scott v. Glover*, 7 Ga. App. 182, 66 S. E. 380; *Ga. Supply Co. v. Coffee*, 8 Ga. App. 502, 69 S. E. 1083; *Harden v. Lang*, 110 Ga. 392, 36 S. E. 100; *Paxson v. Butterick Pub. Co.*, 136 Ga. 774, 71 S. E. 1105. Of course, where trover is brought, the defendant may plead any set-off or recoupment growing out of the con-

tract of purchase by reason of a failure of consideration, defects in the property, or breach of the contract by plaintiff. *Rogers & Thornton v. Otto Gas Engine Wks.*, 7 Ga. App. 587, 67 S. E. 700. It is insisted that trover will not lie in cases like the present, unless the right to declare the whole debt due in case of default is stipulated in the contract.

It is pointed out that in the case of *Scott v. Glover*, supra, the notes contained such a stipulation. In the case of *Paxson v. Butterick Pub. Co.*, supra, the contract stipulated that the failure of either party to perform would release the other party. It is to be noted, however, that the decisions in those two cases were not put upon the ground that the contract contained the stipulations just referred to, but were distinctly based upon the general rule that the vendor may rescind a conditional sale and recover the property in trover as soon as any part of the purchase price becomes due and remains unpaid. In the case last referred to the rule was broadly stated that the "failure to make payments for articles delivered under a contract during a series of years, to be delivered in installments and paid for monthly, entitles the vendor to rescind the contract." The mere incorporation into the contract of the stipulation that failure by one party to perform would release the other was simply a statement of a legal right which either party would have had without reference to the contract. That was not a trover case, but the right to rescission was involved and the principle is the same. The fact of the incorporation into a contract of sale, where the purchase money is to be paid in installments, of a stipulation that, if any part of the purchase money is not paid at maturity, the vendor may declare the whole debt due is simply to permit the vendor, at his option, to proceed for the collection of the entire amount of the purchase money. If he does this, he treats the contract as valid and subsisting and elects to enforce it. But neither the presence in the contract of such a stipulation nor the failure to incorporate it therein affects the legal right of the vendor to rescind the contract of sale for nonpayment of a portion of the purchase price and recover the property or its value, accounting to the purchaser for the portion of the purchase money which has been paid. The contract of sale requires the purchaser to pay the vendor a certain sum of money at stipulated times. By failing to make these payments according to the terms of the contract the purchaser is guilty of a breach of the contract, and the vendor has a right to act upon this breach of contract and rescind the entire contract of sale.

[2] 2. The defendant pleaded by way of couponment that the plaintiff had taken possession of some of his property and converted

it to his own use, and prayed to recover of the plaintiff the value of the property thus converted. No point is made by demurrer or otherwise on the right of the defendant to file the cross-action. Under the act of 1903 (Civil Code, § 4484), where trover is brought in a case like the present, the defendant may plead as set-off any demand or claim he may have against the plaintiff, or may recoup any damages that he has sustained by reason of any failure of consideration or any breach of the contract by the plaintiff whereby the defendant has been in any way injured or damaged. And this may be done whether the plaintiff elects to take the property or damages. *Rogers & Thornton v. Otto Gas Engine Wks.*, 7 Ga. App. 587, 67 S. E. 700. The act of 1903 (page 84) seems to be broad enough to authorize the defense made in the present case. But, since this question is not raised by the record, no express ruling is made on it. Treating the cross-action as properly filed, the question is whether or not there is sufficient evidence of the conversion by the plaintiff to authorize a recovery by the defendant. On this point one of the witnesses for the plaintiff testified: "The property that Mr. Splers is claiming has always been ready for him down there. We did not claim it at all. We did not take possession of it; he knew that. Mr. Splers' property is in this laundry building. We used it. We used his property; he never claimed or made any demand for it. The property he is claiming is there at the laundry. He owns the collar and cuff machine; gas plant belongs to him. We used the collar and cuff machine; used the gas machine; we used the dry room he had there. * * * We used the soap of Mr. Splers that was there; we used the tub; we used the collar and cuff machine. He had the laundry so connected that we could not use our laundry without using his property. I notified Mr. Splers that he could come and get his stuff at any time he wanted it. I did not make any arrangements with Mr. White or any one else to run the laundry at any time." The plaintiff testified that he did not claim any of the property except that which he sold to the defendant, but that he used some of the defendant's property by permission of one Bailey, to whom the defendant had given a mortgage.

Any dominion over property in exclusion or defiance of the owner's right is a conversion. *Liptrot v. Holmes*, 1 Ga. 381, 391. "If the act was unlawful, if it was in derogation of the right of property in the owner, if there was an appropriation of the property of the defendant to their own use, it was a conversion, irrespective of any intent to injure him. Even dominion over property, without use, is conversion. User of property, without consent of the owner is conversion." *Macon & Western R. Co. v. Holt*, 8 Ga. 157, 166. "Any use or disposition of a chattel, without the consent of the owner and inconsistent with his right, is a conversion."

Tharp v. Anderson, 31 Ga. 293. See, also, *Rushin v. Tharpe*, 88 Ga. 779, 15 S. E. 830. When a conversion has once taken place, it cannot be cured. Even the redelivery of the property will not cure it. Damages for the conversion are still recoverable and the return of the property goes merely in mitigation of damages. *Jordan v. Thornton*, 7 Ga. 517, 528. See, also, *Farkas v. Powell*, 86 Ga. 800, 13 S. E. 200, 12 L. R. A. 397, where, after the return of the horse to the owner, trover was maintained upon the theory that the defendant had been guilty of a conversion by riding the horse to a point beyond that to which he was authorized to go under the contract of hire.

Tested by these decisions the plaintiff was very clearly guilty of a conversion of the defendant's property. If one takes and uses property of another without the owner's consent, it is none the less a conversion because he may have asserted at the time that he did not intend to deprive the owner of the use and possession of his property. Conversion is tested not so much by what a man says as by what he does. And if one takes another's property without his consent and uses it in a manner inconsistent with the owner's complete right of possession, he is guilty, at least, of a technical conversion, although he may tell the owner that he can obtain his property on demand. And demand and refusal need not be shown, being merely a circumstance to prove the conversion, and being essential only where the possession in the first instance was obtained lawfully and with the owner's consent. There was nothing in the evidence in the present case to show that the defendant consented for his property to be used by the plaintiff. The plaintiff does claim that it was necessary for him to use the defendant's property in order to obtain the benefit of his own. But this is inconsistent with his statement to the defendant that he might have his property at any time that he called for it. If it could be segregated upon demand of the defendant, this could have been done as well before as after the conversion. It is doubtless true that, if one should so commingle his own property with that of another which he wrongfully holds as that it cannot be separated, the person whose property is thus wrongfully withheld would not be guilty of a conversion by taking possession of the whole of the property; but this is not the case here. Under the evidence, the plaintiff was guilty of a conversion in taking and using the defendant's property, and the defendant was entitled to a verdict for the damages he thus sustained.

[3] 3. There was no error in the admission in evidence of certain liens upon the property of the defendant which it was claimed the plaintiff had wrongfully converted to his use. If the defendant should elect to take a money verdict against the plaintiff, and these claims are valid and subsisting liens

upon the property, the plaintiff would have a right to have the damages reduced by the amount due on these liens. The defendant insists that there were no pleadings to authorize such a reduction to be made. On another trial, however, the plaintiff can offer an appropriate amendment to meet this objection; and, if the evidence should be substantially the same as disclosed by the present record, the plaintiff would be entitled to recover his property or its value and the defendant would be entitled to recover from the plaintiff such of his property or its value as he may be able to show that the plaintiff has converted to his own use. If the defendant elects to take a money verdict, the plaintiff would have a right to reduce the amount of damages in the amount of whatever valid and subsisting liens there may be outstanding against the defendant's property. There will be no difficulty in molding such a verdict and judgment as will do justice between the parties.

Judgment reversed.

(12 Ga. App. 691)

McLENDON v. STATE. (No. 4,797.)

(Court of Appeals of Georgia. May 6, 1913.)

(Syllabus by the Court.)

OBSTRUCTING JUSTICE (§ 3*)—ELEMENTS OF OFFENSE.

The gist of the offense defined in the first part of section 311 of the Penal Code 1910 is knowingly obstructing an officer attempting to execute a lawful process. One cannot be convicted of this offense unless it be shown that he knew the official character of the person attempting to make the arrest, and also knew that the officer was endeavoring to execute a lawful process.

[Ed. Note.—For other cases, see Obstructing Justice, Cent. Dig. §§ 3-12; Dec. Dig. § 3.*]

Error from Superior Court, Laurens County; K. J. Hawkins, Judge.

Wade McLendon was convicted of obstructing an officer, and he brings error. Reversed.

T. E. Hightower and H. P. Howard, both of Dublin, for plaintiff in error. E. L. Stephens, Sol. Gen., of Wrightsville, for the State.

POTTLE, J. The accused was convicted of a violation of section 311 of the Penal Code, and complains that the verdict is without evidence to support it. It appears that one Walker was charged with the unlawful shooting of another. The sheriff was requested to place Walker under arrest. He had no warrant charging the offense of shooting at another, but he did have in his possession a bench warrant for Walker, which had never been executed. The officer went to the scene of the shooting, and while he was there a buggy drove up with the top up and all inclosed. This excited the officer's suspicion, and he called to the occu-

pants to stop. It appears that Walker and the accused and another person jointly indicted with him were in the buggy. When the sheriff called to them to stop, Walker struck with a whip the mule attached to the buggy, and it dashed off, catching the sheriff between the wheels of the buggy. Thereupon Walker threw a double-barrel shotgun in the sheriff's face, and McLendon tried to push the officer out of the buggy. All this time the mule was being rapidly driven away. In the scuffle the sheriff had one of his ribs broken, and was otherwise injured. The mule was finally stopped, and Walker was arrested. The sheriff did not inform any of the occupants of the buggy that he had a warrant for Walker's arrest, nor that he was the sheriff of the county. He testified, however, that the accused knew he was sheriff, and had known him ever since he had been sheriff, some two or three years. As soon as the buggy was stopped, the accused jumped out, called the sheriff by name, and stated that he did not know it was he; that he did not mean to hurt him; and that, if he had known it was the sheriff, he would not have made any resistance. Of course, if the accused did not know that the sheriff was an officer of the law having the authority to make the arrest, he could not be convicted. *Jones v. State*, 114 Ga. 73, 39 S. E. 861; *Franklin v. Amerson*, 118 Ga. 860, 45 S. E. 698.

The question arising under the evidence is whether the attempted arrest of Walker was legal, and the accused knowingly obstructed the officer in the execution of a legal process. It is undisputed that the officer had a valid warrant for Walker's arrest, that Walker was charged with the offense of shooting at another, and that at the time the arrest was made he was attempting to escape. There is, however, no evidence that the accused knew that the officer had a warrant, or knew that Walker was accused of a crime. The gist of the offense defined in section 311 of the Penal Code is knowingly obstructing an officer in serving or attempting to serve or execute a legal process or order. It is not enough that the accused should know that the person attempting to make the arrest is an arresting officer. It must also appear that he knew that the officer was attempting to execute a lawful process or order. If he does not know that the officer has in his possession such a process, nor that the officer is attempting to execute such a process, he cannot be convicted. If the accused had known that Walker was charged with a crime, and that he was attempting to escape, and that the officer was endeavoring to arrest him, the accused would be guilty, if the officer in fact had a lawful warrant, whether the accused knew it or not. But the evidence in the present record is wholly insufficient to

show that the accused knew that Walker was charged with a crime, and that the officer was attempting to execute a warrant for his arrest. It is even doubtful, under the evidence, whether the accused was apprised of the official character of the person who was attempting to make the arrest. The evidence was not sufficient to authorize the conviction, and the court erred in refusing to grant a new trial.

Judgment reversed.

(12 Ga. App. 690)

EASTERLING v. STATE. (No. 4,789.)
(Court of Appeals of Georgia. May 6, 1913.)

(*Syllabus by the Court.*)

1. CRIMINAL LAW (§ 593*)—CONTINUANCE—
GROUND—DISCRETION.

Where a motion for continuance was based upon two grounds—first, the absence of one attorney who represented the accused; and, second, the physical inability of the other attorney of the accused, who was present in court—and it appeared that the accused employed the absent attorney to represent him after notice, to himself or his attorney present in court, that the absent attorney had a leave of absence from that term of the court before he employed him to represent him, and that the attorney who was sick and present in court was employed by the accused with knowledge of his physical indisposition, the discretion of the trial judge in overruling the motion to continue will not be disturbed.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 1320; Dec. Dig. § 593.*]

2. CRIMINAL LAW (§ 878*)—PERSONS JOINTLY
INDICTED—VERDICT.

An indictment containing four counts charged two persons with a violation of the general prohibition law, which went into effect on January 1, 1907, and the jury found one of the defendants guilty on the first and fourth counts of the indictment. *Held*, that the jury, according to the evidence, might legally convict one or both of the accused as to some of the counts, and acquit one or both as to the other counts. *Tooke v. State*, 4 Ga. App. 495, 61 S. E. 917, and *cit.*

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2098-2101; Dec. Dig. § 878.*]

3. CRIMINAL LAW (§ 877*)—PERSONS JOINTLY
INDICTED—VERDICT.

Where two persons are jointly indicted for an offense which does not require in its commission the joint act of both, but may be separately committed by either, a verdict finding one of the defendants guilty, if supported by the evidence, would be authorized.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2096, 2097; Dec. Dig. § 877.*]

4. CRIMINAL LAW (§ 945*)—NEW TRIAL—
GROUND.

The alleged newly discovered evidence is not of such a character as would probably produce a different result on a second trial, and therefore there was no abuse of discretion in refusing to grant another trial on that ground.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2324-2327, 2336; Dec. Dig. § 945.*]

5. VERDICT SUSTAINED.

The evidence supports the verdict, and no error of law appears.

Error from Superior Court, Tattnall County; W. W. Sheppard, Judge.

Boy Easterling was convicted of violating the prohibition law, and he brings error. Affirmed.

See, also, 11 Ga. App. 134, 74 S. E. 899.

H. H. Elders, of Reidsville, and Hines & Jordan, of Atlanta, for plaintiff in error. N. J. Norman, Sol. Gen., and Edwin A. Cohen, both of Savannah, for the State.

HILL, C. J. Judgment affirmed.

(12 Ga. App. 651)

WOOD v. STATE. (No. 4,833.)
(Court of Appeals of Georgia. May 6, 1913.)

(*Syllabus by the Court.*)

1. HOLIDAYS (§ 5*)—TIME (§ 10*)—PRESENTA-
TION OF PETITION FOR CERTIORARI—COMPU-
TATION OF TIME.

In the absence of a legislative enactment declaring any of the holidays enumerated in Civ. Code 1910, § 4284, to be dies non juridicus, there is nothing to invalidate or prevent the holding of courts or the exercise of other judicial functions on July 4th; and consequently, in computing the 30 days within which a petition for certiorari must be presented for sanction, the 4th of July must be included, if that date, though a holiday for business purposes, is in fact one of the calendar days embraced in the statutory period within which the certiorari is by law required to be presented.

[Ed. Note.—For other cases, see Holidays, Cent. Dig. §§ 2-5; Dec. Dig. § 5;* Time, Cent. Dig. §§ 34-52; Dec. Dig. § 10.*]

2. HOLIDAYS (§ 5*)—TIME (§ 10*)—COMPU-
TATION—NONJUDICIAL DAYS.

If in any case the last day allowed by law for the performance of an act is both a holiday and the Sabbath day, the following Monday can be included, and the requisite act will be performed in time, if done upon Monday. But this is for the reason that such Sunday is by Civil Code 1910, § 4, par. 8, expressly excluded from the count. By express statutes each of the legal holidays mentioned in section 4284 of the Civil Code has been made dies non juridicus in cases of appeals from justices' courts. The same provision is applicable to the notice specified in section 5393, and also to the acceptance or payment of papers which may fall due on Sunday, within the terms of section 4285. But a holiday cannot become dies non juridicus by implication.

[Ed. Note.—For other cases, see Holidays, Cent. Dig. §§ 2-5; Dec. Dig. § 5;* Time, Cent. Dig. §§ 34-52; Dec. Dig. § 10.*]

3. TIME (§ 10*)—APPEAL AND ERROR—PRES-
ENTATION OF PETITION FOR CERTIORARI —
COMPUTATION OF TIME.

Applying the foregoing rulings to the facts of the present case, the judge of the superior court did not err in refusing, on July 5th, to sanction a petition for certiorari, brought to review a judgment rendered on June 4, 1912, since more than 30 days had elapsed between the rendition of the judgment in the lower court and the time when the petition for certiorari was presented. The fact that the thirtieth day was July 4th, and a holiday, does not have the effect of excluding that day from the count, since the holiday is not by law dies non juridicus.

[Ed. Note.—For other cases, see Time, Cent. Dig. §§ 34-52; Dec. Dig. § 10.*]

Error from Superior Court, Fulton County; J. T. Pendleton, Judge.

Fletcher Wood was convicted of crime. From refusal of the superior court to sanction a petition for certiorari, he brings error. Affirmed.

Scott & Davis, of Atlanta, for plaintiff in error. Hugh M. Dorsey, Sol. Gen., and Lowry Arnold, Sol., both of Atlanta, for the State.

RUSSELL, J. Judgment affirmed.

(12 Ga. App. 559)

MOON v. WRIGHT. (No. 4,628.)

(Court of Appeals of Georgia. May 6, 1913.)

(Syllabus by the Court.)

1. SALES (§ 479*)—CONDITIONAL SALE—REMEDIES OF SELLER—TROVER—DEFENSES.

Where one buys live stock on credit, and takes possession under a conditional bill of sale, which provides that, should any of the stock die, the purchaser shall "stand the loss," it is no defense to an action of trover, brought after the failure to pay the purchase money at maturity, that some of the stock died before and some after the suit was brought. Especially is this true where bond was given in the trover case for the forthcoming of all the property, as provided in Civ. Code 1910, § 5151, and it was not shown that the death of the live stock was due to the act of God, and was in no wise the result of the conduct or negligence of either the defendant or his securities. Carr v. Houston Guano Co., 105 Ga. 268, 31 S. E. 178.

[Ed. Note.—For other cases, see Sales, Cent. Dig. §§ 1418-1432, 1434-1438; Dec. Dig. § 479.*]

2. SALES (§ 479*)—CONDITIONAL SALES—REMEDIES OF SELLER—TROVER—DEFENSE—JUDGMENT ON PURCHASE-MONEY NOTES.

It is no bar to an action of trover, brought to recover property held by the defendant under a conditional bill of sale, that the plaintiff had previously sued the purchase-money notes to judgment. If a money judgment is taken in the trover suit and satisfied, it will operate as a satisfaction pro tanto of the judgment on the notes for a larger sum. The principle is the same as that in the case of a note and mortgage, upon either or both of which the creditor may sue to collect his debt. Montgomery v. Fouché, 125 Ga. 43, 53 S. E. 767.

[Ed. Note.—For other cases, see Sales, Cent. Dig. §§ 1418-1432, 1434-1438; Dec. Dig. § 479.*]

3. BANKRUPTCY (§ 421*)—DISCHARGE—EFFECT.

In a bail trover case, neither the defendant nor his security can set up as a defense the discharge of the defendant in bankruptcy pending the action. Birmingham Fertilizer Co. v. Cox, 10 Ga. App. 699, 73 S. E. 1090. This rule prevails, without reference to the source from which the plaintiff derives his title, and applies in any case in which trover will lie.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 772-774, 776, 777, 779-781, 783-786, 788-790; Dec. Dig. § 421.*]

4. JUDGMENT (§ 145*)—DEFAULT—REFUSAL TO OPEN—GROUNDS.

Failure to offer to plead a meritorious defense is a sufficient reason to refuse to open,

at the trial term, an entry of default. Civ. Code 1910, § 5856.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 271, 292-295; Dec. Dig. § 145.*]

5. APPEAL AND ERROR (§ 1043*)—HARMLESS ERROR—CONTINUANCE.

Under the pleadings, the only issue involved was as to the value of the property. It was no abuse of discretion to refuse a continuance for the purpose of obtaining the testimony of one of the securities on the bond, on the question of value, where it appeared that the defendant had other witnesses who would testify to the same value as would the absent witness.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4115-4121; Dec. Dig. § 1043.*]

6. EVIDENCE (§ 574*)—OPINION EVIDENCE—VALUE—EFFECT.

Positive evidence as to the value of live stock in possession of a defendant in a trover case cannot be met by testimony of a witness that he had been acquainted with all the live stock the defendant had owned for a period of years, and none of it was worth as much as a named sum.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 2400; Dec. Dig. § 574.*]

7. EVIDENCE (§ 489*)—OPINION EVIDENCE—VALUE.

Value being a matter of opinion, it is competent for a witness to testify that he saw the property in controversy in the fall of the year, and he thought it was then worth a given sum; the question at issue being the value in the early part of the year following.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 2274; Dec. Dig. § 489.*]

8. APPEAL AND ERROR (§ 1066*)—HARMLESS ERROR—INSTRUCTION.

There was no issue in the case in reference to conversion, and the instruction upon this subject, if erroneous, is not cause for a new trial.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 4220; Dec. Dig. § 1066.*]

9. VERDICT SUSTAINED.

The evidence warranted the verdict.

Error from Superior Court, Greene County; B. F. Walker, Judge.

Action by Lillias Wright, executrix, against G. W. Moon, Jr. Judgment for plaintiff, and defendant brings error. Affirmed.

F. B. Shipp and Jos. P. Brown, both of Greensboro, for plaintiff in error. Lewis, Davison & Lewis, of Greensboro, for defendant in error.

POTTLE, J. Judgment affirmed.

(12 Ga. App. 737)

LOWTHER v. CITY OF WAYCROSS.

(No. 4,522.)

(Court of Appeals of Georgia. May 6, 1913.)

(Syllabus by the Court.)

1. CRIMINAL LAW (§ 719*)—ARGUMENT OF COUNSEL—EVIDENCE.

One view of the evidence in behalf of the prosecution suggested an inference which authorized the argument of the city attorney to which objection was offered, and the court did not err in overruling the objection. Furthermore, for manifest reasons, a greater latitude in

argument upon the evidence is allowable in a trial before a judge than before a jury.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 1669; Dec. Dig. § 719.*]

2. INTOXICATING LIQUORS (§ 17*)—CONSTITUTIONALITY OF ORDINANCE.

Even if the act of the General Assembly approved August 17, 1909 (Acts of 1909, p. 1456), creating a new charter for the city of Waycross, is unconstitutional, the ordinance which is attacked would be valid, remaining of full force and effect under the previous municipal charter of the city of Waycross. Upon this the decision is controlled by the ruling of this court in *Young v. City of Waycross*, 11 Ga. App. 846, 76 S. E. 648, decided December 10, 1912.

[Ed. Note.—For other cases, see Intoxicating Liquors, Cent. Dig. §§ 21-23; Dec. Dig. § 17.*]

Error from Superior Court, Ware County; T. A. Parker, Judge.

W. H. Lowther was convicted of violating the city ordinance and from a refusal of the superior court to sanction certiorari he brings error. Affirmed.

John S. Walker, of Waycross, for plaintiff in error. C. L. Redding and J. L. Crawley, both of Waycross, for defendant in error.

RUSSELL, J. [2] In the legal principles involved this case differs in one respect only from that of *Young v. City of Waycross*, 11 Ga. App. 846, 76 S. E. 648. As in the *Young Case*, the plaintiff in error attacks the validity of the ordinance of the city of Waycross passed July 27, 1900, by the terms of which it was made unlawful for any person to keep for illegal sale, barter or exchange within the corporate limits of the said city any vinous, spirituous, malt, or intoxicating liquors. The plaintiff in error was tried by the mayor of the city of Waycross, adjudged guilty, and sentenced to pay a fine of \$100, and to work on the chain gang of the city for 90 days. Counsel for the plaintiff in error in his brief practically abandons the contention that the conviction is not sufficiently supported by the evidence, but urges that the certiorari should have been sanctioned because of improper remarks of counsel, and because of the invalidity of the ordinance under which the accused was adjudged guilty.

[1] It appears from the record that the attorney for the city, in the course of his argument, used the following language: "Will Lowther is not guilty of selling this liquor himself, but his undertaking to shield some one higher, and, not having told who it was, he himself is guilty." This argument was objected to on the ground that there was no evidence to support it—no evidence of any other person being connected with the sale of the whisky, and upon the ground that counsel was expressing his individual opinion as a fact. In our opinion all these objections were properly overruled.

The case of *Moore v. State*, 10 Ga. App. 805, 74 S. E. 315, which is cited in support

of the contention that the argument was improper, dealt with a statement which was clearly prejudicial to the accused; and, while the ruling there made is adhered to, this court in deciding the *Moore Case* did not overlook the cardinal principle that injury must concur with error in order to warrant a new trial upon review. In the present case a not improbable result attaching to a logical conclusion from the remarks made by the city attorney might have been an acquittal.

Granting the contention that there is nothing in the evidence to show that the accused was undertaking to shield some one higher, as the defendant was accused of keeping intoxicating liquor for sale, proof of a sale (for which the municipality could not punish him) is merely indirect evidence, and in the present case the only evidence from which a "keeping for sale" can be inferred; and when the city, through its attorney, admitted that the accused was not guilty of selling the liquor, but was merely undertaking to shield some one else, the admission could well have been taken as an admission that the city had failed to make out its case, and the objectionable language, so far from being prejudicial to the accused, would have been beneficial to him if greater importance had been attached to it by the mayor. It was a non sequitur that the defendant was guilty because he had not named the person "higher up" whom the city attorney suspected of being the real seller.

Judgment affirmed.

(12 Ga. App. 688)

REGISTER et al. v. STATE. (No. 4,788.)
(Court of Appeals of Georgia. May 6, 1913.)

(Syllabus by the Court.)

CRIMINAL LAW (§§ 874, 951*)—MOTION FOR NEW TRIAL—TIME FOR FILING—VERDICT.

The accused having procured a decision that the verdict which was read by the foreman in open court, but which the trial judge declined to receive, was a valid verdict and a final termination of the case, and the effect of this decision being that a motion for a new trial could have been filed to set aside this verdict, notwithstanding it had not been received and recorded on the minutes, the trial judge properly refused to entertain a motion for a new trial more than a year after the rendition of the verdict, and also properly overruled a demand that the jury be polled, and rightly refused to discharge the accused. The demand to poll came too late, and the question as to the right of the accused to be discharged has already been adjudicated against them by the Court of Appeals.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2085-2088, 2349-2358; Dec. Dig. §§ 874, 951.*]

Error from Superior Court, Colquitt County; W. E. Thomas, Judge.

B. L. Register and others were convicted of involuntary manslaughter, and they bring error. Affirmed.

See, also, 76 S. E. 649.

W. A. Covington, Jas. Humphreys, and E. L. Bryan, all of Moultrie, and Claude Payton, of Sylvester, for plaintiffs in error. J. A. Wilkes, Sol. Gen., L. L. Moore, and Shipp & Kline, all of Moultrie, for the State.

POTTLE, J. A verdict of voluntary manslaughter was returned against the accused, and this verdict was set aside on the ground that a verdict of involuntary manslaughter, which the court had previously declined to receive, was a legal verdict and a final termination of the case. Register v. State, 10 Ga. App. 623, 74 S. E. 429. Subsequently the accused were arraigned under the indictment and filed pleas setting up that the effect of the refusal of the court to receive the verdict of involuntary manslaughter was to declare a mistrial, and operated to acquit the accused, and that, if this were not true, the verdict finding the accused guilty of involuntary manslaughter was a valid verdict and a final termination of the case, and they could not be again arraigned under the indictment. The accused excepted to the judgment striking both of these pleas. This court held that the verdict of involuntary manslaughter was a valid verdict and a final termination of the case, and that the accused could not again be tried under the indictment for any offense. The trial judge was directed to have the verdict of involuntary manslaughter recorded upon the minutes of the court, and to impose sentence in the manner prescribed by law. It was contended in that case by counsel for the accused that they never had an opportunity to file a motion for a new trial for the purpose of setting aside the verdict of involuntary manslaughter, for that verdict had never been received by the court and filed, and no exception to it could be taken. In reply to this contention this court said: "The effect of the decision of the Court of Appeals was that publication of the verdict by the foreman of the jury was sufficient to give it legal efficacy. There was therefore no reason why the accused could not have filed a motion for a new trial and asked that that verdict be set aside. And, furthermore, they cannot now assert that that verdict was not a final determination of the case, when, on their own motion, they procured a decision from the Court of Appeals that it was." 76 S. E. 652. When the case was again called in the trial court, in order that the direction of this court to impose sentence might be complied with, the accused made a demand that the jury be polled, moved that they be discharged; and also tendered a motion for a new trial, which the court refused to entertain. To all of these adverse rulings they accepted.

The accused procured from this court a decision that the verdict of involuntary manslaughter was a valid verdict and a final

termination of the case. It was held that the oral pronouncement of the verdict by the foreman of the jury was a sufficient publication of it, and that it was not necessary, in order to give it validity, that it be filed and recorded on the minutes of the court. We are satisfied with the correctness of this decision, and it is too late now to challenge its soundness. The accused could have filed a motion to set aside this verdict at any time within the time required by law after its publication. They were not deprived of this right by the failure of the court to receive the verdict and to allow it to be recorded on the minutes. They have asserted all the while that this verdict was legal and valid and a final termination of the case. They had a right to have the verdict for voluntary manslaughter set aside, and they had a right to have sentence imposed upon the first verdict. They also had a right to file a motion for new trial to set aside the first verdict. Having allowed the statutory period to elapse without availing themselves of this right, they cannot now be heard to assert that the verdict should be set aside for errors made during the progress of the trial. They are in laches, because of their own failure to file a motion in time, and not because of anything done by the trial court which prevented them from so doing. The trial judge properly refused to entertain the motion for a new trial. The demand to poll the jury, having been made long after the jury had been discharged, came too late. If the court in the first instance had declined to give the accused an opportunity to poll the jury, a motion for a new trial, complaining of this failure, should have been tendered in due time. The question of the right of the accused to be discharged has already been adjudicated against them by this court and need not be further discussed.

Judgment affirmed.

(12 Ga. App. 693)

BROOKS v. STATE. (No. 4,834.)

(Court of Appeals of Georgia. May 6, 1913.)

(Syllabus by the Court.)

1. CRIMINAL LAW (§ 508*)—EVIDENCE OF ACCOMPLICE—MISDEMEANOR CASE.

The rule of law that the uncontroverted evidence of an accomplice is not legally sufficient to convict does not apply to misdemeanor cases. Nevertheless the fact that the principal witness against the accused in a misdemeanor case is an accomplice is a fact that the jury can properly take into consideration in weighing the credibility of his evidence. In the present case, however, the positive and direct testimony of the accomplice is abundantly corroborated by many strong circumstances connecting the accused with the commission of the offense, which would have been sufficient of themselves to authorize a conviction, even without the evidence of the accomplice.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1099-1123; Dec. Dig. § 508.*]

2. CRIMINAL LAW (§ 1172*)—APPEAL AND ERROR—HARMLESS ERROR—INSTRUCTION.

The instructions of the court to the jury relating to the impeachment of a witness by evidence of his general bad character, while, strictly speaking, not pertinent to any of the evidence on the subject of bad character, in the present case could not have been harmful to the accused, since such charge could have applied only to the evidence of the accomplice, who was a material witness for the state.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 3123, 3154-3157, 3159-3163, 3169; Dec. Dig. § 1172.*]

3. CRIMINAL LAW (§ 784*) — INSTRUCTION — CIRCUMSTANTIAL EVIDENCE.

The evidence establishing the guilt of the accused was both direct and circumstantial, and there was no error in the failure of the trial judge to charge as to the effect and weight of circumstantial evidence.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1883-1888, 1922, 1960; Dec. Dig. § 784.*]

4. CONVICTION SUSTAINED.

No error of law appears, and the evidence, both direct and circumstantial, strongly and clearly shows that the verdict of guilty was properly returned.

Error from City Court of Columbus; G. Y. Tigner, Judge.

Z. A. Brooks was convicted of a misdemeanor, and he brings error. Affirmed.

Wynn & Wohlwender and T. T. Miller, all of Columbus, for plaintiff in error. T. H. Fort, Sol., of Columbus, for the State.

HILL, C. J. Judgment affirmed.

(12 Ga. App. 693)

TAYLOR v. TOWN OF OMEGA. (No. 4,826.)
(Court of Appeals of Georgia. May 6, 1913.)

(Syllabus by the Court.)

CRIMINAL LAW (§ 1091*)—APPEAL—REFUSAL OF CERTIORARI—BILL OF EXCEPTIONS.

In order for this court to review a refusal of a judge of the superior court to sanction a petition for certiorari, the petition must be incorporated in the bill of exceptions, or be verified as a part thereof by the trial judge. An unsanctioned petition cannot be specified as a part of the record. Central Ry. Co. v. Whitehead, 105 Ga. 492, 30 S. E. 814, and citations; Evans v. Bloodworth, 105 Ga. 835, 31 S. E. 778; Anthony v. State, 112 Ga. 751, 38 S. E. 79; Wood v. Tattnell, 115 Ga. 1000, 42 S. E. 403; Lenney v. Finley, 118 Ga. 719, 45 S. E. 593; Tompkins v. Newnan, 120 Ga. 173, 47 S. E. 557; Clarke v. Deal, 4 Ga. App. 326, 61 S. E. 295.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2803, 2815, 2816, 2818, 2819, 2823, 2824, 2828-2833, 2843, 2931-2933, 2943; Dec. Dig. § 1091.*]

Error from Superior Court, Tift County; W. E. Thomas, Judge.

Carl Taylor was convicted of violating an ordinance of the Town of Omega. From refusal of the superior court to sanction certiorari, he brings error. Writ of error dismissed.

C. C. Hall, of Tifton, for plaintiff in error. J. A. Wilkes, Sol. Gen., of Moultrie, and Robley D. Smith, of Tifton, for defendant in error.

RUSSELL, J. Writ of error dismissed.

(12 Ga. App. 667)

PYLES v. STATE. (No. 4,689.)

(Court of Appeals of Georgia. May 6, 1913.)

(Syllabus by the Court.)

1. CRIMINAL LAW (§ 823*) — INSTRUCTION — ALIBI.

An instruction in a criminal case that, where the defense of alibi is relied on, the burden is on the accused to establish this defense "to your satisfaction," is not erroneous, when, in immediate connection therewith, the jury are instructed to consider the testimony in reference to the special defense along with all of the evidence in the case, and that, in order to convict, the jury must be satisfied of guilt beyond a reasonable doubt, after considering all of the evidence and the prisoner's statement. The omission of the word "reasonable" before satisfaction is not reversible error. See Ledford v. State, 75 Ga. 856; Harris v. State, 120 Ga. 167, 47 S. E. 520. In Harrison v. State, 83 Ga. 130, 9 S. E. 542, the Supreme Court has laid down the rule touching alibi which it would be well for the trial judges to follow; but the charge in the present case is not erroneous, when tested by that decision. Nor is the instruction here complained of subject to the objections pointed out in Raysor v. State, 132 Ga. 237, 63 S. E. 786.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1992-1995, 3158; Dec. Dig. § 823.*]

2. VERDICT SUSTAINED.

The evidence fully authorized the verdict.

Error from City Court of Polk County; F. A. Irwin, Judge.

Will Pyles was convicted of crime, and he brings error. Affirmed.

Bunn & Trawick, of Cedartown, for plaintiff in error. J. A. Wright, Sol., and E. S. Ault, both of Cedartown, for the State.

POTTLE, J. Judgment affirmed.

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

(162 N. C. 243)

EDWARDS v. PRICE.

(Supreme Court of North Carolina. May 13, 1913.)

1. APPEAL AND ERROR (§ 1078*) — ASSIGNMENTS OF ERROR—STATEMENTS IN BRIEF—RULE.

Assignments of error not stated in appellant's brief, with the authorities relied on and citations of material statutes, as required by Supreme Court rule 34 (43 S. E. v), are abandoned.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4256-4261; Dec. Dig. § 1078.*]

2. WITNESSES (§ 357*)—IMPEACHMENT—CHARACTER OF WITNESS—SCOPE OF EVIDENCE.

A party introducing a character witness may not go farther than to inquire as to the general character of the party impeached; but the witness can qualify his own testimony by stating that he does not know the general character, but only the character in certain localities or for certain qualities.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. §§ 1157, 1158; Dec. Dig. § 357.*]

3. APPEAL AND ERROR (§ 1048*)—HARMLESS ERROR—ADMISSION OF IMPEACHING TESTIMONY.

Where a character witness' means of knowing the character of the defendant was confined to certain localities, and to his reputation there as a horse trader, any error in admitting his answer that he knew only his general reputation as a horse trader in those localities, which was bad, was harmless where the defendant had testified in the case, where there was much evidence as to character, both for and against him, and where he had the right to cross-examine the witness.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4140-4145, 4151, 4158-4160; Dec. Dig. § 1048.*]

4. WITNESSES (§ 344*)—IMPEACHMENT—CHARACTER—PARTICULAR ACTS.

Evidence as to whether defendant had the general reputation of having seduced an innocent and virtuous woman was inadmissible as character evidence.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. §§ 1120, 1125; Dec. Dig. § 344.*]

5. WITNESSES (§ 336*)—IMPEACHMENT—EXAMINATION OF PARTY—PARTICULAR ACTS.

A party who himself testifies may be asked questions as to particular acts impeaching his character.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. § 1112; Dec. Dig. § 336.*]

6. WITNESSES (§ 358*) — IMPEACHMENT — CROSS-EXAMINATION OF IMPEACHING WITNESS—PARTICULAR ACTS.

On cross-examination of an impeaching witness, a party may ask as to the general character of the party attacked for particular vices or virtues, but it is not permissible either to show distinct acts of a collateral nature or a general reputation for having committed such specific acts.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. §§ 1159, 1160; Dec. Dig. § 358.*]

Appeal from Superior Court, Alleghany County; Allen, Judge.

Action by W. S. Edwards against Thomas J. Price. Judgment for plaintiff, and defendant appeals. Reversed, and new trial directed.

T. C. Bowle, of Jefferson, for appellant.
R. A. Doughton, of Sparta, for appellee.

CLARK, C. J. This is an action to recover damages in a horse trade, alleging breach of warranty and deceit.

[1] The first and second assignments of error are abandoned by not being stated in the appellant's brief. Rule 34 (43 S. E. v). We find no error in the other assignments of error, except the fourth assignment of error, and the fifth, seventh, eighth, and ninth, which present the same proposition.

[2, 3] The tenth assignment of error is that the witness, when asked as to the general reputation of the defendant, answered that he knew only his general reputation as a horse trader around Jefferson and down in Wilkes county, but he did not know his reputation in his own community, nor anywhere except as a horse trader, which was bad in the localities named. It is not competent for the party introducing the character witness to ask further than as to the general character of the party impeached. But the witness can qualify his own testimony by stating that he does not know the general character, but only in certain localities, or for certain qualities. The witness' means of knowing the character of the defendant were confined, it seems, to those localities, and to that one business which seems to have been the occupation of the defendant in those localities. The defendant had testified in the case. We do not see that the defendant has sustained any injury in regard to the admission of this evidence. He had the right to cross-examine, and there was much other evidence as to character, both for and against him.

[4, 5] The fourth exception was: "Did not the defendant have the general reputation of having seduced Miss Blevins, an innocent and virtuous woman?" It was error to admit this question. As was also the admission of the same question and answer as to other witnesses as set out by assignments of error 5, 7, 8, and 9. The rule as to this matter has been fully settled by many decisions in this court. It is this: The party himself when he goes upon the witness stand can be asked questions as to particular acts impeaching his character, but as to other witnesses it is only competent to ask the witness if he "knows the general character of the party." If he answers, "No," he must be stood aside. If he answers, "Yes," then the witness can of his own accord qualify his testimony as to what extent the character of the party attacked is good or bad.

[6] The other side on cross-examination can ask as to the general character of the party for particular vices or virtues. But it is not permissible either to show distinct acts of a collateral nature, nor a general reputation for having committed such specific act. McKelvey, Ev. §§ 123-125; 1 Gr.

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

Ev. § 461b. To permit this would protract trials to an indefinite extent by permitting the investigation of numerous incidents, if not indeed the whole life of the party, and would distract the attention of the jury from the real points at issue in the case, and turn the trial into an investigation of the character of the party. It is important to confine the rule strictly as above stated both to concentrate the attention of the jury upon the matters in issue and to avoid unnecessary length of trials.

The court is reluctant to give a new trial upon a matter of this kind. But aside from the necessity, for the reasons already given, for restricting inquiries, it is also extremely probable that questions of this kind would prejudice the defendant not merely as to the weight to be given to his testimony, but also upon the merits of the case. The proposition as we have laid it down is clearly stated in *State v. Bullard*, 100 N. C. 487, 6 S. E. 191, and in many cases there cited; *Marcom v. Adams*, 122 N. C. 222, 29 S. E. 333; *State v. Hairston*, 121 N. C. 579, 28 S. E. 492. The same rule was reiterated and again clearly stated by Allen, J., in *State v. Holly*, 155 N. C. 492, 71 S. E. 450, giving the reasons requiring the maintenance of the well-settled rule, and citing numerous cases with the reasons for its maintenance.

We must direct a new trial for this.

Error.

(162 N. C. 347)

ASBURY et al. v. TOWN OF ALBEMARLE.
(Supreme Court of North Carolina. May 13, 1913.)

1. WATERS AND WATER COURSES (§ 182*)—MUNICIPAL WATER SUPPLY — MANDATORY STATUTE.

The Battle Act (Pub. Laws 1911, c. 86) enabling towns to construct and maintain waterworks, but requiring them, before constructing a public system, to acquire by purchase or condemnation any system of like character already constructed by any private or quasi public corporation, then in active operation and serving the public, is mandatory and not directory in its terms, leaving no discretion to the municipal authorities, and is also in derogation of the usual and common rights of municipalities, in the exercise of a sound discretion, to construct and purchase, as well as maintain, their public utilities.

[Ed. Note.—For other cases, see *Waters and Water Courses*, Cent. Dig. § 267; Dec. Dig. § 182.*]

2. STATUTES (§ 239*) — CONSTRUCTION — STATUTES IN DEROGATION OF COMMON RIGHTS.

Statutes in derogation of common rights or offering special privileges are to be construed liberally in favor of the public and strictly against those specially favored.

[Ed. Note.—For other cases, see *Statutes*, Cent. Dig. § 320; Dec. Dig. § 239.*]

3. STATUTES (§ 235*)—CONSTRUCTION—MANDATORY STATUTE.

A statute mandatory in its terms must be strictly construed.

[Ed. Note.—For other cases, see *Statutes*, Cent. Dig. § 316; Dec. Dig. § 235.*]

4. STATUTES (§ 188*)—CONSTRUCTION—WORDS OF DEFINITE AND WELL-KNOWN SENSE.

Words of definite and well-known sense in the law are to be expounded in the same sense when used in the statute.

[Ed. Note.—For other cases, see *Statutes*, Cent. Dig. §§ 266, 267, 276; Dec. Dig. § 188.*]

5. STATUTES (§ 190*) — CONSTRUCTION — JUDICIAL AUTHORITY AND DUTY—AMBIGUITY.

There can be no construction of a statute where there is no ambiguity, and, if the language used is clear and admits of but one meaning, it should be taken to mean what the Legislature has plainly expressed; and any departure by the courts from the language so used would be an unjustifiable assumption of legislative power.

[Ed. Note.—For other cases, see *Statutes*, Cent. Dig. §§ 266, 269; Dec. Dig. § 190.*]

6. WATERS AND WATER COURSES (§ 183*)—MUNICIPAL WATER SUPPLY — STATUTES — "PRIVATE CORPORATION" — "QUASI PUBLIC CORPORATION" — "COMPANY" — "CORPORATION" — "PARTNERSHIP."

The Battle Act (Pub. Laws 1911, c. 86), enabling towns to construct and maintain waterworks, but requiring them before constructing any public system to acquire by purchase or condemnation any system of like character already constructed by any "private corporation" or "quasi public corporation," was not intended to embrace works constructed by a single individual or a "partnership," which is a contract between private individuals for the purpose of trade or gain; the word "corporation" does not include a "partnership" or unincorporated association of individuals, while the word "company" has no such technical and legal meaning as the word "corporation," but is a generic and comprehensive word which may include individuals, partnerships, and corporations.

[Ed. Note.—For other cases, see *Waters and Water Courses*, Cent. Dig. §§ 277, 278; Dec. Dig. § 183.*]

For other definitions, see *Words and Phrases*, vol. 2, pp. 1347-1350, 1608-1621; vol. 8, pp. 7619, 7620; vol. 6, pp. 5191-5202; vol. 8, pp. 7746, 7747; vol. 6, pp. 5571, 5572; vol. 8, p. 7763; vol. 7, p. 5886; vol. 8, p. 7777.]

7. WATERS AND WATER COURSES (§ 183*)—MUNICIPAL WATER SUPPLY—STATUTES—ACQUISITION OF PRIVATE SYSTEM—"IN ACTIVE OPERATION SERVING THE PUBLIC."

The Battle Act (Pub. Laws 1911, c. 86), enabling towns to construct and maintain waterworks, requires them, before constructing any public system, to acquire by purchase or condemnation any system of like character constructed by any private or quasi public corporation, then in active operation, serving the public. In an action by the owner of a private system of waterworks to enjoin a town from constructing a municipal waterworks until it had acquired his system, it appeared that the average daily capacity of his plant was only 15,000 gallons; that during the dry season it furnished water only from 6 a. m. to from 12 to 2 p. m.; that he had only 185 customers in the town; that there were 240 other families unsupplied; that he had only one tank of 1,000-gallon capacity, and furnished no more than one-third of the business houses and no water for fire purposes; that the pipes of the system were so small as to be useless for fire protection and worthless in the construction of a new plant; and that as a part of the proposed system of waterworks it would be of no value to the town. *Held*, in view of the fact that the town was about to install a plant with a 100,000-gallon tank and a capacity of three-fourths of a million gallons a day, that the plaintiffs'

system was not "in active operation serving the public," and that the act did not require the purchase of such a plant as that owned by the plaintiff.

[Ed. Note.—For other cases, see *Waters and Water Courses*, Cent. Dig. §§ 277, 278; Dec. Dig. § 183.*]

8. MUNICIPAL CORPORATIONS (§ 323*)—MUNICIPAL WATER SUPPLY — ACQUISITION OF PRIVATE SYSTEM—INJUNCTION—ADMISSIBILITY OF EVIDENCE.

In an action by the owner of a private water system to enjoin defendant town from constructing a public water system without acquiring plaintiffs' system, as required by Pub. Laws 1911, c. 86, evidence that no part of the system belonging to the plaintiff could have been used by the town as a part of its proposed system, and that as a part of such system it would have no value, was admissible.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. §§ 842-846; Dec. Dig. § 323.*]

9. MUNICIPAL CORPORATIONS (§ 861*)—PUBLIC UTILITIES — CONSTITUTIONAL PROVISIONS — "NECESSARY EXPENSES."

Under the constitutional provisions recognizing municipal corporations and giving the Legislature power to create them, and conferring upon them the right to provide for their necessary expense, waterworks, sewerage, and other public utilities are "necessary expenses."

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. §§ 1819-1823; Dec. Dig. § 861.*]

For other definitions, see *Words and Phrases*, vol. 5, pp. 4715, 4716.]

10. MUNICIPAL CORPORATIONS (§ 70*)—LEGISLATIVE CONTROL—MUNICIPAL WATER SUPPLY — ACQUISITION OF PRIVATE SYSTEM — CONSTITUTIONALITY OF STATUTE.

The Battle Act (Pub. Laws 1911, c. 86), enabling towns to construct and maintain public water systems, but requiring them, before construction of any public system, to acquire by purchase or condemnation any system of like character already constructed by any private or quasi public corporation then in active operation and serving the public, is unconstitutional as an invasion of the principle of local self-government which requires that the control of such utilities be left to the sound discretion of the municipal authorities.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. §§ 170-174; Dec. Dig. § 70.*]

11. MUNICIPAL CORPORATIONS (§ 57*) — NATURE AND STATUS AS CORPORATIONS—PUBLIC AND PRIVATE CHARACTER.

Municipal corporations possess a double character, one governmental, legislative, or public, in which character it exercises political powers on behalf of the state, and the other private, in which character its powers are conferred primarily for the benefit of the corporation.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. §§ 144, 148; Dec. Dig. § 57.*]

12. MUNICIPAL CORPORATIONS (§ 64*)—LEGISLATIVE CONTROL — GOVERNMENTAL MATTERS.

In matters governmental, a municipal corporation is under the absolute control of the Legislature; but, as to its private or proprietary functions, the Legislature is under the same constitutional restraints that are placed upon it with respect to private corporations.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. §§ 156, 157; Dec. Dig. § 64.*]

13. MUNICIPAL CORPORATIONS (§ 57*)—GOVERNMENTAL OR CORPORATE POWERS—PROVIDING PUBLIC UTILITIES.

Local conveniences and public utilities, like water and light, are not provided by municipal corporations in their governmental capacity, but in the quasi private capacity in which they act for the benefit of citizens alone.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. §§ 144, 148; Dec. Dig. § 57.*]

14. MUNICIPAL CORPORATIONS (§ 70*)—LEGISLATIVE CONTROL — PUBLIC IMPROVEMENTS NOT GOVERNMENTAL IN CHARACTER.

A town cannot be compelled by the Legislature to undertake public improvements not governmental in character.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. §§ 170-174; Dec. Dig. § 70.*]

Hoke and Allen, JJ., dissenting.

Appeal from Superior Court, Stanly County; Cooke, Judge.

Action for an injunction by E. M. Asbury and others against the Town of Albemarle. Judgment for plaintiffs, and defendant appeals. Reversed, motion to nonsuit allowed, and action dismissed.

Civil action brought to restrain defendants from proceeding with the construction of municipal waterworks in the town of Albemarle. Motion to nonsuit was overruled. Certain issues were submitted to a jury, and under the instructions of the court found for plaintiffs. The court rendered judgment that the defendant commissioners "be, and each of them, peremptorily commanded and directed to proceed forthwith to acquire the waterworks system or plant of the plaintiffs described in the complaint in the manner provided by chapter 86, Public Laws of 1911," etc. The defendant appealed.

R. L. Smith, of Albemarle, and Manly^{*} Hendren & Womble, of Winston-Salem, for appellant. J. R. Price and R. L. Brown, both of Albemarle, and Burwell & Cansler, of Charlotte, for appellees.

BROWN, J. Chapter 86, Public Laws 1911, among other things provides that: "Whenever any incorporated town or city which under this or by special act has been or may be authorized from the sale of bonds or otherwise to build, operate, and maintain a public * * * waterworks * * * there shall have been constructed in said town or city by any private or quasi-public corporation * * * waterworks * * * then in active operation and serving the public, which construction or operation was authorized by said town or city * * * then, before constructing any proposed system of waterworks * * * heretofore or hereafter authorized by law, along or upon the streets occupied by such private or quasi-public corporation, the town or city within which such utilities are located and owned, proposing to build any public system of like

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

character, shall, before undertaking to do so, first acquire, either by purchase or condemnation, the property of such system already laid, operated, and maintained by such private or quasi-public corporation." Then follows the machinery pointed out in said act for the acquirement by condemnation of the property aforesaid.

The defendants contend among other defenses:

(1) That upon all the evidence the plaintiffs' plant is not a "system of waterworks" constructed by a "private or quasi-public corporation" in "active operation and serving the public," and therefore the plaintiffs do not come within the act.

(2) That the act is unconstitutional.

[1] We are of opinion that the allegations of the complaint, as well as the evidence in support thereof, fall entirely to bring the plaintiffs within the terms of the act of 1911, commonly known as the Battle Act.

The evidence shows that the waterworks plant which the plaintiffs are endeavoring to compel the town to take over was not constructed or owned by a private or quasi public corporation, but was constructed and is owned by a partnership, and that, at the time of the plaintiffs' demand under the act, this private plant was not "in active operation serving the public," within the sense and meaning of the law.

[2] This statute is mandatory and not directory in its terms. No discretion is left to the municipal authorities. Again, the statute is in derogation of the usual and common rights of all municipalities to construct or purchase, as well as to manage, their public utilities in the exercise of a sound discretion by the municipal authorities to manage them for the public good.

[3] Statutes in derogation of common rights or conferring special privileges are to be construed liberally in favor of the public and strictly against those specially favored. Also, where the requirements of a statute are mandatory in terms, it must be strictly construed. 36 Cyc. 1173.

[4] Another rule applicable to the construction of statutes is that, when they make use of words of definite and well-known sense in the law, they are to be received and expounded in the same sense in the statute. *Adams v. Turrentine*, 30 N. C. 149. In that case Chief Justice Ruffin says: "Indeed, this rule is not confined to the construction of statutes, but extends to the interpretation of private instruments. There are exceptions to it, where it is seen that a word is used in a sense different from its proper one in instruments made by a person inops consilii. But that is a condition in which the Legislature cannot be supposed; and therefore, although the intention of the Legislature, as collected from the whole act, is to prevail, a technical term, having a settled legal sense, cannot be received in any other

sense, unless at the last it be perfectly plain on the act itself what that other sense is. This principle which is as well one of common sense as of common law seems to be decisive of the present question."

[5] It is well settled that the province of construction lies wholly within the domain of ambiguity, and that, if the language used is clear and admits of but one meaning, the Legislature should be taken to mean what it has plainly expressed. *Hamilton v. Rathbone*, 175 U. S. 421, 20 Sup. Ct. 155, 44 L. Ed. 219; 26 A. & E. Enc. 598. As Mr. Justice Story says in *Gardner v. Collins*, 2 Pet. 93, 7 L. Ed. 347: "What the legislative intention was can be derived only from the words they have used; and we cannot speculate beyond the reasonable import of those words. The spirit of the act must be extracted from the words of the act, and not from conjectures aliunde." Where the words used are plain and have a well-known meaning, "any departure by the courts from the language used would be an unjustifiable assumption of legislative power." *Foley v. People, Breese (Ill.)* 57; 26 A. & E. Enc. 598.

[6] The words "private corporation" and "quasi public corporation" are technical terms of well-known significance in the law, and so much so that it is unnecessary to define them. In the use of such terms we have no right to say that the Legislature intended also to embrace a single individual or a partnership. The latter is a contract between private individuals for the purpose of trade or gain. Their relation to the public is very different from that of a corporation.

The *Esland Case*, 146 N. C. 135, 59 S. E. 355, is not a precedent. In that case we held that the word "companies," as used in the statute, was plainly intended to embrace "all corporations, companies, or persons" engaged as common carriers in transportation of freight. The word "company" has no such technical and legal meaning as the word "corporation." The authorities generally hold that "company" is a generic and comprehensive word and may include individuals, partnerships, and corporations. 8 Cyc. 399. But we are cited to no authority which holds that the word "corporation" may include a partnership or an unincorporated association of individuals. It is said that this construction will work a great hardship on plaintiffs. That is not our fault. *Ita lex scripta est*. If the Legislature intended to include an individual or partnership, it should have so declared by appropriate and unambiguous language.

[7] It is not probable that the General Assembly intended to compel municipalities to purchase such private waterworks as the entire evidence in this case shows plaintiffs' plant to be. As a sample, we copy from the evidence of plaintiffs' witness Finger, who had charge of the plaintiffs' plant since 1905: "The average daily capacity of the plant is

15,000 gallons. We have been pumping this amount for the last two or three months. It has about the same capacity in the winter time. Our customers use about as much again water in the summer as they do in the winter. During the dry season this summer we have furnished water from 6 o'clock in the morning to from 12 to 2 in the afternoon. When we turn it on, there is from 3,000 to 5,000 gallons in the tank which is drawn out almost immediately by the customers and put in buckets and tubs."

Plaintiffs have 185 customers in the town and there are 240 other families unsupplied. The plant has one tank of 1,000-gallon capacity only on a 40-foot tower. It furnishes not more than a third of the business houses and no supply at all for fire purposes. Its pipes are so small as to be useless for fire protection and are worthless in the construction of a new plant.

The evidence shows that the town is now installing a large and modern plant with a 100,000-gallon tank on top of a 112-foot tower. There will be, when completed, five miles of distributing pipe ranging from ten inches to six inches in diameter, and that the capacity will be 750,000 gallons per day. The defendants offered to prove by the civil engineer that no part of the property or system of waterworks belonging to the plaintiff could be or could have been used or utilized by the defendant as a part of its proposed system of waterworks, and that as a part of its proposed system of waterworks it would have no value to the town.

[8] While this evidence was improperly excluded by the court, it is manifest from all the admitted evidence that the plaintiffs' plant could not be of the slightest value in constructing the new one. To purchase it would be to take the money of the taxpayers and devote it to a private use exclusively and to give something for nothing, a result not contemplated by the statute.

[9, 10] The learned counsel in this and the similar case of *Shute v. Monroe* have challenged in their briefs the constitutionality of the act as being an invasion of the rights of municipal corporations under the organic law.

We next come to consider the power of the Legislature to deprive a municipal corporation of the right, through its governing body, to exercise its discretion in the purchase of a waterworks or sewerage plant. It must be admitted that the act of 1911 attempts to do so, and places the municipality entirely in the power of a compulsory arbitration without even a right of review or appeal to the courts. If this be a valid exercise of legislative authority, then the right to exercise its own discretion in a purely local matter is taken from the municipality and the money of the taxpayers may be donated to a private concern. By the action of a majority of the arbitrators, the city may be

compelled to purchase something which, according to the judgment of its own authorities, is of no sort of value or use to it.

Our Constitution recognizes municipal corporations and gives the Legislature power to create them, and also confers upon them the right to provide for their necessary expenses. We have held that waterworks, sewerage, and some other public utilities are necessary expenses. We do not think the Legislature can dictate to a municipal corporation the manner in which it may acquire its waterworks any more than it can dictate the kind of engine to be used in pumping the water. The principle of local self-government requires that this of necessity must be left to the sound discretion of the municipal authorities.

[11] "Municipal corporations possess a double character; the one governmental, legislative, or public; the other, in a sense, proprietary or private. * * * In its governmental or public character the corporation is made by the state one of its instruments, or the local depository of certain limited and prescribed political powers, to be exercised for the public good on behalf of the state rather than for itself. * * * But in its proprietary or private character the theory is that the powers are supposed not to be conferred, primarily or chiefly, from considerations connected with the government of the state at large, but for the private advantage of the compact community which is incorporated as a distinct legal personality or corporate individual; and as to such powers, and to property acquired thereunder, and contracts made with reference thereto, the corporation is to be regarded quoad hoc as a private corporation, or at least not public in the sense that the power of the Legislature over it or the rights represented by it are omnipotent."

[12] In matters purely governmental in character, it is conceded that the municipality is under the absolute control of the legislative power; but, as to its private or proprietary functions, the Legislature is under the same constitutional restraints that are placed upon it in respect of private corporations. *The Detroit Park Case*, 28 Mich. 228, 15 Am. Rep. 208 et seq; *Bailey v. New York*, 3 Hill (N. Y.) 531, 38 Am. Dec. 669; *Philadelphia v. Fox*, 64 Pa. 180; *Small v. Danville*, 51 Me. 362; *Western College v. Cleveland*, 12 Ohio St. 375; *Dillon's Municipal Corporations* (4th Ed.) vol. 1, pp. 99 to 101, inclusive, and especially pages 107, 108, and pages 111 to 123, inclusive.

"It may be admitted that corporations, * * * such as * * * cities, may in many respects be subject to legislative control. But it will hardly be contended that, even in respect to such corporations, the legislative power is so transcendent that it may, at its will, take away the private property of the corporation or change the uses

of its private funds acquired under the public faith." *Dartmouth College Case*, 4 Wheat. 518, 694, 695, 4 L. Ed. 629; *Cooley's Cons. Lim.* (6th Ed.) pp. 284, 285, and 290; *Hewison v. New Haven*, 37 Conn. 475, 9 Am. Rep. 342.

The case of *People v. Hurlburt*, 24 Mich. 44, 9 Am. Rep. 103, is in point. In a learned and forcible opinion Judge Cooley says: "The doctrine that within any general grant of legislative power by the Constitution there can be found authority thus to take from the people the management of their local concerns, and the choice, directly or indirectly, of their local officers, if practically asserted, would be somewhat startling to our people." Again: "The officers in question involve the custody * * * and control of the * * * sewers, waterworks, and public buildings of the city, and the duties are purely local. The state at large may have an indirect interest in an intelligent, honest, upright, and prompt discharge of them; but this is on commercial and neighborhood grounds rather than political, and it is not much greater or more direct than if the state line excluded the city. Conceding to the state the authority to shape the municipal organizations at its will, it would not follow that a similar power of control might be exercised by the state as regards the property which the corporation has acquired, or the rights in the nature of property which have been conferred upon it." See, also, the opinion of Chief Justice Breese in *People v. Mayor of Chicago*, 51 Ill. 17, 2 Am. Rep. 278; *People v. Batchelor*, 53 N. Y. 128, 13 Am. Rep. 480; 1 Dillon, *Mun. Corp.* 72.

[13] It is well settled that local conveniences and public utilities, like water and lights, are not provided by municipal corporations in their political or governmental capacity, but in that quasi private capacity in which they act for the benefit of their citizens exclusively. 1 Dillon, *Mun. Corp.* p. 99; *San Francisco Gas Co. v. San Francisco*, 9 Cal. 453; *Detroit v. Corey*, 9 Mich. 165, 80 Am. Dec. 78. The same doctrine is held by this court. *Fisher v. New Bern*, 140 N. C. 506, 53 S. E. 342, 5 L. R. A. (N. S.) 542, 111 Am. St. Rep. 857; *Terrell v. Washington*, 158 N. C. 288, 73 S. E. 888.

[14] A town cannot be compelled by the Legislature to undertake public improvements not governmental in character. This is well settled. 1 Abbott, *Mun. Corp.* 134. If the Legislature cannot compel a municipality to establish waterworks, how can it control the exercise of its discretion by the municipality when it undertakes to install them? The exercise of such a power would be destructive of the most cherished principles of local self-government. We are cited to a very strong and learned opinion directly in point. *Helena Con. Water Co. v. Steele*, 20 Mont. 1, 49 Pac. 382, 37 L. R. A. 412.

The Legislature of Montana passed a statute similar to the Battle Act. The Supreme Court of Montana held that the statute placed a restriction upon the municipality and made mandatory the incurring of indebtedness for the purpose of acquiring the plant if it decided to maintain and operate its own works. The court, in addition to other objections, declared the statute to be an infringement of the right of local self-government inherently vested in all municipal corporations in a matter relating purely to its property rights and private affairs, as distinguished from the rights and duties as an agency of the state. In referring to the moral obligation to purchase an established plant, the court said: "It is contended that the moral obligation of the city to assume this compulsory indebtedness is sufficient to support the law and relieve it of its unconstitutionality, if it be in conflict with the Constitution. But we are unable to see what moral obligation the city is under, or has ever assumed, that will bring the matter under the rule contended for by counsel of respondent. The city never agreed to continue for all time to buy water from the plaintiff. If expressly reserved the right to do otherwise. Plaintiff's plant may not be capable of furnishing an ample supply of wholesome water for the inhabitants of the city either now or as the city may expand or increase in population in the future. The plant and system may be practically worthless. The city may be able to secure the water system and supply for half what plaintiff's plant would cost. Is there any such moral obligation on the part of the city disclosed in this case as would justify this court in compelling it to assume the indebtedness necessary for it to assume in order to purchase plaintiff's plant, tax the people for money to meet such indebtedness, in total disregard of all these possible and probable events? Shall it be said, in obedience to this law, that the city authorities, the legal representatives of the inhabitants of the city, have no discretion in the premises, but must obey, notwithstanding disaster and oppressive taxation and ruin may come upon the people as a consequence? We think the two provisos of the law under discussion are in violation of the clauses of the Constitution quoted and referred to above, as well as the spirit of our governmental system, which recognizes 'that the people of every hamlet, town, and city of the state are entitled to the benefits of local self-government.' The law is not supported by any moral obligation, but is rather a violation of the law, the Constitution, as well as the principle of moral obligation invoked by the respondent. It violates the general rule of the law that the consent of parties to a contract is necessary to its validity, whether the parties be natural or artificial persons. We are at a loss to find any theory of law, equity, or justice up-

on which we can conscientiously sustain the constitutionality of the statute in question." This case is cited by the federal Supreme Court in an action between the same parties, coming up upon the appeal of the water-works company from a decree of the Circuit Court of Appeals of the Ninth Circuit, where it was sought to restrain the city of Helena from acquiring a system of its own, except by purchasing an existing system. *Helena Water Works Co. v. Helena*, 195 U. S. 383, 393, 25 Sup. Ct. 40, 49 L. Ed. 245.

We are of opinion that the statute under consideration is void in so far as it attempts to control the exercise of discretion by the defendant in the management of its purely private and property rights.

The motion to nonsuit is allowed and the action dismissed.

Reversed.

HOKE and ALLEN, JJ., dissenting.

(162 N. C. 275)

SHUTE SEWERAGE CO. v. CITY OF MONROE.

(Supreme Court of North Carolina. May 18, 1913.)

1. MUNICIPAL CORPORATIONS (§ 708*)—PUBLIC WORKS—SEWERS—"PUBLIC SYSTEM"—"CONSTRUCTED OR OWNED BY EITHER A PRIVATE OR QUASI PUBLIC CORPORATION."

Under the Battle Act (Pub. Laws 1911, c. 86) enabling towns to maintain sewerage systems, but providing that before constructing any public system they should acquire either by purchase or condemnation the property of any system of like character constructed by any private or quasi public corporation then in active operation and serving the public, a sewerage plant constructed by a firm of individuals, not incorporated until after construction by the city had been begun, was not within the term "constructed or owned by either a private or quasi public corporation," and its plant constructed for the limited purpose of supplying its own buildings, though incidentally serving 5 or 10 per cent. of the inhabitants, was not a "public system," so as to require its purchase or condemnation by the city.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. § 1519; Dec. Dig. § 708.*]

2. MUNICIPAL CORPORATIONS (§ 70*)—LEGISLATIVE CONTROL—PUBLIC WORKS—SEWERAGE SYSTEM—CONSTITUTIONAL AND STATUTORY PROVISIONS.

The Battle Act (Pub. Laws 1911, c. 86), enabling towns to construct and maintain sewerage systems, but requiring them, before constructing any public system, to acquire by purchase or condemnation any like system constructed by any private or quasi public corporation then in active operation and serving the public, is unconstitutional as an invasion of the principle of local self-government, which requires that such private matters be left to the discretion of municipal authorities.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. §§ 170-174; Dec. Dig. § 70.*]

Hoke and Allen, JJ., dissenting.

Appeal from Superior Court, Union County; Peebles, Judge.

Action for injunction by the Shute Sewerage Company against the City of Monroe. Judgment for plaintiff, and defendant appeals. Error, and judgment reversed, and injunction dissolved.

Adams, Armfield & Adams and Redwine & Sikes, all of Monroe, for appellant. Williams, Love & McNeeley, of Monroe, and Tillett & Guthrie, of Charlotte, for appellees.

BROWN, J. [1] The affidavits in the record show that the plaintiff's plant was not "constructed or owned by either a private or a quasi public corporation," as it must have been in order for plaintiff to come under the provisions of the act of 1911. It was constructed by J. Shute & Sons, a firm of individuals. The Shute Sewerage Company had not been incorporated at the time the city made its contract for a sewerage system, but it belonged to J. Shute as an individual. The Shute Sewerage Company was not incorporated until the city's contractor had been at work for four months and had actually constructed one-seventh of the proposed system of the city. The corporation was formed very shortly before the bringing of this action and evidently for that purpose.

The affidavits establish in this case that the Shute sewer is not a public system. It has never purported to be one serving the public, but a reading of the ordinances which attempted to give Shute authority to put the pipes in the streets shows that it was for a limited purpose; this purpose being to supply buildings that the firm of J. Shute & Sons owned. The fact that Shute incidentally supplied some others with sewerage who desired it does not make it a public system serving the public. The affidavits show that Shute's sewerage does not serve over 5 or 10 per cent. of the inhabitants of Monroe, and that it was not constructed with a view to serving the public generally.

[2] The affidavits of the civil engineer show that Shute's line of sewerage will not articulate with the city's system and is of no possible value to it. Assuming that the plaintiff is a private or quasi public corporation, within the meaning of the Act of 1911, c. 86, and as such had constructed this sewerage line, the defendant could not be compelled to purchase it, and pay for it with the money of the taxpayers if it is of no practical value to the municipality. The case is governed by our decision in *Asbury v. Town of Albemarle*, 78 S. E. 146, at this term.

The judgment of the superior court is reversed, and the injunction dissolved.

Error.

HOKE and ALLEN, JJ., dissent.

(153 N. C. 245)

**TRUSTEES OF CATAWBA COLLEGE v.
FETZER.**

(Supreme Court of North Carolina. May 13, 1913.)

VENUE (§ 77*)—CHANGE—WAIVER.

Under Revisal 1905, § 425, providing that, if the county designated in the summons and complaint be not the proper county, the trial may, notwithstanding, be held there unless the defendant before the time for answering expires demands in writing that it be held in the proper county, a motion to remove must be made in apt time, and, although defendant might have answered at any time during the term, his time to answer expired whenever he filed a formal answer to the merits, and such answer was a waiver of his privilege of removal.

[Ed. Note.—For other cases, see Venue, Cent. Dig. §§ 59, 134, 138; Dec. Dig. § 77.*]

Appeal from Superior Court, Catawba County; Daniels, Judge.

Action by the Trustees of Catawba College against Mrs. Zeta M. Fetzer, executrix of the estate of P. B. Fetzer, deceased. From the denial of a motion to remove the cause for trial in Cabarrus county, defendant appeals. Affirmed.

The action was instituted in Catawba county, returnable to February term, 1913, commencing February 8d. Verified complaint was duly filed December 11, 1912; verified answer to merits filed February 5, 1913; formal replication filed February 8, 1913. Defendant is executrix of the obligor of the note, duly qualified and acting as such in the county of Cabarrus, and later in the term, to wit, on February 10, having obtained leave to withdraw her answer, made a motion in writing to remove the cause for trial in said county of Cabarrus.

L. T. Hartsell, of Concord, for appellant. Geo. McCorkle and R. R. Moose, both of Newton, and W. A. Self, of Hickory, for appellee.

HOKE, J. Our statute (Revisal, § 425) provides that "if the county designated for that purpose in the summons and complaint be not the proper county, the action may, notwithstanding, be tried therein, unless the defendant, before the time for answering expires, demand in writing that the trial be held in the proper county." Construing the section, our court holds that, "in order for a litigant to avail himself of the right, conferred by the statute, the motion to remove must be formally made and in apt time," and further that, although a defendant might have answered at any time during the term, his time to answer has expired within the meaning of the law whenever he has filed a formal answer to the merits. *County Board v. State Board*, 106 N. C. 82, 10 S. E. 1002; *McMinn v. Hamilton*, 77 N. C. 300. If it be conceded that a right of removal exists in the present case, the defendant, having filed formal answer, must

be taken to have waived his privilege of removal.

The authorities are decisive against the defendant's position and the judgment of the superior court denying the motion is affirmed.

Affirmed.

(162 N. C. 257)

AMERICAN TRUST CO. v. NICHOLSON.

(Supreme Court of North Carolina. May 13, 1913.)

1. TRUSTS (§ 193½*)—SALE OF TRUST PROPERTY.

Where land was granted in trust to persons in being for their life, remainder to their children, the descendants of any children who may die, leaving issue, to take per stirpes, a court of chancery may, where it has before it all the remaindermen then in being and the other parties to the trust, direct a sale of the trust property for reinvestment.

[Ed. Note.—For other cases, see Trusts, Cent. Dig. §§ 246, 248; Dec. Dig. § 193½.*]

2. PERPETUITIES (§ 6*)—VALIDITY—RESTRAINTS ON ALIENATION.

Where land was granted in trust to one for life, remainder to his children, a provision that no partition should be made until the youngest child should arrive at the age of 21 years is invalid as a restraint upon alienation, if it be considered as preventing the sale of the trust property for reinvestment; hence the property may be sold for reinvestment instead of distribution.

[Ed. Note.—For other cases, see Perpetuities, Cent. Dig. §§ 4-47, 49-53, 56; Dec. Dig. § 6.*]

Appeal from Superior Court, Mecklenburg County; Webb, Judge.

Controversy between the American Trust Company and W. L. Nicholson submitted without action. From a judgment for plaintiff, defendant excepted and appeals. Affirmed.

This is a controversy submitted without action for the purpose of determining the validity of the title to real estate contracted to be purchased from the plaintiff by the defendant. It is admitted that the title was good in Andrew J. Dotger and wife, and that if the proceeding in the superior court of Mecklenburg county, wherein an order of sale was made by Lyon, Judge, at January term, 1912, appointing the plaintiff a commissioner to sell the land described in the complaint, and the subsequent order in regard to the particular sale in controversy were obtained, is valid, then the title offered defendant by the plaintiff is good and indefeasible.

On April 26, 1899, A. J. Dotger, who was then the owner of the lands in controversy, and his wife executed the following paper writing, which was duly probated and registered:

"Whereas, I, Andrew J. Dotger, of the aforesaid county and state, am the owner in fee simple of a certain tract of land lying and being in the county of Mecklenburg, state of North Carolina, near the city of Charlotte, containing about 89 acres, and

described in a deed made to me by McD. Arledge and wife, which is duly registered in the office of the register of deeds for said county of Mecklenburg, in Book 104, page 122, and in a deed made to me by J. H. and W. R. Wearn, which deed is also duly registered in the office of said register of deeds, in Book 110, page 303, to which two deeds reference is made for a more perfect description of the said tract of land. And whereas, because of my love and affection for my brother, Henry C. Dotger and his wife, Bertha M., and their children, I desire that they shall have the use and benefit of the said tract of land. Now, in consideration of my love and affection for them, and of ten dollars to me in hand paid, I, Andrew J. Dotger, do covenant with the said Henry C. Dotger and his wife Bertha M. and their children as follows:

"(1) That the said Henry C. Dotger and his wife, Bertha M., and the survivor of them, may occupy and use the said plantation as a home so long as they, or the survivor of them, may elect to live upon the said place and use and occupy it as a home for themselves and their children, and that while they, or the survivor of them, may use and occupy the said plantation as aforesaid, they shall have and hold the same free and clear from any demand for rent on the part of myself, my heirs or assigns; they or the survivor of them paying, when due, all taxes and assessments which may be levied against the said plantation.

"(2) Upon the death of Henry C. Dotger and his wife, Bertha M., I covenant and agree that the title to the said plantation shall vest in fee simple in the children of the said Henry C. Dotger and his wife, Bertha M. Dotger, that may then be living, and in the children of any one of their children who may then have died leaving issue, such grandchildren, if any there be, to take per stirpes and not per capita; provided, however, that no partition of said land nor any sale thereof shall be made by any of the issue of the said Henry C. Dotger and his wife, Bertha M. Dotger, until the youngest child shall arrive at the age of twenty-one years, that date being fixed as the time when partition is to be made.

"(3) Upon my death, if that should occur before the demise of my said brother and his wife, I covenant and agree that the title to the said land shall vest in the executor of my will to be held by him upon the same trusts and conditions as I hold the said land under this instrument.

"(4) And in the event of the death of my executor before the death of my brother and his wife, then the title to the said land shall vest in my heirs at law, to be held by them upon the trusts and conditions herein set out.

"(5) If my said brother and his wife shall elect not to use and occupy the said planta-

tion as a home, and shall signify such election by removing from it or shall attempt to incumber it or to assign or mortgage any right which they acquire hereunder, then and in that event the possession and control of the said plantation shall be reserved by me or by my successor or successors hereunder, and I or they shall collect the rents and profits thereof, and having first paid all taxes and assessments due thereon, and all expenses incurred in the administration of this trust, shall apply the balance of such rents to the support and maintenance of the said family, as the trustees may see fit to do, and upon the death of both the said Henry C. Dotger and his wife, Bertha M. Dotger, the possession and control of the said plantation shall immediately pass over to the descendants of the said Henry C. Dotger and his wife, Bertha M. Dotger, as above provided, who shall then become, by the operation of this instrument, invested with the fee-simple title of the said land, subject only to the limitation aforesaid. And Clara L. Dotger, wife of the said Andrew J. Dotger, joins her husband in the execution of this deed in token of her renunciation of all right of dower in the land above described.

"In witness whereof the said Andrew J. Dotger and wife, Clara L. Dotger, have here-to set their hands and seals, this 26th day of April, 1899.

"Andrew J. Dotger. [Seal.]

"Clara L. Dotger. [Seal.]"

On November 16, 1911, an action was commenced in the superior court of Mecklenburg county for a sale of said lands or parts thereof, subject to confirmation by the court, and to reinvest the proceeds of sale.

Henry C. Dotger and wife, all their children, Freda L. Burch, Anna D. Kirby, Bertha C. McLaughlin, F. W. Dotger, and Dorothy F. Dotger, all their grandchildren, Florence E. Burch and Caroline Kirby, the Fidelity Trust Company, executor of A. J. Dotger, deceased, Annie C. New, Dora Warner, Elizabeth Wolf, Claire Richards, and Herbert L. Richards, who with the plaintiffs are all the heirs of A. J. Dotger, were parties to said action, and the plaintiffs alleged, among other things, in their complaint: "That the plaintiffs, Henry C. Dotger and wife, Bertha M. Dotger, have, since the execution of said deed, occupied and used the lands therein described as a home, and have in every respect complied with all the terms and conditions of said deed. That at the time said deed was executed the lands therein described were of small value and were suitable only for agricultural purposes. That the city of Charlotte has grown and extended in area until the greater part of said lands are now situated within said city and all of said lands have become very desirable for residential purposes. That said lands have so increased in value that they are now worth the sum of \$100,000, and are assessed

for taxation at the sum of \$25,000, which assessment will likely be increased at the next appraisal of property for taxation. That said lands are likely to be subjected at any time to assessment for purposes of public improvement. That, on account of the high taxes levied against said lands and the assessments to which they may at any time be subjected, the said lands have not only ceased to be profitable for farming and trucking purposes, but have actually become burdensome to plaintiffs. That the interest of all parties concerned would be materially enhanced if said lands or parts thereof were sold and the proceeds reinvested in other estate of a profit-bearing character or in the improvement of other real estate or such part of said lands as may not be sold; such newly acquired or improved real estate to be held upon the same contingencies and in like manner as was the property ordered to be sold."

Answers were filed, guardians ad litem appointed, and at the hearing the following judgment was rendered therein at January term, 1912: "This cause coming on to be heard, and being heard upon the pleadings filed in the cause, and it appearing to the court from the pleadings, the affidavits of John F. Orr, Paul Chatham, and N. W. Wallace, and other evidence introduced, that the interest of all parties concerned would be materially enhanced if the lands described in the complaint herein filed, or parts hereof, were sold and the proceeds reinvested in other real estate of a profit-bearing character or in the improvement of other real estate or such part of said lands as may not be sold; and it further appearing that the American Trust Company, a corporation, having its principal office and place of business at Charlotte, N. C., is a suitable entity to act as commissioner for the purpose of making sale of said lands and reinvestment of the proceeds derived from such sale: It is therefore, upon motion of Morrison & McLain, attorneys for plaintiffs, ordered and adjudged that the American Trust Company be and it is hereby appointed a commissioner clothed with full power and authority to sell said lands, or any parts or parcels thereof, subject to confirmation by the court, at either public or private sale, and reinvest the proceeds under order of court, after first paying the costs of this proceeding to be taxed by the clerk, in other real estate of a profit-bearing character or in the improvement of such other real estate or such parts of said lands as may not be sold; such newly acquired or improved real estate to be held upon the same contingencies and in like manner as the property ordered to be sold. And this cause is retained for the further orders of the court. C. C. Lyon, Judge Presiding."

In October, 1912, the commissioner appointed in said judgment reported to the court that the defendant Nicholson had offered

\$5,000 for 1.87 acres of said land upon the terms set out in the report, and at October term, 1912, of said court said offer was accepted, and the commissioner was directed to execute a deed to the purchaser, upon compliance with the terms of the offer.

The commissioner offered to execute a deed in accordance with said last judgment, and the defendant refused to pay the purchase money, alleging that the title was defective, and thereupon the following judgment was rendered: "This cause coming on to be heard, the plaintiff being represented by its attorneys of record, Morrison & McLain, and the defendant his attorneys of record, Stewart & McRae, and being heard: It is ordered and adjudged that the title tendered to the defendant by the plaintiff is good and indefeasible, and that the plaintiff is entitled to judgment against the defendant for the amount of the purchase money upon the execution to the defendant of the deed referred to in the case submitted to the court. Jas. L. Webb, Judge Presiding."

The defendant excepted and appealed.

Stewart & McRae, of Charlotte, for appellant. Morrison & McLain, of Charlotte, for appellee.

ALLEN, J. [1] The power of the court to order a sale of the land in controversy, with the parties before it, considered independent of the provision in the declaration of trust "that no partition of said land nor any sale thereof shall be made by any of the issue of the said Henry C. Dotger and his wife, Bertha M. Dotger, until the youngest child shall arrive at the age of twenty-one years, that date being fixed as the time when partition is to be made," is settled in *Springs v. Scott*, 132 N. C. 563, 44 S. E. 116, where Justice Connor, in an elaborate and learned opinion, after reviewing the authorities, says: "Upon a careful examination of the cases in our own reports and those of other states, we are of the opinion: (1) That, without regard to the act of 1903, the court has the power to order the sale of real estate limited to a tenant for life, with remainder to children or issue, upon failure thereof, over to persons, all or some of whom are not in esse, when one of the class being first in remainder after the expiration of the life estate is in esse and a party to the proceeding to represent the class, and that upon decree passed, and sale and title made pursuant thereto, the purchaser acquires a perfect title as against all persons in esse or in posse. (2) That, when the estate is vested in a trustee to preserve contingent remainders and limitations, the court may, upon petition of the life tenant and the trustee, with such of the remaindermen as may be in esse, proceed to order the sale and bind all persons either in esse or in posse."

[2] Nor do we think the provision quoted prevents the exercise of this power. If treat-

ed as a restraint on alienation, it is void. *Dick v. Pitchford*, 21 N. C. 480; *Mebane v. Mebane*, 39 N. C. 131, 44 Am. Dec. 102; *Pace v. Pace*, 73 N. C. 119; *Latimer v. Waddell*, 119 N. C. 370, 26 S. E. 122, 3 L. R. A. (N. S.) 668; *Wool v. Fleetwood*, 136 N. C. 465, 48 S. E. 785, 67 L. R. A. 444; *Christmas v. Winston*, 152 N. C. 48, 67 S. E. 58, 27 L. R. A. (N. S.) 1084.

In *Wool v. Fleetwood*, *supra*, where the subject is fully discussed by Justice Walker, it is held, citing *Dick v. Pitchford*, that a condition against alienation annexed to a life estate is void, and in *Christmas v. Winston*, *supra*, citing *Latimer v. Waddell*, that such a condition, whether annexed to a life estate or a fee, is not made valid because limited to a certain period of time.

The other condition as to partition has not been violated, as no actual partition has been had, and the sale is not for the purpose of dividing the proceeds which are directed to be held for reinvestment. It is not necessary for us to decide the question in the view we have taken of the case, but there is also high authority for the position that conditions like those before us annexed to estates, limiting the powers of trustees or cestui que trust, if valid, do not prevent the court of equity from ordering a sale of property contrary to such condition, upon facts like those alleged in the complaint. *Curtiss v. Brown*, 29 Ill. 230; *Weld v. Weld*, 23 R. I. 311, 50 Atl. 490; *Johns v. Johns*, 172 Ill. 472, 50 N. E. 337; *Conkling v. Washington Uni.*, 2 Md. Ch. 504; *Stanley v. Colt*, 72 U. S. (5 Wall.) 169, 18 L. Ed. 502; *Jones v. Habersham*, 107 U. S. 183, 2 Sup. Ct. 336, 27 L. Ed. 401; *Gavin v. Curtin*, 171 Ill. 648, 49 N. E. 523, 40 L. R. A. 776.

In the first of these cases (*Curtiss v. Brown*) the court says: "This question of jurisdiction does not depend upon the necessities of this case, but, if it is possible that such a case might have existed as would authorize the court to break in upon the provisions of this trust deed and order a disposition of the property not in accordance with its terms, then the power to do so is established. The case might exist where the property was unproductive, as in this case, but where the cestui que trust was absolutely perishing from want, or forced to the poorhouse, or where the trustee could not possibly raise the means to pay the taxes upon the property and thus save it from a public sale and a total loss. Can it be said that the beneficiary of an estate which would bring in the market \$100,000 should perish in the street from want or be sent to the poorhouse for support, or that the estate should be totally lost, because there is no power in the courts to relieve against the provisions of the instrument creating this trust? Exigencies often arise not contemplated by the party creating the trust, and which, had they been anticipated, would un-

doubtedly have been provided for, where the aid of the court of chancery must be invoked to grant relief imperatively required; and in such cases the court must, as far as may be, occupy the place of the party creating the trust and do with the fund what he would have dictated had he anticipated the emergency. In *Harvey v. Harvey*, 2 P. Wms., the court said it 'would do what in common presumption the father, if living, would, nay, ought, to have done, which was to provide necessaries for his children.' It is true that courts should be exceedingly cautious when interfering with or changing in any way the settlements of trust estates, and especially in seeing that such estates are not squandered and lost. Trust estates are peculiarly under the charge of and within the jurisdiction of the court of chancery. The most familiar instances in which the court interferes and sets aside some of the express terms of the deed creating the trust is in the removal of the trustee for misconduct and the appointment of another in his stead. But this is as much a violation of the terms of the settlement as is a decree to sell the estate and reinvest it, or to apply the proceeds to the preservation of the estate, or the relief of the cestui que trust from pinching want. From very necessity a power must exist somewhere in the community to grant relief in such cases of absolute necessity, and, under our system of jurisprudence, that power is vested in the court of chancery. This power is liable to be abused or imprudently exercised, no doubt, and so may every power vested in the courts or other branches of the government. The liability to the abuse or misuse of power can never prove its nonexistence, else all powers of government would be at once annihilated."

And in the last (*Gavin v. Curtin*): "We think it is well settled that a court of equity, if it has jurisdiction in a given case, cannot be deemed lacking in power to order the sale of real estate, which is the subject of a trust, on the ground alone that the limitations of the instrument creating the trust expressly deny the power of alienation. It is true the exercise of that power can only be justified by some exigency which makes the action of the court, in a sense, indispensable to the preservation of the interests of the parties in the subject-matter of the trust, or, possibly, in case of some other necessity of the most urgent character. The jurisdiction and power of a court of chancery in this respect were the subject of discussion in this court in *Curtiss v. Brown*, 29 Ill. 201, *Voris v. Sloan*, 68 Ill. 588, and *Hale v. Hale*, 146 Ill. 227 [33 N. E. 858, 20 L. R. A. 247]; and the conclusion reached in each of such cases is in harmony with the view hereinbefore expressed that courts in equity have full power to entertain bills and grant relief in such cases as that at bar."

We are therefore of opinion, upon a care-

ful review of the whole record, that the plaintiff can convey a good title to the defendant, and that there is no error.

Affirmed.

(102 N. C. 273)

VANDERBILT v. ROBERTS et al.

(Supreme Court of North Carolina. May 13, 1913.)

1. PARTITION (§ 79*)—REFEREE'S REPORT—EXCEPTIONS.

A party objecting to the decision of a referee in partition is limited to the errors pointed out by his exception.

[Ed. Note.—For other cases, see Partition, Cent. Dig. §§ 224, 225; Dec. Dig. § 79.*]

2. PARTITION (§ 79*)—PROCEEDINGS—JURY TRIAL.

The question whether land sought to be partitioned is indivisible so that a sale is necessary when raised by exceptions to the report of a referee is not an issue of fact triable by the jury but is a mere question of fact which may be determined either by the clerk or on appeal by the court without a jury.

[Ed. Note.—For other cases, see Partition, Cent. Dig. §§ 224, 225; Dec. Dig. § 79.*]

Appeal from Superior Court, McDowell County; Lyon, Judge.

Suit for partition by George W. Vanderbilt against Frances E. A. Roberts and others. From a decree of sale by referee, defendants appeal to the superior court, where a jury trial was directed, and plaintiff excepts and appeals. Reversed.

Petition for partition of a certain tract of land of 50 acres in Henderson county, removed to and tried in McDowell county because of the disqualification of the clerk of the former county. The clerk referred the cause to a referee, who heard the cause, reported the evidence, and found as a fact that partition cannot be made without serious injustice to the various and numerous owners, and that the interest of all parties will be greatly promoted by a sale of the entire tract for partition.

There are a large number of defendants, all of whom consent to a sale, except the heirs of W. T. Johnson, whose names are set out in their joint answer on pages 12 and 13 of the record. These defendants duly excepted to the order of reference. They also excepted to the report of the referee and demanded a jury trial in these words: "That the question of whether the said land can be actually divided or not be submitted to a jury."

Lyon, Judge, granted defendants' motion and directed that the cause be tried by a jury upon the issues raised by the pleadings. Plaintiff excepts and appeals.

Harkins & Van Winkle and J. G. Merriam, all of Asheville, and Pless & Winborne, of Marion, for appellant. Michael Schenck, of Hendersonville, for appellees, heirs of W. T. Johnson.

BROWN, J. (after stating the facts as above). It is needless to consider the question as to whether the joint answer of the heirs of W. T. Johnson raises an issue of fact, except as to whether the land is susceptible of actual partition without serious injury to the many owners. The answer certainly raises no issue of title.

[1] These defendants in their exceptions to the referee's report have pointed out with particularity the only matter upon which they demand a jury trial, viz., as to whether the land can be actually divided. Having specified their issue in their exception to the referee's report, they are necessarily limited to that. Driller Co. v. Worth, 118 N. C. 746, 24 S. E. 517.

[2] These defendants are not entitled to have that matter passed on by a jury because that is not an issue, but only a question of fact to be determined first by the clerk and on appeal by the judge. The clerk heard the cause and found the facts fully and ordered a sale. These defendants appealed to the judge. The judge held, as a matter of law, "that the answer of these defendants raises issues of fact which should be tried by a jury. In this he erred. No issues of title or fact are raised except as to the feasibility of dividing the 50-acre tract of land among a large number of owners. This is only a question of fact.

In Ledbetter v. Pinner, 120 N. C. 455, 27 S. E. 123, it is held: "The only controverted fact arising on the pleadings was as to the advisability of a sale for partition or an actual division. This was not an issue of fact, but a question of fact for the decision of the clerk in the first instance, subject to review by the judge on appeal." Tayloe v. Carrow, 156 N. C. 8, 72 S. E. 76, and cases cited.

The order of Judge Lyon is set aside and the cause remanded, to be proceeded with in accordance with this opinion. The costs of this appeal will be taxed against the heirs of W. T. Johnson, whose names are set out in their answer.

Reversed.

(102 N. C. 635)

STATE v. TONEY.

(Supreme Court of North Carolina. May 13, 1913.)

1. HUSBAND AND WIFE (§ 302*)—"ABANDONMENT"—WHAT CONSTITUTES.

To constitute the offense of abandonment denounced by Revisal 1905, § 3355, providing that, if any husband shall willfully abandon his wife without providing adequate support, he shall be guilty of a misdemeanor, both abandonment and nonsupport are essential, and mere proof of abandonment will not support the conviction.

[Ed. Note.—For other cases, see Husband and Wife, Cent. Dig. § 1100; Dec. Dig. § 302.*]

For other definitions, see Words and Phrases, vol. 1, pp. 4-13; vol. 8, p. 7559.]

2. HUSBAND AND WIFE (§ 304*)—ABANDONMENT—WHAT CONSTITUTES.

Mere statements by accused that, while he was in another state, he cared no more for his wife than any other respectable woman, and that he did not propose to live with an aggravating woman, will not in itself constitute the offense of abandonment denounced by Revisal, 1905, § 3355; the element of nonsupport being absent.

[Ed. Note.—For other cases, see Husband and Wife, Cent. Dig. § 1102; Dec. Dig. § 304.*]

3. CRIMINAL LAW (§ 97*)—OFFENSES—JURISDICTION.

The courts of North Carolina cannot take cognizance of the offense of wife abandonment, where it was wholly consummated in a foreign state.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 177-189, 191; Dec. Dig. § 97.*]

Appeal from Superior Court, Rutherford County; Adams, Judge.

F. L. Toney was convicted of wife abandonment, and he appeals. Reversed, and remanded for new trial.

Indictment for abandonment and nonsupport under Revisal, § 3355.

The prosecutrix and the defendant were married in January, 1912, and kept house for three months, when the defendant told his wife that he was going away on a visit of a few days. He left with his trunk, and remained away about a month. His wife went to her father's home, and lived with him until she returned to her husband, who was then at Blacksburg, S. C. Defendant wrote to his wife about two weeks after he left, and sent her some money. He sent for her, and she went to him in South Carolina, and they lived at Drayton, S. C., for two weeks. She then left him, and returned to her father's home. She was not driven away by her husband, but left of her own accord. He told her, if she wished to go, he would not object, but left it to her. When she left, he bought her a ticket, gave her \$10, and accompanied her on her journey as far as Chesney, S. C., where she kissed him and they parted. They have been living apart ever since. He told her while they lived in South Carolina that he did not care any more for her than he did for any other respectable woman. He paid for her board and clothing while they were at Drayton, and when he left Caroleen, in this state, she received \$23.50, and he sent her, before he left the state for Drayton, S. C., \$22.50. The warrant was issued June 15, 1912. Defendant offered to live with her, but she refused to do so. The court left the case to the jury upon the question whether there had been an abandonment in this state and a failure to provide adequate support. Defendant was convicted, and appealed.

Quinn, Hamrick & McRorie, of Shelby, for appellant. Attorney General Bickett and T. H. Calvert, of Raleigh, for the State.

WALKER, J. (after stating the facts as above). [1, 2] We have examined the record in this case very carefully, and have failed to find any evidence that defendant failed to provide his wife with adequate support, even if the evidence is sufficient to show an abandonment. The crime denounced by the statute consists of two elements: First, abandonment; second, failure to provide adequate support. If either is wanting, there is no criminal offense. This is clear, but it is also so decided in *State v. May*, 132 N. C. 1020, 43 S. E. 819. The failure to establish this essential ingredient of the crime is fatal to the prosecution. It does not appear what was an adequate support for the wife, and, for all that does appear, she received from her husband all that was required to meet her expenses. There was evidence in the case that he supplied all of her wants and treated her kindly while they lived in South Carolina, and when she prepared to leave him, stating that she did not care to come back, he said to her that, if she stayed there with him, "he would do his best for her." He proved a good character by the state's witness, and there was no testimony tending to disparage him, except the bare circumstances of the case. A witness testified that after she had left him and returned to her father's home and refused to come back and live with him, and after he was indicted, he heard defendant say that "he did not propose to live with an aggravating woman." This was not a very nice, but a very rude and indelicate speech. It was morally reprehensible, and the same may be said of his offensive remark to his wife in South Carolina. He is not, though, indicted for mere rudeness of speech or unseemly conduct, but for a violation of the criminal law, and what he thus said has no direct or material bearing upon the legal question involved. All things considered, we conclude that the state failed in its proof as to inadequacy of support, if not as to the abandonment. It may seriously be doubted if the facts as now presented bring this case within the intent and meaning of the statute. *Witty v. Barham*, 147 N. C. 479, 61 S. E. 372.

[3] But we may say more confidently that defendant is not criminally liable in this state for any marital delinquency in South Carolina. If any offense was committed in that state, he can be made to answer only in her courts. Whether he can be successfully prosecuted there is not a part of our inquiry. We are concerned only with the enforcement of our own laws, and therefore merely decide that there was no evidence of the charge in the indictment that defendant did not provide his wife with an adequate support. This point is sufficiently raised by the exceptions.

New trial.

(162 N. C. 277)

CARPENTER v. CAROLINA, C. & O. RY.
(Supreme Court of North Carolina. May 13, 1913.)

1. APPEAL AND ERROR (§ 999*)—QUESTION OF FACTS—CONCLUSIVENESS OF VERDICT.

A verdict on an issue of fact is conclusive.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 8912-3921, 3923, 3924; Dec. Dig. § 999.*]

2. WATERS AND WATER COURSES (§ 179*)—PONDING—EVIDENCE—FACTS FOREIGN TO ISSUE.

In an action against a railroad for damages for wrongfully ponding water on plaintiff's land, evidence that certain lands on the river some distance above and below that of plaintiff and of the same character had been turned out before the construction of the roadbed, and its cultivation no longer attempted, was properly excluded as introducing issues foreign to the inquiry.

[Ed. Note.—For other cases, see Waters and Water Courses, Cent. Dig. §§ 244-250, 256-259, 263, 264; Dec. Dig. § 179.*]

Appeal from Superior Court, Rutherford County; Adams, Judge.

Action by Jacob Carpenter against the Carolina, Clinchfield & Ohio Railway. Judgment for plaintiff, and defendant appeals. Affirmed.

Quinn, Hamrick & McRorie, of Rutherfordton, and J. J. McLaughlin, of Marion, for appellant. McBrayer & McBrayer and S. Gallert, all of Rutherfordton, for appellee.

HOKE, J. [1] There was allegation with evidence on part of plaintiff tending to show that the defendant company in constructing its roadbed along French Broad river, just below plaintiff's lands, had filled up the original bed of the stream, thereby diverting the water into an artificial channel, inadequate for the flow of the stream, causing the waters of same to pond back upon and sob and injure plaintiff's lands, to his great damage, etc.

There was evidence on the part of defendant in denial of this view, but the issue is almost exclusively one of fact; and, the jury having accepted plaintiff's version of the matter, an actionable wrong has been clearly established.

[2] It was chiefly urged for error that the court sustained an exception to questions proposed by defendant to two or more of the witnesses, and to the effect that certain lands on the river some distance below and above that of plaintiff and of same character had been turned out before the construction of the railroad, and its cultivation no longer attempted. There are so many reasons which might have led to this course on the part of the owners of these other tracts that the proposed questions in our opinion were properly excluded as tending to introduce issues entirely foreign to the inquiry, and more likely to distract than to aid the jury in their deliberations. *Chaffin v. Manufactur-*

ing Co., 135 N. C. 102, 47 S. E. 226; *Warren v. Makely*, 85 N. C. 12.

After careful examination of the record, we find no reason for disturbing the results of the trial, and the judgment in plaintiff's favor is affirmed.

Affirmed.

(162 N. C. 266)

MOORE v. JOHNSON et al.

(Supreme Court of North Carolina. May 13, 1913.)

1. EJECTMENT (§ 15*)—CLAIMS THROUGH COMMON SOURCE—REGISTRATION OF TITLE.

Where both parties to an action to recover land claim from a common source of title, the right of recovery depends upon priority of registration of the deeds of the respective parties, and not upon color of title and adverse possession thereunder.

[Ed. Note.—For other cases, see Ejectment, Cent. Dig. §§ 59-62; Dec. Dig. § 15.*]

2. ADVERSE POSSESSION (§ 82*)—COLOR OF TITLE—UNREGISTERED DEED.

An unregistered deed does not constitute color of title since the enactment of Acts 1885, c. 147 (Revisal 1905, § 980), providing that no conveyance shall be valid as against creditors or purchasers for value but from the registration thereof.

[Ed. Note.—For other cases, see Adverse Possession, Cent. Dig. §§ 468-471; Dec. Dig. § 82.*]

3. EJECTMENT (§ 15*)—COMMON SOURCE.

Though plaintiff in an action to recover land introduced in evidence a grant from the state to P., who conveyed to C., and defendant introduced a grant from the state to F., who also conveyed to C., the parties claimed through C. as a common source of title.

[Ed. Note.—For other cases, see Ejectment, Cent. Dig. §§ 59-62; Dec. Dig. § 15.*]

4. HUSBAND AND WIFE (§§ 193, 194*)—CONVEYANCES.

A deed by a married woman without the joinder of her husband and acknowledgment of both and her privy examination was void as to her.

[Ed. Note.—For other cases, see Husband and Wife, Cent. Dig. §§ 716-718, 726, 940; Dec. Dig. §§ 193, 194.* Acknowledgment, Cent. Dig. §§ 19, 20.]

5. VENDOR AND PURCHASER (§ 228*)—REGISTRATION—EFFECT OF NOTICE.

Notice, however complete and formal, will not supply the place of the registration of a deed.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. §§ 495-501; Dec. Dig. § 228.*]

Appeal from Superior Court, Wilkes County; Lyon, Judge.

Action by P. H. Moore against Mary Johnson and others. From a judgment for defendants, plaintiff appeals. Affirmed.

This is an action for the recovery of 23 acres of land. The defendants are Mary Johnson and her children, Thomas Johnson and Walter Johnson. If Mary Johnson can successfully defend the action, plaintiff cannot recover against her codefendants, her children, as they are in possession under her.

Plaintiff claimed title as follows:

(1) Grant from the state to Richard Parker for 80 acres of land, dated July 29, 1843.

(2) Deed from Richard Parker to William Tedder, June 1, 1830, and from William Tedder to James Calloway, April 16, 1844, the will of James Calloway, December 30, 1878, appointing George H. Brown his executor, with power to sell his lands, in his discretion, to pay his debts, and make title to the same, and deed of George H. Brown, executor of James Calloway, to Wilson Moore, April 8, 1880, registered March 16, 1909, and deed from Wilson Moore to plaintiff, P. H. Moore, January 12, 1901, registered December 2, 1907.

There was some evidence that all these deeds and the will cover the land in dispute, and evidence to the contrary. There was also evidence of possession by plaintiff of the land for about 24 years before this suit was brought.

Defendant denied the plaintiff's title and asserted title in herself as follows:

(1) Grant of the state to James Fletcher, dated April 17, 1799.

(2) Deed from James Calloway to Jesse Anderson, dated October 19, 1863, and registered February 20, 1906.

(3) Death of Jesse Anderson, leaving four children, (1) James Anderson, to whom Calloway conveyed; (2) Mary Anderson, who married John Johnson in 1880, he being still alive; (3) John Anderson, who died 25 years ago intestate and without having married; and (4) Reuben Anderson, who conveyed his one-third interest in his father's land to plaintiff, P. H. Moore, March 14, 1891.

(4) Deed from P. H. Moore and wife to James Anderson, dated October 6, 1900, and registered September 27, 1912.

(5) James Anderson and his sister, Mrs. Mary Johnson, the defendant, partitioned their lands and executed deeds accordingly, James Anderson conveying to Mary Johnson her one-half share in severalty by deed dated January 6, 1907, and registered March 6, 1909.

(6) There was some evidence that the grant and deeds in defendant's chain of title covered the locus in quo.

The court in its charge made the case turn, first, upon the question whether the defendant's deeds covered the land in dispute, instructing the jury, if they did, to answer the issue as to ownership in favor of defendants, and still to answer in that way if they found that plaintiff's deeds did not cover the land, the burden being upon plaintiff to show that fact, but he further instructed them to answer the issue for the plaintiff if they found that his deeds covered the land and the defendant's did not. The court then proceeded to instruct the jury as follows: "Both parties claim under James Calloway. They admit that at one time James Calloway owned the 150-acre tract and the 80-acre tract, and

that he made a deed to the defendants or to those under whom the defendants claim, and that his executor made a deed to Wilson Moore, under whom the plaintiff claims. Now, the deed of James Calloway to Jesse Anderson under whom the defendant, Mary Johnson, claims, was made in 1863, and was registered in 1906. The deed from George Brown to Wilson Moore, under whom the plaintiff claims, was made in 1880 and registered March 16, 1909, about three years after the deed to Jesse Anderson was registered. So there is no question in this case of adverse possession. The plaintiff, P. H. Moore, has not introduced any deed under which he has held possession of the land for seven years. While his deed is seven years old, it only counts as color of title against Mary Johnson from the date of its registration, and that was in 1909, and not seven years before the suit was brought (which was March 3, 1908). In passing upon the issues in this case you will not consider the quitclaim deed of James Anderson either as against him or any one else. The whole question turns on whether or not the James Fletcher grant and deeds to the defendants from James Calloway on down cover the land in dispute. If they do, the plaintiff is not entitled to recover, but if the defendant's deeds do not cover the land in dispute, and if the deed from James Calloway to Jesse Anderson did not cover the land in dispute, the plaintiff would be entitled to recover, provided you find from the evidence and by the greater weight of the evidence that the Richard Parker grant and the deeds introduced by the plaintiff do cover the land in dispute."

The jury returned a verdict for the defendant, and plaintiff appealed, having assigned as error each instruction of the court, as above stated, and also the refusal of the court to give this instruction requested by him in apt time: "If the jury find from the evidence that the plaintiff and those under whom he claims have been in the open, peaceable, and notorious possession of the land in controversy, holding the same adversely to the defendants for seven years prior to the commencement of this action under color of title, such possession would ripen title in plaintiff, and the jury should answer the first issue, 'Yes.'"

W. W. Barber, of Wilkesboro, for appellant. H. A. Cranor and Hackett & Gilreath, all of Wilkesboro, for appellees.

WALKER, J. (after stating the facts as above). [1] We do not see why the charge of the court was not correct under the rule, now well established by the decisions of this court, that where the parties to the action claim from a common source of title, in this case James Calloway, the true title and right to recover depends, not upon color of title and adverse possession under it, but must

be determined by reference to the date of registration of the deeds of the respective parties.

[2] It was held in *Austin v. Staten*, 126 N. C. 783, 36 S. E. 338, that in such a case "an unregistered deed does not now constitute color of title," since the passage of Acts 1885, c. 147 (Revisal of 1905, § 980). This view of the law was adopted in *Janney v. Robbins*, 141 N. C. 400, 53 S. E. 863, the court following the decisions in *Austin v. Staten*, supra, *Lindsay v. Beaman*, 128 N. C. 189, 38 S. E. 811, *Collins v. Davis*, 132 N. C. 106, 43 S. E. 579, and *Laton v. Crowell*, 136 N. C. 380, 48 S. E. 767. Justice Hoke in *Janney v. Robbins*, referring to what had been decided in *Austin v. Staten*, and its legal effect upon titles as a construction of the Acts of 1885, c. 147 (Revisal, § 980), said: "The plaintiff in *Austin v. Staten* claimed under a deed to himself from H. W. Staten and two others, dated March 31, 1896, registered the same day. The defendant claimed under a deed to himself from the same parties, dated December 31, 1887, registered May 31, 1897. It will be noted that there both parties claimed from the same grantor, and the plaintiff's deed, though dated nine years or more later than the defendant's, had been registered more than a year prior to the defendant's deed. There were questions of fraud involved in the case in no way material to the point now considered. By the express provisions of the registration act the plaintiff on the record and face of the papers had the superior right because his deed had been first registered. Defendant then took the position that, though his deed by virtue of the registration act was avoided as against plaintiff, yet the same was good as color of title, and proposed to maintain his title by showing occupation under his unregistered deed for seven years. The court held that to allow this would be "in effect to destroy chapter 147, Laws 1885, and this we cannot do." It will be observed that the facts thus recited as those in *Austin v. Staten* are substantially the same as those we have before us in this record. The court, both in *Janney v. Robbins* and *Collins v. Davis*, expresses a very serious doubt as to whether the Legislature intended to effect such a radical change by the act of 1885 in the law of color of title, as formerly declared, but this doubt was finally settled in *Collins v. Davis*, supra, by the use of this language: "We therefore hold that where one makes a deed for land for a valuable consideration and the grantee fails to register it, but enters into possession thereunder and remains thereon for more than seven years, such deed does not constitute color of title and bar the entry of a grantee in a subsequent deed for a valuable consideration who has duly registered his deed. * * * Except in cases coming within this rule, the rights acquired

by adverse possession for seven years under color of title are not disturbed or affected by the act of 1885. To this extent we affirm the law as laid down in *Austin v. Staten*, supra. It is in harmony with the legislative purpose and policy incorporated into our laws by the act of 1885. The act intended to make secure and give notice of the condition of titles and thereby prevent the evils existing under the law prior thereto, and must be construed with reference to this evil and in furtherance of the remedy," which was afterwards approved in *Janney v. Robbins*, supra. The court did say in both of these cases that the doctrine of color of title is not modified except to the extent stated; that is, where the parties claim from the same source of title and in cases coming strictly within the principle, and that when they do not so claim, but derive their alleged right from independent sources, the doctrine of color of title, with respect to an unregistered deed, still exists.

[3] The plaintiff argues, though, in his brief, that the parties in this case do not claim from a common source, and he seems to think that because the plaintiff introduced one grant from the state to Richard Parker for the 80 acres, and defendant a grant to James Fletcher for the 150 acres, both of which covered the disputed land, they claimed by independent titles. But not so, for the true title afterwards was acquired, or is presumed to have been acquired, by James Calloway, who thereby became, if we may so speak by analogy to a descent, the propositus of both parties, as they both introduced mesne conveyances to themselves from him and those under whom they claimed. The grants are of no importance, as there was no evidence of any better title than that presumed to have been held by Calloway, with which plaintiff connected himself. It was upon the idea that, by the introduction of the grants, it was shown that the parties claimed under different titles, and not from a common source, that plaintiff requested the instruction which was refused, and properly so, and his exceptions to the charge are all based upon the same erroneous view of the law. This is not a question of the lappage of two grants, though they may actually interfere with or overlap each other. The true title, so far as appears, came finally into James Calloway, and we start with him, and are not required to consider the Parker or Fletcher grants. It may be added that neither of the parties is connected by mesne conveyances or otherwise with the Fletcher grant. The rulings of the court were all correct, unless it be that the plaintiff's deed was color of title, and we have held that it was not. The case was tried upon the theory that the pivotal question involved was whether the plaintiff's deed, not having been registered until the year 1900, was color of title, the defendant's having

been registered before that year and before the bringing of this suit, and upon this theory we decide it. There is no merit in the other question.

[4] A quitclaim deed from James Anderson to Wilson Moore, who conveyed to the plaintiff, can play no part in the case, as it appears that at the time it was made Anderson had parted with his title, and the joinder in the deed of Mary Johnson, alone or without her husband, was void as to her, she being a married woman and the joinder of her husband, with acknowledgment of both and her privy examination, being necessary to give efficacy to the deed. But plaintiff's counsel admits that this, the second, exception becomes immaterial and the ruling unprejudicial in view of our holding as to the other assignment of error. The act of 1885 was intended, of course, to protect only bona fide purchasers for value and without notice, but there is no question of that sort in this case.

[5] No notice, however full and formal, will supply the place of registration. *Robinson v. Willoughby*, 70 N. C. 358; *Blevins v. Barker*, 75 N. C. 436; *Quinnerly v. Quinnerly*, 114 N. C. 145, 19 S. E. 99, and cases cited. Both parties appear to have acted in good faith in buying the land, and to have given value therefor, and the plaintiff loses unfortunately by his neglect to have his deed duly registered. There was no request for instructions, except as indicated. The only prayer raises the same question practically as the exception to the charge. We have considered the questions discussed in the brief of appellant, covered by his assignments of error, and have discovered no error in the trial.

No error.

(163 N. C. 226)

MISENHEIMER v. ALEXANDER et al.
(Supreme Court of North Carolina. May 13, 1913.)

1. CORPORATIONS (§ 197*)—CAPITAL STOCK—RESOLUTION FORFEITING UNPAID SHARES—ESTOPPEL AGAINST STOCKHOLDER.

Plaintiff with another obtained an option on valuable property and, with the defendants, undertook to organize a corporation, and was allowed 33 shares for his interest in the option and for services to be rendered, and also paid \$1,400 cash for 14 shares issued to him. After the original organization had failed, the stockholders at a meeting at which plaintiff was present, without his protest, passed a resolution reciting the facts and releasing its stockholders from all liability beyond the amount paid in cash for which certificates of stock had been issued, and provided that the stock issued to plaintiff, in consideration of the option and his services, be surrendered. Plaintiff refused to surrender the 33 shares, and at a subsequent meeting at which he was allowed to vote only 14 shares, it was voted to issue new stock, which measure would have failed had plaintiff been allowed to vote the entire 33 shares. *Held*, in his action to enjoin the issuance of new stock, that as he had

been present when the resolution was passed without protest, he was concluded by the resolution, and was entitled to vote only on 14 shares.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 747, 749-763, 764; Dec. Dig. § 197.*]

2. CORPORATIONS (§ 57*)—BY-LAWS AND RESOLUTIONS—EFFECT AS CONTRACT.

As between a corporation and its stockholders and the stockholders themselves a by-law or resolution may be considered as a contract.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 157-159; Dec. Dig. § 57.*]

3. CORPORATIONS (§ 110*)—RESOLUTION BY STOCKHOLDERS—CONSIDERATION.

Where plaintiff had received 33 shares of stock for a valuable option turned over by him, and for services to be rendered, and others had subscribed for stock on condition that it might be paid for in services, a resolution, passed at a meeting at which plaintiff was present without protest, releasing subscribers from liability except as to stock paid for in cash, and requiring plaintiff to surrender the 33 shares and receive the shares for which he had paid cash, was supported by the consent of the other stockholders, by the surrender of the claim for plaintiff's services, and by relief from his contingent liability to creditors.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. § 461; Dec. Dig. § 110.*]

4. SPECIFIC PERFORMANCE (§ 70*)—CONTRACTS ENFORCEABLE—CORPORATIONS' STOCK OR SECURITIES.

While contracts for the sale or transfer of government securities or shares of stock on the market, and readily obtainable, will not, as a general rule, be specifically enforced, it is otherwise when the agreement for transfer concerns stock of a different character, and contains terms giving the contract special significance and presenting a case where the award of ordinary damages in case of breach would be inadequate.

[Ed. Note.—For other cases, see Specific Performance, Cent. Dig. § 203; Dec. Dig. § 70.*]

5. CORPORATIONS (§ 94*)—CAPITAL STOCK—"CERTIFICATE OF STOCK."

A certificate for shares of stock is not the stock itself, but constitutes only prima facie evidence of the ownership of a number of shares.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. § 435; Dec. Dig. § 94.*]

For other definitions, see Words and Phrases, vol. 2, pp. 1032-1033.]

6. CORPORATIONS (§ 67*)—REDUCTION OF CAPITAL STOCK—STATUTES.

Under Revisal 1906, § 1164, making a notice of the reduction of capital stock necessary to afford stockholders protection against creditors, a reduction without notice, if otherwise valid, is enforceable by the corporation against its members.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 181-183, 449; Dec. Dig. § 67.*]

Appeal from Superior Court, Mecklenburg County; Webb, Judge.

Action by J. J. Misenheimer against S. B. Alexander, Jr., and others. A restraining order obtained by plaintiff was dissolved, and plaintiff appeals. Affirmed.

Civil action to enjoin the issuance of 800 shares of stock, 400 of same being preferred, and 400 common, stock at par value, \$100

per share, in a corporation known as the Equitable Realty Company, involving also a change of name and amendment to charter of the company; heard on return to restraining order before his honor, J. L. Webb, Judge at Chambers, on January 28, 1913. On the hearing it was made to appear that plaintiff, holding certificate for 33 shares of stock in said company, was present at the meeting when the issue was determined upon and proposed to vote his 33 shares against the measure. He was allowed to vote 14 shares, and prevented from voting the entire 33 shares, defendant insisting that this was the extent of his right. It was admitted that the question depended on whether the facts in evidence established the right of plaintiff to vote these 33 shares or raised serious question as to such right. The court entered judgment dissolving the restraining order, and plaintiff excepted and appealed.

G. A. Shuford, of Asheville, and C. A. Duckworth and Stewart & McRae, all of Charlotte, for appellant. Burwell & Cansler, of Charlotte, for appellees.

HOKE, J. [1] The evidence tended to show that on or about April 15, 1912, plaintiff and one W. M. Paul had acquired and held an option on a valuable lot in the city of Charlotte, known as the "Mansion House Lot," at the stipulated price of \$80,000, and as a consideration had deposited their notes for \$500 each. That desiring to avail themselves of their option, the holders, with others, chiefly the defendants, proposed to form a corporation and erect a sky scraper on such lot, to cost not less than \$4,000,000, the undertaking to be entered upon when a bona fide stock subscription of \$100,000 should have been obtained. In pursuance of this purpose, plaintiff and his associate, W. M. Paul, and defendants subscribed to as much as 260 shares of said stock at par value of \$100 per share. That much of the stock subscribed for was on condition that the amount considered requisite, to wit, the \$100,000, should be first subscribed, and several of them on condition that they should be allowed to pay for their subscription in service of value to the company. That the option being about to expire, the corporation having been first formed, the company took over the option, and bought and took a deed for the property, paying therefor \$20,000 in cash and securing the remainder of the contract price, \$60,000, by notes to the vendee and deed of trust on the property to secure the same; the notes of plaintiff and Paul having been assumed by the company and liquidated in the deal. In making the cash payment of \$20,000, the amount of \$10,000 was raised on the note of the company, indorsed by plaintiff and defendants, and the second \$10,000 was secured by second mortgage on the property. In taking over the option at \$5,000 the same

was paid for by issuing 33 shares, the shares in controversy, to plaintiff, and 17 shares to plaintiff's associate, W. M. Paul, and there was evidence tending to show that in addition to the option the plaintiff and W. M. Paul were to give their services to the company in the effort to obtain the amount of stock subscription considered necessary to render the undertaking a feasible project. The evidence further tended to show that the parties failed to obtain the amount of subscription desired and deemed requisite for the purpose contemplated, and the subscribers, having some concern as to their possible liability to creditors by reason of their subscription, and desiring to settle the amount and question of such liability, assembled in corporate meeting and passed resolutions as follows:

"At a called meeting of the stockholders of the Equitable Realty Company held in the office of Paul Chatham on the 25th day of November, 1912, the following stockholders being personally present, S. B. Alexander, Jr., E. T. Garsed, Paul Chatham, C. C. Hook, C. A. Misenheimer, and J. J. Misenheimer, and the following represented by proxy, W. H. Thompson, the following resolutions were unanimously adopted:

"Whereas, at and before the organization of this company the following parties agreed to subscribe for the stock therein in the amounts set opposite their respective names, filed with the secretary of this company, to wit:

Paul Chatham.....	50 shares
C. A. Misenheimer.....	10 shares
S. B. Alexander, Jr.....	25 shares
E. T. Garsed.....	25 shares
Chas. C. Hook.....	25 shares
W. G. Rogers.....	25 shares
Walter M. Paul.....	25 shares
J. J. Misenheimer.....	25 shares
Robt. E. Milligan.....	10 shares
T. C. Thompson Bros., approximately	35 shares
W. R. Ebert.....	5 shares

—the original incorporators, to wit, W. F. Harding, W. O. Gardner, and F. H. Chamberlain, having theretofore each subscribed for ten shares; and whereas, the said S. B. Alexander, Jr., E. T. Garsed, Chas. C. Hook, W. B. Rogers, T. C. Thompson Bros. subscribed for the number of shares of said stock in said company set opposite their respective names as above, upon the condition that the same should be paid for in services to be rendered the corporation in the construction of a fourteen-story building to be located at the corner of Church and West Trade streets in the city of Charlotte, and the said Walter M. Paul and J. J. Misenheimer subscribed for the shares of stock in said company set opposite their respective names as above, on condition that the same should be paid for in services rendered and to be rendered the said corporation, and in consideration of the assignment of an option, which the said Paul and Misenheimer had upon

the lot of land above referred to; and whereas, the other stockholders above mentioned subscribed for stock set opposite their respective names, on condition that the company would proceed forthwith to the erection of said buildings upon said lot, all of which conditions were by mutual mistake of the parties left out of the paper writing signed by them, and whereas, since the organization of said company the following parties have paid in upon said stock subscriptions the following amounts, to wit:

Dr. C. A. Misenheimer.....	\$1,400 00
J. J. Misenheimer.....	1,400 00
Paul Chatham.....	1,400 00
E. T. Garsed.....	1,400 00
T. C. Thompson Bros.....	1,400 00
Hook and Rogers.....	1,400 00
S. B. Alexander.....	1,400 00
W. M. Paul.....	1,200 00

—for which certificates of stock have been issued them respectively; and whereas, it has been decided by the stockholders and officers of said corporation that it is not expedient at this time to proceed with the erection of said building upon the lot aforesaid, in view of the fact that a sufficient amount of stock has not been subscribed to enable the company to proceed therewith, thereby rendering it unnecessary that the parties above named should render the services with which they were to pay for their respective stock subscribed and that those who made cash subscriptions should pay the same into the treasury of the company:

"Therefore, be it resolved unanimously that each of the stockholders and stock subscribers to this corporation be and is hereby released from any and all liabilities on his respective stock subscription to said corporation, beyond the amount which he has paid in in cash and for which stock certificates have been issued, it being recognized by this company that it is unable to fulfill the conditions upon which said stock subscriptions were made.

"It is further resolved, that the certificates of stock issued to the said Walter M. Paul and J. J. Misenheimer for the original amount of their subscriptions be for a like reason surrendered and that new certificates be issued to each of them for the amount of cash paid in by them respectively as above set forth. There being no further business the meeting adjourned.

"Paul Chatham, Chairman.

"Chas. C. Hook, Secretary."

The evidence of defendant was to the effect that plaintiff was present at the meeting and voted for these resolutions, and of plaintiff is that he was present and did not vote or make protest against them. In pursuance of the same certificates of stock were issued to the different subscribers other than plaintiff; W. M. Paul the associate of plaintiff as original holder of the option, surrendering his 17 shares, the number issued

to him by the company at the time the option was taken over. The plaintiff, who has received a check for \$17.01, the difference between the par value of the 14 shares to which he was entitled by the terms of the resolution and the cash paid in by him, to wit, \$1,417.01, but has not received and has declined to take the 14 shares, or to surrender the 33 shares of original issue.

Thirty thousand dollars of the indebtedness for the purchase money being about to mature, the company having no available means to meet the demand, it was formally proposed to amend the charter, make the issue of stock at present in question, to wit, 400 shares preferred and 400 common stock, as a means of relieving the company and raising the money required to pay the claim. It is assumed, and seems to be agreed upon as determinative, that at the corporate meeting when this was decided upon, the measure was properly carried if plaintiff had the right to vote only 14 shares of stock, and that it would fail if he had the right as claimed by him to vote the entire 33 shares. It may be well to note that the resolutions referred to, after reciting that plaintiff and W. M. Paul had made their subscriptions on conditions that same should be paid for in services rendered, and to be rendered, and on assignment of the option, contains provision:

"Therefore, be it resolved that each of the stockholders and stock subscribers to this corporation be and is hereby released from any and all liabilities on his respective stock subscription to said corporation, beyond the amount which he has paid in in cash and for which stock certificates have been issued, it being recognized by this company that it is unable to fulfill the conditions upon which said stock subscriptions were made.

"It is further resolved, that the certificates of stock issued to the said Walter M. Paul and J. J. Misenheimer for the original amount of their subscriptions be for a like reason surrendered and that new certificates be issued to each of them for the amount of cash paid in by them respectively as above set forth."

On these, the facts chiefly relevant, we concur in the ruling of his honor below, that plaintiff's right to vote should be restricted to the 14 shares and that he is concluded by the force and effect of the corporate resolutions above set out, and the acts done pursuant thereto, as to any right to vote the shares in excess of that amount. It is well understood that a stockholder in a private corporation is bound by a corporate resolution regularly passed in accordance with its charter and by-laws (Clark on Corporations, p. 460); and, although attended with some irregularities a member who is present when a measure is formally passed and votes for the same or fails to make protest, is ordinarily concluded (1 Cook on Corporations

[6th Ed.] § 39, p. 730; Callahan v. Ditch Company, 37 Colo. 331, 86 Pac. 123; Wood v. Water Works [C. C.] 44 Fed. 146, 12 L. R. A. 168). It is urged for plaintiff, as we understand his position, that his option was a valuable right which he has passed to the company, and that this transaction should be regarded as an executory agreement to surrender 33 shares in exchange for the 14, and that as to him, the resolution providing for such exchange is unenforceable from a total lack of consideration.

[2] It is not infrequently true that, as between the corporation and its stockholders and the stockholders themselves, a by-law or resolution of the company may be considered as a contract. *New England Trust Co. v. Abbott Ex.*, 162 Mass. 148, 38 N. E. 482, 27 L. R. A. 271; 10 Cyc. 351.

[3] But assuming, as plaintiff contends, that this is a case calling for the application of the principle, the further premise of defendant cannot be maintained that on the facts in evidence there is a total lack of consideration. In a case of this kind the consent of one stockholder may well be regarded as a consideration for the consent of the others, and the position is emphasized in this instance by the fact that W. M. Paul, the associate of plaintiff, as original holder of the option, and who received 17 shares of stock as part of the 50 issued, has surrendered these shares pursuant to the resolution and received or has the right to the number equivalent to the actual cash paid in by him, about \$1,200, thus giving the company and plaintiff as one of its members the pecuniary value of the difference. And the surrender of this claim on plaintiff's services, recited in the resolutions as part of the consideration for the 50 shares, and the relief against the contingent liability of plaintiff to creditors existent when stock has been issued in payment for property, may also be referred to in support of the resolution; the same being one of the requisite steps in affording plaintiff protection from such a demand.

[4] Speaking further to plaintiff's position that this resolution, providing for the surrender of the 33 shares and the issue of the 14 in lieu thereof, should be treated as a contract or agreement: While contracts for the sale or transfer of government securities or shares of stock on the market and readily obtainable will not, as a general rule, be specifically enforced, it is otherwise when the agreement, as in this instance, concerns stock of a different character, and there are terms giving the contract special significance and presenting a case where the award of ordinary damages in case of breach would be inadequate. The distinction adverted to is very well stated in *Cook on Corporations*, § 338, as follows: "An entirely different rule prevails as regards contracts for the sale of

stock of private corporations. If the stock contracted to be sold is easily obtained in the market, and there are no particular reasons why the vendee should have the particular stock contracted for, he is left to his action for damages. But where the value of the stock is not easily ascertainable, or the stock is not to be obtained readily elsewhere, or there is some particular and reasonable cause for the vendee's requiring the stock contracted to be delivered, a court of equity will decree a specific performance and compel the vendor to deliver the stock." It is not required, however, in this case, that defendants should have recourse directly to this principle in the doctrine of specific performance or the remedy ordinarily available in such cases.

[5] The certificate for 33 shares held by plaintiff is not the stock itself, but constitutes only prima facie evidence, of the ownership of that number of shares. *Cook on Corporations* (6th Ed.) § 13; *Clark on Corporations*, p. 260. And as between the parties this resolution of November 25th approved, or certainly acquiesced in by plaintiff, had the force and effect of annulling the 33 shares of stock held by plaintiff, or reducing the same to 14, and the company was well within its rights in denying the right of plaintiff to vote the larger number.

[6] It is further insisted for plaintiff that the reduction contended for is not valid because of the failure of the company and the parties to comply with the statutory requirements contained in *Revisal*, § 1164, and particularly as to the publication of the proper notices, but it will appear from a perusal of the section that this provision as to notice is only necessary to afford the stockholders of a corporation protection against creditors. As between the parties, the reduction, if otherwise lawful and valid and pursuant to resolutions properly passed, will bind the members, and may be enforced as in this instance by corporate action.

There is no error, and the judgment dissolving the restraining order is affirmed.

Affirmed.

The CHIEF JUSTICE not sitting.

(163 N. C. 236)

HARTIS v. CHARLOTTE ELECTRIC RY. CO.

(Supreme Court of North Carolina. May 13, 1913.)

DEPOSITIONS (§ 100*)—ACTIONS IN WHICH DEPOSITIONS MAY BE USED.

Where, pending an action for personal injuries, plaintiff died from the injuries, and her administrator brought an action for her wrongful death, her deposition as to the cause of the injuries regularly taken and filed in the first action with opportunity to the defendant to cross-examine was admissible in evidence in the second action, notwithstanding the technical dissimilarity of parties and causes of action,

since its admissibility was not dependent upon exact identity of parties and causes of action, but rather upon identity of the question under investigation and upon the opportunity of the party against whom it was offered to cross-examine, especially where the complaint in the first action demanded \$10,000, thus giving defendant notice of the importance of the action.

[Ed. Note.—For other cases, see Depositions, Cent. Dig. §§ 297, 298; Dec. Dig. § 100.*]

Brown and Walker, JJ., dissenting.

Appeal from Superior Court, Mecklenburg County; Webb, Judge.

Action by J. M. Hartis, administrator of Maggie J. Hartis, against the Charlotte Electric Railway Company. From a judgment of nonsuit, plaintiff appeals. New trial ordered.

It is alleged that Maggie J. Hartis was injured by the negligence of the defendant on May 24, 1910, and soon thereafter the said Maggie J. Hartis and her husband commenced an action against the defendant to recover damages for the injury. During the pendency of that action the deposition of the said Maggie J. Hartis was regularly taken and filed, and thereafter the said Maggie J. Hartis died. This action was then commenced by J. M. Hartis, as administrator of his wife, to recover damages for her wrongful death, caused, as the plaintiff contends, by the injuries of May 24, 1910. Upon the trial of the action the plaintiff offered as evidence the deposition taken in the former action, which was excluded, and the plaintiff excepted. The deposition, if admissible, contains material evidence on the issue of negligence, and the record shows that the defendant had the opportunity to cross-examine, although it did not do so. The plaintiff, having no other evidence of negligence, submitted to a judgment of nonsuit and appealed.

E. R. Preston and Neill R. Graham, both of Charlotte, for appellant. Burwell & Canaler, of Charlotte, for appellee.

ALLEN, J. The question presented by this appeal has not been heretofore decided by this court.

If we adopt the rule prevailing in some jurisdictions, that there must be an exact identity of parties or of their privies and of causes of action before a deposition taken in one action is admissible in another, we must sustain the ruling of his honor, because we have recently held in *Broadnax v. Broadnax*, 76 S. E. 216, that damages for wrongful death are not in the usual acceptance of the term a part of the personal estate of the deceased, and in *Hood v. Am. Telephone & Telegraph Co.*, 77 S. E. 1094, at this term, that the administrator or executor does not sue because of succession to the rights of the deceased, but by virtue of his designation in the statute; and the deductions from these authorities are that the causes of action are not identical, and that the administrator in

actions of this character is not in privity with the intestate. This rule finds support in *Miller v. Gillispie*, 54 W. Va. 462, 46 S. E. 451, *Railroad v. Gumby*, 99 Fed. 197, 39 O. C. A. 455, 6 A. & E. Pl. & Pr. 579, and is expressly adopted in *Murphy v. Railroad*, 81 Hun (N. Y.) 358, in which a deposition was excluded under facts in all material respects like those before us. These authorities in our opinion sacrifice substance to form, and exclude material evidence which has been subjected to the tests of truth and in favor of a party who has had an opportunity to cross-examine.

The witness in this case was sworn at the time of taking the deposition by a competent officer; she testified as to the one fact upon which both actions depend, the cause of her injury; the plaintiffs in both actions were endeavoring to establish the same fact, the negligence of the defendant; the same party is a defendant, and it had the opportunity to cross-examine; and the plaintiff in the present action is the administrator of the plaintiff in the former. Prof. Wigmore says in reference to identity of issues, in volume 2, § 1387 (1): "It is sufficient if the issue was the same, or substantially so with reference to the likelihood of adequate cross-examination, because the opponent has thus already had the full benefit of the security intended by the law"—and as to parties, in section 1388: "It ought, then, to be sufficient to inquire whether the former testimony was given upon such an issue that the party opponent in that case had the same interest and motive in his cross-examination that the present opponent has; and the determination of this ought to be left entirely to the trial judge." And he adds, while discussing the admissibility of a deposition taken in another action: "It is enough to suggest that the situation is one that calls for common sense and liberality in the application of the rule, and not a narrow and pedantic illiberality." Mr. Greenleaf (vol. 1, § 163) says: "The chief reasons for the exclusion of hearsay evidence are the want of the sanction of an oath and of any opportunity to cross-examine the witness. But where the testimony was given under oath, in a judicial proceeding, in which the adverse litigant was a party and where he had the power to cross-examine, and was legally called upon to do so, the great and ordinary test of truth being no longer wanting, the testimony so given is admitted after the decease of the witness in any subsequent suit between the same parties"—and in section 558: "We have seen that in regard to the admissibility of a former judgment in evidence it is generally necessary that there be a perfect mutuality between the parties; neither being concluded, unless both are alike bound. But with respect to depositions, though this rule is admitted in its general principles, yet it is ap-

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

plied with more latitude of discretion; and complete mutuality or identity of all the parties is not required. It is generally deemed sufficient if the matters in issue were the same in both cases, and the party against whom the deposition is offered had full power to cross-examine the witness." In *Tiffany on Death by Wrongful Act*, § 192, the author says: "It has been held that in an action under the statute it is admissible to prove the testimony of a deceased witness in a suit by the intestate for the personal injury which abated on his death upon the ground that the causes of action were the same, and that the admissibility of such evidence turns rather upon the right to cross-examine than upon the precise nominal identity of the parties."

This rule, approved by the text-writers from which we have quoted, that the admissibility of the deposition is not dependent upon exact identity of parties and causes of action, but rather upon identity of the question being investigated and upon the opportunity of the party *against whom the deposition is offered to cross-examine*, has been adopted in *Dawson v. Smith's Will*, 3 Houst. (Del.) 340; *Wade v. King*, 19 Ill. 308; *Watson v. St. Paul R. R.*, 76 Minn. 362, 79 N. W. 308; *Andricus, Adm'r, v. Coal Co.*, 121 Ky. 731, 90 S. W. 233; *Railroad v. Hengst*, 36 Tex. Civ. App. 219, 81 S. W. 832, and it has been held in three cases—*Railroad v. Venable*, 67 Ga. 699, *Railroad v. Stout*, 53 Ind. 158, and *Walkerton v. Erdman*, 23 Can. Sup. C. 352—that a deposition taken in an action to recover damages for personal injuries is admissible in evidence in a subsequent action against the same defendant to recover damages for wrongful death, which is the case at bar. In the Georgia case the mother had sued for personal injuries to herself by the railroad company, and in that case her interrogatories were taken. Subsequently she died, and her child, by next friend, sued for her homicide and recovered. Objection was made to the introduction of her testimony on the former trial, but it was admitted, and the court said: "The admissibility of the interrogatories turns on the question whether the action was substantially on the same issue and substantially between the same parties. Substantially we think that the issue was the same. The injuries for which she had sued caused her death and for that result of those injuries the child sued."

* * * It is true that the child could not have sued had not her mother died; and in the mother's case the literal cause of action is the injury done her not resulting in death, and in the child's the literal cause of action is the homicide; but the substantial cause in both cases is the one cause of both actions, the wrong done by the railroad company, and that was the issue. The interrogatories were introduced, too, only in respect to the injury and the manner in which it was done and how it occurred, and this was the real thing

in issue in both cases. Was the company negligent or diligent? Was the mother? These were the main, substantial questions at issue." In the Indiana case it was said that: "On the trial of an action brought by an administrator to recover damages for the death of his intestate, caused by the wrongful act of the defendant, evidence is admissible to prove what was the testimony of witnesses, since deceased, on the trial of an action brought by said intestate, and abated by his death, for damages for injuries caused by said wrongful act"—and in the case from Canada: "Though the cause of action given by Lord Campbell's Act for the benefit of the widow and children of a person whose death results from injuries received through negligence is different from that which the deceased had in his lifetime, yet the material issues are substantially the same in both actions, and the widow and children are in effect claiming through the deceased. Therefore, where an action is commenced by a person so injured in which his evidence is taken *de bene esse* and the defendant has a right to cross-examine, such evidence is admissible in a subsequent action taken after his death under the act."

This rule confined to facts like those before us commends itself to our judgment as based upon reason and authority, and it is just, as it deprives the defendant of no right and permits a trial of the issue between the plaintiff and the defendant upon its merits. The cross-examination in the two cases would be practically the same, as the two facts to be investigated in each would be negligence, and the extent of the injuries, unless it would be broader and more extended in the first, due to the fact that in an action for personal injury, recovery may be had for expenses, pain, loss of time, impaired capacity to make a living, &c., while in an action for wrongful death the inquiry as to damages is confined to the single question of the present value of net earnings, based on life expectancy.

The sum demanded in the first, \$10,000, the same being demanded in the second, was sufficient to put the defendant upon notice of the importance of the action.

We are of opinion the deposition was competent, and a new trial is ordered.
New trial.

BROWN, J. (dissenting). I am of opinion that the deposition is incompetent evidence in this case for these reasons: (1) The parties to the two actions were different. (2) The causes of action were different. (3) There was no privity of interest between the parties to the first and second action. (4) The cause of action for wrongful death of plaintiff's intestate did not exist when deposition was taken in first action. (5) That deposition was never opened or ordered to be admitted in evidence in the first action.

In the case of *Murphy v. Railroad Co.*, 81

Hun (N. Y.) 358, which was an administrator's action for injuries causing death, the court in ruling out similar testimony said: "The deposition of the deceased taken in an action prosecuted by him in his lifetime was not competent evidence in this action. That action terminated with the death of the plaintiff therein and all interlocutory proceedings went down with it, and are not saved by section 881 of the Code of Civil Procedure. While the plaintiff is the personal representative of the deceased, the action is prosecuted for the benefit of those who do not claim under him, but is an original cause of action that did not exist in the lifetime of the deceased." In the case of Metropolitan Street Railway Co. v. Gumby, 99 Fed. 192, 39 C. C. A. 455, it was held by the Circuit Court of Appeals for the Second Circuit that testimony in an action by an infant claiming damages for his pain and suffering from an injury is not admissible (the witness having died in the meantime) in a subsequent action against the same defendant by the infant's mother, claiming damages for loss of his services; there being no privity between the plaintiffs. The opinion in that case was very able and exhaustive, citing and distinguishing many authorities relied on in favor of the admission of the testimony, and quoting from many others, holding contra, and is therefore instructive. To same effect are Nelson v. Harrington, 72 Wis. 591, 40 N. W. 228, 1 L. R. A. 719, 7 Am. St. Rep. 900; Miller v. Gillisple, 54 W. Va. 462, 46 S. E. 451; 6 A. & E. Pl. & Prac. 579.

In the case of Oliver v. Louisville & N. R. Co. (Ky.) 32 S. W. 759, it was held that, in an action by husband and wife for personal injuries to the wife, depositions taken in a former action by the husband against the same defendant for loss of services of the wife caused by the same accident were inadmissible, though they related wholly to the character of the injury and the manner in which it was received; the court saying: "And, although the depositions referred to relate wholly to the character of the injury received by her (the wife) and the manner in which it was done, and are therefore pertinent to the question of legal liability, as well as measure of damages, in each action, still the personal injury, if the result of the defendant's negligence, constituted two distinct causes of action, for one of which he (the husband) could alone sue and for the other of which she (the wife) might have sued alone in case of his refusal to join with her. And, while reason for the rule mentioned does not exist to the same extent as if there had been different occurrences or transactions, we can very well see how disregard of it by the court might have taken defendant by surprise and deprived it of the advantage of developing on cross-examination admissions and confessions of the wife

it was not permitted to show in other suits. Moreover, defendant could not be legally deprived of an opportunity afforded him by enforcement of the rule to again cross-examine the witnesses." I admit there are authorities cited in the majority opinion that held the deposition admissible, but I am of the opinion that the conclusion reached by the courts whose opinions I have cited are more logical and convincing and better accord with our own decisions as to the character of this action. Hood v. Telephone & Telegraph Co., 77 S. E. 1094, this term; Broadnax v. Broadnax, 160 N. C. 432, 76 S. E. 216; Hall v. Railroad, 146 N. C. 345, 59 S. E. 879; Id., 149 N. C. 108, 62 S. E. 899.

It further appears that the deposition was never passed on, opened, or admitted in evidence in the first action. That being so, the deposition never became legal evidence in the first action, and the court therefore had no power or authority to permit it to be opened for the first time upon notice given by the plaintiff in the present action.

WALKER, J., concurs in this opinion.

(162 N. C. 632)

STATE v. HEMPHILL

(Supreme Court of North Carolina. May 13, 1913.)

1. ASSAULT AND BATTERY (§ 48*)—OFFENSES—ELEMENTS OF CRIMINAL ASSAULT—INTENT TO INJURE—"ASSAULT."

A touching of the person of another, however slight the force may be, if done in an angry or hostile way, will constitute an assault and battery; but if there is no intent to injure, and it was so understood by the other party and there was in fact no injury, there was no assault.

[Ed. Note.—For other cases, see Assault and Battery, Cent. Dig. § 68; Dec. Dig. § 48.*]

For other definitions, see Words and Phrases, vol. 1, pp. 532-538; vol. 8, p. 7582.]

2. ASSAULT AND BATTERY (§ 49*)—OFFENSES—PRESUMPTION OF INTENT.

The intent to injure by an assault may be inferred from the act; and, when the act itself is unlawful, the intent is immaterial or will be presumed.

[Ed. Note.—For other cases, see Assault and Battery, Cent. Dig. § 69; Dec. Dig. § 49.*]

3. ASSAULT AND BATTERY (§ 95*)—OFFENSES—QUESTION FOR JURY—INTENT.

On evidence in a criminal prosecution for assault by taking hold of the prosecuting witness, held, that the question whether it was done with intent to injure or against her consent was for the jury.

[Ed. Note.—For other cases, see Assault and Battery, Cent. Dig. § 141; Dec. Dig. § 95.*]

Appeal from Superior Court, Burke County; Lyon, Judge.

Fred Hemphill was convicted of assault, and he appeals. New trial.

The defendant was indicted for an assault on Cleo Moore. In view of the judge's charge to the jury, it is necessary to state only the defendant's testimony, which was as follows:

"At the time of the alleged assault I saw the prosecutrix, Cleo Moore, down in the woods near a spring with two white men. I took hold of her to carry her to her grandmother. She jerked loose from me, and I went and told her grandmother where she was, and what she was doing. Her grandmother cried. I never did strike her with anything. I only took hold of her to carry her to her grandmother, and, when she broke loose, I did nothing more than to go and tell her grandmother." The court charged the jury that, if they believed the defendant's own testimony, they should find the defendant guilty, to which the defendant excepted, and from the judgment, upon the verdict of guilty, he appealed. The sentence was 12 months on the roads.

R. L. Huffman and Avery & Ervin, all of Morganton, for appellant. Attorney General Bickett and T. H. Calvert, of Raleigh, for the State.

WALKER, J. It may be that the defendant should have been convicted upon the testimony of the state, but this was not submitted to the jury. The instruction of the court confined the jury to a consideration of the defendant's evidence. We do not think that this evidence was susceptible of only one construction, or was so conclusively against the defendant as to warrant a direction to return a verdict of guilty, if the jury believed it. The jury might well have found from the circumstances surrounding the parties at the time, if left untrammelled by this peremptory instruction, that the prosecutrix was about to be led astray and defendant intervened, at the request of her grandmother, her natural guardian and protector, for the innocent and laudable purpose of leading her away from the danger which threatened her, and that he placed his hand upon her, not with the intent of committing an assault upon her, and not in anger, but in kindness, for the purpose of protecting her.

[1,2] It may be true that every touching of the person of another, however slight or trifling the force may be, if done in an angry, rude, or hostile manner, will constitute an assault and battery, but not so if there was no intention to hurt or injure, and it was so understood by the other party, and there was in fact no injury. Whether it was done in anger or against the consent of the prosecutrix was a question for the jury. There must be an intent to injure (3 Cyc. 1024; State v. Reavis, 113 N. C. 679, 18 S. E. 388), though this intent may be inferred by the jury from the act; and, when the act itself is unlawful, the intent is immaterial or will be presumed. 1 McLain's Cr. Law, §§ 239, 240, where the subject is fully discussed. Clark's Cr. Law (2d Ed.) p. 224, §§ 81, 83 et seq. and notes. Judge Gaston said in State v. Davis, 28 N. C. 126, 35 Am. Dec. 735, that: "An as-

sault is an intentional attempt by violence to do an injury to the person of another. It must be intentional—for, if it can be collected, notwithstanding appearances to the contrary that there is not a present purpose to do an injury, there is no assault." And again: "The intention as well as the act makes an assault."

[3] If we are restricted to the defendant's testimony, it would appear, or at least there is reason for saying, that he did not intend to injure the prosecutrix, or to do any violence to her person, or to restrain her of her liberty against her will. The jury may reasonably conclude that his object was one of persuasion rather than coercion. He saw her plight, perhaps had been informed of it by her grandmother, and wished to relieve her of its evil consequences. If, so, it was an act of kindness and mercy to her, rather than one of hostility. If he laid his hand upon her gently for the purpose of inducing her to return to her home, and quit the company or association of designing men, and did not seize her with anger or rudeness, it surely would not be an assault in law. This might have been fairly deduced from his testimony. When she refused to go with him, he did not persist even in his effort to persuade her, nor did he offer her any violence or utter any threat. He simply desisted, returned to the house, told her grandmother what had occurred, and she cried, presumably because she knew that the safety of her child was imperiled. This made no more than a case for the jury upon the question whether there had been an assault.

New trial.

(94 S. C. 463)

KEELS v. ATLANTIC COAST LINE R. CO. et al.

(Supreme Court of South Carolina. April 21, 1913. On Rehearing, May 14, 1913.)

1. APPEAL AND ERROR (§ 1078*)—WAIVER OF ERROR.

Exceptions which are not argued will be deemed abandoned.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4256-4261; Dec. Dig. § 1078.*]

2. MASTER AND SERVANT (§ 286*)—ACTIONS—JURY QUESTION—NEGLIGENCE.

Evidence in an action for the death of a section foreman by his hand car being struck by a freight train held to make it a jury question whether the company was negligent.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 1001, 1008, 1008, 1010-1015, 1017-1033, 1036-1042, 1044, 1046-1050; Dec. Dig. § 286.*]

3. MASTER AND SERVANT (§ 243*)—SERVANT'S DUTY—OBEDIENCE OF RULES.

An employé is only bound to obey the reasonable rules promulgated by the company.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 682, 759-775; Dec. Dig. § 243.*]

4. MASTER AND SERVANT (§ 247*)—INJURIES—CONTRIBUTORY NEGLIGENCE—DISOBEDIENCE OF RULES.

An employé's failure to obey a rule of the company must be the proximate cause of his injuries, in order to make such failure bar a recovery.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 795-800; Dec. Dig. § 247.*]

5. TRIAL (§ 252*)—INSTRUCTIONS—CONFORMITY TO EVIDENCE.

Where there was no evidence in a section foreman's action for injuries by collision of his hand car with a freight train that the roadmaster had condemned the brake on the hand car or inspected it, as required by rule of the company, but it was shown that employés were forbidden to discard tools as worthless, except on inspection by the roadmaster, the court properly refused to charge a rule of the company requiring employés to inspect machinery which they were expected to use.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 505, 596-612; Dec. Dig. § 252.*]

6. TRIAL (§ 251*)—INSTRUCTIONS—ISSUES.

In an action for injuries to a section foreman by his hand car being struck from behind by a freight train because of alleged defective brakes on the hand car, defendant requested a charge of the company's rule that hand cars should not be used after dark except by authority of the roadmaster, or in foggy weather where objects one-half mile distant could not be distinctly seen, and must not be run around curves without a flagman in advance, and also a charge with reference to another rule which required the placing of signals behind where a train was stopped or was delayed. *Held*, that both rules were inapplicable to the case, so that the charges were properly refused.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 587-595; Dec. Dig. § 251.*]

7. MASTER AND SERVANT (§ 145*)—INJURIES—INSTRUCTIONS—APPLICABILITY—"OBSTRUCTION."

A section gang's lever car which was in motion on the track was not an "obstruction" within the meaning of a rule requiring stop signals to be displayed in both directions upon obstructing the track.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 238; Dec. Dig. § 145.*]

For other definitions, see Words and Phrases, vol. 6, pp. 4890-4894.]

8. APPEAL AND ERROR (§ 1062*)—HARMLESS ERROR—WITHDRAWING ISSUES.

Defendants, in an action against a railroad company for personal injuries to a servant, cannot complain that plaintiff withdrew the issue of punitive damages from the jury, where there was no evidence tending to support such damages.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4212-4218; Dec. Dig. § 1062.*]

9. NEGLIGENCE (§ 100*)—CONTRIBUTORY NEGLIGENCE—WILLFULNESS.

Willfulness by defendant will prevent plaintiff's contributory negligence from being a defense.

[Ed. Note.—For other cases, see Negligence, Cent. Dig. § 85; Dec. Dig. § 100.*]

Appeal from Common Pleas Circuit Court of Barnwell County; R. E. Cokes, Judge.

Action by A. M. Keels against the Atlantic Coast Line Railroad Company and others. From a judgment for plaintiff, defendant named appeals. Affirmed.

P. A. Willcox, of Florence, S. G. Mayfield, of Denmark, S. C., Harley & Best of Barnwell, and L. W. McLemore, of Sumter, for appellant. R. C. Holman, Bates & Simms, and J. O. Patterson, all of Barnwell, L. K. Sturkie, of Orangeburg, and Best & Cunningham, of Columbia, for respondent.

FRASER, J. This is an action for personal injuries. The plaintiff was a section master. The complaint alleges that the plaintiff was returning from his work on defendant's track, and in the discharge of his duties had to pass through a long, deep cut and curve, and, when the plaintiff and his collaborators had passed through the said cut and curve for a distance of several hundred yards, the plaintiff discovered the approach of an extra freight train, running at a rapid, careless, negligent, and reckless rate of speed, and thereupon the plaintiff ordered one of the section hands to immediately apply the brakes in order to stop the car, so that they could alight in safety, and remove the said car from the track, in order to save the property of the defendant company and other persons from bodily harm. But the brakes on said lever car failed to work and stop the car, and that thereupon the plaintiff realizing that said brakes would not work and that said car could not be stopped, and further perceiving that he was confronted with immediate peril and danger from a rapidly approaching freight engine and train, and in order to save himself from great bodily harm, attempted to get off of said lever car, and as a result thereof he was struck and run over by the same and injured.

The negligence alleged was: (a) Passing through the cut and curve without giving any signals of any sort. (b) Refusing to slacken the speed of the train after they saw the peril of the plaintiff. (c) Furnishing the plaintiff with a defective car, in that the brake was defective. (d) In failing to furnish a safe place to work, in that the brake was defective. The complaint alleged negligence, carelessness, recklessness, and willfulness, and joined the engineer and roadmaster as codefendants with the railroad company. The defendants put in a general denial, and pleaded contributory negligence, in that: (a) Plaintiff failed to inspect his lever car. (b) Plaintiff failed to keep a proper lookout for his own protection. (c) Plaintiff was himself running at an excessive rate of speed. The defendants moved for a direction of a verdict in favor of defendants on the grounds: (1) That there was no evidence of negligence on the part of the defendants. (2) That there was no evidence of willfulness. (3) That the evidence showed contributory negligence. (4) That plaintiff's own negligence was the proximate cause of his own injury. The motion was refused, and the jury rendered a verdict for

the plaintiff. From the judgment entered upon this verdict the defendant appealed.

[1] There are 17 exceptions in the case, and we will adopt appellant's grouping, but the first 3, being entirely omitted from the argument, are deemed abandoned.

The fourth exception is as follows: "His honor erred, it is respectfully submitted, in overruling appellant's motion for direction of verdict made at the close of all the evidence; whereas, he should have granted the motion, and directed the verdict for the reasons and upon the grounds urged in support thereof, as follows: (First) Because there is no evidence of negligence proximately causing or contributing to the plaintiff's accident or injury. (Second) Because there is no evidence of willfulness or its equivalent proximately causing or contributing to plaintiff's accident and injury. (Third) Because plaintiff's accident and injury were contributed to by his own negligence as the proximate cause thereof. (Fourth) Because plaintiff's accident and injury were due to his own negligence as the proximate cause thereof." This exception cannot be sustained.

[2] There was evidence: That about the time in the afternoon when the accident occurred sectionmasters and their helpers might be expected to be on the track returning from their labors. That the hand cars used by them moved much slower than the trains, and the train might overtake them. That there was a blow post near the curve. That the extra train was running very fast. That no signals were given by the train crew of their approach. That, if the engineer had seen the lever car after it (the train) came round the curve, there was still time to stop before injury was done. That no effort was made to slacken the speed of the train. That those on the lever car were in a position of great danger, and that their danger was easily apparent to the engineer. There was evidence that neither the engineer nor the conductor saw anything of the lever car or its occupants until they saw the section hands by the side of the road as they were passing them. There was evidence that the cut and curve was a dangerous place. If the jury believed that the respondent was on his way, in the discharge of his duties, to put up the lever car, and that the extra train ran upon him suddenly without any warning, and that a warning ought to have been given and would have been given by a reasonably prudent man, that the respondent with his car and laborers was in such a position that those in charge of the extra train must have seen him if they were looking ahead at all, then the jury could have inferred that there was such an utter disregard of the safety of themselves and others as would warrant a finding, not only of negligence, but of willfulness.

Appellants coupled exception 17 with exception 4. Seventeen is also overruled.

The appellant groups exceptions 10, 11, 12, 15, and 16. These will have to be considered separately.

[3, 4] Exception 16: "His honor erred, it is respectfully submitted, in refusing to charge appellant's sixteenth request as follows: 'I charge you that it was the duty of this plaintiff to become conversant with and obey the rules and special instructions of the defendant Atlantic Coast Line Railroad Company, and if you find from the testimony that he failed to do so, or in not carrying out the rules of the company he was injured, your verdict should be for the defendants.' The error being that the request contained a sound proposition of law applicable to the case and his honor's refusal so to charge was prejudicial to appellant." This exception cannot be sustained for two reasons. The duty is to obey reasonable rules (see *Bussey v. Railway*, 78 S. C. 358, 58 S. E. 1015), and the failure to obey the rule must be the proximate cause of the injury. The request as made is not the law. The charge would have been misleading here. The duty to send a flagman before the car could have had nothing to do in law or in fact with an injury that came from behind. This exception is overruled.

[5] Exception 15: "His honor erred, it is respectfully submitted, in refusing to charge appellant's fifteenth request, as follows: 'I charge you rule 707, as follows: "Employees of every grade are warned to see for themselves, before using them, that the machinery or tools which they are expected to use are in proper condition for the service required; and if not to put them in proper condition, or to see that they are so put, before using them. The company does not wish, nor expect, its employees to incur any risks whatever from which, by exercise of their own judgment and by personal care, they can protect themselves, but enjoins them to take time in all cases to do their duty in safety, whether they may, at the time, be acting under orders of their superiors or otherwise." I charge you that, under this rule, it was the duty of the plaintiff to use reasonable care to have the lever car in his charge in safe condition, either by repairing it himself, if there was any defect in it, or by bringing the defect, if any, to the attention of his superior, if there was such superior, to whom he could make such report.' The error being that the request contained a sound proposition of law applicable to the case, and his honor's refusal so to charge was prejudicial to appellant." This exception cannot be sustained. It is true that rule 707 required the respondent to inspect his machinery before using it, but rule 1001 required the roadmasters to inspect tools of each section monthly, and condemn such as are unfit for use, and provide further that no tools should be thrown aside as worthless until condemned by them. There is no evi-

dence that the roadmaster had condemned this brake nor inspected it for a year. His honor could not, therefore, charge the jury that it was the absolute duty of the section-master to repair the brake, which might have included throwing it aside. Further, appellant in his argument said the rule is plain, and needs no construction. This is true. All that was required was an application of the facts to the rule, and this was the province of the jury, and not of the judge. The judge construes the rule, the jury applies the facts. To so charge would necessarily be a charge on the facts.

[6] Exception 12: "His honor erred, it is respectfully submitted, in refusing to charge appellant's fourteenth request, as follows: 'I charge you rule 1033 which is as follows: "Hand or push cars must not be used except in company's business; and never after dark except by special authority of the roadmaster. Neither will they be allowed on track in cloudy or foggy weather when objects one-half mile distant cannot be distinctly seen. They must not be run around curves without a flagman well in advance and must not be attached to trains in motion." I construe this rule to mean that it was the duty of this plaintiff to not only have a flagman well in advance of his hand car or lever car when running around curve or curves, but also that under rule 99 it was incumbent upon him to leave the proper signals behind him, as required in rule 99, so as to notify an engineer or operator of a train that he with his crew were on a hand car in front.' The error being that the request contained a sound proposition of law applicable to the case, and his honor's refusal so to charge was prejudicial to appellant." This exception cannot be sustained. Rule 1033 has nothing to do with this case. The absence of a flagman in front of the car had nothing to do with the injury caused by being run down from the other way. Rule 99 is in reference to a train that stops or is delayed on the track, and has nothing to do with this case.

Exception 10: "His honor erred, it is respectfully submitted, in refusing to charge appellant's twelfth request, as follows: 'I charge you rule 1021, as follows: "They must never obstruct the track in any way whatever, without first conspicuously (see rule 99) displaying stop signals at least 900 yards in both directions." I also charge you rule 99, as follows: "When a train stops or is delayed, under circumstances in which it may be overtaken by another train, the flagman must go back immediately with stop signals a sufficient distance to insure full protection. When recalled he may return to his train, first placing two torpedoes on the rail, and planting a lighted fusee on the track, when the conditions require it. The front of a train must be protected in the same way, when necessary, by the fireman." I construe the above rules to mean that it was the

duty of the plaintiff to give the proper signals so as to notify and put on notice all trains that were behind him or his section car by putting two torpedoes on the rail or planting a lighted fusee on the track.' The error being that the request embodied a sound proposition of law applicable to the case, and his honor's refusal to grant the request was prejudicial to appellant."

Exception 11: "His honor erred it is respectfully submitted in refusing to charge appellant's thirteenth request as follows: 'I charge you rule 1022, as follows: "Special trains or engines may pass over the road at any time without previous notice, and they will always be prepared for them. Anything that interferes with the safe passage of trains is an obstruction." I charge you rule 1023, as follows: "They are permitted to use the tracks when making repairs to within fifteen minutes of the time of passenger trains, and to within ten minutes of the time of freight trains, but invariably under protection of stop signals." I also charge you rule 1024, as follows: "During heavy rains and storms they must take every precaution to prevent accident. Sufficient force must be placed on duty watching or repairing damage. Where safety of trains is involved additional force may be employed to put the track in safe condition. Men must be assigned to watching along those sections of track which seem likely to be washed out; they must be supplied with proper flags, lamps and torpedoes for stopping trains, and must be instructed how to use them." I construe the above-mentioned rules to mean it was the duty of the section foreman to look out for both special and regular trains and engines, and to have properly protected himself and section hands against them, as required in rule 99. I also construe the above-mentioned rules to mean that a hand or lever car in charge of a section foreman to be an obstruction, as stated in said rules.' The error being that the request contained a sound proposition of law applicable to the case and his honor's refusal made so to charge the jury was prejudicial to appellant."

If appellant's construction of these rules is correct, the necessity to restrict, the necessity for obedience to rules—to reasonable rules—is apparent.

[7] The appellants ask the court to hold that a lever car on the track is an obstruction, and that, when the track is obstructed, there must be signals displayed 900 yards in both directions. Now this lever car was not standing on the track but in motion. This would require moving signals 900 yards in front and 900 yards behind a lever car every morning and every evening. A lever car is not as much of an obstruction as a train. A standing lever car is an obstruction within the meaning of the rule, but a moving lever car is not.

Exception 5: "His honor erred, it is re-

spectfully submitted, in allowing plaintiff's attorneys, over appellant's objection, to withdraw, or attempt to withdraw, from the consideration of the jury the cause of action for punitive damages, because such motion was not made until the conclusion of the case, when plaintiff had had the benefit of the cause of action at all times during the trial, and had exercised the privilege of presenting in the arguments of two of his counsel before the jury the right of the jury to inflict upon appellant a verdict for punitive damages."

Exception 6: "His honor erred, and, it is respectfully submitted, abused his discretion, in allowing plaintiff's attorneys, over appellant's objection, to withdraw, or attempt to withdraw, from the consideration of the jury the cause of action for punitive damages, because such motion was not made until the conclusion of the case when plaintiff had had the benefit of the cause of action at all times during the trial, and had exercised the privilege of presenting in the argument of two of his counsel before the jury the right of the jury to inflict upon appellant a verdict for punitive damages."

[8] These exceptions cannot be sustained. If there were evidence upon which punitive damages could be based, it would be different, but there was no such evidence, and the appellants cannot complain that plaintiffs have remitted a part of their demand.

[9] The plaintiff did not withdraw the allegations of recklessness and willfulness, but only stated that they withdrew a claim for punitive damages. Willfulness is still in question in order to offset the defense of contributory negligence.

The judgment of this court is that the judgment appealed from is affirmed.

GARY, O. J., and HYDRICK and WATTS, JJ., concur. WOODS, J., concurs in the result.

On Rehearing.

PER CURIAM. Having carefully considered the within petition, this court is not convinced that it has overlooked any fact or disregarded any proposition of law involved in this case.

It is therefore ordered that the petition is refused, and the order heretofore granted staying the remittitur is revoked.

(139 Ga. 756)

HARPER v. JEFFERS.

(Supreme Court of Georgia. April 18, 1913.)

(Syllabus by the Court.)

1. ARREST (§ 48*)—BAIL TROVER—GROUNDS FOR DISCHARGE.

Where in a trover case the plaintiff sued out bail process and the defendant was imprisoned thereunder, on the hearing of an application for discharge, under Civ. Code 1910, § 5154, the applicant could set up, as a reason for granting the discharge, that there was no

sufficient description of the property in the affidavit to obtain bail.

[Ed. Note.—For other cases, see Arrest, Cent. Dig. §§ 112-114; Dec. Dig. § 48.*]

2. ARREST (§ 28*)—BAIL TROVER—AFFIDAVIT—SUFFICIENCY.

In a trover suit to recover money, a description thereof contained in an affidavit to require bail as being "\$700.70, the same \$700 being in the denomination of \$20 and \$10 gold certificates, and the 70 cents being in silver, the same being the property of Georgia Jeffers, and of the value of \$700.70," was insufficient.

[Ed. Note.—For other cases, see Arrest, Cent. Dig. §§ 56-63, 72; Dec. Dig. § 28.*]

3. REPLEVIN (§ 9*)—BAIL TROVER—BASIS OF ACTION.

Under the evidence, it was error to refuse to discharge the defendant from imprisonment.

[Ed. Note.—For other cases, see Replevin, Cent. Dig. §§ 69-82; Dec. Dig. § 9.*]

Error from Superior Court, Baldwin County; Jas. B. Park, Judge.

Action by Georgia Jeffers against Rebecca Harper. Judgment for plaintiff, and defendant brings error. Reversed.

Georgia Jeffers instituted an action of trover against Rebecca Harper, seeking to recover certain money. The plaintiff also filed an affidavit for the purpose of requiring bail. In the affidavit the money was described as follows: "\$700.70, the same \$700 being in the denomination of \$20 and \$10 gold certificates, and the 70 cents being in silver; the same being the property of petitioner, Georgia Jeffers, and of the value of \$700.70." The defendant was arrested and imprisoned. In accordance with the statute she filed a petition, addressed to the judge of the superior court where the action was pending, alleging that she was able neither to give bond and security nor to produce the property; and that she had never been in possession or control of such property, and was not so at the time when the bail proceedings were commenced. The presiding judge issued a rule nisi requiring the plaintiff in the action to show cause why the prayer of the petition for discharge should not be granted. On the hearing the applicant for discharge filed what was termed a demurrer to the affidavit made for the purpose of requiring bail, on the grounds that it did not set out a sufficient reason for requiring bail; that the property was not sufficiently described therein; and that bail trover would not lie upon the facts therein alleged. She prayed to be discharged and that the affidavit be dismissed. This was overruled.

The applicant introduced evidence tending to show the following facts: She never had in her possession, custody, or control \$700.70, the \$700 being in the denominations of \$20 and \$10 gold certificates, and 70 cents being in silver, the property of Georgia Jeffers, as described in the affidavit; and she could not produce it. She had never seen it. She was unable to give bond in order to secure her release from imprisonment. She endeavored

to get securities to go on her bond, but failed to do so. She was the wife of Clifford Harper, now deceased. He did not live with her. They lived together at intervals. He died on September 17, 1912, in Brunswick. He left about \$730 deposited in a bank in that place. She has not the money in her possession. It is in the hands of her lawyers. "I did not get any money, but a check. I had to sign a paper for it. I did not see any money. It was a check for \$730. My lawyers have that money. They have it with my permission. * * * I did not get any \$700.70 as described in that affidavit for bail. My lawyers did not either. We have never seen or had the money. He got a check for \$730. I had to sign for it."

The plaintiff in the action of trover introduced an official of a bank in Milledgeville, who testified: "Georgia Jeffers formerly had money on deposit in the bank. She instructed the witness to deliver her money to Clifford Harper, who was her grandson. The witness delivered it accordingly, paying to Harper \$700.70; the \$700 being in gold certificates of the denominations of \$10 and \$20. Mrs. Jeffers said that she was sick and wished to give the money to her grandchildren. Harper carried her book to the bank in order to obtain payment."

Georgia Jeffers, the plaintiff, testified as follows: "Clifford Harper was her grandson. She was sick, and sent for the officer of the bank, and directed him to deliver to Harper all of her money. Harper went to the bank and drew it out. He kept it in his trunk and did not deliver it to her. She never asked him for it until after he went to Brunswick, when she wrote to him to send her part of it. He had some money in his trunk other than that which she gave him, but it was not much. He kept the money in his trunk until he went to Brunswick, when he took it with him. She did not give him permission to do so."

The presiding judge denied the application for discharge, and the applicant excepted.

Sibley & Sibley, of Milledgeville, for plaintiff in error. Hines & Vinson and D. S. Sanford, all of Milledgeville, for defendant in error.

LUMPKIN, J. (after stating the facts as above). [1] 1. The first question which arises is whether, after an affidavit has been filed in a trover case for the purpose of requiring bail, and the defendant has been arrested and imprisoned and has applied to be discharged under section 5154 of the Civil Code, upon the hearing of such application the applicant can attack the affidavit as containing no sufficient description of the property to be seized, or for the forthcoming of which the defendant is required to give bond. A bail proceeding is not an essential part of a trover case. The plaintiff is not compelled to require bail of the de-

fendant, but has the privilege of making the affidavit provided by the statute for that purpose. Such a proceeding constitutes a species of ancillary proceeding in connection with the action of trover.

The Civil Code, § 5154, provides for an application to obtain a release from imprisonment under bail process, without giving security, when the defendant is neither able to give the security required by law nor to produce the property. Under the old law, if the defendant could not give security, he was compelled to remain in jail. The hardship of imprisonment until the case should be tried was the mischief. The act of 1879 (Acts 1878-79, p. 144), from which the Code section above cited was codified, furnished the remedy. It did not seek to affect the power to proceed with the trover suit to a determination of the rights of the plaintiff upon the question of the trial of property, but to furnish a method by which a defendant should not be held unjustly in imprisonment until the trial. Upon such a hearing the main question of fact is as to the inability of the defendant to give security or produce the property. This has been referred to as the issue, in several decisions of this court. But none of them dealt with the question of whether the imprisonment should be continued if, on the face of the affidavit made by the plaintiff, it appeared that there was no sufficient ground for requiring bail, the production of the property, or imprisonment of the defendant. The statute states that the defendant, in applying for a release, shall state in his petition that he is neither able to give the security required by law nor to produce the property, "and can furnish satisfactory reasons for its nonproduction, and traverse the facts stated in the plaintiff's affidavit for bail." If the affidavit for bail describes no property sufficiently to be seized by the officer, or produced by the defendant, or for the production of which security could be properly required, was it the intention of the statute that the defendant must produce undescribed property or remain in jail until the final hearing of the trover suit? Would not such an affidavit as failed to supply a sufficient description of the property to furnish a basis for imprisonment of the defendant show a "satisfactory reason for its nonproduction," within the meaning of the statute?

In this case, when the hearing came on upon the question of discharging the defendant from imprisonment, the trover suit, as a whole, was not up for consideration, but the bail proceedings and the question of continuing the imprisonment of the defendant were before the court. We see no reason why the court could not then determine the question of the sufficiency of the affidavit as a ground for further imprisonment. Whether the attack upon it, which seems to partake of the nature of both a demurrer and a motion, was

accurately framed is not very material. The point was raised, and the presiding judge passed upon it on its merits by overruling the demurrer and motion.

[2] 2. Having held that the point of lack of sufficiency of description contained in the affidavit filed for the purpose of requiring bail could not be raised on the hearing of the petition for discharge, the next question is whether the description was sufficient to authorize imprisonment until bail should be given. In *McElhannon v. Farmers' Alliance Warehouse, etc., Co.*, 95 Ga. 670, 22 S. E. 686, it was held that a description of money sought to be recovered in an action of trover as being "\$3,500 lawful money of the United States" was insufficient, and the petition was demurrable. It was said that: "The test of the sufficiency of such a declaration is and should be, is the description of the chattels sued for so definite and distinct as to enable the court to seize them for restitution to the owner?" When the case was again before this court, an amendment had been made so as to add to the description the words, "lawful money of the United States consisting of 100 silver certificates of \$5 each, 150 national bank notes, known as national currency, each for \$10, and 75 treasury notes of the United States, each for the sum of \$20." It was held that this was good as against a demurrer. In the opinion Chief Justice Simmons said: "The description is sufficient to identify the property if found in the defendant's possession. Each particular class of bills or notes is described; the denominations of each class are given, and the number of bills or notes of each denomination. If this description is not sufficient, it would be a rare case in which money could be recovered in an action of trover, for few people who handle money remember the particular bank which issued it or the number of each particular bill or note; indeed, few persons ever look at the name of the bank or the number of the bill or note; and in these busy days of commerce few persons keep their money in bags, so that it can be identified in that manner. If the sheriff, upon attempting to make a seizure of the property described in the writ, should find in the defendant's possession 100 silver certificates of \$5 each, 150 national bank notes of \$10 each, and 75 treasury notes of \$20 each, lawful money of the United States, he would be justified in taking possession of the same." *Farmers' Alliance Warehouse, etc., Co. v. McElhannon*, 98 Ga. 394, 25 S. E. 558. It was mentioned, as an additional reason why the demurrer should be overruled, that the defendant had given bond for the forthcoming of the property, thus admitting the possession of money answering the description. But this additional reason was criticised in *Cooke v. Bryant*, 103 Ga. 727, 730-731, 30 S. E. 435. Beside the criticism there made, it might be inquired: On demurrer to the sufficiency of

the allegations of a petition, how does the fact of the giving or not giving of a bond appear, unless alleged in the petition?

In *McLennan v. Livingston*, 108 Ga. 342, 33 S. E. 974, the petition in an action of trover described the property as "\$270 in lawful money of the United States. * * * Also \$30 in lawful currency of the United States, the same being two \$10 bills and two \$5 bills." It was held that the description was insufficient, and that a demurrer to the petition was properly sustained. This was clearly correct as to the description of the "\$270 in lawful money of the United States." As to the description of a part of the money as "\$30 in lawful currency of the United States, the same being two \$10 bills and two \$5 bills," it was said that "this description is not nearly so distinct as that in the case in 98 Ga." It is not so clear that the description last quoted differs greatly from that in the 98 Ga. But they were held to be distinguishable. Reference was again made to the fact that in the case in 98 Ga. a bond had been given for the forthcoming of the property as a reason for overruling a demurrer to the declaration. But we have already seen that this additional reason for overruling the demurrer had previously been discredited.

But the description in the affidavit now before us does not measure up to that held to be sufficient in 98 Ga. It gives the amount of \$700 in bills of the denominations of \$20 and \$10, but does not say how many there were of each or either. How many of each could the sheriff seize under this general description? It is too vague to furnish a basis for bail process.

[3] 3. The action to recover personality, which is commonly called trover in this state, is not applicable to recovering a sum of money which may be due and unpaid. Its purpose is to recover specific property or for its conversion by the defendant. Bail process is permitted in order that security may be had for the forthcoming of the property, or, in default thereof, that the specific property may be seized, or, if the property cannot be seized, the defendant may be imprisoned. Civil Code, § 5152. The statutory right on the trial to elect to take a verdict for the property or its value does not change the nature of an action of trover so as to make it the equivalent of an action of assumpsit. "An action of trover for the recovery of money must be based on a legal obligation upon the part of the defendant to deliver specific money to the plaintiff." *Cooke v. Bryant*, supra.

The evidence in the present case showed, in brief, as follows: Harper, the husband of the defendant, obtained from a bank in Baldwin county, under authority from Georgia Jeffers, \$700 in gold certificates of the denominations of \$20 and \$10, and 70 cents in silver. This occurred in the spring of the year. At the time Mrs. Jeffers, who was

the grandmother of Harper, was sick, and he kept the money in his trunk, where he also had some money of his own, though not much. Some time later (the date does not appear) he went to Brunswick, in Glynn county, where he died on September 17th thereafter. He left \$730 on deposit in a bank in that place. His widow, the defendant, and her attorney went to Brunswick, where she had to "sign a paper" for the money, and received a check for \$730. Her attorney had charge of the proceeds with her consent at the time of the hearing. She never received or had the bills of the character mentioned in the affidavit. The deposit of Harper was not identified with the money received by him in the spring, and what she received from the Brunswick bank was not the specific money which Harper had previously received from the other bank. This did not authorize the continued imprisonment of the defendant under bail process, and she should have been discharged.

Judgment reversed. All the Justices concur.

(129 Ga. 763)

HARPER v. TERRY, Jailer.

(Supreme Court of Georgia. April 18, 1913.)

(Syllabus by the Court.)

1. APPEAL AND ERROR (§ 486*)—BAIL TROVER—SUPERSEDEAS—EFFECT.

Where a defendant in bail-trover proceedings is apprehended and confined in jail, and makes application for discharge, alleging that on account of her poverty she is unable to give the bond or security required by law, and is unable to produce the property, that the property is not in her custody or control, and that she at no time had possession or control of the property, and the judge hearing such application for discharge refuses it and remands the applicant to custody, the effect of a supersedeas upon the suing out of a bill of exceptions to have this judgment reviewed is not to release the applicant from custody, but the case is left in statu quo. The applicant, being already in custodia legis, is properly remanded until the determination of the questions raised in the bill of exceptions by the reviewing court.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 2276; Dec. Dig. § 486.*]

2. HABEAS CORPUS (§ 33*)—GROUNDS—BAIL TROVER.

The court did not err in refusing to discharge the petitioner in the habeas corpus proceedings. She was not detained in jail under "a mere semblance of law." The order of court under which she was restrained of her liberty was one granted by a judge of the superior court after hearing the application, made by the party herself, for discharge from custody under bail process. Whether that order refusing the discharge on that hearing was erroneous or not will be determined upon a review of that judgment; that question having been brought up for determination by the reviewing court. But it is not a void judgment. It is a binding adjudication until reversed or set aside.

[Ed. Note.—For other cases, see Habeas Corpus, Cent. Dig. §§ 18, 31; Dec. Dig. § 33.*]

Error from Superior Court, Baldwin County; Jas. B. Park, Judge.

Application for writ of habeas corpus by Rebecca Harper against S. L. Terry, jailer. Application denied, and applicant brings error. Affirmed.

Sibley & Sibley, of Milledgeville, for plaintiff in error. D. S. Sanford and Hines & Vinson, all of Milledgeville, for defendant in error.

BECK, J. Rebecca Harper filed her application for a writ of habeas corpus against S. L. Terry, jailer of Baldwin county, alleging that she was illegally restrained of her liberty and held in the jail. This application, coming on to be heard on the 17th day of December, 1912, before the judge of the superior court, was refused, and the applicant was remanded. To this judgment she excepted.

It appeared on the trial of the case that the applicant had been taken into custody of the sheriff in certain bail-trover proceedings instituted against the applicant by Georgia Jeffers. Afterward Rebecca Harper made application for discharge, alleging that she was neither able to give bond and the security required by law nor to produce the property, and denying that she had in her possession, custody, or control the property to recover which the bail-trover proceedings had been instituted. Upon the hearing of this application, she was remanded to the custody of the jailer. To this judgment she sued out a bill of exceptions to have the judgment reviewed in the Supreme Court, and filed two affidavits, one stating that she had been advised by her counsel that she had good cause for writ of error, and that she was unable, because of her poverty, to pay the costs or give the bond or security for the eventual condemnation money, the other stating that she was unable to pay the costs in the case. On the hearing of the habeas corpus case appeared the following, in addition to the facts recited in the foregoing statement: In 1912 the applicant was appointed temporary administratrix of the estate of her deceased husband, Clifford Harper, by the court of ordinary of Baldwin county. As such she collected, on November 4, 1912, \$730 from the National Bank of Brunswick, Ga., and in the following month she secured possession of a trunk and other personal effects belonging to the deceased. She has not produced the money sued for in the bail-trover proceeding, and has given no bond to secure its production.

[1] 1. It is contended by counsel for plaintiff in error, in the first place, that the detention of plaintiff in error in the jail was illegal, because upon the hearing of the application for discharge from custody in the bail-trover case the filing of the pauper affidavits referred to in the statement of facts

operated as a supersedeas, and consequently that the applicant for discharge, the plaintiff in error here, should have been released from custody until the hearing and determination in the reviewing court of the bill of exceptions sued out to the order of the judge refusing the application for discharge from custody under the bail-trover proceedings. But we are of the opinion (conceding that, the bill of exceptions having been sued out, the filing of the affidavits referred to operated as a supersedeas without any express order from the court granting a supersedeas) that the effect of such a supersedeas was to leave the case and the applicant for discharge in statu quo. The applicant was already in custody of the law; the judgment refusing her discharge had no other effect than to leave her where she was at the time of the filing of the application. A supersedeas would not have the effect of changing the status and releasing the party held in custody.

[2] 2. The ruling made in the second headnote does not require elaboration. See, in this connection, the case of *Harper v. Jeffers*, 78 S. E. 172.

Judgment affirmed. All the Justices concur.

(140 Ga. 14)

BROWN v. PINSON.

(Supreme Court of Georgia. May 18, 1913.)

(Syllabus by the Court.)

APPEAL AND ERROR (§ 1005*)—VERDICT—EVIDENCE.

There being evidence to authorize the verdict, and the same having been approved by the trial judge, it will not be disturbed here.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3860-3876, 3948-3950; Dec. Dig. § 1005.*]

Error from Superior Court, Worth County; Frank Park, Judge.

Action between William Brown and G. M. Pinson. From an adverse judgment, Brown brings error. Affirmed.

Julian B. Williamson and J. H. Lipton, both of Sylvester, for plaintiff in error. Pope & Bennet, of Albany, for defendant in error.

BECK, J. Judgment affirmed. All the Justices concur.

(139 Ga. 773)

DEUBLER v. HART et al.

(Supreme Court of Georgia. April 18, 1913.)

(Syllabus by the Court.)

1. EJECTMENT (§§ 9, 86*)—PROOF OF TITLE—APPOINTMENT OF EXECUTOR.

In an action of ejectment in the common-law form, where a demise is laid in an executor, the appointment and qualification of the executor is a necessary part of the plaintiff's title. The usual way of proving them is by the in-

roduction in evidence of the lessor's letters testamentary.

(a) Where the same person is both executor and testamentary trustee under a will, but the title to the property devised is placed in him as trustee, in a suit to recover realty so left, a demise in the name of the executor is not available.

[Ed. Note.—For other cases, see Ejectment, Cent. Dig. §§ 16-29, 238-245; Dec. Dig. §§ 9, 86.*]

2. EJECTMENT (§ 9*)—TITLE OF PLAINTIFF—JOINT DEMISE.

In order to recover on a joint demise, it is necessary to show title and a right of entry in each and all of the persons named as lessors in that count.

[Ed. Note.—For other cases, see Ejectment, Cent. Dig. §§ 16-29; Dec. Dig. § 9.*]

3. APPEAL AND ERROR (§ 1050*)—ACTION BY EXECUTOR—PROOF—WILL—ADMISSION IN EVIDENCE.

At common law an executor suing in ejectment was required to make a profert of the will, but that rule is abrogated by statute. Nevertheless, where one of the plaintiff's lessors is an executor, the will would not be so irrelevant that its reception in evidence would require a new trial.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1068, 1069, 4153-4157, 4166; Dec. Dig. § 1050.*]

4. EJECTMENT (§ 90*)—EVIDENCE—EXEMPLIFICATION OF BANKRUPTCY.

The exemplification of bankruptcy was admissible as bearing on the issue made as to the execution and delivery of a deed by the bankrupt anterior to the adjudication.

[Ed. Note.—For other cases, see Ejectment, Cent. Dig. §§ 254-277; Dec. Dig. § 90.*]

Error from Superior Court, Terrell County; W. C. Worrill, Judge.

Action by Mrs. M. A. Hart and others against Charles Deubler. Judgment for plaintiffs, and defendant brings error. Reversed.

H. A. Wilkinson, of Dawson, for plaintiff in error. M. C. Edwards, of Dawson, for defendants in error.

EVANS, P. J. The action was ejectment in the common-law form. The demises were laid, one in the name of M. A. Hart, executrix of T. J. Hart, and the other in the name of Mrs. M. A. Hart, Tom Hart, and Ed Hart, heirs at law of T. J. Hart. The defendant pleaded not guilty, and that he is the owner of the premises in dispute by virtue of a deed from T. J. Hart, dated November 8, 1875, and continuous possession thereunder from the date of its execution to the filing of the suit. The jury returned a general verdict for the "plaintiffs." The court refused to grant a new trial, and the defendant excepted.

[1] 1. An insuperable obstacle to upholding the verdict is that neither of the plaintiff's lessors was shown to have a right of recovery. An executor may maintain an action of ejectment, but, in order to recover, he must exhibit in evidence his letters testamentary. The province of the letters is to prove the appointment in order to show

his authority to have possession of the land. *Lamar v. Sheffield*, 66 Ga. 710. Where one sues as executor to recover on a chose in action belonging to his testator, upon failure of the defendant to file a plea in abatement, the plaintiff is not required to prove his appointment as executor; but the rule is otherwise if the letters testamentary constitute a part of the plaintiff's title to the property sued for. *Hazlehurst v. Morrison*, 48 Ga. 397. Letters testamentary on the estate of T. J. Hart were a part of the lessor's title in the demise laid in the name of the executrix, and there could be no legal recovery on that demise without proof of the same. The reception in evidence of the will naming Mrs. Hart as executrix will not suffice to dispense with proof of her appointment and qualification as executrix, as wills may be probated by others than the nominated executor, and a nominated executor may offer a will for probate and yet refuse to qualify. Nor could a recovery be supported under this demise on the ground that Mrs. Hart is also named as testamentary trustee. Where the same person is both executor and testamentary trustee under a will, but the title to real property therein devised is placed in him as trustee, in a suit to recover such realty a demise in the name of the executor is not available. *Schley v. Brown*, 70 Ga. 64.

[2] 2. Nor could there be a recovery on the demise of the heirs at law of T. J. Hart. The plaintiffs offered in evidence the will of T. J. Hart, in which the specific property was devised to Mrs. Hart in trust for her sons Thomas J. Hart, Jr., and Edwin Harris Hart. T. J. Hart having disposed of the premises in dispute by will, his heirs could not take the estate by inheritance. The devise is not to the widow and children as tenants in common, but to the widow as trustee for the children. She would only take the naked legal title during the minority of the children, and the evidence discloses that at least one of them was sui juris upon the institution of the action. As to him the trust was executed. So that, even if the words "heirs at law" annexed to the names of the lessors in the second demise be treated as surplusage, there can be no recovery under the familiar rule in ejectment that, in order to recover upon a joint demise, it is necessary to show title and a right of entry in each and all of the persons named as lessors in that count. *Powell on Actions for Land*, § 27, and cases cited.

[3] 3. The will of T. J. Hart was received in evidence over objection. At common law an executor suing in ejectment was required to make proof of the will, but that rule has been abrogated by statute in this state. *Lamar v. Gardner*, 113 Ga. 781, 39 S. E. 498. Nevertheless, where one of the plaintiff's lessors is an executor, the will would not be altogether irrelevant, and its reception in

evidence would not be ground for new trial.

[4] 4. The court excluded from evidence certified copies of the proceedings in bankruptcy of Thomas J. Hart. The petition in bankruptcy was filed on November 26, 1875, and the adjudication also was made on that date. Included in the inventory of property claimed as exempt is "one house and lot in the city of Dawson." The evidence does not disclose whether the locus in quo was that house and lot. If that is the same house and lot in dispute, this proceeding would be relevant in connection with the plaintiffs' evidence attacking the execution and delivery of the deed produced in evidence by the defendant from Thomas J. Hart, purporting to have been executed a few days prior thereto. On the other hand, if the premises in dispute were not scheduled in bankruptcy, the bankruptcy exemplification would be admissible as bearing on the execution and delivery of the deed. In either view the evidence was relevant.

As the case will be sent back for another trial, we forbear discussion of the facts.

Judgment reversed. All the Justices concur.

(129 Ga. 768)

ROBSON & EVANS v. J. R. HALE & SONS.
(Supreme Court of Georgia. April 18, 1913.)

(Syllabus by the Court.)

1. SALES (§ 62*)—CONTRACT—CONSTRUCTION. A contract to purchase a certain quantity of oats, to be delivered in specified amounts each month during five months, is an entire contract of purchase, though the deliveries are to be made at separate times.

[Ed. Note.—For other cases, see Sales, Cent. Dig. §§ 171-179; Dec. Dig. § 62.*]

2. CONTRACTS (§ 313*)—BREACH OF CONTRACT—ATTEMPT TO RESCIND.

If a purchaser under such a contract, after receiving two shipments of the grain, without lawful cause notified the seller that he would not receive the balance of the grain undelivered, he could not thereby rescind the contract without the consent of the seller, but such a repudiation of it constituted a breach.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. § 1279; Dec. Dig. § 313.*]

3. SALES (§ 340*)—BREACH BY BUYER—REMEDIES.

By Civ. Code 1910, § 4131, it is declared that upon the breach of an executory contract of sale by a purchaser the seller ordinarily has a choice of any one of three remedies: He may retain the goods, and sue for the difference between the contract price and the market price at the time and place for delivery; or he may sell the property, acting for that purpose as agent for the purchaser, and recover the difference between the contract price and the price on resale; or he may store or retain the property for the purchaser and sue the latter for the entire price.

[Ed. Note.—For other cases, see Sales, Cent. Dig. §§ 927-942; Dec. Dig. § 340.*]

4. VERDICT SUSTAINED.

The evidence disclosed a clear repudiation of the contract by the purchaser, with no legal reason therefor. The verdict was fully war-

ranted, and none of the grounds of the motion for a new trial furnish sufficient reason to cause a reversal.

(Additional Syllabus by Editorial Staff.)

5. SALES (§ 334*)—BREACH BY BUYER—REMEDIES—RESALE—REASONABLE TIME.

Where a buyer refuses to receive goods and the seller elects the remedy of a resale, the resale must ordinarily be made in a reasonable time; and what is a reasonable time is a question of fact for the jury.

[Ed. Note.—For other cases, see Sales, Cent. Dig. § 920; Dec. Dig. § 334.*]

Error from Superior Court, Baldwin County; Jas. B. Park, Judge.

Action by J. R. Hale & Sons against Robson & Evans. Judgment for plaintiffs, and defendants bring error. Affirmed.

Robson & Evans made with Hale & Sons the following contract:

"Nashville, Tenn., Dec. 8/09.

"Robson & Evans, Milledgeville, Ga.

"We are pleased to confirm sale to you today by wire through Messrs. R. T. Birdsey & Co., as follows:

500-160# sax wh. oats at 54½, last of Jan., 1910.

300-160# sax #3 wh. oats at 55½, last of Feb., 1910.

300-160# sax wh. oats at 55½, last of March, 1910.

300-160# wh. oats at 56½, last of April, 1910.

600-160# sax #3 wh. oats at 57½, May, 1910;

"Nashville official weights and grades final. Shipments subject to draft drawn with exchange and collection charges; payable on arrival of car; shipment as follows: Jan. Feb. March, April, and May, 1910. Subject to freight charges. Price and terms accepted.

"Yours truly, J. R. Hale & Sons,

"Per D. W. L."

"Robson & Evans,

"Per R. C. Robson."

Hale & Sons brought suit against Robson & Evans for a breach of this contract, alleging, among other things, as follows: The oats agreed to be delivered the last of January and those to be delivered the last of February were delivered accordingly. On April 6th, before the delivery of any of the remaining oats, or the furnishing of shipping orders on request, Robson & Evans advised the plaintiffs that they would not accept any further shipment, and instructed the plaintiffs to cancel the contract. The plaintiffs immediately advised Robson & Evans that they were unwilling to cancel the contract, except upon condition that Robson & Evans would pay them two cents per bushel for the remaining 6,000 bushels. The plaintiffs continued to hold such 6,000 bushels of oats at their place of business, in Nashville, Tenn., awaiting shipping orders. After Robson & Evans had been repeatedly informed that the plaintiffs would not cancel

the contract except upon the terms above stated, and repeatedly requested to give shipping instructions, so that the plaintiffs might forward the oats in accordance with the contract, they failed and refused to do so. The plaintiffs held the oats until June 13th, and then sold them at the market price at that time. Deducting the price which they brought from the aggregate contract price, with the cost of sacking and storage added, there was a balance of \$567.46. The sale was made after frequent efforts to dissuade Robson & Evans from repudiating the contract, and after giving them written notice of the intention to sell and hold them liable for the difference between the contract price and the price which the oats might bring in the Nashville market.

The defendants admitted the making of the contract, and that they refused to give shipping instructions, and on April 6th notified the plaintiffs that they would not accept the oats, which were to be delivered in March, April, and May. They also pleaded that at the time of such notice oats for March, April, and May delivery were worth more than the contract price, and that the plaintiffs, after receipt of the notice, held the oats until June 13th, during which period the market price of oats declined. The defendants insisted that the delay was unreasonable, and that they were not liable for damages resulting from the fall in the market price.

The jury found in favor of the plaintiffs \$567.46, with interest from June 13th. The defendants moved for a new trial, which was refused, and they excepted.

Hines & Vinson, of Milledgeville, for plaintiffs in error. Allen & Pottle, of Milledgeville, for defendants in error.

LUMPKIN, J. (after stating the facts as above). [1, 4] 1. The contract to purchase the oats was entire, although they were to be delivered in different lots monthly at a stated price per bushel for each lot.

[2] The buyers could not receive some of the oats and rescind the contract as to the balance, without the consent of the sellers. A refusal to accept more oats after the first two shipments was a repudiation of the contract, not a rescission of it. When the buyers, without lawful cause, notified the sellers that they would not receive the remainder of the oats undelivered, this was a breach of the contract. *Henderson Elevator Co. v. North Georgia Milling Co.*, 126 Ga. 279, 55 S. E. 50. Under the previous rulings of this court the sellers could not thereafter deliver other quantities of oats to a common carrier for transportation to the buyers, treat this as the equivalent of delivery to the buyers, and sue for the purchase price of the oats as delivered. *Oklahoma Vinegar Co. v. Carter & Ford*, 116 Ga. 140, 42 S. E.

378, 59 L. R. A. 122, 94 Am. St. Rep. 112; Rounsaville v. Leonard Mfg. Co., 127 Ga. 735, 56 S. E. 1030.

[3] The sellers could treat the contract as breached, and pursue any of the remedies stated in the Civil Code, § 4131. One of these was to sell the property as the agents of the buyer, after notice and in a reasonable time, and recover the difference between the contract price and the price on resale.

[5] It will be observed that, under the contract, the sellers were not required to deliver the oats except in monthly shipments; and therefore they were not obliged to buy oats for each delivery until the time for it, if they did not have the oats on hand. It would seem that the buyers ought not to be better off by reason of breaking the contract than by complying with it. It may be, however, that the sellers should take this into consideration in electing which remedy they will pursue, and not elect to treat the notice as an entire breach and resell the whole, if they have not the property on hand for resale. Where a buyer refuses to receive goods and the seller elects the remedy of a resale, the general rule is that the resale must be in a reasonable time; and what is a reasonable time is a question of fact for the jury. *N. Georgia Milling Co. v. Henderson Elevator Co.*, 130 Ga. 113, 116, 60 S. E. 258, 24 L. R. A. (N. S.) 235. In *Bainbridge Oil Co. v. Crawford Oil Mill*, 138 Ga. 741, 76 S. E. 41, the seller refused to deliver goods deliverable in installments. The buyer refused to treat the contract as at an end, and demanded that deliveries be made at the times specified; and, on failure of the seller to comply therewith, the buyer sued for the difference between the contract price and the market price at the time specified for each delivery. See, also, *Ford v. Lawson*, 133 Ga. 237 (5, 6), 238, 65 S. E. 444.

If it be assumed, under the facts of this case, that the sale of the entire lot of oats should have been made in a reasonable time after the notice of refusal to receive the balance was given to the plaintiffs on April 6th, nevertheless, the facts of the case are to be considered in determining the question of reasonableness. Here the evidence as to the contract, the conduct of the parties, the repeated letters and telegrams of the sellers, urging the buyers to give instructions and offering to release them on certain terms, but not otherwise, and the failure or delay on the part of the buyers in answering, was sufficient to authorize the jury to find that the delay in selling until June 13th was not unreasonable. *Mendel v. Miller*, 126 Ga. 834, 56 S. E. 88, 7 L. R. A. (N. S.) 1184.

The verdict was right; and none of the rulings complained of, if they had even apparent merit when considered alone, were such as to furnish ground for reversal.

Judgment affirmed. All the Justices concur.

(130 Ga. 749)

THORNTON v. HITCHCOCK.

(Supreme Court of Georgia. April 18, 1913.)

(Syllabus by the Court.)

1. BOUNDARIES (§ 52*)—RETURN OF PROCESSIONERS—AMENDMENT.

Where a motion is made to dismiss the return of processioners because of incompleteness and noncompliance with the statute, it is competent to allow the processioners (they being in office at the time) to amend their return; and if the deficiencies pointed out in the motion are cured by the amendment, it is proper to deny the motion. Such amendment may be made after a protest is filed by the processioners' return, and during the trial of the issue formed thereon.

[Ed. Note.—For other cases, see *Boundaries*, Cent. Dig. §§ 253-260, 262, 263; Dec. Dig. § 52.*]

2. BOUNDARIES (§ 52*)—RETURN OF PROCESSIONERS—VALIDITY—CLERICAL MISTAKE.

Where an application is made to certain persons as processioners to have the land of the applicant processioned, a variance in the initials of one of the processioners as stated in the application from that as stated in the return, where no point as to the identity of the person is raised, is insufficient to invalidate the return.

[Ed. Note.—For other cases, see *Boundaries*, Cent. Dig. §§ 253-260, 262, 263; Dec. Dig. § 52.*]

3. VERDICT SUSTAINED.

The evidence was sufficient to support the verdict.

Error from Superior Court, Putnam County; J. B. Park, Judge.

Application by R. L. Hitchcock to the processioners of land to have his land processioned, and especially the line between his land and that of G. M. Thornton. Thornton protested, and the proceeding was transferred to the superior court. From the verdict, the protestant brings error. Affirmed.

Roy D. Stubbs and W. T. Davidson, both of Eatonton, for plaintiff in error. W. F. Jenkins and S. T. Wingfield, both of Eatonton, for defendant in error.

EVANS, P. J. R. L. Hitchcock made application to the processioners of land for the 814th (Kinderhook) district of Putnam county to have his land processioned, and especially the line between his land and that of G. M. Thornton. Upon that application the land was surveyed, and the processioners made the following return: "Georgia, Putnam County, June 1, 1909. We, the undersigned, processioners of Kinderhook Dist., Putnam county, Ga., have had Farrar line and Noah Lawrence line run, and find corner on Farrar line near the place recognized by all parties interested; and we have decided to make the line that divided R. L. Hitchcock and G. M. Thornton on the Farrar line run in a straight line to the district line where it crosses the big road between 314th and 369th Dists." Thornton filed a protest, and the whole proceedings were duly

transmitted to the superior court of Putnam county. On the call of the case for trial the protestant moved to dismiss the return of the processioners, on the ground that it showed on its face that an arbitrary dividing line had been made between the lands of applicant and protestant, and had not been marked out or traced as provided by the statute, and that the return failed to show that any application had been made to the processioners to authorize their action. At the instance of applicant the court allowed the processioners, who were in office, to amend their return by attaching thereto the original application made to them by the applicant to procession his land, which was in terms of the statute; and also to further amend their return as follows: "To Hon. John S. Reid, Ordinary of Said County: The undersigned, processioners for the 314th Dist., G. M., said county, having been applied to by R. L. Hitchcock to trace and mark anew the line dividing his lands from the lands of G. M. Thornton, adjoining each other in said district, did appoint the ——— day of May, 1909, at 10 o'clock a. m., as the day of tracing and marking said line pursuant to the provisions of section 3244 et seq. of the Civil Code of 1895, and, after having given ten days' written notice to said Thornton, the owner of said adjoining lands to said Hitchcock, did on the ——— day of May, 1909, as required by statute, together with the county surveyor, survey said lands and proceed to run and mark said lines between the lands of said named parties, as is set out in our original return to said ordinary. Attached to the original return filed by us with the ordinary is a plat made by H. R. Pinkerton, county surveyor of said county, which is hereby made a part of said return, and which properly represents the service made and the lines run and marked anew by us and said surveyor. This 21st March, 1910. J. F. Freeman, W. T. McDade, and J. T. Resseau, Processioners."

[1] 1. It may be stated as a general rule that a return which is incorrect or erroneous as to the facts may always be amended, so as to conform to the truth, on application to the court for that purpose by the officers who made the return. 18 Enc. Pl. & Pr. 950. If a return be so defective as not to amount to official action, it is not amendable; but where it is merely incorrect or erroneous, it may be amended by the officer who made it, so as to make it comply with the facts existing at the time of the return. *Dorminey v. De Lang*, 130 Ga. 618, 61 S. E. 475, 124 Am. St. Rep. 193. The return made by the processioners was not too defective for amendment. It appeared therefrom that the line between the applicant and the protestant began at a fixed corner and extended in a straight line to another fixed corner. In defining the duties of processioners relative to the marking anew of lines, the statute de-

clares that "if the corners are established, and the lines not marked, a straight line, as required by the plat, shall be run." Civil Code 1895, § 3246. The original return discloses that the processioners had established such straight line between the parties, but failed to state that it was the line which they found and which they marked anew. The other defect in the return pointed out in the motion was a failure to attach the application to procession the land, or to recite that they had given the statutory notice to the adjacent landowner. This was a mere matter of form, and was curable by amendment.

It is contended that it is too late for the processioners to amend their return after the same had been filed in court and a protest filed thereto. There can be no sound objection to the amendment of an official return by the officer who made it, after it has been filed. In many cases this practice is regulated by statute, as, for instance, an amendment of a levy, by the officer who made it, is allowable even after the sale occurred, and during the progress of an ejectment suit, in which the deed by the sheriff, based upon such sale, is one of the muniments of title relied upon in the case. Civil Code 1910, §§ 5115, 5116; *Dorminey v. De Lang*, supra. But a statute is not necessary to authorize such amendment; and in the absence of regulatory legislation it is generally a matter resting in the sound discretion of the court, which is exercised with great liberality. 18 Enc. Pl. & Pr. 954. Amendments to the reports of commissioners to lay out highways are allowable after the reports are filed, so as to show conformity with the statute. 37 Cyc. 112. If the officer is not in office, he cannot amend an incomplete or defective return without some order of court giving direction in the matter. *Beutell v. Oliver*, 89 Ga. 246, 15 S. E. 307. In this case it does not appear but that the officers amending the return were in office when the amendment was allowed.

The case of *Rawls v. Nowell*, 133 Ga. 874, 67 S. E. 187, does not conflict with this ruling. In that case the applicant proposed to amend the plat made by the surveyor, by adding a description of the land, and the court held that such amendment by the applicant was not permissible. It will be noted that the proposal to amend was by the applicant, and not by allowing the officer to amend his return. It follows that the court properly allowed the amendment, and overruled the motion to dismiss for defects in the return of the processioners which were cured by it.

[2] 2. The application to procession the land was made to "W. T. McDade, J. F. Freeman, and John Resseau, Sr., processioners of land for the 314th (Kinderhook) district of said county." The return was signed by "J. F. Freeman, W. D. McDade, and J. T. Resseau, Processioners." It is contended

that the variance in the initial of one of the processioners creates such a variance between the names of the persons to whom application was made and those who acted as processioners as to invalidate the whole proceeding. There are two replies to this contention: The application was made to the processioners of the Kinderhook district, and the officials made their return as such processioners. There is no point made as to the identity of the person, and, besides, this point is not good under a general assignment that the verdict is contrary to evidence.

[3] 3. The evidence was sufficient to authorize the verdict, which has the approval of the trial judge, and no reason appears why the same should be set aside.

Judgment affirmed. All the Justices concur.

(129 Ga. 815)

FURR v. BANK OF FAIRMOUNT.

(Supreme Court of Georgia. April 18, 1913.)

(Syllabus by the Court.)

1. PROCESS (§ 164*)—AMENDMENT—FORECLOSURE OF MORTGAGE.

Where a sheriff served a rule nisi to foreclose a mortgage on realty in proper time, but inadvertently dated his return so as to make it appear that the service was made in the future, and at a time subsequent to the term at which the rule absolute was granted, and the rule absolute recites service of the rule nisi according to law, such return is thereafter amendable by the sheriff, who is in office, without order of court, so as to make the return show the true date of the service. *Manley v. McKenzie*, 128 Ga. 348, 57 S. E. 705; *Thornton v. Hitchcock*, 78 S. E. 179.

[Ed. Note.—For other cases, see *Process*, Cent. Dig. §§ 176, 239-248; Dec. Dig. § 164.*]

2. MORTGAGES (§ 494*)—FORECLOSURE—JUDGMENT—VALIDITY.

Where a petition was filed to foreclose a mortgage on realty, addressed to the superior court of Murray county, and a rule nisi was issued thereon, bearing the caption of "Murray County," and was duly served, and at the return term a rule absolute was granted by the court, and duly entered upon the minutes of the superior court of Murray county, such judgment absolute is not invalid because at the head of the paper on which it is written, and before the statement of the case, appear the words, "Georgia, Bartow County."

[Ed. Note.—For other cases, see *Mortgages*, Cent. Dig. §§ 1441-1445; Dec. Dig. § 494.*]

3. MORTGAGES (§ 486*)—FORECLOSURE—JUDGMENT—PARTNERSHIP PROPERTY.

In the foreclosure of a mortgage on realty to secure the debt of the mortgagor and also that of a partnership of which he is a member, it is proper to enter up a special judgment against the mortgagor, to be made out of the mortgaged property, for the full amount of the secured debts.

[Ed. Note.—For other cases, see *Mortgages*, Cent. Dig. §§ 1404-1411, 1470; Dec. Dig. § 486.*]

4. MORTGAGES (§ 413*)—FORECLOSURE—INJUNCTION—GROUNDS—PARTNERSHIP PROPERTY.

It is no ground to enjoin the orderly progress of a mortgage *fi. fa.*, at the instance of

the mortgagor, that some of the land which is included in the mortgage was not his individual property, but that of a partnership of which he was a member.

[Ed. Note.—For other cases, see *Mortgages*, Cent. Dig. §§ 1187-1201; Dec. Dig. § 413.*]

5. COSTS (§ 260*)—APPEAL FOR DELAY—DAMAGES.

A motion to award damages on the ground that the case was brought to this court for delay only must be denied; the judgment to which exception is taken being the refusal of an interlocutory injunction, and not a money judgment. *Pittsburg-Bartow Mining & Mfg. Co. v. Washington Trust Co.*, 137 Ga. 232, 73 S. E. 367.

[Ed. Note.—For other cases, see *Costs*, Cent. Dig. §§ 983-996, 1002, 1003; Dec. Dig. § 260.*]

Error from Superior Court, Murray County; A. W. Fite, Judge.

Action by the Bank of Fairmount against L. O. Furr. Judgment for plaintiff, and defendant brings error. Affirmed.

W. E. Mann, of Dalton, for plaintiff in error. Wm. T. Townsend and Neel & Neel, all of Cartersville, for defendant in error.

EVANS, P. J. Judgment affirmed. All the Justices concur.

(129 Ga. 716)

MILLER v. STATE

(Supreme Court of Georgia. April 17, 1913.)

(Syllabus by the Court.)

1. CRIMINAL LAW (§ 942*)—APPEAL—REFUSAL OF NEW TRIAL.

Newly discovered evidence, which is impeaching and cumulative in character, is not generally cause for a new trial. In this case there was no abuse of discretion in refusing to grant a new trial because of newly discovered evidence.

[Ed. Note.—For other cases, see *Criminal Law*, Cent. Dig. §§ 2316, 2331, 2332; Dec. Dig. § 942.*]

2. JURY (§ 110*)—OBJECTION TO JUROR—WAIVER.

Where a juror is kin both to the prosecutor and the defendant within the prohibited degrees of relationship, and this fact is known to the defendant, and he makes no objection until after conviction, he will be presumed to have waived the incompetency of the juror.

[Ed. Note.—For other cases, see *Jury*, Cent. Dig. §§ 502-513, 515-523; Dec. Dig. § 110.*]

3. JURY (§ 90*)—INCOMPETENCY OF JUROR—RELATIONSHIP.

The fact that a sister of a juror married the brother of the prosecutor's wife establishes no relationship between the prosecutor and the juror, and the latter is not incompetent to serve as a juror on the trial of one charged with the murder of the prosecutor's child.

[Ed. Note.—For other cases, see *Jury*, Cent. Dig. §§ 413-418, 422; Dec. Dig. § 90.*]

4. HOMICIDE (§§ 297, 309*)—INSTRUCTION—EVIDENCE TO SUPPORT.

It is not error to fail to instruct the jury on the law of justifiable homicide and of voluntary manslaughter, where the evidence does not authorize it.

[Ed. Note.—For other cases, see *Homicide*, Cent. Dig. §§ 611, 648, 650, 652-655; Dec. Dig. §§ 297, 309.*]

Beck, J., dissenting.

Error from Superior Court, Heard County; R. W. Freeman, Judge.

Lou Miller was convicted of murder in the second degree, and brings error. Affirmed.

S. Holderness and W. Smith, both of Carrollton, W. C. Wright, of Newnan, and A. J. Andrews, of La Grange, for plaintiff in error. J. R. Terrell, Sol. Gen., of Greenville, Frank S. Loftin, of Franklin, H. A. Hall, of Newnan, and T. S. Felder, Atty. Gen., for the State.

HILL, J. John Daniel and Lou Miller were jointly indicted for the crime of murder. Daniel was never tried, having fled from the state and died without being arrested. Miller was put upon trial as a principal in the second degree, convicted, and sentenced to life imprisonment in the penitentiary. He made a motion for a new trial, which was overruled, and he excepted. The evidence for the state tended to show that a few hours previous to the homicide Daniel and the prosecutor, D. E. (Doc) Bell, had a difficulty in the presence of the defendant, who was in the buggy with Daniel, and who had without legal provocation shot at Bell, and Bell, later arming himself, returned the fire, after Daniel had again fired first at Bell. Daniel and the defendant retired from the scene of the first encounter, and the defendant procured a Winchester rifle from a neighbor, and soon thereafter Daniel, with a Winchester rifle, in company with the defendant, went to Bell's home, where his family was, and a general fusillade occurred, Daniel shooting from behind a stump, and, according to eyewitnesses, firing first at Bell, who was on or near his front porch when the shooting began, and who later retreated to a storehouse near his dwelling, from where he and his brothers' friends returned the fire with shotguns and a parlor rifle. During this shooting the defendant was standing near Daniel and saying, "Shoot! Shoot!" In his statement the defendant denied this and said that what he did say was, "Don't shoot!" A Winchester rifle ball entered the dwelling house of Bell from the direction Daniel was standing and killed an infant child of Doc Bell in one of the rooms. After the shooting both Daniel and the defendant left the scene of the homicide together and fled from the state.

1. The first, second, third, and fourth special grounds of the amended motion ask for a new trial because of newly discovered evidence. Most of this evidence tends to impeach the state's witness McBrayer, who testified on the trial that, as he passed the scene of the difficulty, the defendant was standing near Daniel, who did the shooting, and said to the latter, "Shoot!" The affidavits of these newly discovered witnesses tend to show that McBrayer prior to giving his testimony said to the affiants that he understood the defendant, Lou Miller, to say to

John Daniel, "Shoot!" but he could not be positive, that he might have said, "Don't shoot!" that his mule was frightened and he was watching his mule instead of Miller. In a counter affidavit McBrayer denies the language attributed to him by all the alleged newly discovered witnesses and says that what he did say to these witnesses was the same as his testimony given on the trial of the case, which was that he heard the defendant, Lou Miller, say to John Daniel, "Shoot!" and that he did not hear him say, "Don't shoot!" Two other newly discovered witnesses gave affidavits to the effect that on the afternoon of the homicide they saw John Daniel, who had on his shoulder a Winchester rifle at the time. Daniel gave affiants the first information they had of the difficulty at Bell's. The judge did not abuse his discretion in refusing a new trial upon the ground of this newly discovered evidence.

[1] This evidence was impeaching and cumulative in its character, and "it is well settled that alleged newly discovered evidence of this character is not generally cause for a new trial, even where it is uncontradicted; and it is perfectly clear that, where it is contradicted by evidence introduced by the state on the hearing of the motion, there is no abuse of discretion in refusing to grant a new trial upon the ground of the existence of such evidence and its discovery since the rendition of the verdict." *Washington v. State*, 124 Ga. 423, 431, 52 S. E. 910, 914; *Burge v. State*, 133 Ga. 431, 66 S. E. 243; *Wimms v. State*, 135 Ga. 659, 70 S. E. 254.

[2] 2. The fifth ground of the motion assigns error because Joe Bagwell, a juror who was impaneled and sworn, and who did try the defendant, was related to D. E. (Doc) Bell and to the deceased; the latter being the infant daughter of the prosecutor. It is insisted that the juror is a second cousin by marriage to the prosecutor and a third cousin to the deceased and is therefore within the prohibited degrees of relationship. The affidavit to support this ground tends to show that "Bagwell married a Barber, which said Miss Barber was a daughter of Bud (L. E.) Barber; said Bud Barber married a Miss Mathis; and said Miss Mathis was a first cousin to John Bell; Doc Bell, the prosecutor in said case, is a son of John Bell." From this affidavit it appears that Bagwell, the juror, is the husband of the third cousin of the prosecutor. In other words, the juror married the prosecutor's third cousin. This would bring the juror within the prohibited degree, and as a general rule would disqualify him and would be cause for a new trial, if he served on the jury which convicted the defendant, without knowledge on the part of the defendant or his counsel of the relationship at the time of his acceptance and service as a trial juror. But the state introduced on the hearing of the motion for a new trial a counter affidavit of L. E. Barber, who testified that he was

"the father of Lola Bagwell, the wife of Joe Bagwell; that deponent married Emma Mathews; that Matilda Mathews was the daughter of Mrs. Brown; that Mrs. Brown was the sister of John Cheek and also the sister of Mrs. Luke Bell, who was the grandmother of Lou Miller and D. E. Bell, the prosecutor; that Lou Miller [the defendant] always called deponent 'cousin Bud' and called my wife cousin; that said Miller has visited deponent's family; that Mrs. Luke Bell was the grandmother of said Lou Miller and said D. E. Bell." It appears, therefore, that the defendant and the prosecutor had a common ancestor in Mrs. Luke Bell, the grandmother, and consequently are first cousins. We think the evidence sufficiently indicates, if it does not absolutely show, that the defendant knew of the relationship existing between the juror and the prosecutor. He did know of the relationship between the juror and himself; and it is inconceivable that he did not know the relationship existing between all three. He lived in the neighborhood, was a first cousin of the prosecutor (as testified by the latter), and he called the juror's father-in-law "cousin Bud." The prosecutor testified that the defendant "was nearly double a first cousin to me; he was a first cousin, then he was a second cousin." If the juror was related to the prosecutor within the prohibited degree, he was also as nearly related to the defendant within the prohibited degree. This relationship must have been known to the defendant, because he always addressed the juror's father-in-law as "cousin Bud" and his wife as cousin. It is well settled that, where a juror is known to be incompetent, such incompetency is presumed to be waived unless objection is made. *Georgia R. Co. v. Cole*, 73 Ga. 713 (2b); *Lampkin v. State*, 87 Ga. 516 (7), 13 S. E. 523; *Hadden v. Thompson*, 118 Ga. 207 (2), 44 S. E. 1001.

[3] 3. The sixth ground of the motion assigns error because of the alleged relationship of one of the jurors, Jim Boggus, to Mrs. D. E. Bell, the wife of the prosecutor, and mother of the child killed, within the prohibited degrees. The affidavit of L. R. Jones introduced by the defendant at the hearing of the motion tends to show that Boggus, the juror, is a brother-in-law of Jim Jones in that the latter married a sister of Boggus, and Jones is a brother of Mrs. D. E. Bell, the wife of the prosecutor, and the mother of the child killed. In other words, the juror is a brother-in-law of Jim Jones, who is also a brother-in-law of the prosecutor, Doc Bell. Neither is there any relationship between the juror and the mother of the child by reason of the fact that she was the sister of Jones who married the juror's sister. This does not disqualify the juror. It comes within the ruling made in the case of *Burns v. State*, 89 Ga. 527, 15 S. E. 748. It was there held that: "Marriage relates the husband to the wife's kin-

dred, but does not relate any of his kindred to hers. Consequently a man whose brother had married the prisoner's sister was not for that reason incompetent as a juror to try the prisoner for an offense." And see *City of Dalton v. Humphries*, 139 Ga. 556, 77 S. E. 790.

[4] 4. Error is assigned on the failure of the court to charge the law of justifiable homicide or of voluntary manslaughter, as applied to John Daniel, the alleged principal in the first degree. It is insisted that inasmuch as the state contended that John Daniel was the actual perpetrator of the crime, and that the defendant Miller was present aiding and abetting the same to be done, the failure of the court to charge the law of justifiable homicide and make such instructions applicable to John Daniel was error and prejudicial to the defendant for the reason that the burden was on the state, under the law, to show that the principal was guilty of murder before the state could ask a conviction of the movant, who was the alleged principal in the second degree; and, before the jury could convict him, they must believe, beyond a reasonable doubt, that Daniel was guilty of murder. Under the evidence in this case, we do not think that either the law of justifiable homicide or that of voluntary manslaughter is applicable.

The evidence for the state tended to show that, after the first difficulty between John Daniel and the prosecutor, the latter went to his home; and that Daniel and the defendant went away together. The defendant procured a Winchester rifle from a neighbor for the purpose, he said, of killing a hawk, and in a very short time he and Daniel appeared at the home of the prosecutor; Daniel having a Winchester rifle. Soon after lending the rifle the neighbor said to J. D. O'Keefe, a witness for the state, that, "when that old rifle began to crack, he said he knew that was his gun then." The evidence tended to show that Daniel commenced to fire at the prosecutor from behind a stump while the latter was endeavoring to get him to leave, and continued to shoot at least 16 times, twice after the mother had brought the dead baby out on the porch in her arms and told Daniel that he had killed her. One of the bullets from the Winchester rifle went through a portion of the house and killed the infant child of the prosecutor while lying in its bed. While the shooting was in progress a minister of the gospel was driving along the public road opposite to where the shooting was and saw a man there holding a horse and understood the man to say to another man also standing there, "Shoot!" and the man immediately shot. Other witnesses identified the man holding the horse as the defendant, Lou Miller, and the man at the stump with the rifle as John Daniel. Mrs. Effie Johnson and Nonie Bell were pleading with John Daniel not to go back to Doc Bell's. Daniel was cursing Doc Bell

and said he was going to kill him. Before Daniel said this of Bell, Miller said, "John can't take everything." It seems clear from the evidence that John Daniel went to the house of the prosecutor for the purpose of killing him, and that the defendant was there aiding and abetting him. Had Daniel killed the prosecutor, we think there is no question that he would have been guilty of murder, and the defendant, who aided and abetted the act, would have been none the less guilty. And if, under such circumstances, the shot or shots fired by Daniel at the prosecutor missed him, but hit his child and killed her, both Daniel and Miller would be guilty of murder. 1 Bishop, Crim. Law (8th Ed.) § 328; 1 Wharton's Crim. Law (11th Ed.) p. 695; 21 Cyc. 694. We can see no element of justifiable homicide in this case; but, on the contrary, the evidence makes out a case of murder. *Williams v. State*, 130 Ga. 400, 403 (2), 60 S. E. 1053; *Bowden v. State*, 126 Ga. 578 (3), 55 S. E. 499.

The court did not err, therefore, in failing to charge on the subject of justifiable homicide. He had correctly instructed the jury as to the law of murder, malice, burden of proof, and of principals in the first and second degree. He instructed the jury that, before the defendant could be convicted of murder, they "must find from the evidence, beyond a reasonable doubt, that John Daniel was guilty of the crime of murder; * * * that John Daniel willfully and with malice aforethought, while endeavoring to kill and murder Doc Bell, killed Sallie Maud Bell." And also: "Before you would be authorized to convict Lou Miller, it must be shown to you, beyond a reasonable doubt, that John Daniel was guilty of murder in killing Sallie Maud Bell. It must be shown that he killed her, and that in killing her he was guilty of murder, under the evidence of this case. If that has not been shown, why you should acquit the defendant Lou Miller." This charge was as favorable to the defendant as he was entitled to, under the evidence. The court instructed the jury that there could be no conviction unless Daniel was guilty of murder. And there could be no murder if the homicide was justifiable.

Nor was the failure to charge on the subject of voluntary manslaughter error. This was a case of murder or nothing. *Tolbirt v. State*, 119 Ga. 970, 47 S. E. 544. There was no such "hot blood," as contended by able counsel, as to authorize a charge on the law of voluntary manslaughter. After the first difficulty Daniel had deliberately armed himself with a deadly repeating rifle procured through his companion, Miller, and had gone to the home of the prosecutor for the expressed purpose of killing him. There might be a question of voluntary manslaughter in this case if the circumstances of the first transaction were such that, had death resulted to Doc Bell as a result of that quarrel, it would have been voluntary man-

slaughter. See *Williams v. State*, 125 Ga. 302, 54 S. E. 108. But let us see how the evidence stands as to that. Roy Johnson, who was in the buggy with Bell at the time of the first difficulty, and who was offered as a witness by the defendant, testified that Daniel said to the prosecutor that Hope Bell, a brother of the prosecutor, had wrecked his mother's home by running away and marrying her daughter, and he was going to kill Hope. Doc Bell then told Daniel that "somebody else could pull triggers." "Then John (Daniel) didn't say anything to Doc. He then shot at Doc without saying a word. Doc was in the buggy with me when John Daniel shot at him. We were 20 steps from John Daniel." There was nothing in this first transaction to authorize a charge on the law of voluntary manslaughter had death resulted. It is true that in the first transaction the prosecutor had fired one shot at Daniel, but it was only after Daniel had fired the third shot at him. In order to reduce the offense from murder to manslaughter, there must be some assault by the person killed upon the person killing or other equivalent circumstances. *Ray v. State*, 15 Ga. 223 (5). There was no assault made by Doc Bell in this transaction on John Daniel. The cases cited by the plaintiff in error show an assault by the deceased upon the person killing. But, if there was no voluntary manslaughter in the first transaction had death resulted, there is certainly none in the second, under the evidence. If Daniel had killed Bell during the first quarrel, he would have been guilty of murder. He made the first assault, and Bell only fired later when Daniel had fired the third shot at him. Daniel made no retreat, for none was necessary, and, without any apparent reason or justification, pulled his pistol and commenced to fire at Bell. Had death resulted to Bell, can there be a question that he would have been guilty of murder? This case does not, therefore, fall within the ruling made in the *Williams* case, *supra*, and the court properly failed to instruct the jury on the law of manslaughter. The verdict is supported by the evidence.

Judgment affirmed. All the Justices concur, except

BECK, J. (dissenting). It appears from the evidence of a witness introduced by the state that Daniel, who was indicted as a co-principal with the defendant, without provocation except words, shot at one Doc Bell with a pistol. Bell, being unarmed, left at once and went to his brother's house, procured a gun, and returned to the place at which his assailant, Daniel, had remained. As Bell was approaching with a deadly weapon in his hands, Daniel fired again. Under these facts, the jury would have been authorized to find that, after the first assault had been completed, Bell left the place, went a short distance from there, armed himself with a gun, and

returned to where Daniel had remained, with intention to engage in deadly conflict with him; and further that Daniel remained and awaited Bell's return and fired upon Bell as he approached, and that Bell, availing himself of the preparation which he had made when he went to his brother's house after the combat, answered the fire, and that this constituted mutual combat between the parties; and that the killing of either by the other under these circumstances would have been a felonious killing of the grade of voluntary manslaughter. If we are right in this, then it was a question for the jury to decide as to whether or not there had been sufficient cooling time between the time of mutual combat and the time of the fatal shooting, and consequently as to whether, in firing the shot that resulted in the death of the decedent, the principal in the first degree acted under the passion aroused by the mutual combat, or acted in malice or a spirit of revenge. In the one case he would have been guilty of murder; in the other, of voluntary manslaughter. But whether it was murder or voluntary manslaughter was a question for the jury to decide. And if they had found that the principal in the first degree was guilty of voluntary manslaughter, then it became a question for them to decide whether Miller, alleged to be the principal in the second degree, was also guilty of that offense.

Thus the question as to whether the defendant was guilty of the offense of voluntary manslaughter was one for determination by the jury, and the court should have given them appropriate instructions relative to that grade of homicide; and failure to give such instructions was error which should be corrected by the grant of a new trial.

(129 Ga. 765)

WYNN & ROBINSON v. TYNER.

(Supreme Court of Georgia. April 18, 1913.)

(Syllabus by the Court.)

1. CHATTEL MORTGAGES (§ 6*)—CONDITIONAL SALE—WHAT CONSTITUTES.

Where a seller of personal property on credit took from the buyer an instrument promising to pay the purchase price amounting to \$175, and providing that the title to the property should remain in the seller until the amount was fully paid, such instrument created a reservation of title as security. It was not a mortgage, and could not be foreclosed by the summary statutory method applicable to mortgages on personalty.

[Ed. Note.—For other cases, see Chattel Mortgages, Cent. Dig. §§ 23-41; Dec. Dig. § 6;* Sales, Cent. Dig. § 1332.]

2. SALES (§ 479*) — CONDITIONAL SALE — OPERATION AND EFFECT.

Where sellers of personal property took from the buyer a written instrument, promising to pay the unpaid purchase money, and agreeing that the title to the property should remain in the sellers until payment in full, and in the instrument was inserted an agree-

ment by the buyer that, upon default in payment, the sellers might, "in addition to any other remedies provided by law for the enforcement of the collection hereof, at their option elect to treat the instrument as a mortgage upon the property, title to which is retained by the said [sellers] by the terms hereof, and upon the execution of a bill of sale to the maker or makers hereof to such property, and the filing and recording of such bill of sale in the office of the clerk of the superior court, * * * shall give the right to the said [sellers] to proceed to foreclose this instrument as a mortgage upon the property, together with the other property herein mortgaged, in the same manner as mortgages on personalty are foreclosed under the laws of this state," the parties could not by such an agreement make the instrument one both retaining title and not retaining title; nor could they by such agreement make a summary statutory proceeding applicable by law to one character of instruments applicable by agreement to another.

[Ed. Note.—For other cases, see Sales, Cent. Dig. §§ 1418-1432, 1434-1438; Dec. Dig. § 479.*]

(Additional Syllabus by Editorial Staff.)

3. CHATTEL MORTGAGES (§ 6*) — "BILL OF SALE TO SECURE A DEBT"—"CONDITIONAL SALE."

The distinctive difference between a "chat-tel mortgage" and a "bill of sale to secure a debt," or the "retention of title" by a seller to secure the purchase money, is that a "chat-tel mortgage," under Civ. Code 1910, § 3256, is only security for a debt and passes no title; a "bill of sale to secure a debt," with an obligation to reconvey on payment, passes title to the buyer, under Civ. Code 1910, § 3306, until the debt secured shall be fully paid; and a "conditional sale," with retention of title as security, leaves the title, under Civ. Code 1910, § 3313, in the seller until the purchase money is paid.

[Ed. Note.—For other cases, see Chattel Mortgages, Cent. Dig. §§ 23-41; Dec. Dig. § 6;* Sales, Cent. Dig. § 1332.]

For other definitions, see Words and Phrases, vol. 1, pp. 800-801; vol. 2, pp. 1098-1106, 1408-1410.]

Error from Superior Court, Chattahoochee County; S. P. Gilbert, Judge.

Action by Wynn & Robinson against J. C. Tyner. Judgment for defendant, and plaintiff brings error. Affirmed.

J. C. Tyner executed the following instrument: "Georgia, Muscogee County, Columbus, Ga. March 2, 1910. 175.00. By the first day of October, 1910, next, I promise to pay Wynn & Robinson, or order, one hundred and seventy-five dollars, for value received, as purchase money, for one brown mare mule, white nose, smooth mouth, in the sale of which there is no warranty of any kind. The title to which aforescribed property shall be and remain in the said Wynn & Robinson, until this obligation is fully paid off, and discharged. It is agreed, however, that if said property, or any part thereof, is lost by death, destruction, or otherwise, such loss shall fall on the makers of this obligation and not on the said Wynn & Robinson, their heirs or assigns; but I agree to pay this obligation notwithstanding. To further secure the payment of this obligation I

hereby mortgage, sell and convey to the said Wynn & Robinson their heirs and assigns, the following described property, to wit: Fifty acres of land (50), more or less, known as the northeast part of land lot No. 203 in the 10th district of originally Muscogee county, now Chattahoochee county, Georgia, said 50 acres bounded as follows: West by branch, south by branch to line running north which joins land of J. M. Green, and bounded on north by above-described lands, being and lying in Chattahoochee county near Box Springs, Georgia. Which property so mortgaged I represent to be owned by me, and free and clear of all liens or incumbrances of every kind and description whatever. If this obligation is not promptly paid at maturity, I agree that the said Wynn & Robinson may, in addition to any other remedies provided by law for the enforcement of the collection hereof, at their option elect to treat this instrument as a mortgage upon the property title to which is retained by the said Wynn & Robinson by the terms hereof, and upon the execution of a bill of sale to the maker or makers hereof to such property, and the filing and recording of such bill of sale in the office of the clerk of the superior court of the county of the residence of such maker or makers, or any one of them, shall give the right to the said Wynn & Robinson to proceed to foreclose this instrument as a mortgage upon said property, together with the other property herein mortgaged, in the same manner as mortgages upon personal property are foreclosed under the laws of this state, and the maker or makers hereof hereby ratify and confirm the sale of all or any part of said property sold under such foreclosure, and agree to pay all the costs and expenses of such foreclosure and the sale of the property thereunder, including the cost of recording such bill of sale. This obligation shall bear interest from date at the rate of eight per cent. per annum; and in the event the same is placed in the hands of an attorney for collection after maturity, I agree to pay ten per cent. upon the amount due as attorney's fees. As against the payment of this note, the makers waive all right to claim the benefit of any homestead or exemption of personalty provided for under the Constitution and laws of the state of Georgia, or any other state. In witness whereof I have hereunto set my hand and seal, this 2 day of March, 1910." This was signed by Tyner and attested by two witnesses, one of whom was a notary public.

On November 16, 1910, Wynn & Robinson executed and filed an instrument in which they recited the one above set out, and stated that Tyner made default in payment, and that for the purpose of foreclosing on the property sold, in accordance with the terms of the note, they conveyed to him the title to the mule in order to levy thereon under such foreclosure. Thereupon an attorney for

Wynn & Robinson made affidavit that Tyner was indebted to them in the sum of \$175 principal and \$98.06 interest, together with \$17.50 attorney's fees, "for the purchase of a certain brown mare mule, white nose, smooth mouth; and affiant makes this affidavit so that a mortgage *fi. fa.* may issue and be levied upon said mule." The clerk of the superior court issued an execution, and it was levied upon the mule. It is inferable from the record that an affidavit of illegality was filed, as the case was returned to the superior court. When it came on for trial, the defendant demurred to the affidavit of foreclosure and the proceedings thereunder, on the ground that the contract was not a mortgage, but was a contract of retention of title to secure the purchase price of the property, and was not subject to summary foreclosure as a mortgage on personalty. The demurrer was sustained, and the plaintiffs excepted.

C. C. Minter, of Cusseta, and Wyan & Wohlwender, of Columbus, for plaintiff in error. W. B. Short, of Buena Vista, for defendant in error.

LUMPKIN, J. (after stating the facts as above). [1] 1. By the Civil Code, § 3306, it is declared that a bill of sale to secure a debt, with an obligation given to the debtor to reconvey the property upon payment being made, shall pass title to the "vendee" until the secured debt shall be paid, and shall be construed by the courts to be an absolute conveyance, with the right to have a reconveyance upon payment of the secured debt, and not a mortgage. By section 3318 a method is provided whereby one who sells and delivers personal property may retain the title as security until the purchase price shall be paid. By section 3298 it is declared that "the owner of any bill of sale to personal property to secure a debt where the principal sum does not exceed one hundred dollars, may foreclose the same in the manner as mortgages on personal property are now foreclosed, under the laws of this state." By section 6037 a general provision is made by which a holder of title to secure a debt may reduce the debt to judgment, file and have recorded a conveyance to the debtor, and levy on the property. In *Berry v. Robinson & Overton*, 122 Ga. 575, 50 S. E. 378, it was held that where one purchased personal property and gave therefor a promissory note, in which it was agreed that the title should remain in the seller until the purchase money should be paid, such an instrument was not a "bill of sale" made by the purchaser to the seller, and could not be foreclosed in the summary manner provided by section 3298. The promise to pay involved in the present case was for more than \$100 principal, and moreover, the paper was not a bill of sale made by the owner of the property to secure a debt, but an agreement by the purchaser for the

seller to retain title until the purchase money was paid. It is covered by the decision cited.

The argument that the instrument is a mortgage is without merit. Cases like that of *Frost v. Allen*, 57 Ga. 328, where the owner of property executed to a creditor an instrument to secure a debt, and the question was whether under its peculiar language it conveyed title or was a mere mortgage, are not applicable to an instrument like this. As to them, see, also, *Smith v. De Vaughn*, 82 Ga. 575, 9 S. E. 425, and *Pitts v. Maier*, 115 Ga. 281, 41 S. E. 570.

[2] 2. It is argued that the purchaser agreed, if the obligation should not be promptly paid at maturity, that the sellers might, "in addition to any other remedies provided by law for the enforcement of the collection hereof, at their option elect to treat this instrument as a mortgage upon the property title to which is retained by the said [sellers] by the terms hereof, and upon the execution of a bill of sale to the maker or makers hereof to such property, and the filing and recording of such bill of sale in the office of the clerk of the superior court, * * * shall give the right to the said [sellers] to proceed to foreclose this instrument as a mortgage upon the property, together with the other property herein mortgaged, in the same manner as mortgages on personalty are foreclosed under the laws of this state." In *Smith v. De Vaughn*, supra, the instrument under consideration seems to have included in the indebtedness secured not only the purchase money of the mule described, but also \$80 of a prior indebtedness. In it the purchaser promised to pay the sum named, and added: "I hereby mortgage and convey unto the said payee, his heirs, and assigns, the following described property [describing the mule], for which this note is given in part. Said mule to remain the property of [the seller] until paid for." We are aware that Mr. Justice Simmons in discussing the peculiar language of this instrument, after holding that it was a conditional bill of sale, and not a mortgage, said: "If Smith [the purchaser] had paid the purchase money of the mule, he would have acquired title thereto, and it is possible that the instrument might have been foreclosed as a mortgage for the \$80; and this may have been the reason that the paper was written both in the form of a mortgage and a bill of sale." But this mere suggestion of a possibility, and one which was not directly involved (the action being brought to recover possession of the property by the sellers), is very far from a ruling that a seller can retain title and also in the same instrument have a mortgage created in his favor on the same property, as being that of the purchaser, to secure the purchase money.

[3] The distinctive difference between a

mortgage and a bill of sale to secure a debt, or the retention of title by a seller to secure the purchase money, is that "a mortgage in this state is only security for a debt, and passes no title" (Civil Code, § 3256); a bill of sale to secure a debt, with an obligation to reconvey on payment "shall pass the title of said property to the vendee till the debt or debts which said conveyance was made to secure shall be fully paid" (Civil Code, § 3306); and a conditional sale, with retention of title as security, leaves the title in the seller until the purchase money is paid (Civil Code, § 3318). Just how the same instrument can convey title and not convey title at the same time, or retain title and not retain title, but be a mere lien, as to the same property and for the same debt, is not plain. It would seem to be an effort to reconcile the irreconcilable. Relatively to dower, year's support, and the right of other creditors to levy their common-law executions, there is a wide difference between the status of a mortgage and a conveyance of title as security, or a retention of title for that purpose. To permit a creditor to word his contract so as to call it one or the other at his pleasure, and substantially to get the benefits of each, frightening off other creditors by means of the declaration that the title is in him, and yet reserving the right of summary foreclosure of the instrument as a mortgage would be to allow a variable and uncertain form of legal instrument. How shall a paper be classified which declares that it conveys title or does not convey title, as the creditor may at any time thereafter choose to declare? If it be possible to frame an instrument so that it may be a mortgage or a reservation of title at the option of the creditor, the instrument before us does not even do that. It seeks to hold all the benefits of a reservation of title, and yet to declare that a summary remedy may be applied to that situation when the statute has not so declared. A conveyance or reconveyance and levy after judgment is provided in cases where title is held as security, omitting the provision for foreclosure of a bill of sale to secure a debt under \$100. A summary foreclosure by affidavit is provided for cases where no title is held by the creditor, but a mere lien is given. There are cases in which a party has an election of remedies, such as where a transaction partakes both of the nature of a tort and a contract, and where the party may sue for the tort, or waive the tort and sue on the contract; where the principal may ratify or repudiate the unauthorized act of his agent; where one has the option to declare a contract terminated because of a breach of a condition subsequent, or to insist upon its performance; and other instances which might be mentioned. But this is different from a contract authorizing one of the parties to apply a summary statutory remedy, authorized by law under one set

of circumstances, to the enforcement of his rights under a different set of circumstances. The law declares when the statutory method of foreclosure by affidavit may be employed. Parties cannot by agreement make such a proceeding applicable to a different class of cases. It is evident that an agreement attempting to give a party the right to recover land by possessory warrant, or to recover personalty by an action of ejectment, or by a warrant to dispossess a tenant, would not be valid or confer upon the courts the right to proceed in accordance with the agreement, instead of in accordance with the statutes on those subjects. In the instant case it was agreed that upon filing and recording a bill of sale the sellers of the mule should have the right "to foreclose this instrument as a mortgage upon said property, together with the other property herein mortgaged, in the same manner as mortgages upon personal property are foreclosed under the laws of this state." "The other property herein mortgaged" was real estate. It would hardly be contended that by such an agreement the parties could authorize the foreclosure upon land in the summary manner authorized by the statute for foreclosing mortgages upon personalty. No more can they by agreement authorize the same summary method of foreclosure of a mortgage upon personalty to be used in a case where a seller retains title as security, to which such a foreclosure has been held by this court not to apply, and for which provision has been expressly made by another statute.

The presiding judge correctly sustained the demurrer and dismissed the summary effort to foreclose the instrument.

Judgment affirmed. All the Justices concur.

(140 Ga. 14)

GLAWSON v. STATE.

(Supreme Court of Georgia. May 13, 1913.)

(*Syllabus by the Court.*)

CRIMINAL LAW (§ 1092*)—APPEAL AND ERROR—BILL OF EXCEPTIONS.

A bill of exceptions assigning error upon a judgment overruling a motion for a new trial in a criminal case must be tendered to the judge within 20 days from the rendition of the judgment. Pen. Code 1910, § 1102; Civ. Code 1910, § 6153.

(a) Accordingly, where it appears from a bill of exceptions in a criminal case that the plaintiff in error was convicted on October 30, 1912, and on the next day during the term of court filed a motion for a new trial, and on the same date a rule nisi was granted, calling upon the solicitor general to show cause, at chambers, on November 18, 1912, why a new trial should not be granted, and on November 22, 1912, the motion by consent of counsel for both sides was heard and a new trial was refused on the last-named date, and on March 23, 1913, a bill of exceptions was presented to the judge, complaining of the judgment refusing a new trial, and the judge certified the bill of exceptions on the date it was presented, the Supreme Court

has no jurisdiction to entertain the writ of error. See *Harris v. State*, 117 Ga. 18, 43 S. E. 419; *Crawford v. Goodwin*, 128 Ga. 134, 57 S. E. 240; *Sistrunk v. Mangum*, 138 Ga. 222, 75 S. E. 7.

(b) In a case of the character above stated, jurisdiction is not conferred upon the Supreme Court to entertain the bill of exceptions by an averment therein to the effect that the delay in tendering it was caused by the refusal of counsel, who represented plaintiff in error on the trial, to proceed further with the case, and the inability of plaintiff in error to procure other counsel to present the bill of exceptions within 20 days from the decision refusing a new trial.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2808, 2829, 2834-2861, 2919; Dec. Dig. § 1092.*]

Error from Superior Court, Jones County; J. B. Park, Judge.

J. H. Glawson was convicted of crime, and he brings error. Dismissed.

Jno. R. Cooper, of Macon, for plaintiff in error. Jos. E. Pottle, Sol. Gen., of Milledgeville, and T. S. Felder, Atty. Gen., for the State.

FISH, C. J. Writ of error dismissed. All the Justices concur.

(129 Ga. 302)

LACHER v. MANLEY.

(Supreme Court of Georgia. April 18, 1913.)

(*Syllabus by the Court.*)

DISMISSAL AND NONSUIT (§ 80*)—INVOLUNTARY DISMISSAL OF PETITION—EFFECT ON CROSS-BILL.

Prior to the uniform procedure act of 1887 (Civ. Code 1910, §§ 5514, 5538) the involuntary dismissal of an equitable petition for want of equity carried with it the defendant's cross-bill which only prayed for legal relief (*Johansen v. Tarver*, 74 Ga. 402); but if the cross-bill alleged facts germane to the plaintiff's petition, entitling the defendant to independent and distinct equitable relief, the dismissal of the petition did not interfere with the defendant's right to a hearing and trial on the matters set up in the cross-petition. *Ryan v. Fulghum*, 96 Ga. 234, 22 S. E. 940. Since the enactment of 1887, which provides that in suits in the superior court founded on a legal or equitable cause of action, for a legal or equitable remedy, or both, relief of an equitable or legal nature may be had in the same action, the dismissal of the plaintiff's petition on demurrer as being without equity will not have the effect of dismissing a cross-bill of the defendant, alleging additional matters germane to the original petition, and praying affirmative relief, although the relief prayed is not equitable in character, and is cognizable in a court of law.

[Ed. Note.—For other cases, see Dismissal and Nonsuit, Cent. Dig. §§ 178-181; Dec. Dig. § 80.*]

Error from Superior Court, De Kalb County; L. S. Roan, Judge.

Action by W. D. Manley against Ludwig Lacher. Judgment for plaintiff, and defendant brings error. Reversed.

Hooper Alexander, of Atlanta, for plaintiff in error. Green, Tilson & McKinney, of Atlanta, for defendant in error.

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

EVANS, P. J. W. D. Manley brought suit against Ludwig Lacher, alleging that the defendant was in the occupancy of a farm belonging to the plaintiff by virtue of a written contract which was attached to the petition. The plaintiff alleged that the contract had been breached in divers and sundry particulars, and prayed for the appointment of a receiver for so much of the farm as was actually occupied by the defendant, and for an injunction against the defendant's interfering with the plaintiff in the management and control of so much of the farm as was not occupied by the defendant, and from in any manner interfering with the property on the farm, and that the plaintiff recover possession of so much of the farm as the defendant occupied. To this petition the defendant filed his demurrer, and also an answer and cross-action, wherein he alleged that the plaintiff had violated the contract in the various particulars alleged, to the damage of the defendant in a certain sum, for which he prayed judgment. The court sustained the demurrer on the ground that "the petition states no cause to warrant the relief prayed," and dismissed the same without prejudice to the defendant's rights under his cross-action. Thereafter the court passed the following order: "The defendant in the above-stated case having filed a general demurrer to plaintiff's petition and pressed said demurrer, which demurrer was sustained by the court this date, and plaintiff's petition dismissed, it is ordered by the court that the order sustaining plaintiff's case carried with it the defendant's cross-petition in the case against the plaintiff, under the case of *Johnamsen v. Tarver, Cashin & Co.*, 74 Ga. 402." Exception is taken to this order, upon the ground that the dismissal of the petition on demurrer did not have the effect to dismiss the cross-petition, which prayed affirmative relief.

The question made is: What is the effect of an involuntary dismissal of the petition praying equitable relief upon the cross-petition of the defendant praying affirmative relief not of an equitable nature? We will consider the question, first, from the viewpoint of the English chancery practice; and, secondly, as such practice has been modified by our practice and procedure statutes. A cross-bill implies a bill by a defendant against the plaintiff in the same suit, or against other defendants in the same suit, or both, touching the matters in question in the original suit, and is auxiliary to or dependent upon the original suit. 2 Dan. Ch. Pr. 1548. Because of this dependency was involved the general rule that an involuntary dismissal of the original bill carried with it the cross-bill. 5 Enc. Pl. & Pr. 662; *Dows v. City of Chicago*, 11 Wall. 108, 20 L. Ed. 65; *Dill v. Shahan*, 25 Ala. 703, 60 Am. Dec. 540. The statement that the cross-bill shares the fate of the original bill when the latter is

dismissed is too comprehensive and general to be strictly accurate. In Story's Eq. Pl. § 399, note, it is said: "A distinction should be drawn between cross-bills which seek affirmative relief as to other matters than those brought in suit by the bill, yet properly connected therewith, and cross-bills which are filed simply as a means of defense; since there are rules applicable to the one class which do not apply to the other. Thus a dismissal of the original bill carries the cross-bill with it when the latter seeks relief by way of defense; but it is otherwise, and relief may still be given upon the cross-bill, where affirmative relief is sought thereby as to collateral matters properly presented in connection with the matters alleged in the bill." And where the cross-bill sets up additional facts germane to the subject-matter of the original bill, and prays for affirmative relief against the complainants in the original bill on the case thus made, the dismissal of the original bill does not dispose of the cross-bill, but it will be retained for disposition on its merits as an original bill. Fletcher's Eq. Pl. & Pr. § 918.

In those jurisdictions where there is a separation of forums for the administration of law and equity the rule is firmly established that, if the original bill is dismissed for want of equity, a cross-bill, praying affirmative relief which may be obtained in a court of law, will not be retained for giving purely legal relief. The reason is manifest. Courts of equity will not grant relief where the remedy at law is adequate. When the original bill has been adjudicated to be without equity, and the cross-bill standing alone presents no ground for equitable relief, it must fall because of an adequate legal remedy. This is what was decided in *Johnamsen v. Tarver*, 74 Ga. 402. In that case the complainant filed a petition to cancel a contract of sale of a stock of merchandise, containing a stipulation for monthly payments, praying also for an accounting and the remedy of injunction. The defendant by cross-bill prayed judgment for the installments, which were in arrears. When the original suit was dismissed at the instance of the defendant as being without equity, the cross-bill of the defendant, which only sought a judgment on a money demand, was held to be without equity—the defendant having an adequate remedy at law. It is to be remembered that this decision was rendered prior to the uniform procedure act of 1887, which permits both legal and equitable principles to be applied in the same action and administered in the same court having jurisdiction over cases in law and in equity.

The case of *Ryan v. Fulghum*, 96 Ga. 234, 22 S. E. 940, is supposed by counsel to be in conflict with the *Johnamsen* Case just noticed. We think that an analysis of the *Ryan* Case will demonstrate that there is no collision of principle between it and the former case. In the *Ryan* Case the plaintiff sought

an injunction against a solvent defendant to prevent an apprehended trespass on land. It is true that he prayed for cancellation of the defendant's claim of title, but his allegations were so indefinite and inconclusive that the court refused to consider them to be a substantial part of his petition. The defendant in addition to filing a demurrer and answer to the petition filed a cross-petition praying affirmative equitable relief with respect to the same land involved in the original petition; and the court held: "Inasmuch as the defendant's answer, in the nature of a cross-bill, alleged facts entitling him to independent and distinct equitable relief, the dismissal of the plaintiff's petition did not interfere with the defendant's right to a hearing and trial on the matters set up in his answer, and, this being so, it was error to dismiss the same." The decision in that case comes within the principle that where a cross-bill which sets up additional facts germane to the subject-matter of the original bill, entitling the defendant to equitable relief against the complainant, the cross-bill will not fall with the original bill, for the reason that standing alone it is good as an original bill praying affirmative equitable relief. Thus it will be seen that in the first case the cross-petition prayed only for judgment on a money demand, for remedy of which the courts of law afforded adequate relief; whereas in the second case the cross-petition contained allegations germane to the original petition, which presented a complete case for the equitable relief which was prayed. Another distinction is that which will be presently noticed, viz., that between the pronouncement of the two decisions the uniform procedure act of 1887 was enacted. In 1897 it was enacted: "All suits in the superior courts for legal or equitable relief, or both, shall be by petition to the court, signed by the plaintiff or his counsel, plainly, fully, and distinctly setting forth his charge, ground of complaint and demand, and the names of the persons against whom process is prayed." And: "In suits in the superior court, founded on a legal or equitable cause of action, for a legal or equitable remedy or both, the petition shall be addressed to the court and shall set forth the cause of action, legal or equitable or both, and the claim for legal or equitable relief or remedy or both, plainly, fully, and distinctly." Civil Code, §§ 5538, 5514. Since that enactment equitable and legal relief may be given in the same action in the superior courts; and there is now no reason for giving effect to the old equity rule that a cross-bill will not be retained after the original bill is dismissed, unless it prays affirmative equitable relief. By virtue of the statute, if the cross-petition sets up matters germane to the allegations of the original petition, and prays affirmative relief, the involuntary dis-

missal of the plaintiff's petition will not carry with it the cross-petition, notwithstanding the relief therein prayed for may be cognizable at law. The conclusion which we have reached, when applied to the assignment of error, requires a reversal of the judgment. Judgment reversed. All the Justices concur.

(139 Ga. 702)

DAVIS v. FIRST NAT. BANK OF
BLAKELY.

(Supreme Court of Georgia. April 17, 1913)

(Syllabus by the Court.)

1. JUDGMENT (§ 90*)—AUTHORITY—CONSENT
TO JUDGMENT—SETTING ASIDE.

Where a suit was brought to cancel a deed, to have the land described in it decreed to belong to the plaintiff, to have an accounting, to recover double the usurious interest alleged to have been paid to the grantee, a national bank, and to obtain other equitable relief, if the plaintiff authorized her attorneys to enter into a consent decree fixing the amount required to be paid by her to the defendant in discharge of all liabilities against her and the property at \$5,000, and expressly instructed them that she would not consent to a compromise or settlement of the case except upon such terms, to which the attorney agreed, which instructions were known to the adverse party through its leading attorney, and if, nevertheless, the defendant's leading attorney persuaded the plaintiff's counsel to disregard such instruction, and induced them to consent to a decree fixing such liability at \$15,000, declaring the debt to be hers and not that of her husband, as she alleged it was, and directing that in default of payment by her the land should be sold as provided therein, a consent decree so entered could be set aside by the client upon proper proceedings therefor duly commenced.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 148, 149; Dec. Dig. § 90.*]

2. JUDGMENT (§ 90*) — VACATION — SUBSE-
QUENT PROCEEDINGS.

If the consent decree involved in the present case should be set aside, the former case should be reinstated upon the docket for trial, and the parties should have the rights of prosecution and defense in reference thereto which they would have had before the consent decree was entered, together with any additional right which may be germane to the litigation.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 148, 149; Dec. Dig. § 90.*]

3. JUDGMENT (§ 90*)—ACTION TO SET ASIDE—
PETITION—DEMURRER.

In view of the character of the litigation in which the consent decree was entered, the fact that the allegations of the original petition largely covered the same ground as those now sought to be alleged, outside of the attack made upon the consent decree, and of the vague and contradictory character of many of such allegations in the present petition, other than those attacking such decree, direction is given that all of the allegations and prayers be stricken from the petition, except those attacking the consent decree in the former case. The striking of them on demurrer was error.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 148, 149; Dec. Dig. § 90.*]

Error from Superior Court, Early County;
W. O. Worrell, Judge.

Action by M. C. Davis against the First National Bank of Blakely. Judgment for defendant, and plaintiff brings error. Reversed, with directions.

Thos. E. Watson and J. B. Burnside, both of Thomson, for plaintiff in error. Little & Powell, of Atlanta, for defendant in error.

LUMPKIN, J. Mrs. M. C. Davis filed her petition against the First National Bank of Blakely seeking to have a consent decree which had been previously rendered set aside and to obtain other relief. Two amendments were made thereto. General and special demurrers were filed and were sustained, and the plaintiff excepted.

[1] 1. An important question arises as to the authority of an attorney to bind his client by a compromise resulting in a consent decree, in direct opposition to the instructions of his client, and with the knowledge of the leading counsel of the adverse side of such violation of instructions. On behalf of the defendant, reliance is placed upon Civil Code, § 4955, which reads as follows: "They [attorneys] have authority to bind their clients in any action or proceeding, by any agreement in relation to the cause, made in writing, and in signing judgments, entering appeals, and by an entry of such matters, when permissible, on the dockets of the courts; but they cannot take affidavits required of their clients, unless specially permitted by law." This section has been in each Code since the first, which is generally called the Code of 1863, because its operation was suspended from the time when it first contemplated that it should take effect (January 1, 1862) until January 1, 1863. In the first Code it appeared as section 382. It did not originate from a legislative enactment, but was a codification of the rule previously existing and arising from the decisions of courts. In such a case it has been held that the decisions will be looked to in construing the section thus codified. *Bush & Hattaway v. McCarty*, 127 Ga. 308, 310, 58 S. E. 430, 9 Ann. Cas. 240; *Calhoun v. Little*, 106 Ga. 336 (3), 32 S. E. 86, 43 L. R. A. 630, 71 Am. St. Rep. 254; *Ocean Steamship Co. v. Way*, 90 Ga. 747, 17 S. E. 57, 20 L. R. A. 123. This section did not confer upon attorneys any new authority, but stated in a terse form the pre-existing general rule derived from the sources to which the codifiers were authorized to look. To take such a general rule and slavishly adhere to its letter, without looking to its spirit and meaning, would be substantially to violate the rule in endeavoring to adhere to it. It is a well-established maxim, "*Qui hæret in litera hæret in cortice*" (liberally translated by Brougham, "He who considers merely the letter of an instrument goes but skin deep into its meaning"). Let us then look to the derivation of this rule and to the decisions of this and other courts in regard to it.

In England, after some conflicting discus-

sion, it seems now well settled, by the later decisions, that an attorney, by virtue of his general retainer, has power to compromise a suit, provided he does not violate the instructions of his client in so doing; and that such a compromise will bind his client, even if he does violate instructions, unless the violation is known to the adverse party. A distinction has been drawn between matters directly involved in the litigation and matters collateral thereto. 3 Am. & Eng. Enc. Law (2d Ed.) 362; *Prestwich v. Poley*, 18 C. B. (N. S.) 806. In America there is some conflict of authority, but the greater number of decisions hold that an attorney has no power to compromise a claim, action, or judgment of his client. *Clark v. Randall*, 9 Wis. 135, 78 Am. Dec. 252, and note 261, 262; *Levy, Simon & Co. v. Brown*, 56 Miss. 83, 88; *Whipple v. Whitman*, 13 R. I. 512, 43 Am. Rep. 42. Where the latter rule prevails, it has been said that the fact that a compromise made by an attorney in excess of his authority has been consummated by a consent judgment entered in pursuance of it does not render the compromise thus consummated binding on the client, although it will make the court less inclined to disturb it, and will render prompt action and a reasonable show of merit on the part of the client necessary to secure its annulment. 3 Am. & Eng. Enc. Law (2d Ed.) 362. On the other hand, it has been held that: "In an action by a client to set aside a judgment against him, rendered without his authority upon a compromise of his claim by his attorney at law, his right of recovery in the action in which such judgment was rendered will not be inquired into; but the judgment should be set aside, the suit be again placed upon the docket, and the case proceed in the same manner as if such judgment had never been rendered." *Smith's Heirs v. Dixon*, 3 Metc. (Ky.) 438. See, also, *Dalton v. West End Street Ry. Co.*, 159 Mass. 221, 34 N. E. 261, 38 Am. St. Rep. 410. It is unnecessary to discuss the limitations upon this rule, such as a failure to make the application within a reasonable time, the question whether the parties can be put in statu quo, etc.

Under the English rule the authority of an attorney in regard to the litigation was analogized to that of a general agent. But, where that rule had been adopted, it has generally been declared that an attorney at law cannot make a compromise of a litigation and consent to a judgment or decree to carry it into effect, against the express instructions of his client, when such instructions are known to the other party. Thus, in *Wharton on Agency*, after the author had advocated the English rule, he says (section 594): "If the opposite party knows that the attorney is without authority or acts in disobedience to his client, the compromise will not be enforced to the injury of the client." *Beliveau v. Amoskeag Mfg. Co.*, 68 N. H. 225, 40 Atl.

734, 44 L. R. A. 167, 73 Am. St. Rep. 577; Weeks on Attorneys, § 228; Brady v. Curran, 21 C. L. 314; Strauss v. Francis, L. R. I. Q. 379.

Not long before our first Code was adopted, the question of the authority of counsel was the subject of much discussion in England. In 1854 Samuel Swinfen died, leaving a will. Its validity was contested. Sir F. Thesiger, afterward Lord Chelmsford, appeared for the legatee, who was also the executrix of the will. He entered into a written memorandum of compromise, by one of the terms of which the estates were to be conveyed by the plaintiff to the defendant, and the defendant was to secure to the plaintiff an annuity for her life. It was agreed that either party could make this agreement a rule of court. A juror was thereupon withdrawn, and the compromise was made a rule of the court of common pleas. Mrs. Swinfen insisted that the arrangement had been made not only without her sanction but directly in opposition to her wishes, and she declined to perform it. A rule nisi was obtained against her to show cause why she should not be attached for contempt for disobedience of the rule. The three judges of the common pleas were of the opinion that she was bound by the consent of her counsel; but they thought that there was not sufficient evidence of a demand for performance and a refusal on the part of Mrs. Swinfen to justify an attachment. *Swinfen v. Swinfen*, 18 C. B. (O. S.) 435, decided in 1856. Another application for attachment was made. Crowder, J., delivered an opinion, declaring that Mrs. Swinfen was not bound by the compromise. Creswell, J., who, on the former hearing, had declared that the client was bound, now stated that, "As the validity of that agreement must be discussed before another tribunal, we are anxious that the question should be as little prejudiced as possible by anything that passes in this court," but personally expressed his sympathy for the distinguished advocate who had been attacked. *Swinfen v. Swinfen*, 1 C. B. (N. S.) 364, decided in 1857. After the refusal of the attachment, Swinfen filed his supplemental bill, praying that Mrs. Swinfen be decreed to specifically perform the agreement for a compromise, or, in the alternative, that another issue devisavit vel non be directed. The Master of the Rolls held that there should be a new trial, and that the prayer for specific performance should be denied. He said: "Upon what principle, then, can it be said that an attorney has an implied authority to compromise the subject-matter of a suit which he is employed to conduct? How far does it reach? Does such implied authority extend so far as to enable him to sell the subject-matter of the suit? Yet, in point of fact, a compromise is nothing more than a sale between the parties, upon certain terms. * * * There may

be cases in which questions of very considerable nicety may arise, as to whether a particular matter consented to is or is not properly one relating to the conduct and management of the cause. If it be, then I do not doubt that it is within the scope of the implied authority of the solicitor in the conduct and management of the cause; but, if it be not, then I think that it is not within the scope of his authority." *Swinfen v. Swinfen*, 24 Bevan, 549 (1857). On appeal, the general question as to the power of counsel to bind their clients by compromising cases in litigation was not determined, but it was held that, "under the circumstances of this case," the agreement was not one which a court of equity would enforce. *Swinfen v. Swinfen*, 2 De G. & J. 381 (1858). After this Mrs. Swinfen brought an action against her counsel, who had then become Lord Chelmsford, to recover the costs and expenses to which she had been subjected in the litigation arising out of the compromise. On the hearing in the Court of Exchequer, the Barons presiding were all of the opinion that, under the facts of the case, the defendant was not liable; but they were not agreed as to all the points involved. *Swinfen v. Chelmsford*, 5 Hurl. & Nor. 890 (1860). In so far as the decision involved a difference between the authority of a barrister and that of an attorney in the management of a cause, such distinction is of little or no importance in this country. It will appear from the history of the Swinfen litigation that the client was finally held not to be bound to comply with the compromise which had been made and agreed upon by her counsel against her instruction, and made a rule or order of court; but, under the facts of the case, counsel was held not to be liable for the costs and expenses which had accrued to the client in the litigation arising out of the compromise.

In 1859 the case of *Fray v. Voules*, 1 E. & E. 837, was decided. An attorney of the name of Voules, against the directions of his client, compromised her case, and a consent order was taken thereon. She sued him for damages; and it was held that: "An attorney retained to conduct a cause, and having express directions from the client not to enter into a compromise, has no power, under such retainer, to enter into any compromise, even though it be reasonable and bona fide and for the benefit of the client, and, if he do so, is liable to an action for damages, though the damage actually sustained be nominal."

These cases have been somewhat fully set out, because shortly thereafter our first Code was framed and adopted, and they throw light upon the existing state of the decisions in England at that time. Three sections of the original Code are relevant to the subject under consideration. Section 382 has already been quoted in full. It referred to the au-

thority of attorneys to bind their clients in any action or proceeding, by any agreement in relation to the cause made in writing, etc. Section 383 declared that: "Without special authority attorneys cannot receive anything in discharge of a client's claim but the full amount in cash." Section 385 referred to relieving a party from the results of the conduct of an attorney who assumed to represent such party without authority.

Let us now review the decisions of this court bearing on the subject of compromises of litigation by attorneys, and their power to bind their clients thereto by consenting to judgments or decrees. It may be stated that the Code and the decisions generally follow the English rule, at least in part; and that the decisions hold that, if an attorney at law consents to the taking of a compromise decree in a case in which he is employed, it is binding upon his client, in the absence of fraud or of violation of express directions given by his client and known to the adverse party or his attorney. But the writer has found no decision of this court in which it has been held that if an attorney consented to a compromise judgment in direct violation of his client's instruction, and this was known to the adverse party, the judgment could not be set aside. Nor has he found any decision of this court holding that a compromise of a litigation by an attorney would bind his client, in the absence of authority from the latter, except where a consent verdict, judgment, or decree was taken.

In *Lyon v. Williams*, 42 Ga. 168, it was held that a confession of judgment by counsel, without any special authorization to that effect, was sufficient to bind his client.

In *Platen v. Byck*, 50 Ga. 245, it was held that, without special authority, an attorney could bind his client by an agreement for the dissolution of a garnishment and the depositing of the fund to await the event of the suit. In the opinion of McCay, J., occurs this significant statement: "It is no answer to say that Mr. Hardin [the attorney for the complaining party] acted unwisely, or even corruptly, in making this agreement, unless Byck [the other party] was a party to or had knowledge of the corruption." The intimation is that, if the other party had been affected with knowledge, it would have made a difference.

In *Glover v. Moore*, 60 Ga. 189, it was held that a married woman, who trusted the defense of a suit at law to counsel chosen by herself, was bound by his acts to the extent that any other sutor would be; and that if her plea were withdrawn by her counsel on terms executed by the other side, and judgment were rendered against her without any fraud on the part of her adversary or his counsel, such judgment would be binding on her. No question of the making of a compromise by counsel against the express direction of his client was involved.

In *Williams v. Simmons*, 79 Ga. 649, 7 S. E. 133, it was again ruled that a decree rendered by consent of counsel for a married woman, without fraud, would bind her, as it would bind other litigants. In the opinion there are some expressions to the effect that it was no answer to a solemn judgment of a court, rendered by consent of counsel, for the client to come in and say that the counsel misrepresented the client's interests or wishes; and that, if the client were injured thereby, she would have an action against the attorney. But such expressions must be taken in connection with the question under consideration. It appears distinctly that no question of any limitation on the authority of the counsel who agreed to the decree was involved, and no knowledge by the other party of any such limitation, though there was knowledge of an absence of express authority, which, under former rulings, was unnecessary. This appears from the statement of what the court construed the allegation of an amended answer under consideration to mean. It was said (79 Ga. 653, 7 S. E. 135): "She does not intimate that he was not retained as counsel for these causes in her behalf, or that his powers were more limited than the general powers which appertain to the position of counsel. Moreover, she does not allege any fraud on the part of her counsel or any collusion with him."

In *Lewis v. Gunn*, 69 Ga. 542, and *Perkerson v. Reams*, 84 Ga. 298, 10 S. E. 624, and other similar cases, no question of the violation of an express direction not to compromise, known to the adverse party or his counsel, was involved.

The question of the power of an attorney to bind his client by a consent judgment, in spite of a direction by the client not to compromise, was before this court in *Rogers v. Brand*, 133 Ga. 759, 66 S. E. 1095. The justices at that time constituting the court were evenly divided in opinion; Chief Justice Fish, Presiding Justice Evans, and the writer being of the opinion that the client in that case should not be held bound, but the judgment should be set aside, while Justices Beck, Atkinson, and Holden were of the contrary opinion. The judgment accordingly was affirmed by operation of law. In *Rogers v. Pettigrew*, 138 Ga. 528, 75 S. E. 631, the attorney for the plaintiff in the case last cited, who had made the compromise, sought to foreclose his lien for fees on certain land which was awarded to his client by the consent decree. It was held that an attorney who compromises his client against the latter's express direction is not entitled to any compensation. In the opinion Presiding Justice Evans cited *Fray v. Voules* (sub nomine *Fray v. Vowles*) 1 L. & L., supra, and said: "A litigant has the right to insist that his case be adjudicated according to the established rules of law and pro-

cedure. When he instructs his attorney not to compromise his case, the attorney is bound by such instructions, and is not at liberty to violate them, even though the attorney honestly believes a compromise settlement would be to the best interest of his client." This judgment was concurred in by all the Justices, except Atkinson, J. Between the dates of the two decisions, Holden, J., had resigned and Hill, J., had been appointed in his stead. It cannot be readily understood how it can be held that a litigant has a right to insist that his case be litigated and not compromised, and that, when he instructs his attorney not to compromise the case, the latter is bound by such instructions, and is not at liberty to violate them; and yet how it can at the same time be held that, if this want of authority on the part of the attorney is known to the other party or his attorney, such party can nevertheless bind the client by obtaining the agreement of an attorney without authority, who is known to be committing a breach of duty in making such agreement. A general agent can ordinarily bind his principal, within the scope of his agency, by an agreement with a person who is not aware of any limitation on his authority, but the principal has the power to limit his authority by instructions; and, if such limitation is known to the person contracting with the agent, there is no rule of law which will hold the principal bound by such wrongful contract. If a compromise so made by an attorney has taken the form of a consent judgment or decree, this can be set aside on proper proceedings duly instituted by the client.

Section 4955 of the Civil Code does not mean that, when a client employs an attorney to bring or defend a suit, it ceases to be the client's litigation; that he has no power to say whether he will litigate or compromise his suit; and that the attorney becomes the owner or absolute master of the litigation, so as to be able to sell or give away his client's property rights by contract, in spite of his client. This is a very different thing from the management of the litigation and agreements connected therewith, such as agreeing to a reference of the case to an auditor or a submission of it to arbitration, to allow copies of papers to be used in evidence, to waive notice, and the like. Neither does the statutory lien which an attorney has upon a suit, which ordinarily prevents his client from settling or dismissing the case so as to defeat him of his fee, have the effect to entirely oust the client from the case.

It was contended that fraud, in order to set aside a judgment, must be fraud on the part of the adverse party or his attorney; and expressions of this sort have been used in some of the decisions. But they were cases where the magistrate forgot to notify a litigant of a time when a case would be heard, as he had agreed to do, or where the

fraud alleged was that of some third party. In none of them was a violation of duty by an attorney, with knowledge of the adverse party, involved. If one knowingly obtains from an attorney at law or agent, by agreement, a surrender of the property rights claimed by his client or principal, in spite of instructions to the contrary, what name shall be given to the conduct of the party inducing the agent or attorney to violate his duty? In *Holker v. Parker*, 7 Cranch, 436, 3 L. Ed. 396, the ruling actually made was that an attorney at law, merely as such, has no right, strictly speaking, to make a compromise for his client. In the opinion Chief Justice Marshall makes this pointed statement: "Though it may assume the form of an award or of a judgment at law, the injured party, if his own conduct has been perfectly blameless, ought to be relieved against it. This opinion is the more reasonable because it is scarcely possible that in such a case the opposite party can be ignorant of the unfair advantage he is gaining. His conduct can seldom fall to be tainted with some disingenuous practice; or, if it has not, he knows that he is accepting a surrender of the rights of another from a man who is not authorized to make it." If an attorney, under his general implied powers, has authority to compromise a case with one who is not aware of any express limitation on such authority, still this language is applicable if the adverse party knows of the violation of instructions by the attorney in making the compromise.

[2] In the case before us it appears that a suit was brought by a married woman for the purpose of setting aside a deed and having the property described decreed to belong to the plaintiff, and also to have an accounting, to recover against the grantee, a national bank, double the amount of certain usurious interest alleged to have been paid, under section 5198 of the Revised Statutes of the United States (U. S. Comp. St. 1901, p. 3493), and for other equitable relief. By amendment the action was shaped so as to be one to recover such double interest only. It was held by this court that a demurrer to the petition as amended was properly overruled. *First National Bank of Blakely v. Davis*, 135 Ga. 687, 70 S. E. 246, 36 L. R. A. (N. S.) 134. When the case was returned to the superior court, a compromise was agreed upon by counsel for both sides. The amendments which had been made to the petition were withdrawn, so that the petition stood as originally filed. A consent decree was agreed upon by counsel for both parties and signed by the court. The plaintiff in the former action then brought the present equitable petition and alleged that her attorneys at law, who conducted the former suit, without her knowledge or consent, and in violation of her special instructions, settled the case by a consent decree which was entered; that her attorneys were expressly instructed

that they might consent to a settlement and decree whereby the plaintiff would bind herself to pay the bank the sum of \$5,000 in full settlement of all its demands against her; that this was known to the bank, but through its attorneys, and in collusion with the plaintiff's attorneys, it deliberately perpetrated a fraud upon the plaintiff by consenting to a decree which contained a judgment for \$15,000 against her in favor of the bank; and that she was informed by her attorneys that the consent decree had been taken in accordance with her instructions.

By one of the amendments it was alleged that instructions of the character above stated were communicated to one of her attorneys, named, through her husband, on the morning of the day on which the consent decree was entered; that such attorney communicated them to another of her attorneys who was present; that a third attorney of hers was not present and took no part in the management of the case; that she specifically instructed her attorneys that she would not consent to a compromise or settlement of the case except on such terms, "and her said attorneys agreed that they would settle in no other way"; and that, through her husband, she had on several occasions just prior to the term of court fully apprised the leading counsel for the bank of the terms on which she would be willing to settle; but that such attorney fraudulently persuaded her counsel to disregard her instructions, and induced them to consent to a decree which was rendered, whereby she was required to pay \$15,000 to the bank instead of \$5,000. A copy of the decree was attached. It declared that the debt was that of the plaintiff, and not of her husband, and that the title to the land was in the bank. It fixed the amount of the indebtedness at \$15,000, which was not to be enforced against her personally, but against the land, and provided, in regard to a restoration of title to the plaintiff upon payment of that amount in partial payments of \$5,000 each, the passing of a certain part of the property to her upon payment of the first installment, for allowing her to sell parts of the property at prices satisfactory to the bank, and credit the price on the debt for making sale in case of nonpayment of deferred payments, etc. On demurrer, the allegations of the plaintiff's petition on this subject must be treated as true. Of course we do not mean to express any opinion as to whether they can be sustained by evidence, or are in fact true, but we are dealing with the case on demurrer; and, in so far as the equitable petition sought to set aside the consent decree and to reinstate the parties in the situation which they occupied at the time of its rendition, it was not demurrable. The fact that the defendant had certain other attorneys than the leading attorney, who was charged with knowledge of the instructions given by

the plaintiff to her counsel, would not affect the ruling above made.

It was contended that the plaintiff should be held to be bound by the agreement of her attorneys, and that she should be remitted to a suit against them for damages, if she were injured by their conduct. We have seen that the decisions have not held that the client was compelled to elect such a remedy, if there was a violation of instructions as to compromising, which was known to the adverse party. Unfortunately the members of the bar are not always opulent and are sometimes even insolvent. Daniel Webster is said to have tersely described the career of a lawyer by the words "work hard, live well, and die poor." Leading and honored members of the profession not infrequently accumulate more learning than lucre. If it should be laid down as an absolute rule that a lawyer could in all cases bind his client by a compromise put into the form of a consent decree or judgment, regardless of instructions to the contrary, and regardless of knowledge thereof on the part of the adverse party, it will readily be seen that occasions might arise where a client's entire property involved in litigation might be agreed away, in spite of his protest, and he might be remitted to a suit by which nothing could be realized.

It was argued that the plaintiff had in the former case elected the remedy of suing the bank for double the usurious interest claimed to have been paid to it, and that she was bound by that election. But when the amendments to the former petition were withdrawn, and it was restored to its original condition, the election would seem to have been abrogated. Nor are we prepared to hold summarily, on demurrer in this case, whether or not the consent decree gave to the plaintiff all, or more than all, that she could have recovered under the former suit, with its numerous allegations and prayers. If the consent decree should be set aside, neither party should be cut off merely by reason of such decree from prosecuting or defending the litigation.

[3] 3. The present petition contains a good many allegations rather loosely and vaguely pleaded; some of them asserting that the deed which the plaintiff made to the bank was void for usury, others that she made the deed in payment of a debt infected with usury, in which case it would not be void. *Harris v. Hull*, 70 Ga. 831 (3). Other allegations indicated that the debt which the deed was made to pay was that of the plaintiff's husband, but still others were inconsistent with that theory. One paragraph of an amendment asserts that "she has made sufficient payments to the First National Bank of Blakely to entirely liquidate her own debt to said bank, and the deed to her land now held by said bank is a conveyance of her property to pay her husband's debts; and

therefore said conveyances are null and void." It was then alleged that the bank was not an innocent purchaser, "but took such deeds to her land with full knowledge of the fact that they were made to pay her husband's debts." This again is inconsistent with other allegations of the petition, and some of those contained in the former petition, which was attached thereto as an exhibit. Besides, it is uncertain as to when the payments were made; and this was attacked by demurrer.

If the decree stands of force, none of the relief sought can be had. If it should be set aside, the original suit endeavored to include the substantial grounds of complaint sought to be set up in the present case, except certain allegations in regard to payments upon the decree and in regard to rents, issues, and profits. In view of this fact, and of the character of the allegations of the plaintiff's petition, and of the fact that nearly all of them were attacked by special demurrers, we think that the proper disposition to make of the case is to direct that all the allegations and prayers be stricken from the petition, except those in reference to the bringing of the former action, its termination in the consent decree, and the attack made upon such decree; that such striking shall not be an adjudication that the plaintiff has no cause of action or right of recovery in respect to these matters; but that the present case stands as one to set aside the consent decree, and reinstate the former case as it was before such decree was rendered; and we direct that this be done accordingly.

Judgment reversed, with direction. All the Justices concur.

ATKINSON, J. I concur in the judgment, under the allegations made in the petition as amended, but not in all of the reasoning by which the result is reached.

(13 Ga. App. 663)

TAYLOR v. AMERICAN NAT. BANK.
(No. 4,656.)

(Court of Appeals of Georgia. May 6, 1913.)

(Syllabus by the Court.)

1. BILLS AND NOTES (§ 343*)—BONA FIDE HOLDER—DEFENSES.

Knowledge by the purchaser of a negotiable instrument that it was given for capital stock in an insolvent corporation, and that under a plan of reorganization of the corporation common stock was given as a bonus to subscribers of preferred stock, will not defeat the collection of the note, if it was otherwise acquired in good faith and for value before maturity.

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. §§ 853-855, 864, 865; Dec. Dig. § 343.*]

2. REVIEW ON APPEAL.

All other material questions in the case are controlled adversely to the plaintiff in er-

ror by the decisions of this court in *Stubbs v. Fourth National Bank*, 12 Ga. App. —, 77 S. E. 893, and *Brooks v. Floyd*, 12 Ga. App. —, 77 S. E. 877.

Error from City Court of Macon; Robt. Hodges, Judge.

Action by the American National Bank against Eden Taylor, Jr. Judgment for plaintiff, and defendant brings error. Affirmed.

W. D. McNeil, of Macon, for plaintiff in error. Hardeman, Jones, Park & Johnston, of Macon, for defendant in error.

POTTLE, J. Judgment affirmed.

(12 Ga. App. 687)

SELLERS v. STATE. (No. 4,786.)

(Court of Appeals of Georgia. May 6, 1913.)

(Syllabus by the Court.)

1. CRIMINAL LAW (§ 400*)—SECONDARY EVIDENCE—ADMISSIBILITY.

On the trial of a criminal case, where the existence and contents of a writing are material, and the writing is shown to be in the possession of the accused, parol evidence of the contents of the writing is admissible on the theory that the writing is inaccessible, because the accused cannot be compelled to give testimony against himself by being required by the court to produce the writing in question. *Kinsey v. State*, 12 Ga. App. —, 77 S. E. 369; *Farmer v. State*, 100 Ga. 41, 23 S. E. 26.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 879-886, 1208-1210; Dec. Dig. § 400.*]

2. CRIMINAL LAW (§§ 762, 798½*)—INSTRUCTION—EVIDENCE—VERDICT.

An indictment contained two counts. The first charged the accused with forgery, the specific act of forgery being that the accused wrote on the back of the check the name of the payee (the check being made payable to the said payee or his order); and the second count charged that, after so forging the name of the payee on the back of the check as an indorsement, the accused then and there uttered and published the check as true, with the forged name of the payee thereon, on the bank, with the fraudulent intent charged in the indictment. The undisputed evidence for the state was given by the teller of the bank, to whom the check was presented, both as to the actual act of forgery and the act of uttering and publishing the forged instrument as true. The trial judge, pertinently to this question, charged the jury to the effect that the evidence did not separate the two counts, and if the jury found the accused guilty of one count, they would necessarily find him guilty of the other, and that if they found the accused guilty, under the rules of law which had been given them in charge, the form of the verdict would be, "We, the jury, find the defendant guilty." Held, that this instruction was not an expression of opinion on the evidence, or the weight of the evidence; nor was it erroneous as to the form of the verdict, because the evidence demanded a finding that the accused was guilty on both counts of the indictment.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1731, 1750, 1754, 1758, 1759, 1769; Dec. Dig. §§ 762, 798½.*]

3. CRIMINAL LAW (§ 1163*)—HARMLESS ERROR—INSTRUCTIONS—EVIDENCE.

Any error in the charge, or failure to charge, or in the admission of evidence, was immaterial. In view of the fact that the accused introduced no evidence, and made no state-

ment to the jury, the evidence for the state fully demanded his conviction on both counts of the indictment.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 3085, 3086, 3088, 3089; Dec. Dig. § 1165.*]

Error from Superior Court, Appling County; C. B. Conyers, Judge.

Milton Sellers was convicted of forgery, and he brings error. Affirmed.

W. W. Bennett, of Baxley, for plaintiff in error. J. H. Thomas, Sol. Gen., of Jesup, for the State.

HILL, C. J. Judgment affirmed.

(13 Ga. App. 447)

SOUTHERN EXPRESS CO. v. FANT FISH CO. (No. 4,045.)

(Court of Appeals of Georgia. Feb. 4, 1913. Rehearing Denied March 1, 1913.)

(Syllabus by the Court.)

1. CARRIERS (§§ 72, 188*)—CONSIGNEE—PRESUMPTION OF OWNERSHIP—SHIPPING INSTRUCTIONS—ICING SERVICE—OMISSION.

(a) The consignee of goods delivered to a carrier for transportation may be presumed to be the owner of the goods, and, in the absence of either actual or constructive notice that he is not the owner, the carrier is authorized to follow the consignee's shipping instructions.

(b) A carrier instructed by the ostensible owner of the shipment to omit a service or the performance of a duty usually incident to the contract of carriage cannot demand of him compensation for the performance of the service or duty, unless it be a service or duty required by law. One cannot collect for services rendered to another over the latter's protest, unless, in the performance of a public duty, the service is of such a nature that its omission might affect the rights of others, or of the public, and it is therefore required by law.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 243-250, 258-261, 266-269, 853-858; Dec. Dig. §§ 72, 188.*]

2. CARRIERS (§§ 108, 122, 188*)—TRANSPORTATION—PERISHABLE FREIGHT—RE-ICING—NECESSITY—DELAY—CHARGE AGAINST OWNER—DECAY OF GOODS—DESTRUCTION.

(a) The fact that, in the transportation of goods likely to be damaged by a delay for which the owner of the goods is in no wise responsible, a service for which a carrier is ordinarily permitted to charge compensation as the only means of preserving the shipment, affords no reason for imposing liability for the payment of the usual charge for service upon the consignee or the owner of the goods.

(b) Where a consignee directs the omission or nonperformance of a service which may be essential for the proper transportation and preservation of a shipment perishable in its nature, he assumes all the risk of damage consequent upon the omission, which is traceable to it. In such a case the consignee's direction protects the carrier from any liability, which might have ensued from the omission of this service or duty but for the direction of the consignee.

(c) If, in the transportation of shipments of a perishable nature, the directions of the shipper or consignee (the owner) result in such deterioration or decay as to render further transportation impracticable or unsafe, the direction of the owner will terminate the contract of

carriage, and the carrier may, without liability, discharge or destroy the shipment.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 471-495, 520-522, 537, 538, 557-559, 853-858; Dec. Dig. §§ 108, 122, 188.*]

(Additional Syllabus by Editorial Staff.)

3. CARRIERS (§ 82*)—DELIVERY TO CONSIGNEES—DUTY OF CARRIERS.

A consignee in possession of a bill of lading is entitled to have the goods delivered to him on payment of the charges specified in the bill of lading, unless the carrier knows, or has reason to believe, that the consignee is not the real owner of the shipment.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 299-315; Dec. Dig. § 82.*]

4. CARRIERS (§ 91*)—DUTY TO DELIVER—CONVERSION.

When a consignee having the bill of lading pays or tenders the charges entered thereon, he is entitled to possession of the goods, and a refusal to deliver constitutes conversion.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 338-355; Dec. Dig. § 91.*]

5. CARRIERS (§ 197*)—FREIGHT—ADDITIONAL CHARGES—RE-ICING SHIPMENT—DELIVERY.

A carrier has no lien on the shipment nor can it withhold delivery for nonpayment of extra charges for re-icing, designated on a second waybill; its remedy being limited to a right of action against the consignee.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 891-900; Dec. Dig. § 197.*]

Error from City Court of Savannah; Davis Freeman, Judge.

Action by the Fant Fish Company against the Southern Express Company. Judgment for plaintiff, and defendant brings error. Affirmed.

In August, 1910, the Fant Fish Company of Savannah, Ga., wrote the following letter to the agent of the Southern Express Company in that place: "We desire to put you on notice that we do not want any more of the fish coming to us from Florida points re-iced while in transit. If any are delayed, it is not our fault, and your company will have to use their judgment in disposing of them. We should have no cause to pay re-icing charges on fish that come to us by express from Florida, when they make the schedule time." Thereafter the Fant Fish Company ordered from a Mr. Montgomery, of Oak Hill, Fla., 400 pounds of trout and 500 pounds of bottom fish, of the aggregate value of \$75, and Montgomery delivered this shipment to the Southern Express Company at Oak Hill, Fla., on the afternoon of April 1, 1911. The shipment had not at that time been paid for by the purchasers, but the Fant Fish Company at Savannah was designated in the bill of lading as the consignee. In the ordinary operation of the railroad trains, these fish would have left Oak Hill about 2 o'clock in the morning of April 2d, and would have reached Savannah on the afternoon of the same day. Due to a congestion on the line of the Florida East-Coast Railway, the shipment did not leave Oak

Hill until 2 o'clock in the afternoon of April 2d, and arrived at Jacksonville at 1:30 o'clock in the morning of April 3d. The fish left Jacksonville on the next train, about 8 or 9 o'clock a. m. of April 3d, and were delivered to the Fant Fish Company in Savannah, with transportation and icing charges collectible, at 5 o'clock p. m. of April 3d. The shipment was thus delayed something over 24 hours. The fish company claimed that three barrels of the fish had not been re-iced, but there is evidence in behalf of the express company that the entire shipment was re-iced at Jacksonville; and, inasmuch as the verdict in favor of the plaintiff was directed, it must be conceded that the entire shipment was in fact re-iced. The fish company tendered the express company the transportation charges on the fish and icing charges on those barrels which they thought had been re-iced, but declined to pay the icing charges on the three barrels which they contended had not been re-iced. The express company declined to deliver the fish without the payment of all charges, and the fish company brought suit in trover. On the trial of the case, the court directed a verdict in favor of the plaintiff. The express company moved for a new trial, which was refused.

Lawton & Cunningham and A. R. Lawton, Jr., all of Savannah, and Robt. C. & Philip H. Alston, of Atlanta, for plaintiff in error. Osborne & Lawrence and E. H. Abrahams, all of Savannah, for defendant in error.

RUSSELL, J. (after stating the foregoing facts). It appears from the briefs that the court directed a verdict in favor of the plaintiff upon the ground that the icing charges were shown upon separate waybills, and were not shown upon the waybill which bore the transportation charges, and that, according to the tariff under which this shipment moved, the re-icing charges should have been shown upon the original waybill. There is nothing in the record to indicate that the order directing the verdict was placed upon this ground, but we could not set aside his judgment, even if it was based solely upon that reason. The rule is well settled that the inquiry of a reviewing court is directed to the question as to whether the judgment rendered is right; and, if it be right, it will be sustained, although the trial court may have assigned the wrong reason for its rendition. *Everett v. Southern Express Co.*, 46 Ga. 303 (3), 306. For this reason we pass, for the present, from a consideration of the validity of this reason for the judgment, and address ourselves first to an examination of features of the case which we deem more important.

[1] It is undisputed that the Southern Express Company was notified by the Fant Fish Company not to re-ice shipments of fish being transported to it from Florida; that the

fish in question were transported by the express company from Florida to the Fant Fish Company as consignee; that they were re-iced; that the delay of more than 24 hours in the shipment was not due to any fault of the consignee; that the charges for the re-icing, which were demanded by the express company, are those filed with and approved by the Interstate Commerce Commission; that re-icing would not have been necessary for the preservation and proper transportation of the fish, if the delivery had been effected in the usual period of time required for a shipment by express from the initial point, and that, upon the failure of the consignee to pay the icing charges, delivery was refused. No point is made upon the fact that the plaintiff waived its notice to the express company as to two barrels of the fish by offering to pay the icing charges upon that much of the shipment; and so, to our mind, it appears that the case is one for the application of the elementary principle that no one is required to pay for something which he does not want, and which he has protested against having supplied to him. No one is required to be benefited if he does not wish to be, and certainly no one is required to accept and pay for something which another assumes will be beneficial to him, when he does not entertain the opinion that it will be beneficial. A. cannot perform a service for B. over B.'s protest and then compel B. to pay for it. Measured by this rule, and considering the case apart from the distinctive rules applicable to common carriers, the question presented by this record would appear to be one of easy solution. It is insisted, however, by counsel for the plaintiff in error that it is the duty of the carrier to safely deliver each and every shipment which it receives for transportation, and that, when it is necessary for the preservation of a perishable shipment that it be re-iced, it must charge for the service the rate filed with the Interstate Commerce Commission and posted in accordance with the rules of that tribunal. Counsel for the plaintiff in error therefore insists that the direction of the consignee not to re-ice a shipment so well known to be perishable as fresh fish must be disregarded in any case, and especially in a case where the direction to omit icing is given by a consignee whom the express company does not know to be the true owner of the shipment. The plaintiff in error further insists that not only is the tariff allowed by the Interstate Commerce Commission, and the charge for icing, in the nature of a regulation which is reasonable, and therefore can be imposed by the shipper, but that to permit one shipper to direct that his fish be shipped without icing from a particular section, in avoidance of its general rule, would tend to throw its business as a carrier into hopeless confusion and to involve it in interminable difficulties.

Two incontestable legal principles are involved in the consideration of the case, to which voluminous reference is made in the briefs. In our opinion, neither of these propositions can be questioned, and we understand their validity to be conceded by the defendant in error: First, that the Interstate Commerce Commission has the exclusive power of fixing all rates and regulations as to interstate shipments; and, second, that the rates as filed and approved by the Interstate Commerce Commission must in every case be collected by the carrier. *Georgia Railroad v. Creety*, 5 Ga. App. 424, 63 S. E. 528; *Texas & Pacific Ry. v. Abilene Cotton Oil Co.*, 204 U. S. 426, 427, 27 Sup. Ct. 350, 51 L. Ed. 553, 9 Ann. Cas. 1075; *Interstate Commerce Commission v. C. N. O. & T. P. Ry. Co.*, 167 U. S. 479, 17 Sup. Ct. 896, 42 L. Ed. 243. And so far as the propriety of a rate fixed by the Interstate Commerce Commission, for a service for which a shipper has contracted or which he has voluntarily accepted, is concerned, this court would be without jurisdiction to consider any such phase of the case if it were involved; for, in the case of *Baltimore & Ohio Railroad Co. v. Pitcairn Coal Co.*, 215 U. S. 481, 30 Sup. Ct. 164, 54 L. Ed. 292, the Supreme Court of the United States held that "regulations which are primarily within the competency of the Interstate Commerce Commission are not subject to judicial supervision or enforcement until that body has been afforded an opportunity to exert its administrative functions."

After a careful review of the record in this case, it seems to us that the only substantial issue between the parties is as to the application of well-settled legal principles to the particular facts of the case, and the determination of the question as to whether the carrier had the authority to charge for a service which it must be conceded it was not authorized by the owner of the shipment to perform—nay more, a service which the consignee had expressly requested it not to perform. It is settled that the true owner may give directions for the shipment of his goods delivered to a carrier for transportation. *Redfield on Carriers* (1st Ed.) § 34; 1 *Hutchinson on Carriers*, § 1; 5 *Am. & Eng. Encyc. Law*, 364, 365; *U. S. Express Co. v. Kountz Bros.*, 8 Wall. 342, 19 L. Ed. 457; *Sager v. Portsmouth R. R.*, 31 Me. 228, 50 Am. Dec. 659; *Southern Ry. Co. v. I. M. Frank & Co.*, 5 Ga. App. 574, 63 S. E. 656. It is likewise settled that in the absence of knowledge, either actual or constructive, to the contrary, the consignee may be presumed to be the owner of the goods which have been accepted for shipment. *Hutchinson on Carriers*, §§ 660 et seq., 1304; *Central of Georgia Ry. Co. v. Willingham*, 8 Ga. App. 818, 70 S. E. 190.

We conclude, therefore, that such a consignee may direct the manner of the transportation of a shipment addressed to him, and that the carrier, in following the direc-

tions of such a consignee, will not subject itself to any liability which may result from the consignee's directions (*Western & Atlantic R. Co. v. Exposition Mills*, 81 Ga. 524 [3b], 530, 7 S. E. 916, 2 L. R. A. 102) unless the directions involve the omission or nonperformance of some service or duty the performance of which is by law made essential in its transportation. This being true, does any rule of the Interstate Commerce Commission require the express company to ice in transit fish delivered to it for shipment, in disregard of the instruction of the owner, or of a consignee, under conditions which authorize the presumption that he is the owner? It is well settled, of course, that the main purpose of the statute which forbids the charging of a rate different from that approved by the Interstate Commerce Commission, and likewise forbids a failure to collect the charges in full, is to prevent discrimination, and upon this principle counsel for the plaintiff in error grounds his argument that the fish company is liable for the charges for icing, although this service may have been done in disregard of its notice and over its protest. Whether the consignee would be liable for the icing, even when the icing was in disregard of its orders and in positive disobedience of its instructions, would depend upon two things: (1) Was the icing necessary for the preservation of the fish and their safe transportation, in the usual course of such shipments and within the purview of the contract of carriage, as contemplated by the parties? (2) If the shipment was delayed and the delay not occasioned by any fault of the consignee, and the carrier, being liable for the deterioration or decay of the fish, thought it necessary, and if it was necessary, to ice the fish in order to preserve them, and the icing was due to this extraordinary circumstance alone, would the carrier still be required by the rule of the Interstate Commerce Commission to charge for the icing, because, by a coincidence, it happened that the best means of preserving the fish from the damage incident to the carrier's own delay was the application of a service for which the carrier was required to collect pay in a case in which icing was requested or permitted by the consignee or owner of the goods?

[2] As to the first question: The evidence is undisputed that ordinarily no re-icing is necessary to preserve fish shipped from Oak Hill, Fla., to Savannah, Ga., and it could not have been within the contemplation of the consignee, because the consignee had expressly notified the express company not to re-ice any fish coming to the consignee from Florida.

We come then to the second matter of inquiry. It is well settled, of course, that the consignor must sue for any breach of the contract of shipment, but the consignee has the right of action for any damages accruing during the transportation, and the con-

signee, if the carrier followed his directions and the shipment was damaged in consequence of these directions, would assume the entire risk, and would himself have to stand the damages. It is also well settled that for damage resulting from any delay in transportation occasioned by the act of God or of the public enemies, or where the fault of the consignor or of the owner has occasioned or contributed to the delay, or the delay is the result of misfortune or accident, the consignee is not entitled to recover damages resulting from the fact that the period of transportation was so lengthened as that perishable shipments deteriorated in value or became valueless. But it is equally well settled that when the delay in transportation results from some congestion of traffic (and this was the cause of the delay in the present case), and the shipment is damaged or deteriorates in value by reason of delay, not occasioned by any act of the shipper as the other party to the contract, the owner of the goods may recover. If, therefore, in the present case, the express company, having been notified by the consignee not to re-ice the fish shipped to it from points in Florida (and the distance being such that it was not necessary to the safe transportation of the fish in the usual course that they should be re-iced), was compelled to ice them in order to escape a liability for damage to which a delay in transportation not excused by law might subject it, and not because the rule of the Interstate Commerce Commission required that all fish should be iced, then the consignee should not be liable for the expense of the icing, nor for any charge dependent upon the icing.

It may happen that some service which is enumerated in the tariffs filed with the Interstate Commerce Commission may in a given case, where the carrier's own preservation from liability demands action on his part, be the only preventative from loss, but it cannot be said in such a case that the use of that preventative is a necessary part of the ordinary transportation of that article; and certainly it cannot be held that there was involved in the contract, either express or implied, anything which devolved upon that carrier the duty of collecting the usual charge for such a service when it was properly an incident of the transportation. The collection of the charge in the latter case is necessary to prevent discrimination in favor of one shipper or consignee and against another of either class. The use of a means of preventing damage, applicable alike in every case, except as to amount, where the carrier itself is exposed to liability, is not essential in connection with the subject of transportation. The Interstate Commerce Commission under the provisions of the Interstate Commerce Act (Act Feb. 4, 1887, c. 104, 24 Stat. 379 [U. S. Comp. St. 1901, p. 3154]) as amended June 18, 1910 (Act June 18, 1910, c. 309, 86

Stat. 544 [U. S. Comp. St. Supp. 1911, p. 1288]), fixes the rate at which services of various kinds shall be performed by carriers of various kinds, but the exercise of this power to promulgate tariffs for services actually performed in transportation does not deprive the passenger, nor the owner of goods delivered for transportation, of the right to contract for such services as either, as the case may be, may deem necessary for the safe transportation of his property or of his person, or compel him to pay for services which he may not think necessary, and which may in fact be unnecessary to his own comfort or safety, if a passenger, or to the safety and dispatch of his goods, if he be the owner. The Interstate Commerce Commission has full authority to promulgate rates and rules regulating and fixing the charges of sleeping car companies, and, where one becomes a passenger upon a sleeping car, he subjects himself to the regulations, and the sleeping car company must collect, and the passenger must pay, the fixed rates—no more and no less. The same is true as to the rates and regulations applicable to the passenger upon a railroad company's train, but it does not follow that it is within the power of the railroad company to compel a passenger to occupy a sleeping car, and to pay the rate which the Commission allows to be charged for the sleeping car service, when the passenger does not wish to avail himself of it. Likewise a carrier might be authorized, by the approval of the Interstate Commerce Commission, to fix and charge a rate for icing, but it would not be a matter wholly within the discretion of the carrier as to whether a shipment should be iced. If this were true, the carrier might elect to ice shipments which would be damaged, rather than benefited, by the operation. The owner has the right to direct the manner and the route in which his goods shall be shipped, and, as ruled above, in the absence of anything appearing to the contrary, the carrier may assume that the consignee is the owner of the goods delivered to it by the consignor for shipment to the consignee, without reservation.

The evidence demanded the finding for the plaintiff irrespective of the reason upon which the trial judge is alleged to have based his judgment, and we have dealt first with this phase of the question. But the fact that the icing charges did not appear upon the original waybill, in accordance with the tariff which was introduced in evidence, would itself have constituted a sufficient reason for directing a verdict for the plaintiff. It is argued by counsel for the plaintiff in error that the icing charges were necessarily put upon a separate waybill, because, at the time the original bill of lading was issued and delivered, the service had not been performed, and therefore the charges for the icing could not be entered upon the original waybill. We

do not assent to the assertion that the charges could not have been entered upon the original waybill, but, granting that this contention is sound, that the fact would impose upon the Fant Fish Company the duty of paying the icing charges before the express company delivered the shipment, and as a condition precedent to delivery.

[3] The consignee of a shipment who is in possession of a bill of lading is entitled to have the goods delivered to him (unless the carrier knows, or has reason to believe, that he is not the actual owner of the shipment) upon payment of the charges specified in the bill of lading. A carrier may refuse to deliver a shipment to any other than the consignee or an agent of the consignee, but he cannot refuse to deliver to the consignee who is in possession of the bill of lading, unless he has sufficient reason to doubt that he is the true owner, and unless the consignee refuses to pay the freight charges as shown by the original bill of lading.

[4] When the consignee pays or tenders the payment of the charges which are entered upon the original bill of lading, he is entitled to the possession of the shipment, and a refusal to deliver is conversion.

[5] A carrier might have a right of action against the consignee for the charges upon the second waybill, but he would have no lien upon the shipment, nor could it withhold delivery of the shipment upon these extra charges.

The judge of the city court did not err in refusing to grant a new trial.

Judgment affirmed.

(12 Ga. App. 726)

BODIFORD v. STATE. (No. 4,822.)

(Court of Appeals of Georgia. May 20, 1913.)

(Syllabus by the Court.)

CONVICTION SUSTAINED.

No error of law is complained of, and the evidence supports the verdict.

Error from City Court of Cairo; J. R. Singletary, Judge.

J. W. Bodiford was convicted of crime, and he brings error. Affirmed.

J. Q. Smith, of Cairo, for plaintiff in error. W. J. Willie, Sol., and Ira Carlisle, both of Cairo, for the State.

HILL, C. J. Judgment affirmed.

(13 Ga. App. 702)

FORTUNE v. BRASWELL. (No. 4,896.)

(Court of Appeals of Georgia. May 20, 1913.)

(Syllabus by the Court.)

DUE PROCESS OF LAW.

This case is controlled by the opinion of the Supreme Court (77 S. E. 818) on the constitutional law question certified, and the judgment of the lower court is affirmed.

Error from City Court of Monroe; A. C. Stone, Judge.

Action between Mrs. R. B. Fortune and W. H. Braswell. From the judgment, Fortune brings error. Affirmed.

O. Roberts, of Monroe, and R. B. Fortune, of Logansville, for plaintiff in error. R. L. Cox, of Monroe, for defendant in error.

PER CURIAM. Affirmed.

(12 Ga. App. 726)

ROTHSCHILD v. STATE. (No. 4,873.)

(Court of Appeals of Georgia. May 20, 1913.)

(Syllabus by the Court.)

1. CRIMINAL LAW (§ 878*)—VERDICT—CONSTRUCTION.

If an indictment contains two counts charging kindred or similar misdemeanors, and one of the counts is defective and the other is good, and a general verdict of guilty is rendered on the indictment, the law will apply the verdict to the good count. Especially is this true where the evidence is confined to the good count and clearly establishes the commission of the offense as charged therein. *Bullock v. State*, 10 Ga. 47, 54 Am. Dec. 366; *Frain v. State*, 40 Ga. 529.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2098-2101; Dec. Dig. § 878.*]

2. CRIMINAL LAW (§ 786*)—INSTRUCTION—STATEMENT OF ACCUSED.

Where the trial judge instructed the jury that the defendant had the right to make to the court and jury such statement in his own behalf as he deemed proper, that the statement was not under oath and should have only such weight as the jury might see proper to give it, and that they might believe it in preference to the sworn testimony in the case, it was not error to add the following instruction: "You will consider all the testimony, and give such weight as you see proper, if any, to the defendant's statement, and from all of it undertake to arrive at what the truth is." The words, "if any," are not subject to the criticism, that they constituted an expression of opinion as to the weight they should give the defendant's statement, or an intimation of the court that they should not give any weight whatever to the statement. Nor was it in any respect prejudicial to the defendant, especially when considered in connection with the context of the charge on the same subject. *Woods v. State*, 10 Ga. App. 476 (3), 73 S. E. 608.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1787, 1895-1901, 1960, 1984; Dec. Dig. § 786.*]

3. JURY (§ 142*)—EXAMINATION OF JURORS—WAIVER OF OBJECTION.

While the question propounded by the solicitor to the jurors on the voir dire, "Are you opposed to the enforcement of the law known as the prohibition law in Georgia?" was unauthorized by law, yet where no objection was made to the question when propounded, and the accused stated that he had no objection to the panel of jurors as put upon him, either as a whole or separately, he will not be heard, after the verdict, to object to the question.

[Ed. Note.—For other cases, see Jury, Cent. Dig. §§ 500, 630; Dec. Dig. § 142.*]

4. INTOXICATING LIQUORS (§ 169*)—CRIMINAL PROSECUTION—DEFENSE.

On the trial of an indictment for selling liquor, it is no defense that the accused sold the

liquor as an employé of the social club to the members thereof. Intoxicating liquor cannot be sold in this state by an individual or a corporation as a beverage, and where a steward of a social club sells to the members of the club intoxicating liquors, he is guilty of a violation of what is known as the "prohibition law," although in making the sale he is acting solely for the benefit of the club.

[Ed. Note.—For other cases, see Intoxicating Liquors, Cent. Dig. §§ 187, 188; Dec. Dig. § 169.*]

5. INTOXICATING LIQUORS (§ 169*)—CRIMINAL PROSECUTION—DEFENSE.

The evidence for the state demanded the conviction, and the statement of the accused, to the effect that in selling the intoxicating liquors to members of the club he was acting for the club, and that he received no personal benefit from such sales, constituted no defense.

[Ed. Note.—For other cases, see Intoxicating Liquors, Cent. Dig. §§ 187, 188; Dec. Dig. § 169.*]

Error from Superior Court, Glynn County; C. B. Conyers, Judge.

Ike Rothschild was convicted of selling liquor, and he brings error. Affirmed.

Ernest Dart, of Brunswick, for plaintiff in error. J. H. Thomas, Sol. Gen., of Jesup, for the State.

HILL, C. J. Judgment affirmed.

(12 Ga. App. 694)

WRENN v. STATE. (No. 4,688.)

(Court of Appeals of Georgia. April 16, 1913.
Rehearing Denied May 20, 1913.)

(Syllabus by the Court.)

1. CRIMINAL LAW (§ 597*)—CONTINUANCE—REFUSAL.

Where the testimony of a witness relied upon by the accused to prove an alibi, and for whose absence a continuance was asked, would not have been sufficient for that purpose, the refusal to grant the motion for a continuance will not require a new trial.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1331, 1332; Dec. Dig. § 597.*]

2. LARCENY (§ 80*)—INDICTMENT—DESCRIPTION OF PROPERTY.

The description of the property alleged to have been stolen, given in the indictment, was sufficient for the purpose of identification and notice to the accused, although some of the words of description consisted of technical terms requiring explanation by expert evidence.

[Ed. Note.—For other cases, see Larceny, Cent. Dig. §§ 64-75; Dec. Dig. § 80.*]

3. REVIEW ON APPEAL.

No error of law appears, and the evidence strongly supports the verdict.

Error from Superior Court, Fulton County; Price Edwards, Judge.

George Wrenn was convicted of larceny, and brings error. Affirmed.

Gober & Jackson and Jas. H. Dodgen, all of Atlanta, for plaintiff in error. H. M. Dorsey, Sol. Gen., and E. A. Stephens, both of Atlanta, for the State.

HILL, C. J. Judgment affirmed.

(12 Ga. App. 695)

FELKER v. STARK. (No. 4,676.)

(Court of Appeals of Georgia. May 6, 1913.
Rehearing Denied May 20, 1913.)

(Syllabus by the Court.)

FINES (§ 19*)—PAYMENT BY NOTE.

Where a person pleads guilty in a municipal court to the offense of disorderly conduct, and a fine is imposed, and he is released by the police officer upon the execution and delivery of a promissory note, signed by a third person, in payment of the fine, it is no defense to a suit on the note that the person thus released was not in fact guilty of disorderly conduct, but was guilty only of the offense of gaming, for which the municipal court had no jurisdiction to try him; that the municipal officer knew that the accused was not guilty of disorderly conduct, and charged him with that offense, and accepted his plea simply for the purpose of enabling him to evade a prosecution for gaming. The fact that he was subsequently charged in the state court with that offense is immaterial.

[Ed. Note.—For other cases, see Fines, Cent. Dig. §§ 20-22; Dec. Dig. § 19.*]

Error from City Court of Monroe; G. A. Johns, Judge.

Action by W. B. Stark against J. H. Felker. Judgment for plaintiff, and defendant brings error. Affirmed.

J. H. Felker, of Monroe, for plaintiff in error. R. L. Cox, of Monroe, for defendant in error.

POTTLE, J. Judgment affirmed.

(12 Ga. App. 695)

WARREN v. STATE. (No. 4,722.)

(Court of Appeals of Georgia. April 16, 1913.
Rehearing Denied May 20, 1913.)

(Syllabus by the Court.)

1. INDICTMENT AND INFORMATION (§ 190*)—LARCENY—CONVICTION OF ATTEMPT.

On the trial of an accusation of the offense of larceny from the house, the jury may find the accused not guilty of the offense charged in the accusation, but, if the evidence warrants it, guilty of an attempt to commit that offense, though the accusation contain no special count charging such an attempt. Penal Code 1910, § 1061.

[Ed. Note.—For other cases, see Indictment and Information, Cent. Dig. §§ 596-603; Dec. Dig. § 190.*]

2. CRIMINAL LAW (§ 893*)—APPEAL AND ERROR—VERDICT—INSTRUCTION.

On the trial of an accusation of larceny from the house, the jury found the following verdict: "We, the jury, find the defendant not guilty as charged in the bill of indictment, but guilty of an attempt to commit larceny." Held, verdicts must not be avoided, unless from necessity; and, giving to this verdict a reasonable construction, the jury intended to find the accused guilty of an attempt to commit the crime charged in the accusation, to wit, larceny from the house, and not an attempt to commit simple larceny. Civil Code 1910, § 5927.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2089, 2527; Dec. Dig. § 893.*]

3. LARCENY (§ 40*)—ACCUSATION—VARIANCE.

Where the accusation describes the property as being 50 cigars of the value of \$2, and the proof shows that the stolen property consisted of a box of cigars of the value of \$1.90, the variance is immaterial, whether the box contained 50 cigars or a less number.

[Ed. Note.—For other cases, see Larceny, Cent. Dig. §§ 102-128, 160; Dec. Dig. § 40.*]

4. CRIMINAL LAW (§ 1159*) — APPEAL AND ERROR—VERDICT—EVIDENCE.

The evidence is exceedingly weak and unsatisfactory as to the existence of any criminal intent; but this court cannot say that there were no circumstances from which the jury could have inferred the existence of such intent, and, as no error of law was committed, the verdict must stand.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 3074-3083; Dec. Dig. § 1159.*]

Error from Superior Court, Baldwin County; Jas. B. Park, Judge.

Henry Warren, Jr., was convicted of larceny from a house, and he brings error. Affirmed.

Sibley & Sibley, of Milledgeville, for plaintiff in error. Jos. E. Pottle, Sol. Gen., of Milledgeville, for defendant in error.

HILL, C. J. Judgment affirmed.

(12 Ga. App. 722)

DOZIER v. STATE. (No. 4,810.)

(Court of Appeals of Georgia. May 20, 1913.)

(Syllabus by the Court.)

CRIMINAL LAW (§ 770*) — INSTRUCTIONS — THEORY OF DEFENSE.

Where, in a criminal case, the accused, in his statement at the trial, presents a theory which, if true, entitles him either to an acquittal or to conviction of a lower grade of offense than that charged in the indictment, it is error for the court to refuse to give in charge to the jury a written request upon the law applicable to such theory.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 1806; Dec. Dig. § 770.*]

Error from City Court of Vienna; W. H. Lassiter, Judge.

Charlie Dozier was convicted of larceny, and he brings error. Reversed.

Jule Felton, of Montezuma, for plaintiff in error. Watts Powell, Sol., of Vienna, for the State.

POTTLE, J. The accused was convicted of the larceny of a piece of meat from a storehouse of the Byrom Corporation.

The main witness for the state testified, on direct examination, that the accused came to the store to purchase some meat, took a side of meat from the box, cut off a piece weighing about 9 pounds, paid for it, and put the remainder, weighing about 12 or 14 pounds, back into the meat box. Afterward the accused made several other purchases, put them all in a sack, and took them home. Shortly after he left, the meat was missed,

and the witness went to the home of the accused in search of it. The accused opened the sack in the presence of the witness, took out the 9-pound piece of meat, and said that this was all that he bought. The witness looked in the sack and found another piece of meat, which he identified as the other portion of the side of meat from which the 9 pounds were cut. The accused was requested to go back to the store, and, on the way, he remarked that this was the only thing he had ever taken in his life, and if the witness would not put him in jail he was willing to go to work for him. On cross-examination the witness testified that he did not hear the accused tell him that he got the other piece of meat, and to charge it to him. The witness would not say, however, that the accused did not make this statement, because he was some distance away from him. The accused had worked in the store for a number of years, had a good credit there, had cut meat, delivered goods, collected money, and performed similar duties. When the witness first saw the meat at the house of the accused the accused contended that he had weighed the meat and told the witness to charge it to him. When the accused first came to the store to make the purchase, he told the witness that he wanted all of the side of meat, but did not have enough money, and he had better let part of it remain. The witness had known the accused for several years, and his previous character had been good. Another witness also testified to the good character of the accused.

The accused, in his statement, said that after he cut off the 9-pound piece of meat, and the clerk who was serving him had taken his money and had gone across the store to a desk to make out the cash ticket, the accused told the clerk that he would take the other piece of meat also, and gave its weight and requested that it be charged to him. He thought the witness heard this statement. He had often gotten meat at the store before and had it charged to himself. He excepts to the overruling of his motion for a new trial.

1. The court was requested in writing to charge the jury as follows: "If the defendant took the meat and requested Mr. Slade to charge it to him, and he believed that he was entitled to take it under these circumstances, you could not convict this defendant." The judge declined to give this instruction, but did charge generally the law as to the prisoner's statement at the trial. The refusal to charge as requested is complained of in the motion for a new trial. The accused was entitled to have the court give the instruction requested. If no request is made to do so, it is not generally reversible error to fail to charge on a theory arising solely from the prisoner's statement; but when a pertinent and legal request is pre-

mented for an instruction upon such a theory, it is as much reversible error to refuse to do so as it would be to refuse to give an instruction based upon a theory arising from the sworn testimony in the case. If this were not true, the accused could be deprived of the benefit of the statement which the law authorizes him to make in his own defense, and which is often the only means by which the accused can rebut a prima facie case against him made by the state's evidence. According to the evidence for the state, if the clerk had been requested by the accused to extend credit for the meat, he would have done so; and the clerk, who testified in behalf of the state, does not unequivocally deny the statement that the accused made the request that the meat be charged to him. The guilt of the accused is by no means free from doubt, and he was entitled to the instruction which he requested the court to give.

2. There are several other grounds in the motion for a new trial, but none of them disclose any material error.

Judgment reversed.

(12 Ga. App. 710)

GORDON v. STATE. (No. 4,690.)

(Court of Appeals of Georgia. May 20, 1913.)

(Syllabus by the Court.)

1. CRIMINAL LAW (§ 1064*) — APPEAL — BILL OF EXCEPTIONS.

A recital in a bill of exceptions, to the effect that the trial judge refused to consider or to approve certain grounds of an amendment to the motion for new trial, presents nothing for the consideration of the Court of Appeals.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2676-2684; Dec. Dig. § 1064.*]

2. CRIMINAL LAW (§ 913*) — NEW TRIAL — SUFFICIENCY OF EVIDENCE.

The incriminatory circumstances introduced in evidence by the state were sufficient to exclude every reasonable hypothesis, except that of the defendant's guilt, and authorized the jury to convict him of the offense of gaming; and, as there is no complaint of any error of law upon the trial, the trial judge did not err in overruling the motion for new trial.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2137-2145; Dec. Dig. § 913.*]

Error from City Court of Statesboro; H. B. Strange, Judge.

Joe Gordon was convicted of gaming, and brings error. Affirmed.

F. B. Hunter, of Statesboro, and J. D. Kirkland, of Metter, for plaintiff in error. F. T. Lanier, Sol., of Statesboro, for the State.

RUSSELL, J. [1] 1. It is recited in the bill of exceptions that his honor, Judge Strange, "refused to allow the amended motion, or

to consider the two grounds contained in the same, which said disallowance and refusal Joe Gordon now assigns as error." The two grounds of the amendment, which the trial judge refused to approve, are sent up in the record, and it appears that the reason given by the judge for his refusal to allow the amendment or to approve the grounds thereof was that the grounds of the motion as stated were conclusions of fact and argumentative. If the question were properly presented, we would have no hesitation in holding that the judge properly disallowed the amendment to the motion, for the reason stated by him; but nothing is better settled as to motions for new trial than that a court of review can only pass upon such assignments of error as are contained in grounds of the motion which have been expressly approved. It is elementary that assignments of error contained in the motion for new trial, which are disapproved by the trial judge, present nothing for the consideration of a court of review.

[2] 2. The only point argued in the brief of counsel for the plaintiff in error is that the evidence offered to show the guilt of the accused is wholly insufficient, and therefore that a verdict finding him guilty is contrary to law. In our opinion the verdict was fully authorized by the proof submitted in behalf of the state. It is true that the defendant introduced a number of witnesses, who testified that he was merely a spectator, and did not in any way participate in the unlawful game of cards which they admitted was in progress. But, aside from the general rules which may or may not be controlling with juries in establishing the credibility of testimony, there was one undisputed circumstance, introduced on the part of the prosecution, which is wholly incompatible with the supposition of the defendant's innocence. The state proved that, when the game of cards was interrupted by the arrival of the officers, the defendant immediately claimed the money which was being used in the game as his property, and on the trial he did not offer any explanation which would tend to show that his money was being used either for an innocent purpose or without his consent. He did not deny having made claim for the money.

The other circumstances introduced in behalf of the state, such as the proximity of the accused to those who were shown to be players in the game, and his interest in the proceedings, might have been insufficient to authorize a conviction. Griffin v. State, 5 Ga. App. 43, 62 S. E. 685. But the pregnant fact that he claimed the money that was being played for, taken in consideration with the other circumstances, when unexplained, was so incompatible with innocence as to fully authorize the verdict.

Judgment affirmed.

(12 Ga. App. 725)

KILLEBREW v. STATE. (No. 4,821.)
(Court of Appeals of Georgia. May 20, 1913.)

(Syllabus by the Court.)

HOMICIDE (§ 250*)—VOLUNTARY MANSLAUGHTER—SUFFICIENCY OF EVIDENCE.

There was no theory of the evidence or of the prisoner's statement at the trial which authorized his conviction of the offense of voluntary manslaughter, and the verdict finding him guilty of that offense should have been set aside on a motion for a new trial.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. §§ 515-517; Dec. Dig. § 250.*]

Error from Superior Court, Monroe County; Robt. T. Daniel, Judge.

Sam Killebrew was convicted of voluntary manslaughter, and he brings error. Reversed.

R. L. Williams, of Macon, and A. M. Zellner and Persons & Persons, all of Forsyth, for plaintiff in error. E. M. Owen, Sol. Gen., of Zebulon, for the State.

POTTLE, J. The accused was convicted of voluntary manslaughter, and his motion for a new trial was overruled. Besides the general grounds, the motion contains assignments of error upon the ground that the evidence did not authorize an instruction upon the law relating to voluntary manslaughter, and also a ground containing alleged newly discovered evidence. The evidence leaves in doubt the real cause of the difficulty. From a statement made by the deceased, which was introduced as a dying declaration, it appears that the accused was angered because of some previous difficulty which had taken place between the deceased and a brother of the accused. According to the evidence for the state, the homicide was murder; the deceased was walking along the road unarmed; the accused met him, and, without any circumstances of justification or mitigation, deliberately fired at him and killed him. According to the evidence for the defendant, the deceased came down the road with a pistol in his hand, met several persons and inquired if they had seen the accused, shortly afterward met the accused in the road, threw a rock and hit him on the shoulder with it, and about the same time shot at the accused twice; the accused then shot once; and the deceased then fired three more times. Previous to the killing the deceased told one of the witnesses that he had a pistol and that he was going to kill the accused with it, if it was the last thing that he did. Thereupon he left this witness, with the pistol in his hand and his coat swung over his arm. This conversation took place on the afternoon of the killing and some two or three miles from the place where the homicide occurred. In his statement at the trial the accused said that the deceased met him in the road and threw a rock and hit him with it, and then commenced

shooting at him, and that he then shot the accused one time. Two wounds were inflicted on the deceased; he was wounded in his side and one finger was shot off. There is evidence that one shot could have made both wounds.

From a careful examination of the evidence, we are unable to find any theory upon which the accused could properly be convicted of voluntary manslaughter. The evidence for the state made out a clear case of murder, and the testimony for the defense an equally clear case of self-defense. There is nothing in the statement of the accused which would authorize a conviction of voluntary manslaughter. It is suggested by the solicitor general that the throwing of the rock by the deceased constituted an assault and authorized a conviction of voluntary manslaughter upon the theory that there was a mutual combat or upon the idea that the assault was enough to excite passion. The manifest reply to this contention is that the evidence demanded a finding that the deceased shot twice at the accused before the accused shot at him. If the accused had shot and killed the deceased immediately after the throwing of the rock, the position taken by the solicitor general would be correct. But there is no evidence which supports this theory. According to the testimony the deceased was a man of violent temper, and the accused bore a good reputation. This doubtless influenced to some extent the jury to return a verdict which, in the light of the evidence, can only be regarded as a compromise finding. Under repeated rulings of the Supreme Court and of this court, the accused has a right to have such a verdict set aside in order that the question whether he is guilty of murder or not guilty of any offense may be clearly submitted to the jury. It is unnecessary to pass upon the ground of the motion containing alleged newly discovered evidence. If such evidence is competent, it can be submitted to the jury on another trial.

Judgment reversed.

(12 Ga. App. 490)

CARTER v. STATE. (No. 4,132.)

(Court of Appeals of Georgia. Feb. 24, 1913.)

(Syllabus by the Court.)

1. STATUTES (§ 47*) — AUTOMOBILES — SPEED REGULATION—VALIDITY.

So much of the act of 1910 (Acts 1910, p. 92, § 5) regulating the use of automobiles as undertakes to make penal the operation of an automobile on the highways of this state "at a rate of speed greater than is reasonable and proper, having regard to the traffic and use of such highway, or so as to endanger the life or limb of any person or the safety of any property," is too uncertain and indefinite in its terms to be capable of enforcement.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. § 47; Dec. Dig. § 47.*]

2. HIGHWAYS (§ 186*)—AUTOMOBILES—VIOLATION OF SPEED REGULATION — ACCUSATION.

The count of the accusation charging the accused with having operated an automobile "so as to endanger the life and limb of persons and the safety of property" was subject to special demurrer on the ground that it failed to show what person or what property was endangered by the running of the automobile.

[Ed. Note.—For other cases, see Highways, Cent. Dig. §§ 476, 477; Dec. Dig. § 186.*]

3. MUNICIPAL CORPORATIONS (§ 707*) — AUTOMOBILES—SPEED REGULATION—OPERATION OF STATUTE.

Section 12 of the act of 1910 (Acts 1910, p. 94) regulating the use of automobiles, which provides that "nothing contained in this act shall be construed as changing or interfering with any regulation or ordinance which has heretofore or may hereafter be adopted by any municipality of this state, regulating the running and operation of the machines described in this act, provided such regulation or ordinance is not in conflict with the provisions of this act," does not render the act inoperative in a city or town which has adopted an ordinance attempting to make punishable the running of automobiles "at a rate of speed greater than ten miles per hour at corners and crossings, or fifteen miles per hour beyond crossings and corners when outside of the fire limits, or at a greater speed than five miles per hour when inside the fire limits at crossings or corners, or ten miles per hour beyond corners and crossings," within the limits of the municipality; the ordinance being void because in conflict with section 5 of the same act, which makes it a misdemeanor to operate an automobile at a rate of speed greater than six miles per hour on approaching a crossing of intersecting highways.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. § 1518; Dec. Dig. § 707.*]

4. HIGHWAYS (§ 186*)—VIOLATION OF SPEED REGULATION — ACCUSATION — "AUTOMOBILE."

In an accusation specifically charging the illegal operation of an automobile in violation of the act of 1910 (Acts 1910, p. 90) regulating the running of automobiles and conveyances of like character, it is not necessary to allege the particular power by which the automobile in question was propelled.

The term "automobile" has a definite popular significance, and is understood to refer to a wheeled vehicle, propelled by gasoline, steam, or electricity, and used for the transportation of persons or merchandise.

[Ed. Note.—For other cases, see Highways, Cent. Dig. §§ 476, 477; Dec. Dig. § 186.*]

5. QUESTIONS NOT CONSIDERED.

As some of the rulings upon the demurrer require a reversal of the judgment of the lower court, and the subsequent proceedings in the trial were nugatory, the questions raised by the assignments of error in the motion for new trial will not be considered.

Error from City Court of Elberton; Geo. C. Grogan, Judge.

Cleveland Carter was convicted of violating the statute regulating the speed of automobiles, and he brings error. Reversed.

P. P. Proffitt, of Elberton, for plaintiff in error. Boozer Payne, Sol., of Elberton, for the State.

RUSSELL, J. The plaintiff in error was convicted in the city court of Elberton of a violation of the act approved August 13, 1910, regulating the operation of automobiles on public highways of this state (Acts Ga. 1910, p. 90). There were three counts in the accusation: The first charging that he operated an automobile "at a rate of speed greater than was reasonable and proper"; the second, that he operated the automobile "so as to endanger the life and limb of persons and the safety of property"; and the third, that he operated the automobile on a public highway, at a place known as "Herndon's Corner," "without having said machine under control," and operated it "at a speed greater than six miles per hour."

The defendant demurred to the first count upon the ground that it failed to charge any crime, and that the act itself failed to define a crime, because it failed to name any special rate of speed which would be unlawful, unreasonable, or improper. To the second count he demurred upon the ground that the accusation failed to show what person or what property was endangered by the running of the automobile named in the accusation. To the accusation as a whole he demurred upon the ground that the accusation failed to show that the automobile named therein was propelled by steam, gas, gasoline, electricity, or a power other than muscular power. The demurrers were overruled. The defendant then filed a plea in bar, setting up that the offense was alleged to have occurred within the city of Elberton, and that, the city of Elberton having, on August 2, 1909, passed an ordinance relating to automobiles within the city limits which fixed the rate of speed on the streets and at crossings and in approaching curves, and provided a penalty for its violation, the jurisdiction of the municipality to punish for the unlawful operation of automobiles is exclusive. This special plea was overruled, and exceptions pendente lite were preserved.

[1] 1. We think the court erred in overruling the demurrer to the first count. In so far as the General Assembly attempted to penalize the operation of automobiles at an unreasonable rate of speed, the act of 1910 is void, because there is no measure by which the unreasonableness can be ascertained. The law fails to define what is reasonable or unreasonable, and hence the definition of the offense is too vague and general to constitute a crime. The degree of unreasonableness that may be deemed criminal not being fixed by law, but being left to the varying opinions of different juries, the portion of the act referring to the speed is not uniform in its operation, and for that reason is unenforceable. *Hayes v. State*, 11 Ga. App. 371, 75 S. E. 523.

[2] 2. We think, also, that the demurrer to the second count in the accusation should

have been sustained. While, as a general rule, an accusation which defines an offense in the precise language of the statute is sufficient (Penal Code, 1910, § 954), still this is not a universal rule; and, as has been frequently pointed out in the decisions and text-books (see *Wingard v. State*, 13 Ga. 400; *U. S. v. Simmons*, 96 U. S. 360, 24 L. Ed. 819; *U. S. v. Hess*, 124 U. S. 483, 8 Sup. Ct. 571, 31 L. Ed. 516; *Johnson v. State*, 90 Ga. 444, 16 S. W. 92; *Amorous v. State*, 1 Ga. App. 313, 57 S. E. 999; *Youmans v. State*, 7 Ga. App. 101, 112, 66 S. E. 383; *Burkes v. State*, 7 Ga. App. 40, 65 S. E. 1091), there are some offenses of such a nature as that a charge in the language of the statute under which the accusation is brought would be wholly insufficient to so inform the accused of the nature of the charge against him as to enable him to prepare his defense. Every person accused of crime has the right to be sufficiently informed as to the time, place, and circumstances of the alleged offense, to identify it and enable him to prepare his defense. Presumptively, at least, one accused of crime is innocent; and if he is indeed innocent, and yet the particular crime with which he is charged (identified only by its Code definition) is merely alleged to have been committed by him at a time within the statute of limitations and in the county in which the accusation is preferred, he is no better informed as to the identity of the alleged criminal transaction, as to which he is called upon to defend, than were the Romans as to the provisions of the statutes which Caligula required them to obey, though he purposely placed his edicts upon a column too high to be seen.

A person who operates an automobile should as much obey the law at all times as those citizens who (like the members of this court) are unable to support such a luxury; but it is easy to conceive of a case in which, if the owner of the automobile was accustomed to use his machine even a small portion of the time, and it was charged that in the county, on some day within two years prior to the filing of the accusation (for the state is not confined to the day stated therein), and at some place of which the accusation gives no hint, he operated an automobile so as to endanger the life and limb of some person or persons whose name, age, color, sex, or place of residence is not even suggested, or so as to endanger property the nature and location of which is possibly undiscoverable, he might be placed absolutely at the mercy of the prosecution, though the testimony against him be false.

[3] 8. The question raised by the plea in abatement, based upon section 12 of the law regulating the speed and operation of automobiles and other like vehicles, as contained in the act of 1910, is whether the state law is inoperative upon drivers and automobilists manipulating machines within the limits of

a town or city that has an ordinance regulating the speed and operation of automobiles. The accused claims that it is, and that the state has no jurisdiction over the operating of automobiles and other like vehicles within the limits of the city of Elberton, which has an ordinance upon the subject.

Section 12 of the act of 1910, *supra*, reads as follows: "Nothing contained in this act shall be construed as changing or interfering with any regulation or ordinance which has heretofore or may hereafter be adopted by any municipality of this state regulating the running and operation of the machines described in this act, provided such regulation or ordinance is not in conflict with the provisions of this act." The provision of the law regulating the speed and operation of automobiles is found in section 5 of the act, to wit: "No person shall operate a machine on any of the highways of this state as described in this act at a rate of speed greater than is reasonable and proper, having regard to the traffic and use of such highway, or so as to endanger the life or limb of any person or the safety of any property, and upon approaching a bridge, dam, high embankment, sharp curve, descent or crossing of intersecting highways and railroad crossings, the person operating a machine shall have it under control and operate it at a speed not greater than six miles per hour." The ordinance of the city of Elberton provides: "It shall be unlawful for any person in charge of any automobile, auto buggy, motorcycle, or bicycle or other like machine, or chauffeur, rider, or driver, to run such machine at a rate of speed greater than ten miles per hour at corners and crossings, or fifteen miles per hour beyond corners and crossings when outside of the fire limits, or at a greater rate of speed than five miles per hour when inside the fire limits at corners and crossings, or ten miles per hour beyond corners and crossings, in the city of Elberton."

The question to be decided by this court is whether or not, under section 12 as set forth, the general law of section 5 is operative within the city of Elberton, or whether the city of Elberton has exclusive jurisdiction in reference to the regulation of speed and operation of automobiles within the city limits; in other words, whether the city ordinance so conforms to the statute as to be exclusive of any other regulation within the city limits. Section 12 authorizes cities and towns to pass ordinances regulating the speed and operation of automobiles (notwithstanding that there is a general law on the subject), provided only that they do not conflict with any of the provisions of the general law upon the same subject. A city ordinance regulating the operation of automobiles may contain other regulations, not inconsistent with the law of the state,

and dealing with circumstances which are not included within it, but it must accord with the provisions of section 5, above set forth. Whether the effect of section 12 of the act of 1910 is to oust the state of jurisdiction, and give jurisdiction exclusively to municipal corporations, where they have valid ordinances regulating the operation of the machines described in the act, is a question that need not be determined in this case, for, if such be its effect, it is so only where (to use the language of that section) the ordinance "is not in conflict with the provisions of this act"; that is, section 12 is not to be construed as excluding the operation of the state law in a municipality unless the municipality has an ordinance which conforms to the state law, and in the present case the ordinance does not conform to the state law. If the purpose is that the ordinance shall exclude the operation of the statute, it must cover the same matter, must make punishable the same conduct, and must not omit punishment for conduct punishable under the statute. It is not to be supposed that the state would abdicate its right to deal with the speed of automobiles in populous communities, where the dangers from the operation of such machines are far greater than elsewhere, if the municipal regulations should in any respect fall short of the state law on the subject. Here the ordinance allows a speed of ten miles an hour at crossings in the city, except within the fire limits, while the state law forbids a speed greater than six miles an hour on approaching crossings, in order that the speed may be reduced or the machine stopped at the crossing. Surely it could not have been intended by the Legislature that such an ordinance should render immune from prosecution one running an automobile in a city, who, if he ran it at the same speed outside the city limits and in a less populous locality, would be subject to prosecution under the state law.

If the Legislature intended that where such ordinances existed they should have the effect of excluding other regulation of the speed and operation of automobiles within those towns and cities in which they had been adopted, it certainly did not say so. The statute expressly says: "Provided such regulation or ordinance is not in conflict with the provisions of this act." What pro-

visions? All of the provisions, among which is found the one in section 5 regulating the speed and operation of automobiles and other like vehicles. If the Legislature had meant to refer only to conflict with provisions regulating lights, numbers, signals, etc., and not the provisions regulating speed and operation, it would have specified or indicated the particular provisions to which it intended to refer. The courts must apply to Legislatures, as well as to individuals, that well-known and wise presumption, found in our law, that what was done was intended to be done, and in construing a statute must look to the words of the act to ascertain the legislative intent. We therefore hold that the plea in abatement was correctly overruled, and that the municipal ordinance, in so far as it may be in conflict with the general law in any of its provisions as contained in the act of 1910, supra, is inoperative, null, and void, as usurping the province of the general law of the state as contained in section 12 of the act of 1910.

[4] 4. The demurrer, upon the ground that the accusation failed to allege that the automobile was propelled by any certain kind of power, was properly overruled. The words, "propelled by steam, gas, gasoline, electricity, or any other power than muscular," refer to the phrase "any other vehicle," and not to the word "automobile." The word "automobile" has a well-fixed significance in the popular understanding, and it was not the intention of the Legislature to define it. It is understood to refer to a wheeled vehicle, propelled by gasoline, steam, or electricity, and used for the transportation of persons and merchandise. In our Georgia statute, the only kind of power excepted is "muscular power," applying to "any other vehicle of like kind," and not to "automobiles." The defendant could hardly seriously ask that he be informed that his automobile was not propelled by muscular power.

[6] Since, by reason of the errors of the lower court in ruling upon the demurrer, to which we have referred, the subsequent proceedings in the trial were nugatory, it is unnecessary to rule upon the questions raised by the assignments of error in the motion for new trial.

Judgment reversed.

(162 N. C. 381)

HAGAMAN v. BERNHARDT et al.

(Supreme Court of North Carolina. May 22, 1913.)

1. APPEAL AND ERROR (§ 595*)—JOINT DEFENDANTS—SEPARATE RECORDS.

Where appealing defendants do not present antagonistic exceptions, it is not necessary that they send up separate records.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 2623; Dec. Dig. § 595.*]

2. EVIDENCE (§ 358*)—DOCUMENTS—MAPS.

A map consisting of lines only, with nothing written thereon explaining what lands were referred to and with nothing to give it validity or authority as evidence in a controversy over a boundary, was properly excluded.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 1500-1508; Dec. Dig. § 358.*]

3. BOUNDARIES (§ 35*)—EVIDENCE.

Where a Spanish oak tree was admitted by both parties to a boundary suit to be a proper corner of the land in controversy, and one of defendants' witnesses testified that the oak had been pointed out to him by one since deceased as the corner of the land in controversy, it was not error to permit S., under whom defendants claimed title, to testify that when he bought the land and began to survey it he commenced at a Spanish oak marked as a corner and 30 poles from the river.

[Ed. Note.—For other cases, see Boundaries, Cent. Dig. §§ 153-155, 157-159, 163, 165, 177-183; Dec. Dig. § 35.*]

4. EVIDENCE (§ 274*)—DECLARATIONS IN THE INTEREST OF DECLARANT.

Where defendants claimed title under C., since deceased, it was not error to refuse to permit C.'s son to testify that his father, in pointing out his own lines to him, pointed to a rock as the corner of the grant; the declaration being in the declarant's own interest.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 1121-1134; Dec. Dig. § 274.*]

5. BOUNDARIES (§ 35*)—LOCATION—GENERAL REPUTATION—EVIDENCE.

A question whether a witness knew the reputation of a rock as being the corner of a specified grant was objectionable as not calling for the "general reputation of the rock as a corner."

[Ed. Note.—For other cases, see Boundaries, Cent. Dig. §§ 153-155, 157-159, 163, 165, 177-183; Dec. Dig. § 35.*]

6. BOUNDARIES (§ 41*)—INSTRUCTIONS.

The court in a boundary line dispute properly refused to charge the jury to follow lines in such a manner that, if followed, the lines would not close.

[Ed. Note.—For other cases, see Boundaries, Cent. Dig. §§ 205-207; Dec. Dig. § 41.*]

Appeal from Superior Court, Caldwell County; Adams, Judge.

Ejectment by John R. Hagaman against J. M. Bernhardt and another to recover certain land of which defendant S. F. Harper was in possession and from which defendant Bernhardt had cut timber; both defendants claiming title under G. A. Sullivan. Plaintiff also asked an injunction against the defendants to restrain the cutting of timber and the removal of that already cut. Plaintiff had a verdict for \$60 damages, and from a judgment thereon and in plaintiff's

favor for the recovery of the land, defendants appeal. Affirmed.

This is an action of ejectment, the plaintiff claiming to be owner and entitled to the possession of the land prescribed in the complaint of which the defendant S. F. Harper was in possession and the defendant J. M. Bernhardt has cut timber thereon, both defendants claiming title under G. A. Sullivan, and asking an injunction against the defendants from cutting said timber or removing that which has already been cut. The jury rendered a verdict in favor of the plaintiff, assessing the damages at \$60. Judgment was rendered accordingly in favor of the plaintiff for the tract of land described in the first issue and for said damages. The defendants appealed.

Edmund Jones, of Lenoir, for appellant Harper. Lawrence Wakefield and Mark Squires, for appellant Bernhardt. W. C. Newland, of Lenoir, for appellee.

OLARK, C. J. [1] Both defendants appealed and sent up separate records; but, as they were not on opposite sides nor presented antagonistic exceptions, this was an unnecessary expense. *Pope v. Lumber Co. (McCurdy's Appeal)* 78 S. E. 65.

The decision of this case depends upon the location of grant No. 384 to Aaron Bradshaw. The first exception by the defendant Harper is for the refusal of the motion to nonsuit. This motion could not have been granted as there was sufficient evidence to go to the jury.

[2] Harper's second exception is for the refusal to admit in evidence a map claimed by the defendants to be a plot of McCaleb Coffey's land. This map consisted of some lines only, nothing being written upon it explaining what lands were referred to, and there was nothing to give it validity or authority as evidence in this controversy. It was not attached to any muniment of title and was incompetent. *Jones v. Huggins*, 12 N. C. 223, 17 Am. Dec. 567; *Dancy v. Sugg*, 19 N. C. 515; *Dobson v. Whisenant*, 101 N. C. 645, 8 S. E. 126.

[3] The defendant Bernhardt's first exception is for permitting the witness Sullivan to state that when he bought the land from Coffey and began to survey he commenced at a Spanish oak marked as a corner down next to the river 30 poles from the river. The Spanish oak referred to was admitted by both parties to be a proper corner of the land in controversy. Kirby, witness for defendants, testified under their examination that J. T. Montgomery, now deceased, pointed out to him the Spanish oak as the corner of the land in controversy.

Bernhardt's second exception is abandoned, and his third exception is the same as Harper's first exception above. Bernhardt's

fourth exception is the exclusion by the court of the map made by J. O. Harper, and was incompetent upon the same authorities that are cited in passing upon Harper's second exception above. It was not attached to any deed and was merely an isolated plot, and not competent, in this controversy.

[4] Bernhardt's fifth exception is to the refusal of the court to permit C. C. Coffey to testify that his father, Thomas Coffey, pointed out to him a rock as the corner of grant No. 4157. The witness stated that his father in pointing out this rock was pointing out to him his own lines. It was therefore incompetent as a declaration in his own interest.

[5] Bernhardt's sixth exception was to the refusal of the court to allow the said witness to answer the question, "Do you know the reputation of the rock as being the corner of grant No. 4157?" This seems to be repetition of the last question above, for the witness was not asked if he knew the "general reputation of said rock as a corner."

[6] The chief exception and controversy seems to be this: The defendants asked the court to charge that "the call in said grant is 'south to and with said Elijah and Wilborn Coffey's line 145 poles to a stake,' and the court charges you that the line of the Bradshaw grant would follow the Wilborn Coffey line from the point east 145 poles, irrespective of course, and at the end of the 145 poles, wherever that might be, the line should turn east and continue that course until it struck McCaleb Coffey's line; the next call of the Bradshaw grant being 'east 135 poles to a stake in McCaleb Coffey's line.'" Instead of this the court charged: "The proper interpretation of the next succeeding call in the Bradshaw grant 'thence south to and with Wilborn Coffey's line 145 poles to a stake' would be met by running the line from the circle in the parallelogram to the line E F and then from the intersection of these two lines south 145 poles along the line E F and to the south as far as the distance may extend."

We think there was no error in the above respect. If the prayer asked by the defendants had been given, the lines could not have been closed. Under the instruction given, the jury followed the line E F, which was the Wilborn Coffey line (as admitted by the defendants) prolonged to 145 poles.

Under the defendants' prayer, if given, the line would have followed the Wilborn Coffey line a short distance south, and then have turned west with that line and then south, and the lines, as already said, would not have closed. Under the instruction, as given, the line ran with the Wilborn Coffey line, till it turned square off to the west and then kept on in its course "south to a stake 145 poles, from E"—where the line had struck the Wilborn Coffey line. It could

not have been intended to follow all the turns of the Wilborn Coffey line, irrespective of course.

No error.

(163 N. C. 637)

STATE v. BLACK et al.

(Supreme Court of North Carolina. May 22, 1913.)

1. CRIMINAL LAW (§ 804*)—TRIAL—REDUCING CHARGES TO WRITING.

Where defendant at the close of the evidence requested the court to put his charge to the jury in writing, in accordance with Revisal 1905, § 536, the court's refusal to do so was error.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1948-1957; Dec. Dig. § 804.*]

2. CRIMINAL LAW (§ 1099*)—APPEAL—FILING OF RECORD — STIPULATION — NECESSITY OF WRITING.

Under Supreme Court Rule 39 (140 N. C. 667, 53 S. E. ix), providing that the court will not recognize any agreement between counsel in any case unless it shall appear on the record or in writing filed in the cause in this court, an oral agreement of counsel for the extension of time for preparing and serving a counter case will not be considered.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2866-2880; Dec. Dig. § 1099.*]

Appeal from Superior Court, Buncombe County; Long, Judge.

W. P. Black and others were convicted of conspiracy, and they appeal. Error, and new trial ordered.

J. Scroop Styles, W. P. Brown, and H. B. Carter, all of Asheville, for appellants. Attorney General Bickett and T. H. Calvert, for the State.

WALKER, J. The defendants were charged in the court below with conspiracy. The prosecution originated in the police court of Asheville, by affidavit of C. G. Lanning and a warrant based thereon. Defendants were convicted in that court and appealed to the superior court, where they were again convicted, and from the last judgment they have appealed to this court.

[1] It is unnecessary to consider the numerous exceptions in the case, as it appears therefrom that at the close of the evidence the defendants requested the judge to put his charge to the jury in writing, which he refused to do. Exception was duly taken to this ruling, and the same is assigned as error.

We are compelled by the statute and the decisions of this court to sustain this exception. Revisal 1905, § 536, provides: "Every judge, at the request of any party to an action on trial, made at or before the close of the evidence, before instructing the jury on the law, shall put his instructions in writing, and read them to the jury; he shall then sign and file them with the clerk as a part of the record of the action." We

have held that this provision of the law is mandatory, and if the judge fails to comply with a request duly made that he reduce his charge to writing, a new trial will be ordered, if proper exception is noted in the case on appeal. *Currie v. Clark*, 90 N. C. 355; *Drake v. Connelly*, 107 N. C. 463, 12 S. E. 251; *State v. Young*, 111 N. C. 715, 16 S. E. 543; *State v. Dewey*, 139 N. C. 564, 51 S. E. 937; *Sawyer v. Lumber Co.*, 142 N. C. 162, 55 S. E. 84. The question is not whether the record contains the instructions as actually delivered, there being no admission in regard to it, but whether the request was duly made and refused and the refusal followed by an exception. The judge *must* comply with the request. *State v. Young*, 111 N. C. 715, 16 S. E. 543, is much like this case, and there Justice Burwell said: "In *Drake v. Connelly*, 107 N. C. 463 [12 S. E. 251], it was decided that the refusal to put the charge in writing and read it to the jury, if the request that this should be done was made in apt time, entitled a party in a civil suit to a new trial, for the reason that such refusal would be plainly a violation of Code, § 414. If this is true in a civil suit, much more is it true in a criminal action, where life and liberty are involved. The question, then, is: Did his honor fail or refuse to comply with this request?" And again: "The case made out by the prisoner's counsel, and duly served on the representative of the state in this prosecution, and not excepted to, states that the prisoner's counsel entered an exception when this oral supplemental charge was so given. Whatever may be the facts, we must consider the case as it is presented to us in the record, and are not at liberty to assume that no such exception was *then* made, because we may feel sure that the learned judge would certainly have put his supplemental instruction in writing if his attention had been called to the matter by an exception entered at the time." And in *Sawyer v. Lumber Co.*, supra, Chief Justice Clark thus referred to the mandatory character of the statute: "It is but just to the learned judge who tried this case to add that he states that through inadvertence, in the haste of the trial, he did not observe that the prayer was to put his charge in writing, as well as to give the prayers subjoined. But as the statute gives a party a right to have the whole charge, as to the law, put in writing if asked 'at or before the close of the evidence,' we must direct a new trial."

We are satisfied that the careful and learned judge who presided at the trial must from some cause have been inadvertent to the request of counsel; but, as we have shown by the decided cases, even this is fatal to the verdict and judgment.

[2] The state asked for a certiorari, so that the solicitor could file a counter case on appeal, upon the ground that the defendants

had filed their case with him after the time fixed by the agreement of the solicitor, who had waived this irregularity. It is alleged that there was an express agreement, and, if not, then an implied agreement, that the solicitor should have more time to file a counter case; but this is denied by the defendant's counsel. Rule 39 (140 N. C. 667, 53 S. E. ix) provides that "the court will not recognize any agreement of counsel in any case, unless the same shall appear in the record, or in writing, filed in the cause in this court." We have repeatedly held that we will not undertake to settle disputes between counsel as to their oral agreements. *Mirror Co. v. Casualty Co.*, 157 N. C. 28, 72 S. E. 826. The defendants prepared and tendered their case, and service thereof was accepted. The solicitor filed no exception thereto and did not serve any counter case. We are therefore confined to the defendant's case on appeal as it appears in the record, and which was duly served and filed as required by law. *State v. Young*, supra.

There is a question raised by defendants as to the final jurisdiction of the police court in this case, and as to the power of the superior court to try the case merely upon the affidavit and warrant. This objection, if tenable, may be obviated, perhaps, by requiring a bill to be sent to the grand jury and an indictment returned. But this is only a suggestion, to be followed or not as may be deemed proper.

The error in refusing to write the charge and read it to the jury requires that a new trial be ordered.

New trial.

(162 N. C. 340)

GREEN v. DUNN.

(Supreme Court of North Carolina. May 22, 1913.)

1. TRIAL (§ 260*)—ISSUES—REFUSAL.

It is not error to refuse issues tendered by the defendant, when the issues submitted by the court present every phase of the controversy.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 651-659; Dec. Dig. § 260.*]

2. PLEADING (§ 418*)—DEMURRER—RULINES—WAIVER.

Error in overruling a demurrer to the bill is waived by the filing of an answer.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 1399, 1403-1406; Dec. Dig. § 418.*]

3. APPEAL AND ERROR (§ 515*)—RECORD—STENOGRAPHER'S NOTES.

While a stenographer's notes are material for the consultation of the trial judge in making up the case, he may not send them up as a part of the record of his own motion.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2322-2325; Dec. Dig. § 515.*]

Appeal from Superior Court, Lenoir County; Justice, Judge.

Action to remove a cloud on title by Rich-

ard C. Green against Charles F. Dunn. Judgment for plaintiff, and defendant appeals. Affirmed.

C. F. Dunn, of Kinston, in pro. per. G. V. Cowper, of Kinston, for appellee.

CLARK, C. J. On March 13, 1910, Florence Henderson owned a small lot in Kinston. According to the plaintiff's evidence she sold the lot to him for \$36, and he paid for the same in full; but the vendor being ill at the time she did not make him a deed, but her agent gave him a receipt for the money, and by her authority he took possession of the property, rented it out, and later started a building on it, and has been in possession to the present. In May, 1910, the lot was sold for taxes (23 cents), and was bought by the defendant for 32 cents. In June, 1910, the plaintiff, who had understood that the taxes were paid when he bought, testifies that on learning that the lot had been sold for taxes he tendered the purchase price, legal costs, and 20 per cent. interest four or five times during 1910 to the purchaser, and also to the sheriff and to the city tax collector, each of whom declined to receive the same. In May, 1911, the defendant obtained a deed from the sheriff for the land. The defendant, in his testimony, denied that any tender had been made him by the plaintiff until after he had received the deed from the sheriff. The sheriff testified that the plaintiff several times during 1910 offered to pay him all taxes, costs, and 20 per cent., but that each time he referred him to Dunn, who had purchased the land. The city clerk testified that it was his custom not to take taxes from the owners of land after it had been sold, but that he always sent them to settle with the purchaser; that the plaintiff's character was good, but that he does not remember whether he tendered him the taxes, etc., or not. Witness Hodges stated that during 1910 he heard the plaintiff tender the defendant the taxes, costs, and 20 per cent. The plaintiff also testified that in tendering the taxes he did so as agent of Florence Henderson, who had so authorized him.

[1] This is an action to remove cloud upon title. The court submitted as issues: "(1) Did the plaintiff, within one year from the date of the tax sale to the defendant, make an offer and tender of the amount of taxes paid by defendant, together with costs and 20 per cent. charged? (2) Is plaintiff, Richard C. Green, the owner of the land described in complaint and entitled to possession thereof?" To both of which the jury responded, "Yes." These issues presented every phase of the controversy, and it was not error to refuse those tendered by the defendant. In May, 1912, Florence Henderson executed a deed to the plaintiff to the land, which was prior to the beginning of this

action, and he was properly the party in interest and entitled to maintain this action. It is immaterial to consider whether the plaintiff, as equitable owner, could make a legal tender of the taxes, as he testified that he also tendered them as agent of Florence Henderson. We must presume that his honor charged properly upon these points, as there is no exception to his charge, and it is not sent up.

[2] We need not consider the propositions set up in the demurrer, as that was, of course, overruled by filing the answer. *Moseley v. Johnson*, 144 N. C. 273, 56 S. E. 922.

[3] The stenographer's notes were not sent up as a part of the record, and cannot now be filed, as the defendant offers to do. They are material which the judge could consult in making up the case. But it would have been error for the judge himself to send them up as a part of the record, as we have repeatedly held. *Locklear v. Savage*, 159 N. C. 240, 74 S. E. 347.

We find in the record no indication that the judge committed any error in the trial of the cause.

No error.

(162 N. C. 296)

WILSON LUMBER & MILLING CO. v. ATKINSON et al.

(Supreme Court of North Carolina. May 22, 1913.)

1. EVIDENCE (§ 106*)—CHARACTER—APPLICATION OF PROOF.

In a suit to set aside a compromise and settlement for defendants' alleged fraud, evidence that the general character of a defendant, who had testified in his own behalf, was good, while competent to sustain his credibility as a witness, could not be considered as a substantive fact to disprove the fraud.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 177-187; Dec. Dig. § 106.*]

2. APPEAL AND ERROR (§ 1050*)—SCOPE OF EVIDENCE—PREJUDICE.

Where evidence of defendants' alleged fraud in inducing complainant to make a compromise and settlement of a claim against them was such as to sustain a finding in complainant's favor and require submission of the question to the jury, a ruling that evidence of defendants' good character could be considered as substantive proof to rebut the fraud was prejudicial error.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1063, 1069, 4153-4157, 4166; Dec. Dig. § 1050.*]

Appeal from Superior Court, Caldwell County; Lyon, Judge.

Action by the Wilson Lumber & Milling Company against J. B. Atkinson and others. Decree for defendants, and complainant appeals. Reversed.

This action was brought to set aside a compromise and settlement between the plaintiff and the defendant J. P. Rabb, made on December 29, 1909. Plaintiff, during the years 1904, 1905, 1906, and 1907, was en-

gaged in the lumber business, of which J. B. Atkinson, the other defendant, was its manager at Lenoir, N. C. The defendant Rabb cut, sold, and delivered to the plaintiff at Morganton and other points a large quantity of lumber, for which the plaintiff paid him from time to time. At the end of that period the books of the plaintiff showed that the plaintiff had overpaid Rabb for lumber so cut and delivered in the sum of \$4,354.82. Plaintiff alleged and offered proof to show that, while this was the apparent amount due by Rabb, he had in fact received a large payment or credit for lumber which had not been delivered, and the real balance should be \$10,900, instead of \$4,354.82, and in addition to this amount thus owing by Rabb to the plaintiff the latter paid for him four certain notes for the aggregate amount of \$1,900, which was not charged on its books against him. Plaintiff further alleges that these items were omitted from the books by reason of fraudulent collusion between Atkinson and Rabb, or by mistake of the parties. It then appears that on December 29, 1909, plaintiff and defendant Rabb entered into an agreement for a settlement, by which certain timber was conveyed to J. H. Beall, as trustee, to be sold and the proceeds of sale, together with any cash paid by Rabb, to be applied to the liquidation of Rabb's debt to the plaintiff. This agreement was made for the purpose of "adjusting and settling" the account between the plaintiff and Rabb. Plaintiff alleges that at the time this agreement was entered into by the parties it was totally ignorant of the fact that the lumber on the yard at Morganton had been delivered by Rabb, under its contract with him, or that Rabb owed the company a much larger amount than the balance of \$4,354.82 recited in the compromise agreement; that these facts were only known to Rabb and fraudulently concealed by him from the plaintiff, whereby it was made to convey its own property for the payment of a debt due by Rabb to it; and that Rabb otherwise suppressed the true facts, for the purpose of obtaining an unfair advantage of the plaintiff. Issues were submitted, and upon them the jury returned the following verdict:

"(1) Did the plaintiff company, at various times prior to December 29, 1909, advance to the defendant J. P. Rabb money to be used by him in purchasing lumber and timber to be manufactured into lumber by him for the said lumber company? Answer: Yes.

"(2) Did the plaintiff and defendant, by contract entered into between them on December 29, 1909, make a full and final settlement of all matters of account existing between them, growing out of their lumber transactions? Answer: Yes.

"(3) Did the defendant Rabb, at the time of making the contract of December 29, 1909, fraudulently suppress or conceal from plaintiff facts within his knowledge as to the true

status of the account between them? Answer: No.

"(4) If so, was the plaintiff thereby misled to its injury?" No answer.

"(5) Was said contract entered into by mutual mistake as to the true status of the account? Answer: No.

"(6) Is the defendant Rabb indebted to the plaintiff? If so, in what amount?" No answer.

"(7) Is the plaintiff's cause of action barred by the statute of limitations? Answer: No."

In the verdict proper the answer to the first issue is simply "Yes," while the recital of the verdict in the judgment of the court states that it was, "Yes; but not as agent." But this discrepancy is not considered material in the view we now take of the case. By the contract with Rabb for cutting the timber and delivering the lumber, it is provided that the lumber shall be considered as delivered, and shall become the property of the lumber company when it is piled on the yard. At the close of the evidence the court ordered a nonsuit as to Atkinson, and the case proceeded as to Rabb with the result above stated. Judgment was entered upon the verdict, and plaintiff, having duly excepted to certain rulings, appealed to this court.

Mark Squires, of Lenoir, and A. E. Holton, of Winston-Salem, for appellant. W. B. Council, of Hickory, and Lawrence Wakefield, of Lenoir, for appellee Atkinson. W. C. Newland, of Lenoir, and S. J. Ervin, of Morganton, for appellee Rabb.

WALKER, J. (after stating the facts as above). [1] We have stated so much of the pleadings and evidence as is necessary to present clearly one of the exceptions of the plaintiff, which we think was properly taken and should be sustained. Evidence of the general character of the defendant J. P. Rabb was introduced; the witnesses testifying that it was good. He had testified himself, at great length, as a witness in his own behalf, and had denied circumstantially the charge of fraud made against him. It was competent to prove his good character, so far as necessary to sustain his credibility as a witness; but in his charge to the jury the learned judge expressly permitted the jury to consider his character as a substantial fact involved in the issue of fraud. This is the language of the particular instruction, to which exception was noted: "The defendant Rabb being charged with fraud, evidence of his good character should be considered by you as substantive as well as corroborative evidence, in passing on the issue of fraud." This was error. It has been said: "That a person did or did not do a certain act because his character would predispose him to do or not to do it, is an inference which, although sometimes logically proba-

tive, the English law of evidence, with some exceptions, absolutely rejects in civil cases." 16 Cyc. 1263. The text-writer cites numerous cases in the notes to this passage in support of the proposition, and, among others, several decided by this court. *Jeffries v. Hunt*, 10 N. C. 105; *McRae v. Lilly*, 28 N. C. 118; *Helleg v. Dumas*, 65 N. C. 214; *Marcom v. Adams*, 122 N. C. 222, 29 S. E. 333. In *McRae v. Lilly*, supra, Judge Gaston applied the rule of exclusion to a case of seduction, in these words: "It is also insisted that the judge erred in rejecting the testimony offered by the defendant to show that his general character was that of a modest and retiring man. We are satisfied that there was no error in rejecting the testimony proposed. In civil suits the general rule is that, unless the character of the party be put directly in issue by the nature of the proceeding, evidence of his character is not admissible. And no reason is seen why, in this case, there should be an exception to the general rule." More directly to the point is the language of the court in *Helleg v. Dumas*, supra: "If such evidence is proper, then a person may screen himself from the punishment due to fraudulent conduct till his character becomes bad. * * * Every man must be answerable for every improper act, and the character of every transaction must be ascertained by its own circumstances, and not by the character of the parties"—citing *Thompson v. Bowie*, 4 Wall. 470, 18 L. Ed. 423, and quoting from *Fowler v. Insurance Co.*, 6 Cow. (N. Y.) 673, 16 Am. Dec. 460. The subject is treated exhaustively, with full citations, in *Norris v. Stewart*, 105 N. C. 455, 10 S. E. 912, 18 Am. St. Rep. 917, where the defendant was charged with fraud, and testimony as to his good character was offered and rejected. The ruling was approved by this court, Justice Shepherd saying: "As a general rule, evidence of good general character is inadmissible, by way of defense, in civil actions in which a party is charged with a specific fraud, because the character of every transaction must be ascertained from its own circumstances, and not from the character of the parties. Such evidence is not admitted in civil actions, unless the nature of the action involves the general character of the party, or goes directly to affect it." So whatever the rule may be elsewhere, the law of this state has been settled by repeated decisions. We need not inquire, therefore, whether the reasons for the rule are sufficient to justify it. The distinction between civil and criminal cases in this respect was clearly stated by the present Chief Justice in *Marcom v. Adams*, supra, approving the rule in civil cases as we have stated it. The court committed a positive error in giving the instruction excepted to, and a new trial must be granted, if it was prejudicial.

[2] The defendant J. P. Rabb contends that it was harmless, as upon a fair consid-

eration of the facts which the evidence tends indisputably to establish the defendant was entitled to the verdict which was rendered by the jury. But we do not understand this to be the state of the evidence, and the plaintiff strenuously insists that, on the contrary, there is strong proof of fraud on the part of Rabb, and of a collusive arrangement between him and Atkinson, his codefendant, to cheat and defraud the plaintiff. We might, by a discussion of the testimony, demonstrate that there is evidence for the consideration of the jury upon the question of fraud. If the lumber on the yard at Morganton had been delivered and belonged to the plaintiff, it is strange that, if it had knowledge of the fact, the lumber should have been transferred to the trustee to pay a debt due by Rabb; in other words, that it should pay Rabb's debt, due to it, with its own property. If the lumber did not belong to the plaintiff, not having been delivered, then Rabb has received credit on the books of the plaintiff to which he was not entitled, and in either view he would be indebted to the plaintiff, unless the latter is in some way estopped or concluded by the settlement. There is enough on the face of the agreement and in the conduct of the parties to show that the plaintiff did not understand that the lumber had been delivered, and therefore that the title had passed to it. It might fairly be argued that if it did it would not have arranged to pay a debt due by Rabb to it, and there is evidence, as we look at the case, that Rabb knew that plaintiff was acting upon the false assumption that the lumber was not its property, and yet dealt with the plaintiff, in making the settlement, well knowing that plaintiff was acting in ignorance of the facts. The phraseology of the agreement is such as to indicate that plaintiff had some claim on the lumber, which was released, but was not the owner; either that, or it is so ambiguously worded that the jury might have drawn such an inference from it, in view of the other facts and circumstances. If by his conduct and the manner of dealing with the plaintiff in making the settlement, he induced the plaintiff to believe that the lumber belonged to him and not to the plaintiff, and took advantage of his own peculiar knowledge of the true situation, and plaintiff was misled, beguiled, and overreached in the transaction, the law will not permit the settlement to stand in the way of an equitable adjustment between the parties. As was said in *Manter v. Truesdale*, 57 Mo. App. at 443: "The general rule is that mere silence cannot be treated as a representation, but a party may put himself in a position where he is bound to speak. The Supreme Court, in the case of *McAdams v. Cates*, 24 Mo. 223, in discussing this subject, said: 'Although many duties must be left by law to the honor and conscience of individuals, the public morals require us to lay down and enforce such rules, in relation to the business affairs of

men, as will secure fair and honorable dealing, as far as this is practicable, consistently with the freedom of individual action and the interests of commerce. If, in a contract of sale, the vendor knowingly allow the vendee to be deceived as to the thing sold in a material matter, his silence is grossly fraudulent in a moral point of view, and may be safely treated accordingly in the law tribunals of the country. Although he is not required to give the purchaser all the information he possesses himself, he cannot be permitted to be silent when his silence operates virtually as a fraud. If he fails to disclose an intrinsic circumstance that is vital to the contract, knowing that the other party is acting upon the presumption that no such fact exists, it would seem to be quite as much a fraud as if he had expressly denied it, or asserted the reverse, or used any artifice to conceal it, or to call off the buyer's attention from it." And again: "When the law attaches consequences to silence, it does so, it seems, upon a footing of a breach of duty to speak." See, also, *Thomas v. Murphy*, 87 Minn. 358, 91 N. W. 1097. It was said by Lord Cranworth, in *Reynell and Sprye*, 1 De Gex M. & G. 708: "Once make out that there has been anything like deception, and no contract resting in any degree on that foundation can stand."

There is room to argue that Rabb knew that plaintiff, when the agreement for settlement was being negotiated, was evidently misled as to the title of the lumber and was acting in utter ignorance of its rights, while Rabb himself knew whether or not the lumber had been delivered under the contract of 1905, so that the title had passed to the plaintiff, for he was the one to make the delivery. The books of the plaintiff disclosed the fact, perhaps, after an expert's examination of them, conducted through several months, but there is evidence that an ordinary inspection of them would not have discovered the true situation. While notice to an agent is notice to his principal, we cannot hold, under the facts and circumstances of this case, that knowledge of the true title to Atkinson, plaintiff's manager and a director, was notice to plaintiff of such title. If the agent is so circumstanced as to make it his interest to withhold information from his employer, then the rule that notice to him is notice to his principal, or the doctrine of imputed knowledge, does not apply. *Stanford v. Grocery Co.*, 143 N. C. 419, 55 S. E. 815, and *Tiffany on Agency*, 262, 263, where it is said: "The principal is not bound by

the knowledge of his agent when it would be against the agent's interest to inform him of the facts. Therefore, if the agent is engaged in perpetrating an independent fraud on his own account, knowledge of facts relating to the fraud will not be imputed to the principal. The principal is not bound, it is said, when the character and nature of the agent's knowledge make it intrinsically improbable that he will inform his principal. Whether the rule or the exception rest upon a presumption that the agent will or will not communicate the facts to his principal may be doubted. Whatever the reasons for the exception, it is well established. Of course, if the agent is openly acting adversely to his principal, his knowledge will not be imputed to the latter. In such case he is not acting as agent, but on his own behalf." Whether the plaintiff knew of its title to the lumber, or could have known of it by the exercise of ordinary care and reasonable diligence, were questions for the jury, and they were properly submitted to them by the court in this case. It must not be understood that we are even intimating any opinion upon the weight of the evidence or its sufficiency to establish fraud. As the case must be tried again, we would scrupulously refrain from indicating any view upon that question, lest we might prejudice one or the other of the parties. All we decide is that there is evidence in the case, as now presented, upon the issue of fraud, and that it was error to instruct the jury that they should consider what was said by the witnesses in regard to the good character of J. P. Rabb "as substantive evidence in passing upon that issue." We cannot consider this instruction as harmless. It may have had great weight with the jury in deciding with the defendant.

We have examined the evidence very carefully, and think the judge committed error in holding that there was no evidence against the defendant John B. Atkinson. The evidence may not have been either strong or convincing, but we are unable to say that there was absolutely none. He was the general agent of the plaintiff company at Lenoir, and there are facts and circumstances disclosed by the evidence, in regard to his management of its affairs and his relations and dealings with his codefendant, which, in our opinion, should be submitted to the jury. It might prejudice one or the other of the parties if we discussed the evidence in this connection, or even commented upon it, and for this reason we refrain from doing so.

New trial.

(162 N. C. 326)

CLARKE et al. v. ALDRIDGE.

(Supreme Court of North Carolina. May 22, 1913.)

1. ASSISTANCE, WRIT OF (§ 1*) — SCOPE OF REMEDY.

A writ of assistance, in its ordinary acceptance, is one issuing from a court having general equitable jurisdiction for the enforcement of decrees or orders conferring a right to the present possession or enjoyment of property. It usually issues on motion after notice duly served, when the right thereto is clear and, as a rule, only against parties or persons bound by the terms of the decree.

[Ed. Note.—For other cases, see Assistance, Writ of, Cent. Dig. § 1; Dec. Dig. § 1.*]

2. DEEDS (§ 115*)—PHYSICAL SURVEY—DESCRIPTION.

Where parties, with a view of making a deed, go on the land and make a physical survey of the same, giving it a boundary which is actually run and marked, and the deed is thereupon made, intending to convey the land which they have surveyed, such land will pass, at least as between the parties or volunteer claimants who hold in privity, though a different and erroneous description may appear on the face of the deed.

[Ed. Note.—For other cases, see Deeds, Cent. Dig. § 325; Dec. Dig. § 115.*]

3. EVIDENCE (§ 460*)—PAROL EVIDENCE—CONTRADICTION OF DEED.

Parol evidence of a survey by the parties prior to the execution of a deed to identify the land intended to be conveyed is admissible to control the written description in the deed.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 2115-2123; Dec. Dig. § 460.*]

4. JUDGMENT (§ 735*) — CONCLUSIVENESS — PARTITION DECREE—ISSUES.

Where, in a prior suit, the parties only joined issue as to the delivery of certain deeds, and the question of boundary or correct location of the land was neither involved nor determined, a provision in the decree that defendant was the owner of the land described in the deeds was not conclusive as to the location of the land actually conveyed.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 1263, 1265; Dec. Dig. § 735.*]

5. JUDGMENT (§ 533*)—DECREE—CONSTRUCTION—DESCRIPTION OF LAND.

Where, prior to the execution of certain deeds, the parties went on the land and made an actual survey of the land intended to pass, marking the boundaries thereof, and then executed deeds by a description which did not comply with the boundaries located, a decree awarding title to the land contained in the deeds should be interpreted to mean "as contained" in the deeds correctly located according to law.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 978, 983; Dec. Dig. § 533.*]

Appeal from Superior Court, Mitchell County; Cline, Judge.

Action by T. P. Clarke and others against Benjamin Aldridge. Judgment for plaintiffs, and defendant appeals. Reversed.

On the trial it was made to appear that heretofore plaintiffs and defendant, other than Benjamin Aldridge, as children and heirs at law of D. S. Clarke, deceased, had instituted suit for partition of certain lands in said county. Owing to the existence of

equities affecting the title, and not relevant to the present inquiry, the cause was brought to superior court in term. Pending the controversy, defendant, Benjamin Aldridge, on motion, was made party defendant and pleaded sole seisin as to a portion of the land, under and by virtue of two deeds from D. S. Clarke to two of his sons, H. W. Clarke (Henry) and J. B. Clarke, of date March 3, 1898; said Aldridge having acquired and holding whatever estate and interest were conveyed in these deeds. A deed to a third son, Harvey, for an additional portion of the land, purported to have been made at the same time. The plaintiffs, in the partition proceedings, denied the validity of this claim on the part of Aldridge, asserting that the alleged deeds by D. S. Clarke to his sons had never been delivered. The following issue was submitted and responded to by the jury: "(1) Were the three deeds of March 3, 1898, executed by D. S. Clarke and wife, Susan, to James Clarke, Harvey Clarke, and Henry Clarke, delivered to said parties? Answer: Yes." It was thereupon adjudged that Benjamin Aldridge was owner of the tracts of land described in the two deeds from D. S. Clarke to Henry and J. B. Clarke, and that Harvey Clarke owned the land "described in the deeds to him." Thereupon the defendant, Aldridge, asserting his rights under said deeds, and claimed by him to be in accordance with said decree, particularly under the deed to H. W. Clarke (Henry), which contained the land lying next to that of plaintiffs, occupied the property up to a divisional line: "Beginning at a recognized corner at D., runs thence S. 80 E. 33 poles to a stake, thence S. 65 E. 15 poles to a stake, thence N. 72 E. 60 poles to a stake, thence S. 87 E. 52 poles to a black gum, W. W. Clarke's corner," etc. On the face of the deed to H. W. Clarke, this divisional line is described as follows: "Beginning at the recognized corner, D., runs thence S. 11 E. 33 poles, thence S. 65 E. 15 poles to a stake, thence N. 72 E. 60 poles to a stake, thence S. 87 E. 52 poles to a black gum, W. W. Clarke's corner," etc.; the discrepancy, as it is now presented, being caused by running the line from D., S. 80 E. 33 poles, instead of S. 11 E. 33 poles, the call on the face of the deed. The plaintiffs, then, on affidavit filed and notice duly issued and served on all the adverse parties, returnable to term, moved the court for a writ of assistance to place them in possession of the land, according to the terms of the decree. On this notice, pleadings were regularly filed, and at said November term, 1912, the cause was submitted to the jury and the divisional line was established by the verdict to be as contended for by plaintiffs. There was judgment for plaintiff, and defendant excepted and appealed, assigning for error certain rulings of the court on questions of evidence.

W. L. Lambert, of Bakersville, W. C. Newland, of Lenoir, and S. J. Ervin, of Morganton, for appellant. T. A. Love, of Saginaw, for appellees.

HOKE, J. (after stating the facts as above). [1] The writ of assistance, in its ordinary acceptation, is one issuing from a court having general equitable jurisdiction for the enforcement of decrees or orders conferring a right to the present possession or enjoyment of property. It usually issues on motion after notice duly served, when the right thereto is clear, and, as a rule, only against parties or persons bound by the terms of the decree. *Wagon Co. v. Byrd*, 119 N. C. 464, 26 S. E. 144; *Exum v. Baker*, 115 N. C. 244, 20 S. E. 443, 44 Am. St. Rep. 449; *Knight v. Houghtalling*, 94 N. C. 408; 2 Beach, *Modern Eq. Practice*, § 897; *Schenck v. Conover*, 13 N. J. Eq. 220, 78 Am. Dec. 95, and see editorial note to case of *Clay v. Hammond*, 199 Ill. 370, 65 N. E. 352, appearing in 93 Am. St. Rep. at page 154. It seems that the facts of the present case would properly call for or permit a resort to this process, but we are not required to determine this question, for the reason that, on notice duly served and returnable to term, pleadings have been regularly filed and the issues determined by the jury, and, the parties having thus elected to treat the proceedings as an original action to recover land, we have concluded it is best to adopt their view and consider and deal with the case in that respect.

[2] Coming, then, to the principal question—the validity of the present trial before the jury—the plaintiffs put in evidence the original proceedings, including the decree and the deeds under which defendant claimed, particularly that to H. W. Clarke, describing the divisional line as running from the recognized point at D., S. 11 E. 33 poles to a stake, thence S. 65 E. 15 poles to a stake, etc., to the black gum corner, and offered evidence, further, of the value of the lands wrongfully occupied by the defendant if the line from D., S. 11 E., were run as called for on the face of the deed. Defendant then offered to prove that, just prior to the execution of the deeds in question, and with the view of making the same, the grantor, D. S. Clarke, desiring to make division of said land among his children, went on the premises with a surveyor and the grantees, J. B. and Harvey Clarke, and ran and marked the boundaries, including this divisional line in controversy, running said line from “the corner fixed at D., thence along a fence, S., 80 E. 33 poles to a stake, thence S. 65 E. 15 poles to a stake along the fence, thence north 72 E. 60 poles to G., thence S. 87 E. 52 poles to the black gum at H.,” said D. S. Clarke indicating the line and marking some of the trees and having others marked on the line as surveyed; that “the deed in question was made pursu-

ant to said survey, and intending to convey the land embraced in the same.” This, with other evidence of similar purport, was, on objection, excluded by the court, and we are of opinion that the ruling must be held for reversible error.

[3] It has been long held for law, in this state, that, when parties, with the view of making a deed, go upon the land and make a physical survey of the same, giving it a boundary which is actually run and marked, and the deed is thereupon made, intending to convey the land which they have surveyed, such land will pass, certainly as between the parties or voluntary claimants who hold in privity, though a different and erroneous description may appear on the face of the deed. This is regarded as an exception to the rule, otherwise universally prevailing, that, in the case of written deeds, the land must pass according to the written description as it appears in the instrument (*Reed v. Schenck*, 13 N. C. 416); but it is an exception so long recognized with us that it must be accepted as an established principle in our law of boundary.

In *Cherry v. Slade*, 7 N. C. 82, the position referred to is thus stated: “Whenever it can be proved that there was a line actually run by the surveyor, was marked and a corner made, the party claiming under the patent or deed shall hold accordingly, notwithstanding a mistaken description of the land in the patent or deed”—and in *Reed v. Schenck*, *supra*, it was again referred to as follows: “Parol evidence to control the description of land contained in a deed is in no case admissible, unless where monuments of boundary were erected at the execution of the deed. If the description in the deed varies from these monuments, the former may be controlled by the latter.”

Soon after these decisions, and in some of the later cases, expressions will be found giving intimation that the principle should only be allowed to prevail when there are some other written data in the principal deed or elsewhere by reference to which the physical survey could be attached, but a careful examination of the authorities controlling in the matter will disclose that this suggested limitation on the exception may not be sustained. Thus in *Cherry v. Slade*, Chief Justice Taylor, delivering the principal opinion, refers with approval to the case of *Person v. Roundtree*, 2 N. C. 378, as follows: “In *Person v. Roundtree*, the latter entered a tract of land, lying in Granville county, upon Shocco creek, which was run out, ‘beginning at a tree on the bank of Shocco creek, running south a certain number of poles to a corner, thence north a certain number of poles to a corner on the creek, thence up the creek to the beginning.’ By a mistake, either in the surveyor or secretary who filed up the grant, the courses were reversed, placing the land on the oppo-

site side of the creek to that on which it was really surveyed, so that the grant did not cover any of the land surveyed. Roundtree settled on the land surveyed, which was afterwards entered by Person, who obtained a deed from Lord Granville, and brought an ejectment against Roundtree, who proved the lines of the survey and a possession under his grant. The court decided that Roundtree was entitled to the land intended to be granted, and which was surveyed, and that he should not be prejudiced by the mistake of the surveyor or secretary." The question received very full consideration in several cases appearing in volumes 119, 117, and 116 of our reports, to wit, in *Higdon v. Rice*, 119 N. C. 623, 26 S. E. 256, and *Deaver v. Jones*, 119 N. C. 598, 26 S. E. 156, *Shaffer v. Gaynor*, 117 N. C. 15, 23 S. E. 154, and *Cox v. McGowan*, 116 N. C. 131, 21 S. E. 108, in which Associate Justice Avery, for the court, in opinions of great force and learning, gives adherence to the principle as announced in *Cherry v. Slade* and *Person v. Roundtree*; and in *Higdon v. Rice* the learned judge said: "It seems to have been conceded that, subject to some not very clearly defined restrictions, it is a rule of law that deeds and patents shall be so run as to include the land actually shown to have been surveyed with a view to its execution." In *Deaver v. Jones* the court held that "when a grant is located by contemporaneously marked lines, those lines govern and control its boundary and fix the location so as to supersede other descriptions." In *Shaffer v. Gaynor*, it was held: "A deed is a contract, and the leading object of the courts in its enforcement, where the controversy involves a question of boundary, is to ascertain the precise lines and corners as to which the minds of grantor and grantee concurred. Hence, though parol proof is not, as a rule, admissible to contradict a plain, written description, it is always competent to show by a witness that the parties by a contemporaneous, but not by a subsequent, survey agreed upon a location of lines and corners, different from that ascertained by running course and distance." And again, in *Cox v. McGowan*: "All rules adopted for the construction of deeds embody what the law, founded on reason and experience, declares to be the best means of arriving at the intention of the parties at the time of the delivery of the deed; hence course and distance, or even what is considered, in law, a more certain or controlling call, must yield to evidence, if believed, that the parties at the time of the execution of the deed actually ran and located a different line from that called for, such evidence being admitted to show the description of the line to be a mistake"—and numerous and well-considered cases before and since these decisions are in approval of the principle, notably *Lance v. Rumbough*, 150 N. C. 19-24, 63 S. E. 357; *Fincannon v. Sudderth*, 140 N. C. 246, 52 S. E. 579; *Elliott v. Jefferson*, 133

N. C. 207, 45 S. E. 558, 64 L. R. A. 135; *Barker v. So. Ry.*, 125 N. C. 596, 34 S. E. 701, 74 Am. St. Rep. 658; *Bonaparte v. Carter*, 106 N. C. 534, 11 S. E. 262; *Baxter v. Wilson*, 95 N. C. 137. In *Lance v. Rumbough*, Associate Justice Walker, speaking to the question, said: "The survey made under such circumstances is considered as a practical location of the land by the parties."

[4] It is insisted for plaintiffs that, although the principle is fully recognized in this jurisdiction, it should not be allowed to prevail in the present instance, and this by reason of the language of the decree in the former proceeding "that defendant is the owner of the land described in the deeds," and that defendant is thereby estopped from claiming the lands in controversy, but this position cannot, in our view, be sustained: First. For the reason that the parties only joined issue as to the delivery of the deeds, and the question of their boundary or correct location was in no way involved, and certainly was not considered or determined. It is the accepted rule, in such cases: "When a court, having jurisdiction of the cause and the parties, renders judgment therein, it estops the parties and their privies as to all issuable matters contained in the pleadings, and though not issuable in a technical sense, it concludes, among other things, as to all matters within the scope of the pleadings which are material and relevant and were in fact investigated and determined at the hearing." A correct application of this principle, announced in *Tyler v. Capeheart*, 125 N. C. 64, 34 S. E. 108, and approved in many other decisions of this court, *Weston v. Roper Lumber Co.*, 77 S. E. 430, at present term, *Coltrane v. Laughlin*, 157 N. C. 282, 72 S. E. 961, and *Gillam v. Edmonson*, 154 N. C. 127, 69 S. E. 924, is against the plaintiffs' position. As heretofore stated, the boundary of these deeds and their correct location were not necessarily involved in the partition proceedings, nor were they in any wise put in issue or investigated, and no estoppel arises therefore as to their proper location. Secondly, and apart from this, the law of boundary, which we have discussed and held applicable to the facts presented in the record, whether it be referred for its basic principle to the doctrine of mistake, as suggested by Associate Justice Avery in *Higdon v. Rice*, or to that of estoppel, as intimated by Mr. Justice Douglas in *Barker v. R. R.*, as between the parties or against privies, who claim as volunteers, is a principle governing the correct location of deeds which prevails in actions at law.

[5] In such case, it has not been held that any change in the phraseology of the deeds is required, and therefore in a case where the only issue involved was as to the delivery of the deeds, and there was no question of boundary either raised, considered, or determined, a decree, awarding to a party litigant the lands contained in the deeds,

should by correct interpretation, be construed to mean "as contained" in the deeds correctly located according to law.

For the error in excluding the evidence, there must be a new trial of the cause, and it is so ordered.

New trial.

(162 N. C. 278)

EDWARDS v. SOUTHERN RY. CO.

(Supreme Court of North Carolina. May 22, 1913.)

1. CARRIERS (§ 380*)—EJECTION OF PASSENGER—PROOF—VARIANCE.

Under Revisal 1906, § 515, providing that no variance shall be material unless it has actually misled the adverse party, a variance in an action against a railroad company for wrongful ejection, between the allegation of the station at which plaintiff was ejected and the proof as to such station, is immaterial, where there was no controversy over the place.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 1464-1466, 1469, 1470, 1472; Dec. Dig. § 380.*]

2. CARRIERS (§ 352*)—CARRIAGE OF PASSENGERS—WRONGFUL EJECTION OF PASSENGER—DEFENSES.

Where a passenger, who had purchased and surrendered a ticket, was wrongfully ejected by the conductor upon the theory that he had no ticket, the conductor's good faith will not bar his right of action for compensatory damages, though it may be considered on the question of punitive damages.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 1412-1414; Dec. Dig. § 352.*]

3. CARRIERS (§ 350*)—CARRIAGE OF PASSENGERS—EJECTION.

A passenger not guilty of any misconduct, who has a ticket which he duly surrendered to the proper officials of the railroad company, is entitled to ride to the destination called for in such ticket, and a wrongful ejection entitles him to compensatory damages.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. § 1409; Dec. Dig. § 350.*]

4. CARRIERS (§ 382*)—CARRIAGE OF PASSENGERS—WRONGFUL EJECTION—MEASURE OF DAMAGES.

Where a passenger is wrongfully ejected in the presence of other passengers and in a manner to humiliate him, those facts, as well as mental anguish and inconvenience, may be considered on the question of compensatory damages.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 1478, 1483-1491; Dec. Dig. § 382.*]

5. TRIAL (§ 260*)—INSTRUCTIONS—REQUESTS.

Where the court refused to submit the issue of punitive damages in an action against a railway company for the wrongful ejection of a passenger, expressly telling the jury there was no evidence to sustain the allegation of such damage, the refusal of defendant's instructions on that issue is immaterial.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 651-659; Dec. Dig. § 260.*]

Appeal from Superior Court, Rutherford County; Justice, Judge.

Action by Crawford Edwards, by his next friend, H. E. Edwards, against the Southern Railway Company. From a judgment for plaintiff, defendant appeals. Affirmed.

This is an action to recover damages for wrongfully ejecting the plaintiff from the defendant's train.

The plaintiff offered evidence tending to prove that on July 3, 1910, he bought a ticket at Lattimore for Gilkey, stations on the defendant's road; that he entered the defendant's train as a passenger; that he gave his ticket to the conductor; and that he was ejected from the train against his will at Cox's Crossing, before he reached Gilkey.

The ticket agent of the defendant testified in corroboration of the plaintiff as follows: "Am agent Southern Railway at Lattimore. Know plaintiff. Sold him ticket on 3d of July, Sunday, 1910, from Lattimore to Gilkey. This is the stub. He paid 60 cents. Conductor asked me if I sold ticket to plaintiff for Gilkey. I told him, 'Yes.' He said plaintiff had no ticket to Gilkey. Afterwards he said plaintiff had no ticket at all. Ticket would show same as stub."

There was no controversy that the plaintiff left the train at Cox's Crossing, but the defendant offered evidence tending to prove that the plaintiff either had no ticket to Gilkey or failed to give his ticket to the conductor. The defendant moved for judgment of nonsuit, which was overruled, and defendant excepted.

The defendant asked the court to charge the jury as follows: "(4) That if the jury should find from the evidence, or the greater weight thereof, that the conductor of the defendant believed, or had good reason to believe, that the plaintiff had not given him a ticket from Lattimore to Gilkey, and that the plaintiff had represented to the conductor that he had paid 65 cents instead of 60 cents, which was the regular fare for such a ticket, and if the jury should further find that such representation, in connection with the fact that the conductor of the defendant had not in his possession, among the tickets collected by him, a ticket from Lattimore to Gilkey, if the jury should find from the evidence such a fact was reasonable ground to believe plaintiff had not handed him such a ticket, then the plaintiff cannot recover in this action, and the jury should answer the second issue 'No.'" The court refused this prayer of the defendant, and the defendant excepted.

The court instructed the jury, among other things, as follows:

(1) "If you find from the evidence that the plaintiff had a ticket from Lattimore to Gilkey, and you find such fact from the greater weight of the evidence, and that he gave his ticket to the conductor, then the court instructs you that he had a right to ride on defendant's train from Lattimore to Gilkey, the destination called for in his ticket; and the court instructs you that, if he was ejected from the train (unless on account of his own wrongful conduct or disorderly be-

havior, and there is no evidence of such behavior), his ejection was wrongful and in violation of the duty which defendant owed him, and that he would be entitled to recover compensatory damages. The amount or quantity of damage which plaintiff would be entitled to recover in this view would depend upon the facts as you find them to be from the evidence. If you find from the evidence, and from its greater weight, that the defendant's conductor, after taking up the plaintiff's ticket, went to plaintiff and again demanded a ticket and stated that unless he paid his fare he (the conductor) would put him off the train, and that this was stated to plaintiff in the presence of other passengers and in a manner to humiliate and wound the feelings of plaintiff, and that defendant's conductor actually did eject plaintiff from its train, then you will consider these facts as elements of compensatory damages. And if you further find that defendant's conduct in ejecting and putting plaintiff off its train was calculated to humiliate plaintiff, then you will consider his humiliation and the suffering entailed thereby as elements of damages, as above explained to you. And if you further find that the plaintiff was actually humiliated by the conduct of the defendant in putting him off the train in an out of the way place, if you find that he was put off at an out of the way place, after he had bought and turned in his ticket to the conductor, and that he suffered mental pain on account of such conduct by defendant, then he would be entitled to compensation in damages, notwithstanding the conductor may not have had any intention of causing him humiliation and pain. The question is, Was the conduct of defendant (if you find it to be wrongful, as explained to you above) calculated to entail mental suffering upon the plaintiff by humiliation and mortification, and did he actually suffer in that manner?" Defendant excepted.

(2) "The court instructs you that compensatory damages cover and include a reasonable and fair compensation for loss of time, loss of money, physical inconvenience, and mental suffering and humiliation endured, and which could be considered as a reasonable and probable result of the wrong done. Of course, you must find that the plaintiff sustained the wrong and that it was the proximate cause of the damage sustained, if you find that there was damage, and as to this you have been instructed above." Defendant excepted.

There was a verdict and judgment for the plaintiff, and the defendant excepted and appealed.

S. Gallert, of Rutherfordton, for appellant.

ALLEN, J. [1] The motion to nonsuit is insisted upon in this court principally upon

the ground of a variance between the allegation and the proof in that the complaint alleges that the plaintiff was ejected at Rutherfordton, and the proof is he was ejected at Cox's Crossing, but the whole record shows that there was no controversy as to place, and the Revisal, § 515, provides: "No variance between the allegation in a pleading and the proof shall be deemed material, unless it has actually misled the adverse party to his prejudice in maintaining his action upon the merits."

[2] The prayer for instruction asked by the defendant was properly denied. Construing the verdict with the charge, the jury has found that the plaintiff was a passenger and had given his ticket to the conductor, and that he was expelled from the train against his will. If so, his expulsion was wrongful and gave the plaintiff a right of action, and the good faith of the conductor could not defeat the action and would only be material on the question of punitive damages. *Ammons v. Railroad*, 138 N. C. 555, 51 S. E. 127, 8 Ann. Cas. 886.

The case of *McGraw v. Railroad*, 135 N. C. 264, 47 S. E. 758, is not in point. In that case, as the train was leaving Charlotte, the plaintiff jumped on the platform of the baggage car, and the conductor testified that: "When I got to the front end of the mail car the train had begun to move, and I saw these two men up there. About the time I got there the baggagemaster stepped up on the other side. I told the men to come down. They did not get down, and, in order to get them on the ground before the train got up too much speed, I reached up and pulled them down and let them light on the ground. When I put the second one down I caught on the back end of the same car. I just caught hold of them and pulled them down. They did not resist. I had no conversation with them; did not see any ticket; did not suppose for a moment that they had any ticket or they would not be there, because it was not a place for passengers, and they could not pass from that end of the car to the other. There is no doorway from the mail car to the baggage car. Passengers are not allowed to go through them at all." On appeal it was held to be error to charge the jury, in any view of the evidence, to answer the issues against the defendant, because the plaintiff, according to the conductor, was where passengers had no right to be.

[3, 4] The instructions given to the jury and excepted to are fully sustained by the authorities.

[5] The exceptions for failure to give certain instructions on the issue of punitive damages need not be considered, because his honor expressly told the jury there was no evidence to sustain the plaintiff's allegation of punitive damages, and refused to submit the issue.

There are other exceptions in the record which we have examined and in which we find no error.

No error.

(162 N. C. 294)

WESTERMAN v. CHAMPION FIBER CO.

(Supreme Court of North Carolina. May 22, 1913.)

1. EVIDENCE (§ 543*)—EXPERT TESTIMONY—COST OF CUTTING TIMBER.

Lumbermen of experience, having personal knowledge of facts and conditions, may give their opinion as to the cost of cutting and delivering timber in particular localities.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 2356½-2358; Dec. Dig. § 543.*]

2. EVIDENCE (§ 142*)—RELEVANCY—COST OF CUTTING TIMBER.

In an action to recover damages for defendant's breach of a contract under which plaintiff was to cut and cord timber, evidence as to what it had cost witnesses per cord to get out timber on the same locality was inadmissible, since it involved an inquiry into the capacity of the witnesses for management, the price paid for hands, etc., without proper reference to the description of the methods by which and the conditions under which their work was done, and introduced issues foreign to the inquiry and calculated to confuse the jury.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 416-423; Dec. Dig. § 142.*]

3. CONTRACTS (§ 308*)—EXCUSE FOR NONPERFORMANCE—PARTIAL BREACH BY OTHER PARTY.

Where plaintiff contracted to cut and cord 50,000 cords of wood, and defendant agreed to build the shacks for his hands, defendant's failure to build the 8 or 10 ordinary shacks necessary to house plaintiff's hands was not so material a breach as to effect a complete discharge and justify plaintiff in refusing to further perform his contract.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. §§ 1400-1443; Dec. Dig. § 308.*]

4. CONTRACTS (§ 297*)—PARTIAL BREACH—ACTION FOR DAMAGES.

Where plaintiff contracted to cut and cord 50,000 cords of wood, and where defendant's breach of its agreement to build the shacks for plaintiff's hands was not so material a breach as to justify plaintiff's refusal to perform further, plaintiff, however, might recover damages as for a partial breach.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. §§ 1214, 1215; Dec. Dig. § 297.*]

5. APPEAL AND ERROR (§ 1068*)—HARMLESS ERROR—INSTRUCTIONS.

In an action for damages for breach of contract whereby plaintiff was to cut and cord timber, in which there was evidence that would justify a recovery of damages as for an entire breach by reason of defendant's prevention of plaintiff's work by others working under its authority and approval, the objection that a charge that if defendant agreed to build the shacks for plaintiff's hands, and such agreement was a material part of the contract, defendant, on violation of such agreement, would be liable, was erroneous in giving undue significance to the issue of damages, was not open to defendant.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4225-4228, 4230; Dec. Dig. § 1068.*]

6. APPEAL AND ERROR (§ 928*)—REVIEW—PRESUMPTIONS—INSTRUCTIONS.

Where the entire charge of the court was not sent up, the Supreme Court, in the absence of error assigned or suggested, must presume that the issue of damages was submitted under proper instructions.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3749-3754; Dec. Dig. § 928.*]

Appeal from Superior Court, McDowell County; Lyon, Judge.

Action by W. E. Westerman against the Champion Fiber Company. Judgment for plaintiff, and defendant appeals. Affirmed.

Pless & Winborne, of Marion, and Bourne, Parker & Morrison and T. F. Davidson, all of Asheville, for appellant. Johnston & McNairy and Hudgins & Watson, all of Marion, for appellee.

HOKER, J. The evidence on part of plaintiffs tended to show that in November, 1909, they made a contract with defendant company to cut for it the cordwood on a given boundary of land in Haywood county on the waters of Shinee creek, to begin on one side of the creek, cut the timber up and around the head of the stream, and down on the other side, till 50,000 cords were "cut, calculated and paid for," etc., this being the amount estimated within the boundary, the wood to be cut and put on the edge of the branch and corded up at the price of \$3 per cord, and defendant company was to construct and have ready the shacks required for housing plaintiffs' hands engaged in the work; that, the shacks not having been built by defendant, plaintiffs, with their hands, were compelled to construct the same and, shortly after commencing the work, other persons, acting under contract with the company, and by its authority, commenced cutting wood within the boundary and on the more advantageous portions of the same and so obstructed and interfered with plaintiffs that they were compelled to desist and abandon the undertaking altogether; that they remonstrated with the managing agent of the company about this interruption, who not only declined to interfere, but sanctioned and approved the same and endeavored to induce plaintiffs to cut elsewhere; that the wood within the boundary could have been cut and placed on the creek at an average of \$2.50 per cord, and plaintiffs had suffered great damage. The evidence on the part of defendant was to the effect that the contract was not for any definite boundary, but that the plaintiffs were to cut and cord the wood on the branch at or about the place stated and to be paid for same at \$3 per cord as cut; that, owing to the rugged nature of the land, the dense undergrowth, and its character, it was worth at least \$6 per cord to cut and place the wood as agreed upon; and that plaintiffs had abandoned the contract

without legal excuse, to defendant's great damage.

[1, 2] The plaintiffs, as heretofore stated, having recovered judgment below, the case is before us on defendant's appeal, and it is contended that the trial court committed error in refusing to allow a witness for defendant, W. J. Mashburn, to say what it had cost him per cord to get out wood on this boundary for the two weeks after plaintiffs had abandoned their contract and also, in a similar ruling, excluding a question addressed by defendant to another witness, J. L. Smith, as to "what it had cost him to get out cordwood in a cove in the same locality and similar to the one in which Mashburn worked." The court has held, in several recent cases, that it was proper to permit "lumbermen of experience, having personal knowledge of facts and conditions," to give their opinion on the cost and cutting and delivering timber in specified localities, a case presented in *Younce v. Lumber Co.*, 155 N. C. 239, 71 S. E. 329, Ann. Cas. 1912C, 107, and evidence of this very kind was received on this trial; but the questions addressed to these witnesses do not, in our opinion, come within the principle. Involving, as they do, an inquiry into the capacity of these persons for management, the price paid for hands, etc., in the way now presented and without further reference to or description of the methods pursued or the conditions under which the work was done by them and their manner of doing it, the proposed questions were properly excluded as tending to introduce issues "foreign to the inquiry and calculated rather to distract than aid the jury in their deliberations." *Carpenter v. Railroad*, 78 S. E. 158, at present term; *Chaffin v. Manufacturing Co.*, 135 N. C. 104, 47 S. E. 226; *Warren v. Makely*, 85 N. C. 12.

[3-5] Exception was made further that his honor charged the jury as follows: "If you should find that the defendant agreed to build the shacks for plaintiffs to use, and that such agreement was a material part of the contract, and defendant violated such agreement to build the shacks, then the defendant would be liable, and you should answer the first issue, 'Yes.'" It is not every breach of contract that will operate as a discharge and justify an entire refusal to perform further. Speaking generally to this question, in *Anson on Contracts*, p. 349, the author says: "But though every breach of the contractual obligation confers a right of action upon the injured party, it is not every breach that relieves him from doing what he has undertaken to do." The contract may be broken wholly or in part, and, if in part, the breach may not be sufficiently important to operate as a discharge, or, if it be so, the injured party may choose not to regard it as a breach, but may continue to carry out the contract, reserving to himself the

right to bring action for such damages as he may have sustained." And, if this portion of the charge must be construed as holding that the failure to build these shacks went to the full measure of the obligation and justified an entire severance of the contract relation, it would, in our opinion, constitute reversible error. In a contract of this magnitude, a default in respect to building 8 or 10 ordinary shacks to house the hands engaged in the business should not effect a complete discharge. The plaintiffs themselves did not so regard or treat it, but very properly went on and built the shacks themselves. This, however, would not prevent plaintiffs from recovering damages, in this respect, as for a partial breach, and the charge is both technically correct, and, on the allegations of the pleadings and the evidence, is a proper charge upon the issue. It would only amount to prejudicial error in case it should be given undue significance on the issue as to damages, but we do not think such an objection is open to defendant on the record. There were facts in evidence that would justify a recovery of the damages as for an entire breach, to wit, the interruption and prevention of plaintiffs' work by others acting under the approval and authority of the company.

[6] The entire charge of the court is not sent up, nor is there any exception made thereto on the issue as to damages, and, in the absence of error assigned or suggested, we must presume that this feature of the case has been rightly dealt with and the questions submitted under proper instructions. *Graves v. Railroad*, 136 N. C. 3, 48 S. E. 502.

After giving the case our full consideration, we find no reversible error, and the judgment in plaintiffs' favor is affirmed.

No error.

(162 N. C. 233)

HOWELL v. HOWELL et al.

(Supreme Court of North Carolina. May 22, 1913.)

1. APPEAL AND ERROR (§ 927*)—REVIEW—QUESTIONS OF FACT—DISMISSAL ON PLEADINGS.

Where the court dismisses the action on the pleadings, the statements in the complaint must be taken as true on appeal, because plaintiff by dismissal was barred of the opportunity of proving them to be true.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 2912, 2917, 3748, 3758, 4024; Dec. Dig. § 927.*]

2. PARENT AND CHILD (§ 18*)—ABDUCTION OF CHILD—CIVIL LIABILITY—RIGHT OF ACTION.

A parent has an action for damages for the unlawful taking away or concealment of his minor child, and is not limited to cases in which such child is the heir or oldest son, nor to cases where the abduction is for immoral purposes.

[Ed. Note.—For other cases, see *Parent and Child*, Cent. Dig. §§ 182-183; Dec. Dig. § 18;* *Kidnapping*, Cent. Dig. § 13.]

3. PARENT AND CHILD (§ 18*)—ABDUCTION OF CHILD—CIVIL LIABILITY—DAMAGES.

Damages in a civil action by a parent for the unlawful taking away or concealment of his minor child are not limited to the fiction of loss of services, but the real ground of action is compensation for the expense and injury.

[Ed. Note.—For other cases, see Parent and Child, Cent. Dig. §§ 182-188; Dec. Dig. § 18;* Kidnapping, Cent. Dig. § 13.]

4. PARENT AND CHILD (§ 18*)—ABDUCTION OF CHILD—PUNITIVE DAMAGES.

In a civil action by a parent for the unlawful taking away or concealment of his minor child, punitive damages for the wrong done him in his affections and in the destruction of his household are recoverable.

[Ed. Note.—For other cases, see Parent and Child, Cent. Dig. §§ 182-188; Dec. Dig. § 18;* Kidnapping, Cent. Dig. § 13.]

Appeal from Superior Court, Yancey County; Lyon, Judge.

Action by G. C. Howell against Edith Howell and G. A. Briggs. Judgment for defendants, and plaintiff appeals. Reversed.

Hudgins, Watson & Watson and A. Hall Johnston, all of Marion, for appellant.

CLARK, C. J. The plaintiff entered into a contract with his wife, the defendant Edith Howell, and the defendant G. A. Briggs, her father, that the daughter of the plaintiff, Lucy Howell, might remain with her mother, Edith Howell, at the home of said G. A. Briggs until said child should reach the age of six years, when she should be returned to her father. The plaintiff, soon after said contract, obtained a divorce from his wife on the ground of her adultery, and the decree provided that the custody of the child should be left open for further orders of the court. There has been no decree fixing the custody of said child. It is alleged in the complaint that, a few days prior to the child's attaining six years of age, the defendant Edith Howell, with the advice and assistance of her codefendant, G. A. Briggs, spirited the child away beyond the state to some place unknown to the plaintiff. The complaint asks judgment against the defendant G. A. Briggs for damages, and against both defendants for the custody of said child if she can be located, and for a rule upon the defendant Briggs requiring him to disclose the present whereabouts and residence of the plaintiff's child.

[1] Abduction is usually prosecuted on the criminal side of the docket. But there are many cases in which damages have been recovered for wrongful abduction. The court having dismissed the action upon the pleadings, we must take the statements in the complaint to be true, because by the dismissal of the action the plaintiff has been debarred the opportunity of proving his allegation to be true. The question is whether the complaint states a cause of action.

[2] In *Harris v. Harris*, 115 N. C. 589, 20 S. E. 187, 44 Am. St. Rep. 471, it was held

that a father who was entitled to the custody of the child might recover damages on a bond given for the return of the child to his custody for failure to do so. A grave wrong was done the plaintiff if, as the complaint avers, his child was taken out of the state or secreted by the mother with the aid and assistance of the defendant G. A. Briggs. If the child were in the state, this action can be maintained for the production of the child before the judge who upon hearing the evidence would award her custody. As to the defendant G. A. Briggs, if the allegations of the complaint are proven to be true, he is clearly liable for damages.

It is true that at common law abduction of a female for immoral purposes was not an offense (*State v. Sullivan*, 85 N. C. 506); but as Judge Settle remarked in *State v. Oliver*, 70 N. C. 60 (referring to the common-law right of a husband to whip his wife), "We * * * have advanced from that barbarism," to some extent by Laws 1879, c. 81, now Revisal 3358, which makes *abduction under some circumstances* an offense if the child is under 14 years of age (*State v. George*, 93 N. C. 567; *State v. Chisenhall*, 106 N. C. 676, 11 S. E. 518; *State v. Burnett*, 142 N. C. 579, 55 S. E. 72).

At the common law, abduction of a child was not an offense. *State v. Rice*, 76 N. C. 194. But Blackstone, 3 Com. 140, holds that a civil action lay therefor, and that a father could recover damages, though he says it was a doubtful question, on which the authorities were divided, whether a father could recover for the abduction of any other child than the oldest son and heir. In *Barham v. Dennis*, Cro. Eliz. 770, it was held that he could not. But later cases held that an action would lie for taking away any of the children because the parent "had an interest in them all." It is interesting to quote the reasoning of the courts at common law as given in *Barham v. Dennis*, supra. Anderson, Walmsley, and Kingsmill, JJ., said: "The father should not have an action for the taking of any of his children, which is not his heir; and that is by reason the marriage of his heir belongs to the father, but not of any other his sons or daughters; and by reason of this loss only, the action is given unto him; the writ in the Register is for the son and heir, or daughter and heir only; which proves that the law has always been taken, that the action lies not for any other son or daughter. And although it hath been said that a writ of trespass lies for divers things whereof none of them are in the Register; and it hath been adjudged that it lies for a parrot, a popinjay, a thrush, and as in 14 Henry VIII for a dog; the reason thereof is, because the law imputes that the owner hath a property in them. * * * But for the taking of a son or daughter not heir, it is not upon the

same reason, and therefore not alike. Here the father hath not any property or interest in the daughter which the law accounts may be taken from him." Glanville, J., dissenting, said: "The father hath an interest in every of his children to educate them, and to provide for them, and he hath his comfort by them; wherefore it is not reasonable that any should take them from him, and to do him such an injury, but that he should have his remedy to punish it." The majority of the court are sustained by the form of the writ as preserved in Fitz-Herbert's *Natura Brevium* 90 H., which was of date 12 Hen. IV, 16. But Judge Glanville based his dissent upon reason and justice and has been sustained by subsequent cases.

[3, 4] In *Cooley on Torts* (3d Ed.) 482, 483, it is said that an action for damages for abduction of a child will lie in favor of the parent. In *Rice v. Nickerson*, 91 Mass. (9 Allen) 478, 85 Am. Dec. 777, it was held, in a case much like this, that the plaintiff might recover actual damages for expenses incurred in the pursuit of his child which had been abducted. The court also indicated that upon proper allegations, such as have been made in this case, the plaintiff would be entitled to recover punitive damages for the wrong inflicted upon him. Among other cases sustaining an action for damages for abduction of a child are *Bradley v. Shafer*, 64 Hun, 428, 19 N. Y. Supp. 640; *Hills v. Hobert*, 2 Root (Conn.) 48; *Dobson v. Cothran*, 34 S. C. 518, 18 S. E. 679; *Kreag v. Anthus*, 2 Ind. App. 482, 28 N. E. 773.

In *Brown v. Crockett*, 8 La. Ann. 30, it is held that in an action for the wrongful abduction of a minor the jury has a right to award damages for mental anguish as a part of the compensatory damages for such wrong. In *Baumgartner v. Eigenbrot*, 100 Md. 508, 60 Atl. 601, it was held that if the child was kept in defendant's custody in a clandestine manner an action would lie.

In *Steele v. Thacher*, 1 Ware, 85 Fed. Cas. No. 13,348 it was held that "a parent may maintain a libel in the admiralty for the wrongful abduction of his child, being a minor, and carrying him beyond the sea." This has been cited with approval in 22 Fed. Cas. 1204, where the above case is reprinted. The subject is very interestingly discussed in *Everett v. Sherrey*, 1 Iowa, 356, and *Schouler*, Dom. Rel. (3d Ed.) § 260; 2 *Hilliard on Torts* (3d Ed.) 519, 521, which sustain the proposition that a parent can maintain damages for the abduction of his child. To same effect *Railroad Co. v. Showers*, 71 Ind. 451; *Sargent v. Mathewson*, 38 N. H. 54, and other cases.

The most usual cases in which this action is brought have been upon the abduction of a daughter for marriage or immoral purposes. But the modern authorities, as we

have said, have advanced, and now the parent can recover damages for the unlawful taking away or concealment of a minor child, and is not limited to cases in which such child is heir or eldest son, nor to cases where the abduction is for immoral purposes; nor are the damages limited to the fiction of "loss of services." This court pointed out, in *Hood v. Sudderth*, 111 N. C. 215, 16 S. E. 397, and *Willeford v. Bailey*, 132 N. C. 402, 43 S. E. 928, that this is "an outworn fiction" even in actions for seduction. The real ground of action is compensation for the expense and injury and "punitive damages for the wrong done him in his affections and the destruction of his household," as said in *Scarlett v. Norwood*, 115 N. C. 885, 20 S. E. 459; *Abbott v. Hancock*, 123 N. C. 99, 31 S. E. 268; *Snider v. Newell*, 132 N. C. 614, 628, 624, 44 S. E. 354.

The law is summed up with citation of numerous authorities in 1 *A. & E.* (2d Ed.) 167, as follows: "A father has a right of action against every person who knowingly and wittingly interrupts the relation subsisting between himself and his child or abducting his child away from him or by harboring the child after he has left the house."

It can make no difference that the child at the time she was carried away was not in the immediate custody of the father. She was temporarily with her mother, but he was legally entitled to her custody or to have it adjudged by the court, and to take her out of the jurisdiction of the court, or secrete her, was an injury for which he was entitled to damages. The allegation of the complaint that the defendant Briggs "procured, aided, assisted, and advised the taking off of the child and conceals its whereabouts, and has thereby caused the plaintiff great and agonizing distress of both mind and body," states a good cause of action against him.

The judgment dismissing the action is reversed.

(163 N. C. 346)

J. L. SMATHERS & CO. et al. v. TOXAWAY HOTEL CO. et al.

(Supreme Court of North Carolina. May 22, 1913.)

1. APPEAL AND ERROR (§ 882*)—PERSONS ENTITLED TO ALLEGE ERROR.

A defendant cannot complain of an error in an instruction requested by it, which is in its favor.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3591-3610; Dec. Dig. § 882.*]

2. BILLS AND NOTES (§ 339*)—BONA FIDE HOLDERS—WHO ARE.

Under Revisal 1905, § 2205, providing that to constitute notice of an infirmity in the instrument or defect in the title of the person negotiating it the person to whom it is negotiated must have had actual knowledge of the infirmity or defect, or knowledge of such facts that

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

his action in taking the instrument amounts to bad faith, a holder of a promissory note cannot be charged with notice of infirmities, merely because the circumstances of the issuance of the note should have put a reasonably prudent man upon inquiry, and such inquiry would have disclosed the fraud; but to charge him with notice of fraud the circumstances must be such that his taking of the note amounted to bad faith.

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. §§ 821-828; Dec. Dig. § 839.*]

2. BILLS AND NOTES (§ 358*)—VALIDITY—CONSIDERATION.

Under Revisal 1906, §§ 2173, 2175, providing that value is any consideration sufficient to support a simple contract, and an antecedent or pre-existing debt constitutes value, and that where the holder has a lien on the instrument arising from contract or by implication of law he is deemed a holder for value, persons taking promissory notes for an antecedent debt or as collateral security for a debt are holders for value.

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. §§ 813-823, 961; Dec. Dig. § 358.*]

Appeal from Superior Court, Buncombe County; Foushee, Judge.

Creditors' bill by J. L. Smathers & Co. and others against the Toxaway Hotel Company, in which McMichael & Co. and another intervene. From a judgment for plaintiffs, defendant and interveners appeal. Reversed and remanded.

The relevant facts are very correctly stated in one of the briefs, as follows:

"On November 13, 1906, the Toxaway Hotel Company executed a bill of sale, conveying to R. A. Jacobs certain merchandise, cattle, and other personal property in Transylvania and Jackson counties. On the said day said Jacobs executed to the Toxaway Hotel Company, as payment for said property, fourteen (14) notes of \$500 each, one payable each successive three months thereafter, and at the same time said Jacobs executed a deed of trust to the Wachovia Bank & Trust Company, whereby it conveyed all of said property as security for the payment of said purchase-money notes, which deed in trust was duly registered in Transylvania and Jackson counties, respectively, on November 20 and 28, 1906. On November 16, 1906, the Toxaway Hotel Company indorsed four of said notes to McMichael & Co.; and on the same day said Toxaway Hotel Company indorsed five of said notes to Frank & Co., of Savannah, as collateral security for a debt of about \$2,500, which it owed to said Frank & Co. The first two notes falling due were paid by Jacobs; one of them being held by Frank & Co. On June 6, 1907, the plaintiffs herein, general creditors of the Toxaway Hotel Company, instituted this action, alleging that the sale to Jacobs, and execution of the notes and deed in trust by him, were done for the purpose of hindering, delaying, and defrauding creditors, and the property in the hands

of Jacobs was attached, and the appointment of a receiver of said property was procured by the creditors, who took charge of the same.

"The Toxaway Hotel Company answered, denying the allegations of fraud, and alleging that the sale to Jacobs was bona fide. The Wachovia Bank & Trust Company, by permission of the court, intervened at the request of McMichael & Co. and Frank & Co., holders of some of the notes, as aforesaid, and asked possession of the property held by the receiver, in order that it might enforce the lien of said deed in trust. The plaintiffs, creditors of the Toxaway Hotel Company, resisted, alleging that McMichael & Co. and Frank & Co. were not innocent purchasers. McMichael & Co. and Frank & Co., by order of court, also became interveners, and alleged that they had taken the notes held by them in the usual course of business, before maturity, in good faith and for value, and had no notice or knowledge of any fraud in connection with the execution thereof.

"The plaintiffs, creditors of the Toxaway Hotel Company, replied that the transfer of the notes to McMichael & Co. and Frank & Co. was a part of the original scheme of the Toxaway Hotel Company to hinder, delay, and defraud other of its creditors, and that if McMichael & Co. and Frank & Co. did not have actual knowledge of this fraudulent purpose and intent of said Toxaway Hotel Company and said Jacobs, said transfer of the notes to them was made 'under such circumstances and with knowledge of such facts and circumstances on the part of said alleged transferees as would and ought to lead a reasonably prudent and careful man to discover the wrongful and fraudulent intent of the parties so transferring the same.'

"By consent of all the parties, the receiver, under order of the court, sold the property taken into possession, and is holding the proceeds pending the results of this action."

The jury rendered the following verdict:

"(1) Is the Toxaway Hotel Company indebted to the plaintiffs, as alleged in the complaint? Answer: Yes.

"(2) Were the bill of sale, deed of trust, and notes, dated November 13, 1906, mentioned in the pleadings in this cause, and executed between the Toxaway Hotel Company and R. A. Jacobs, made and executed with intent to hinder, delay, or defraud the creditors of the Toxaway Hotel Company? Answer: Yes.

"(3) Are the interveners J. C. McMichael, incorporated, innocent purchasers for value and without notice of said fraud of the notes mentioned in paragraph 7 of the plea of intervention filed herein? Answer: No.

"(4) Are the interveners Frank & Co. innocent purchasers for value and without notice of such fraud of the notes described

in paragraph 8 of the plea of intervention filed herein? Answer: No."

Bourne, Parker & Morrison, of Asheville, for appellants. J. C. Martin, C. W. Malone, and W. R. Whitson, all of Asheville, for appellees.

HOKE, J. [1] Our statute on negotiable instruments (Revisal, c. 54, § 2205) makes provision as follows: "To constitute notice of an infirmity in the instrument or defect in the title of the person negotiating the same the person to whom it is negotiated must have had actual knowledge of the infirmity or defect or knowledge of such facts that his action in taking the instrument amounted to bad faith."

A perusal of the record will disclose that the court below, on the third and fourth issues, at first charged the jury in substantial accord with the statute. The only criticism suggested is that, having been given in the exact language of one of defendants' prayers for instructions, it is couched in terms too persuasive, in view of the conflict of evidence on the subject; but such an objection is not open to the appellants, for the error here, if one existed, is in defendants' favor.

[2] In a later portion of the charge, however, and more than once, his honor, on these issues, stated, in effect, the correct rule to be that if the jury should find that there was fraud in the execution of the notes, and that these creditors "had notice of the fraud, or had notice of any facts or circumstances which ought to have put a reasonably prudent man upon inquiry, and if they had made such inquiry they could have discovered the fraud, or the facts or circumstances constituting the same, and they failed to make such inquiry and discovery, it would be the duty of the jury to answer the issue, 'Yes.'" This position, in our opinion, is in direct conflict with the statutory provision, as expressed in the first portion of his honor's charge, and must be held for reversible error. *Anderson v. Meadows*, 159 N. C. 404, 74 S. E. 1019. The question as to what is the character of notice required to affect the status of one claiming to be the holder in due course of a negotiable instrument has been subject to some fluctuation in the courts, and has given rise to much contrariety of decision. As shown in the learned and suggestive argument and brief with which we were favored by counsel for appellants, the doctrine for a time prevailed in England as it is laid down by his honor in the latter portion of his charge; that is, that the holder was put upon inquiry by facts or circumstances which would induce a cautious and prudent man to make one, and was affected by notice or knowledge of conditions which such inquiry would disclose. This seems not to have been the rule as it first obtained in the English courts, and later they returned to the original position; and it has been

long firmly established there that, in this respect, the title of the holder can only be impugned by showing direct knowledge of the infirmity, or notice of such facts as would make the acquisition of the instrument amount to bad faith. 2 *Randolph on Commercial Paper* (2d Ed.) § 996 et seq.; *Norton on Bills and Notes* (3d Ed.) p. 319; *Huffcut on Negotiable Instruments*, pp. 29, 400-417.

In *Huffcut*, page 29, a succinct account of the varying phases of the doctrine is given in a citation from *Chalmers, Bills of Exchange Act*, as follows: "The test of bona fides as regards bill transactions has varied greatly. Previous to 1820 the law was much as it now is under the act. But under the influence of Lord Tenterden due care and caution was made the test (*Gill v. Cubitt*, 5 D. & R. 324), and this principle seems to be adopted by section 9 of the *Indian Act*. In 1834 the Court of King's Bench held that nothing short of gross negligence could defeat the title of a holder for value. *Cook v. Jadis*, 5 B. & Ad. 909. Two years later Lord Denman states it as settled law that bad faith alone could prevent a holder for value from recovering. Gross negligence might be evidence of bad faith, but was not conclusive of it. *Goodman v. Harvey*, 4 A. & E. at page 876, *Uther v. Rich*, 10 A. & E. 784. This principle has never since been shaken in England, and it seems now firmly established in the United States. *Murray v. Lardner*, 2 Wall. 121 [17 L. Ed. 857]; *Chapman v. Rose*, 56 N. Y. 140 [15 Am. Rep. 401]." And in *Norton*, supra, 319, the author, after laying down the rule as it temporarily prevailed in England, says: "But this doctrine the law merchant rejects, and it is now the rule of the law merchant that mere knowledge of any facts sufficient to put a reasonably prudent man on inquiry is not sufficient, but that, to defeat his claim to be a bona fide holder in due course, he must be guilty of bad faith."

There has been conflict of decision in this country, but we think the position requiring that bad faith be shown, or notice or knowledge of facts from which bad faith in taking over the instrument could be reasonably inferred, has been long recognized here by the great weight of authority. *Hotchkiss v. Nat. Bank*, 21 Wall. 354, 22 L. Ed. 645; *Goodman v. Simonds*, 20 How. 343, 15 L. Ed. 934; *Bank v. Weston*, 161 N. Y. 521, 55 N. E. 1080, 76 Am. St. Rep. 283; *Bank v. Savery et al.*, 127 Mass. 75, 34 Am. Rep. 345; *Bradwell v. Pryor*, 221 Ill. 602, 77 N. E. 1115; *Bank v. Morgan*, 165 Pa. 199, 30 Atl. 957; *Richards v. Monroe*, 85 Iowa, 359, 52 N. W. 339, 39 Am. St. Rep. 301; *De Voss v. Richmond*, 59 Va. 338, 98 Am. Dec. 646; *Tescher v. Mercea*, 118 Ind. 586, 21 N. E. 816; *Hamilton v. Vought*, 34 N. J. Law, 187. Speaking to the rule in this last case, and the reason for it, Chief Justice Beasley has well said: "From this brief review of the cases, I think it may be safely

said that the doctrine introduced by Lord Tenterden stands at the present moment marked with the disapproval of the highest judicial authority. Nor does such disapproval rest upon merely speculative grounds. That doctrine was put in practice for a course of years, and it was thus, from experience, found to be inconsistent with true commercial policy. Its defect—a great defect, as I think—was that it provided nothing like a criterion on which a verdict was to be based. The rule was that to defeat the note, circumstances must be shown of so suspicious a character that they would put a man of ordinary prudence on inquiry, and by force of such a rule it is obvious every case possessed of unusual incidents would, of necessity, pass under the uncontrolled discretion of a jury. An incident of the transaction from which any suspicion could arise was sufficient to take the case out of the control of the court. There was no judicial standard by which suspicious circumstances could be measured before committing them to the jury. And it is precisely this want which the modern rule supplies. When mala fides is the point of inquiry, suspicious circumstances must be of a substantial character, and if such circumstances do not appear the court can arrest the inquiry. Under the former practice circumstances of slight suspicion would take the case to the jury; under the present rule the circumstances must be strong, so that bad faith can be reasonably inferred."

Our own court has not escaped the perplexities which seem to have attended the subject, as indicated by the case of *Farthing v. Dark*, 109 N. C. 291, 13 S. E. 918, reviewed on appeal and disapproved in case, same title, 111 N. C. 243, 16 S. E. 337, and these and other cases with us, as in *Hulbert v. Douglas*, 94 N. C. 122, give countenance to the position of "putting a prudent man upon inquiry"; but whatever may be the correct estimate of our former decisions, we regard the matter as put at rest by the express language of the statute: "That to constitute notice of infirmity . . . the holder must have had actual knowledge of the infirmity or knowledge of such facts that his action in taking the instrument amounted to bad faith," and are of opinion that the law, by correct interpretation, was designed and intended to establish on this subject and in this jurisdiction the rule as it has been long recognized in England and sustained in this country, as stated, by the great weight of authority.

[3] As a legal proposition, the same statute justifies defendants in making the claims that they are purchasers for value; section 2173 providing that: "Value is any consideration sufficient to support a simple contract. An antecedent or pre-existing debt constitutes value and is deemed such whether the instrument is payable on demand or

at a future time" (*McMichael's Case*), and section 2175: "Where the holder has a lien on the instrument arising either from contract or by implication of law he is deemed a holder for value to the extent of his lien" (*Frank & Co.'s Case*). And on the facts as they now appear of record the determination of the third and fourth issues were very properly made to depend on whether these creditors held without knowledge or such notice of the alleged infirmity as the law requires to affect their title. *Randolph, Commercial Paper*, § 1892; *Carpenter v. Longan*, 83 U. S. (16 Wall.) 271, 21 L. Ed. 313; *Canon v. McDaniel*, 46 Tex. 303; *Logan v. Smith*, 62 Mo. 455; *Updegraff v. Edwards*, 45 Iowa, 513.

For the error indicated, there must be a new trial of the cause upon all of the issues; and it is so ordered.

New trial.

(94 S. C. 414)

In re EVANS.

(Supreme Court of South Carolina. May 9, 1913.)

1. ATTORNEY AND CLIENT (§ 52*)—DISBARMENT—CHARGES—VERIFICATION.

The rule requiring charges against an attorney to be verified need not be observed when the charges are made by a bar association or the Attorney General, and are so grave as to require investigation in the public interest, especially after issues of fact and law have been joined.

[Ed. Note.—For other cases, see *Attorney and Client*, Cent. Dig. §§ 69, 70; Dec. Dig. § 52.*]

2. ATTORNEY AND CLIENT (§ 53*)—DISBARMENT.

Since it is presumed that, upon the admission of an attorney to the bar, the court inquired into his character, charges of misconduct in transactions occurring before an attorney was admitted to the bar should not be considered in proceedings for his disbarment.

[Ed. Note.—For other cases, see *Attorney and Client*, Cent. Dig. §§ 74, 75; Dec. Dig. § 53.*]

3. ATTORNEY AND CLIENT (§ 44*)—MISCONDUCT OF ATTORNEY.

That an attorney had authority to indorse a check and receive money for his client did not excuse the appropriation of the proceeds of the check to his own use, nor was such misappropriation excused by his giving the client his own check, where he never offered to refund the money or pay the check.

[Ed. Note.—For other cases, see *Attorney and Client*, Cent. Dig. §§ 55, 56, 62; Dec. Dig. § 44.*]

4. ATTORNEY AND CLIENT (§ 53*)—DISBARMENT PROCEEDINGS—SUFFICIENCY OF EVIDENCE.

Evidence, in an inquiry into the conduct of an attorney, held to show that the attorney applied to his own use money collected by him as attorney for a client, and refused to refund it without excuse.

[Ed. Note.—For other cases, see *Attorney and Client*, Cent. Dig. §§ 74, 75; Dec. Dig. § 53.*]

5. ATTORNEY AND CLIENT (§ 53*)—MISCONDUCT OF ATTORNEY—LIBEL.

Untrue statements made by an attorney without probable cause in a public speech,

charging others with burning specific property, must be weighed by the court in determining whether the attorney should be disbarred, especially when coupled with other offenses, such as the misappropriation of a client's money.

[Ed. Note.—For other cases, see Attorney and Client, Cent. Dig. §§ 74, 75; Dec. Dig. § 53.*]

6. ATTORNEY AND CLIENT (§ 58*)—SUSPENSION.

Where an attorney has misapplied moneys collected, and otherwise been guilty of misconduct, and the wrongdoing has been caused by habits of intemperance, he will be suspended from the practice of the law indefinitely, with the privilege of moving, after two years on satisfactory proof of reformation, for reinstatement.

[Ed. Note.—For other cases, see Attorney and Client, Cent. Dig. §§ 76-78; Dec. Dig. § 53.*]

In the matter of an inquiry into the conduct of Barnard B. Evans, an attorney at law. Judgment of indefinite suspension from the practice of law, with leave to move for reinstatement after two years.

W. H. Cobb, Sol., of Columbia, for the State. C. P. Sanders, of Spartanburg, for defendant.

WOODS, Acting C. J. This proceeding, involving an inquiry by the court into the character and conduct of Barnard B. Evans, an attorney, was instituted under an information filed on the 6th day of January, 1913, by Honorable J. Fraser Lyon, then Attorney General of the state, charging that the respondent, B. B. Evans, had been guilty of a number of dishonest transactions, and of malicious slander of several persons, that he had been indicted by a grand jury for forgery, and that his reputation for honesty and veracity was bad. The information alleged that the respondent was admitted to the practice of law on the 10th day of March, 1902, and some of the transactions charged against him were alleged to have taken place before that time. In obedience to the court's order Mr. Evans filed his return, in which he set out, by way of defense, his version of the facts which occurred after his admission to the bar.

In the return two legal positions were submitted which were decided by the court before entering upon the trial of the issues of fact. The first was that the whole proceeding should be quashed because the information was not verified by the oath of the Attorney General, and was not founded on the resolution of any bar association of which the respondent was a member, or upon the presentment or true bill of a grand jury. The court, with the dissent of two of the justices, denied the motion to quash the information, on this reasoning: The general rule is that an attorney should not have his character and office put in issue on unverified charges. *Ex parte Burr*, 9 Wheat. 529, 6 L. Ed. 152; *Weeks on Attorneys*, § 83; *Burns v. Allen*, 2 Am. St. Rep. 858, note. But in the leading case of *Ex parte Wall*, 107 U. S.

265, 2 Sup. Ct. 569, 27 L. Ed. 552, it was distinctly held that the rule is not inflexible, and it will be varied according to the circumstances when full notice and opportunity to be heard is given to the accused.

[1] The rule may, with entire propriety, be departed from when it appears that the charges are made by a bar association or by the Attorney General in his official capacity, and that the charges are grave and require investigation in the public interest or in vindication of the accused. In this case, not only were charges of a serious character made by the Attorney General of the state, but when the motion was made to quash, the respondent by his return had admitted the material allegations of fact made in the information, and had endeavored to justify his course by alleging additional facts which, if proved, would have tended to exculpate him. When the issues of fact and law had been thus joined, the rule requiring verification of the information disappeared.

[2] On the second point the court refused to consider charges of misconduct in transactions occurring before the respondent was admitted to the bar, for this reason: The information contained no statement that the alleged discreditable transactions were concealed from the court or were unknown to the court when the respondent was admitted to the bar. The presumption is that the court inquired into his character before his admission, and that the delinquencies alleged against him were not proved, or that he had redeemed his character by subsequent repentance and good conduct.

After disposing of the legal questions in the manner indicated, the court entered upon the investigation of three specific charges against the respondent: First. The indorsement and appropriation to his own use by respondent of a check, payable to George L. Salter, which respondent had received as attorney for Salter. Second. Application to his own use of money collected as attorney for the Murray Drug Company on a claim against T. E. Dowling. Third. Stating maliciously and falsely, at a public meeting in Spartanburg, that E. W. Able and B. W. Crouch, two attorneys of Saluda, were blind tigers, thieves, and incendiaries; "that one of the parties was caught in the act and compromised, and the other had destroyed all the libraries of the lawyers in Saluda"; and in making, with malicious intent, the false statement that B. F. Sample, sheriff of Saluda county, had stolen a receipt from respondent's office in Saluda.

The first charge was proved beyond all dispute. George L. Salter, a farmer of Edgefield, applied to J. Frank & Son of Augusta, Ga., through respondent for a loan of \$1,000 on a mortgage of his land. The application was accepted to the amount of \$650, and the loan made. Frank & Son paid up a

senior mortgage and sent to respondent a check on the Union Savings Bank of Augusta, dated October 17, 1906, payable to Geo. L. Salter, for \$198.90, the supposed balance of the loan. The respondent, Evans, indorsed this check, "Geo. L. Salter, by B. B. Evans, Attorney in Fact," and delivered it to J. J. Robertson of Columbia, receiving from him the full amount called for. The check was indorsed by Robertson and paid by the drawee bank October 26, 1906. Evans did not pay the money to Salter, though payment was several times demanded of him, but afterwards gave Salter as payment his own check on Bank of Johnson for \$200.20, which was protested for lack of funds. The notice of protest indicates that this check was not given by respondent until March 9, 1907, nearly five months after he had used the check for \$198.90. It was never taken up by Evans, nor was the money collected by him on the check for \$198.90 payable to Salter ever accounted for to Salter. Subsequently, when Frank & Son were informed that Salter had not received his money, they sent him another check, repudiated the indorsement made by Evans on the original check, and demanded and received repayment from the bank. On the claim by the bank that Evans had no right to indorse the check, Robertson refunded the money to the bank with whom he had negotiated it. He made several demands on Evans that he repay him the money, without receiving any response, and then placed the check in the hands of Mr. George R. Rembert, his attorney. Demands were made on the respondent by Mr. Rembert, with the threat of criminal prosecution, in April and May, 1907, but he still failed to refund the money. Finally Mr. Rembert brought the matter to the attention of a brother of the respondent, and he paid the amount of the check.

[3] All of the above-stated facts are established beyond controversy. The explanation and excuse offered by Mr. Evans is that there was error in the check for \$198.90, that in his application for the loan Salter had constituted him his attorney in fact to indorse the check and receive the money, and that he did not turn it over to Salter for that reason; but even if he had the authority to indorse the check and receive the money for Salter, that was no excuse for the appropriation of the proceeds of the check. Nor is any excuse to be found in respondent's claim that he gave Salter his own check for \$220 covering the balance coming to him in the place of the check by Frank & Son for \$198.90, for he does not claim that he had funds to meet his check, nor that he has ever offered to pay it. Besides, the protest notice makes it evident that this worthless check was not given until March 9, 1907, more than four months after he had indorsed to J. J. Robertson the check which he should have turned over to Salter, and had appropriated the proceeds

to his own use. It is true that respondent went to Mr. Rembert's office in company with Mr. Robertson, declaring his intention to pay back the money received from Robertson and take up the check, and that he testified that he did not pay because there was no one in the office but a stenographer; but that was after he had disregarded Robertson's letters, and had been threatened with criminal proceedings. Besides, this excuse loses all significance in view of respondent's failure to take any further steps to refund the money.

[4] As to the second charge, the facts are simple. The Murray Drug Company of Columbia placed in the hands of respondent, for collection, a debt due by T. E. Dowling for \$129.84. The respondent collected, during the year 1905, from Dowling in small payments for which he gave separate receipts, on the Murray claim, a total of \$103, and then gave Dowling a general receipt in full of the claim. This money was not turned over to the Murray Drug Company. Upon ascertaining that the respondent had collected \$103 from its debtor, the Murray Drug Company placed the matter in the hands of Mr. Allen Green, now deceased. Mr. Walter T. Green testified that respondent told Mr. Allen Green in his presence that he had not collected the claim, but had received from Dowling a mortgage covering this debt and several others, and asked that he be paid a fee for foreclosing the mortgage. Dowling testified that he never gave a mortgage for the claims held by the respondent, and that Mr. Evans gave a receipt in full after the payment of \$103 on the claim for \$129.84, saying that he had been authorized to make a discount. Dr. Murray, of the Murray Drug Company, testified that he did not authorize settlement for less than the full amount, and that Mr. Evans told him that he had not collected the debt, but had a mortgage to secure it. The matter remained in this condition until, on the affidavit of Dr. Murray, a rule was issued against Mr. Evans in the circuit court, and the money was paid by a brother of respondent.

As explanation and excuse, respondent testified that he did take a mortgage from Dowling which was never recorded, that he had several other small claims against Dowling, and that, while he gave receipts on the Murray claim, the money was actually remitted to the other creditors. He also produced at the trial an account for \$100 against the Murray Drug Company, one item being a charge of \$25 for the collection of the Murray claim, and another of \$50 for answering a question of law propounded by Dr. Murray at a casual meeting on the street. This account was submitted to the court, and is dated January 13, 1913, apparently after the claim of Dr. Murray had been settled. Mr. John Gary Evans testified that he paid this claim, as well as the Salter claim, without communicating with the respondent. It is apparent from

this statement that the respondent did collect \$103 for his client; that he misappropriated the money, and, without any just excuse, failed and refused to refund it.

As to the third specification of the information, the return did not deny, and therefore admitted, the allegation of the information that the respondent had stated in a public speech at Spartanburg that Messrs. Able and Crouch were thieves and incendiaries, "that one of the said persons was caught in the act and compromised, and the other destroyed the libraries of all the lawyers in Saluda," and that at various times he had averred that B. F. Sample, sheriff of Saluda county, was a thief and had stolen a receipt from respondent's office. But by amendment of his return respondent denied "that he had made the charges maliciously, because at the time he believed them to be true." On the stand in open court the respondent reiterated his charge against Sample, giving as the sole foundation that the receipt was among his effects seized by Sample under a distress warrant, and that it had not been returned to him. He testified that he believed the charge against Crouch, because Geo. C. Wheeler and W. J. Padgett told him that they had caught Crouch in the act of setting fire to the house of Geo. C. Wheeler, and that he believed the charge against Mr. Able because Messrs. C. J. Ramage and J. N. Gregory told him that Able burned the lawyers' libraries, and because T. C. Bush had told him that Able had burned his house. All of these persons, except Mr. Gregory, who is dead, appeared and denied that they had ever made such statements to respondent. Not a particle of testimony was offered tending to show that Crouch or Sample was guilty of the heinous offenses charged against them by respondent. The testimony tending to implicate Mr. Able was not credible, and there was nothing to show even that was before the respondent when he made the charge. There is no escape from the conclusion that the charges were false, and that they were made recklessly and without probable cause.

[6] It is not for this court to animadvert upon the prevalent exaggeration and excess in public speech so discreditable and misleading. Allowance must be made for weak men who drift with the current into untrue statements, and who assume one character in private life and another in public speech. A charge of falsehood against an attorney so weak as to meet expletive with expletive and excess with excess in the heat of a political campaign would rarely be considered by the courts in disbarment proceedings. But untrue asseverations, made without probable cause in public speech by a member of the bar, that certain citizens have stolen or burned specific property, are a serious offense, going to the foundation of character, and must be weighed by the courts, especially

when coupled with other offenses showing a reckless disregard of professional duty.

We have not thought it proper to give any weight to the mere true bill of the grand jury of Saluda county on an indictment charging forgery, in that the respondent altered a receipt for papers signed by Sheriff Sample, since the information did not allege that the charge was well founded, and the indictment was quashed and the matter thus ended without trial.

This plain narrative shows that the respondent in two instances appropriated trust funds to his own use, and failed to restore them, though repeated demands were made upon him; that he, without justification, publicly asserted that other citizens were guilty in specific instances of larceny and arson; that in the trial before the court he has presented mere pretexts as excuses for his conduct; and that on almost every material issue of fact he has been contradicted by other witnesses. The childishness of the pretexts and excuses offered indicates obsession of moral perception and a lack of capacity to estimate moral values. In addition to this, a number of persons in Columbia and Saluda have testified to the respondent's bad reputation for honesty, while the witnesses who testified in his favor on the issue of character admitted that they had heard unfavorable, as well as favorable, expressions of opinion.

[6] How did it happen that respondent fell to this low estate? He had the advantages of a rearing gentle and refined; he has been encompassed from his birth with devoted affection; he had a brother ready to come to his relief; he has had all his life the stimulus of descent from families on both sides distinguished and esteemed, in the past and now, for many virtues and public services. The court is of opinion that the reason of his fall may be found mainly in the fact that the respondent is an inebriate. All men know that alcohol may make liars of the truthful, knaves of the honest, ruffians of the gentle, and traitors of the faithful. Under its influence the respondent has in mind and morals staggered along the devious path which leads to the abyss. It is true that he is now just as unworthy and incompetent to perform the duties of an attorney as if his offenses were due entirely to inherent wickedness, and obviously he will remain so until he changes his habits and reforms his character. Therefore the court cannot permit him to exercise the rights of an attorney, or to resume them at any time in the future, until it has had satisfying evidence of redemption in habits and character. But there is a difference in degree between the debasement of the criminal who plans his crime with deliberation and that of the weak wrongdoer whose character has been wrecked by drunkenness. The probability of reform is also much greater in the latter than in the former case.

A license from this court to practice law is a declaration by the court that it has satisfied itself by careful inquiry and examination that the licensee is a person of such attainments and character that he may be trusted by the public. Proceedings of this kind against a lawyer are undertaken by the court for the purpose of ascertaining whether the lawyer accused is no longer worthy to bear the court's imprimatur. When the evidence shows that he is, the court cannot escape the sad duty of withdrawing its license either temporarily or permanently, according to the circumstances. The evidence in this case shows that Mr. B. B. Evans was guilty of the wrongs charged against him, and that he is at this time unfit to be intrusted with the issues of life, liberty, and property incident to the practice of law. The court is of the opinion, however, that the respondent should be allowed the opportunity to reform, and be reinstated upon proof that he has ceased the use of intoxicating liquors, and has redeemed his life in other respects.

It is therefore the judgment of the court that Barnard B. Evans be indefinitely suspended and forbidden to exercise the rights and duties of an attorney in the courts of this state, or elsewhere, under the license of this court, with the privilege, however, to move before this court for reinstatement after the expiration of two years, upon satisfactory proof that he has not, for two years immediately preceding his application, used intoxicating liquors, and that he has reformed his character.

HYDRICK, WATTS, and FRASER, JJ., and NICHOLLS, Acting J., concur.

(94 S. C. 435)

ELLISON v. GREENVILLE, S. & A. RY. CO.

(Supreme Court of South Carolina. May 10, 1913.)

TRIAL (§ 359*)—DISPOSITION OF CASE—JUDGMENT ON SPECIAL VERDICT.

Under Code Civ. Proc. 1912, § 322, requiring the court to give judgment according to the special verdict when conflicting with the general verdict, a special verdict controls on appeal, where the record presents no ground for setting it aside, and judgment must be rendered accordingly.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 857-860, 875, 877, 878; Dec. Dig. § 359.*]

Gary, C. J., and Watts, J., dissenting.

On petition for rehearing. Granted, and former opinion modified.

For former opinion, see 77 S. E. 723.

WOODS, HYDRICK, and FRASER, JJ. Upon consideration of the petition for a rehearing in this case, it appears that, by its judgment, granting a new trial generally, "unless plaintiff shall remit upon the record

so much of the verdict as exceeds the sum of \$750 and interest," the court has inadvertently put it into the power of the plaintiff, by refusing to remit as required, to have the special verdict set aside, notwithstanding its correctness has not been questioned by either party, and notwithstanding the mandate of the statute (Code of Proc. § 322, quoted in the opinion of the Chief Justice) that the court shall give judgment, in a case like this, according to the special verdict. The opinion of the Chief Justice shows clearly that, unless the special verdict is set aside, and plaintiff's attack upon the validity of her deeds sustained, plaintiff cannot recover more than \$750 and interest. As the record presents no ground upon which the special verdict can be set aside, it follows that, in obedience to the statute, it must control and judgment must be rendered accordingly.

Therefore the judgment of this court should have been, and now is, that the judgment of the circuit court be modified, so that plaintiff shall recover of defendant \$750 and interest thereon, together with the costs and disbursements of the action.

GARY, C. J. I cannot concur in the conclusion that the judgment of this court should be modified, for the reason that the verdicts are so interwoven that, if one of them is set aside, there must be a new trial de novo.

WATTS, J. I concur in what Chief Justice GARY says.

(94 S. C. 435)

HOLCOMBE v. SPARTANBURG RY., GAS & ELECTRIC CO.

(Supreme Court of South Carolina. May 12, 1913.)

1. CARRIERS (§ 278*)—PASSENGERS—ACTIONS—JURY QUESTION.

In an action for willful failure of defendant interurban company to carry plaintiff between two points after receiving him in one of its cars, evidence held to authorize the submission of the question of wantonness to the jury.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 1080, 1081; Dec. Dig. § 278.*]

2. TRIAL (§ 194*)—INSTRUCTIONS—WEIGHT OF EVIDENCE.

Instructions which merely stated the issues as made by the pleadings were not objectionable as being on the facts.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 413, 436, 439-466; Dec. Dig. § 194.*]

3. CARRIERS (§ 276*)—PASSENGERS—ACTIONS—ADMISSION OF EVIDENCE.

In an action for willful failure of defendant interurban company to carry plaintiff between two points after receiving him in one of its cars, it was not reversible error to permit plaintiff to testify to a conversation with an employé in charge of defendant's cars, while plaintiff was waiting for the car to his final destination, as to plaintiff not being able to go there on the cars that night.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 1073, 1079; Dec. Dig. § 276.*]

Appeal from Common Pleas Circuit Court of Spartanburg County; Geo. W. Gage, Judge.

Action by Thomas L. Holcombe against the Spartanburg Railway, Gas & Electric Company. From a judgment for plaintiff, defendant appeals. Affirmed.

Sanders & De Pass, of Spartanburg, for appellant. Nicholls & Nicholls and C. P. Sims, all of Spartanburg, for respondent.

WOODS, J. The statement of the case and points at issue, made in appellant's argument, is so excellent that we adopt it:

"This action is brought to recover damages for the alleged willful and malicious failure of the defendant to carry the plaintiff from the Southern depot, in the city of Spartanburg, to Clifton, S. C., after receiving him in one of its cars and contracting to do so.

"The following are the undisputed facts: The plaintiff, with his wife and children, were passengers on the train of the Southern Railway Company, with tickets to Clifton, S. C. The train on the night in question, arrived at Spartanburg at 8:02 o'clock p. m., and left Spartanburg at 8:10 o'clock p. m. The car of the defendant on which the plaintiff took passage, as he says, for Clifton left the Southern depot at 8:15 o'clock p. m. This car did not go to Clifton, but ran from the Southern depot to the eastern end of Main street, and the passengers desiring to go to Clifton were transferred in the city at the crossing of Church and Main streets. The last car of the defendant going to Clifton leaves the point of transfer at 16 minutes after 7. When, therefore, the plaintiff boarded the car of the defendant at the Southern depot, the last car going out to Clifton had been gone about one hour.

"The following facts are in dispute: The plaintiff testifies: That on leaving the car of the Southern Railway he went to the street car of the defendant and asked the conductor if he could go to Clifton that night on that car. That the conductor told him he could. That he, with his wife and children, boarded the car and went to the crossing at Main street. At that point the conductor told him to get off; that the car to take him to Clifton would be there in a few minutes. The testimony of plaintiff's wife tends to corroborate him in this respect. The conductor of the defendant testified that he knew the Clifton car had been gone about an hour; that he did not tell the plaintiff that he could go to Clifton that night, and did not tell him to get off at the crossing, that his car would be there in a few minutes, but did give him transfers, which would have been good the next morning. The plaintiff testified that, instead of waiting until the next morning, he hired a hack and paid the hackman \$1.50 to go to Clifton. He made no effort to find a hotel at which he could have stayed, but voluntarily hired a hack to take him to his destination that night.

"Against the objections of the defendant, the plaintiff and his wife were allowed to testify as to a conversation with Mr. Buckheiser about their not being able to go to Clifton that night. At the conclusion of the testimony the defendant moved the court to direct a verdict to be rendered in its favor as to punitive damages. The motion was refused.

"His honor, at the request of the defendant, instructed the jury that: 'A mere conductor has no authority to make contracts for the running of the cars of a street railway company.' His honor further instructed the jury as follows: 'Now, the third view of the case is this, and that is the one insisted upon by Holcombe's attorney: Did the street car conductor tell Holcombe to get on this car, and that he could make connection, when he knew he could not; did he tell him he could take him through, when he knew he could not; and did he, or not, care whether he could take him through or not? In other words, a total disregard of the duty of carrying and serving the public. Now, if that is so, the jury could assess against the street car company punitive damages for that sort of conduct. Now, the testimony must satisfy you by its preponderance that that is so. Does the testimony satisfy you that on that night the street car conductor told Holcombe to board this car, and "we will take you through to Clifton"? Does the testimony satisfy you that he told him that and he knew it was not so, and was so unmindful of his duty towards the public that he didn't care whether he carried him through or not, so he got his money? Does the testimony leave you in doubt, so that you can't find where the truth lies? If so, you should find a verdict for the defendant.'

"The jury rendered a verdict for the plaintiff for \$500. The defendant thereafter made a motion for a new trial on the grounds, among other things: * * * His honor thereafter passed an order granting a new trial, unless the plaintiff would remit all over the sum of \$300. The plaintiff thereafter did remit the sum of \$200 from the verdict and judgment.

"The appeal challenges the correctness of his honor's ruling: (1) In allowing the plaintiff to prove a conversation with Mr. Buckheiser. (2) In not directing a verdict to be rendered in favor of the defendant as to punitive damages. (3) In that he charged on the facts. (4) In refusing to grant a new trial absolutely."

[1] While it may be true that it is very improbable that the conductor wantonly misled the plaintiff, still there was direct evidence that, although he was familiar with the schedule and knew that the last car for Clifton had gone, yet he assured the plaintiff that he would be taken to Clifton that night. Under this evidence this court cannot say there was error in submitting to the jury the issue of wantonness.

[2] The portions of the charge quoted in the statement were nothing more than a statement of the issues as they appeared in the complaint and answer.

[3] There was no reversible error in allowing the plaintiff and his wife to testify to a conversation with Buckheister, when they were waiting for the Olifton car. The plaintiff testified that Buckheister had charge of defendant's cars, and this fact was admitted by defendant's counsel, and after that fact appeared there was no further objection to the testimony. Besides, the statements of Buckheister were not material to the issue made by the pleading.

Affirmed.

GARY, C. J., and HYDRICK, WATTS, and FRASER, JJ., concur.

(72 W. Va. 63)

CROTTY v. NEW RIVER & POCAHONTAS CONSOL. COAL CO.

(Supreme Court of Appeals of West Virginia. Feb. 18, 1913. Rehearing Denied May 29, 1913.)

(Syllabus by the Court.)

1. EASEMENTS (§ 18*)—WAYS OF NECESSITY—IMPLICATION.

A way of necessity over the lands of a grantor is implied in a deed, if, by reason of a physical obstruction to access to the granted land, the grantee cannot construct a road from a considerable portion thereof over the residue without an expenditure wholly disproportionate to the value of the land.

[Ed. Note.—For other cases, see Easements, Cent. Dig. §§ 50-55; Dec. Dig. § 18.*]

2. EASEMENTS (§ 24*)—WAYS OF NECESSITY—RIGHTS OF GRANTEES.

Such a way is appurtenant to the granted land, and passes to subsequent grantees thereof, and a subsequent grantee of land not used at the time of the severance of the larger tract by the common owner may, when the use of such way becomes necessary to the enjoyment of the land, claim it under the remote deed of severance.

[Ed. Note.—For other cases, see Easements, Cent. Dig. §§ 64-69; Dec. Dig. § 24.*]

Robinson and Lynch, JJ., dissenting.

Appeal from Circuit Court, Fayette County.

Bill by G. E. Crotty against the New River & Pocahontas Consolidated Coal Company. Decree for defendant, and plaintiff appeals. Reversed, and injunction reinstated and perpetuated.

Hubard & Lee and C. R. Summerfield, all of Fayetteville, for appellant. Dillon & Nuckolls, of Fayetteville, for appellee.

POFFENBARGER, P. This bill filed to vindicate the plaintiff's alleged right to a way over the land of the defendant, claimed as a public one, a private one by prescription and a private one by necessity, must be sustained, if at all, upon the last theory, since the evidence wholly fails to sustain either of the other two. The appeal is from a decree dismissing the bill.

The way in question is a short one, only 322 feet in length, leading from the plaintiff's 4.5-acre lot through the land of the defendant to a public road. This lot and the road are on two separate tracts of land, which at one time constituted a portion of a still larger tract, owned prior to the year 1831 by Henry Banks under a patent issued by the state of Virginia December 6, 1794. This large tract, containing 12,300 acres, was divided into lots, and sold in 1831 and 1832, John Bowyer becoming the purchaser of lot No. 15 and Samuel Blake of lot No. 21, containing, respectively, 150 acres and 497 acres. The plaintiff's 4.5-acre lot is a portion of the former. At the time of this division a public road ran through lot No. 15, but there was none through lot No. 21. The portion of lot No. 15 out of which plaintiff's small lot was taken was cut off from the public thoroughfare by a cliff so high and steep as to render it impossible to go over it without very great expense. This portion containing about 30 acres lies about 400 or 500 feet lower than the table land on which the residue of the tract, through which the road ran, is situated. Above and below the cliff the mountain side is very steep, and the cliff itself is nearly perpendicular and 100 feet high. The plaintiff's title goes back regularly to the deed to John Bowyer and that of the defendant to the deed to Samuel Blake. The portion of lot No. 15 lying below the cliffs, excluding the plaintiff's 4.5 acres, is owned in small lots by the heirs of one Wood, and is unimproved. The plaintiff obtained his lot in 1905, and erected a butcher shop thereon. Later he put up a substantial building for residence and mercantile purposes. Until that time he had been permitted to use the way claimed by him out to the county road constructed on the adjacent land, lot No. 21, long after the division of the Banks land. About the time of the completion of the building, the defendants obstructed the road, and denied him the right of use thereof.

When Effie and Frank Roach, the heirs of Woods, conveyed this 4.5-acre lot to the plaintiff, more than 60 years had elapsed from the date of the division of the Banks survey and conveyances of its several parts. They conveyed, not a small lot out of a larger one, but all that had been assigned to them in the partition of the Woods estate. Hence it cannot be said that at the date of this grant there was a grant by implication, on the ground of necessity, of a right of way through their remaining lands. They had none. If, however, there was a way of necessity included in the partition among the Woods heirs which became appurtenant to this 4.5 acre lot, the deed to that lot to the plaintiff may have carried it. But, as the partitioned land did not extend to the public road in question, that way would avail plaintiff nothing. To sustain his claim, it becomes

necessary to go back to the division of the Banks land in the years 1831 and 1832.

[2] Whether an owner of land can go back beyond the deed of the immediate grantee to the common source of title, however remote it may be, and claim a way by necessity, as appurtenant to the land, is a vital and far-reaching question in the case. The authorities uniformly hold there must have been at some time privity of title. There cannot be a way of necessity over the land of a stranger to the title. *Linkenhoker v. Graybill*, 80 Va. 835; *Kimball v. Railroad Co.*, 27 N. H. 448, 59 Am. Dec. 387; *Pomfret v. Ricroft*, 1 Saund. 323; 23 A. & E. Enc. L. 17. Mr. Sergeant Williams' note 6 to *Pomfret v. Ricroft* asserts the right to go back to unity of possession and title, however remote. It says: "If the origin of a way of necessity cannot any longer be traced, but the way has been used without interruption, it must then be claimed as a way either by grant or prescription, according to the circumstances of the case. Where the fact is that there existed at one period an unity of possession, it must then be claimed as a way by grant." The principle and conclusion intimated in this note have been embodied in actual decisions. In *Logan v. Stogsdale*, 123 Ind. 372, 24 N. E. 135, 8 L. R. A. 58, the court, after very thorough consideration of the authorities, upheld the claim to a right of way asserted on the ground of necessity by going back to a remote common grantor, citing *Taylor v. Warnaky*, 55 Cal. 350. The following is taken from the opinion: "The decision in the case referred to is sustained by the doctrine, maintained by the ancient and modern authorities, that the original grantor grants, as appurtenant to the parcel expressly conveyed, a way which will enable his grantee to obtain access to the corporeal property expressly conveyed to him. Both the corporeal property and the incorporeal right pass from the grantor at the same time—one as the inseparable incident of the other—and a subsequent grantee must necessarily take the land conveyed to him subject to the burden created by the implied grant." The character and weight of the considerations upon which this implication rests argue strongly the correctness of the theory of the decisions here referred to. Land without means of access is practically valueless. No reasonable use can be made of it, and it has no market value. The presumption of intent on the part of the parties to the conveyance to provide a means of access is so strong, for this reason, that the contrary thereof can hardly be supposed. This brings the implied grant within a well-settled principle of construction and interpretation of contracts.

That the land was in a state of nature at the date of the division of the Banks land, and there was no road on lot No. 21, nor any occasion for an outlet in that di-

rection for a number of years thereafter, are asserted and relied upon as inconsistent with a presumption of intent to grant the way in question. These circumstances are not broad enough in their scope to preclude it. The parties may well be presumed to have contemplated such conditions as the future was likely to bring forth. This principle is asserted in *Uhl v. Railroad Co.*, 47 W. Va. 59, 34 S. E. 934, in which the following is quoted from *Jones on Easements*, § 323: "The prevailing view in this country is that a way of necessity is not limited to such use of the land as was actually made and contemplated at the time of the conveyance, but is a way for any use to which the owner may lawfully put the granted land at any time." In that case Judge Brannon said: "Though such a use of that crossing may not have been dreamed of at the date of the deed, yet the crossing was for use for any purpose which might thereafter be called for in the conveyance from the land of its products—whether a wagon carrying wheat or coal, or a pipe or other appropriate means of carrying gas—so it did not practically impair the use of the right of the railroad to use its tracks." The principle thus applied necessarily includes, or accords with, what has been said in the preceding paragraph. A way of necessity springs out of the deed at the date of the grant, and becomes appurtenant to the granted estate. If it includes such a way as is necessary for any purpose to which the land may thereafter be adapted and becomes appurtenant and attaches to the subsequent grant, when the occasion for a broader use of the adjacent land or a heavier burden thereon arises, the right to it is found in the remote conveyance. In the case just referred to, there was an express grant of a right of way, but not such a way as afterwards became necessary to the full enjoyment of the land, and the court held such larger grant had been made by implication. If a remote grant by implication can be invoked to enlarge a way expressly granted, no reason is perceived why recourse cannot be had to one for a way of necessity by implication for property, which at the time, owing to its position and the surrounding circumstances, was unoccupied and in connection with which no road was actually used. According to the legal theory, a way of necessity is granted for any and all purposes for which the land is adapted, and, if the grantee has at the time of the grant occasion for an outlet and demands it, he can enforce the right. It is therefore a right appurtenant to the land, and, having become fixed, it goes to subsequent grantees.

[1] As to whether physical obstruction to access to land, such as the insurmountable cliff standing between the plaintiff's lot and the public road on the table land within the boundary of lot No. 15, will sustain an implication of a grant of a way of necessity,

the authorities are in conflict, some saying the grantee cannot have a right of way out over the adjacent land of the grantor, if, by any means, no matter at what cost, he can get out over his own land, while others say necessity within the meaning of the terms as it is used in the law of contracts suffices. The latter class of cases seems to accord with reason and the considerations upon which the rule rests. If the cost of the construction of a right of way or road out over a man's own land would exceed the value of the land itself or be greatly disproportionate thereto, it may well be supposed such means of access was not within the contemplation of the parties, and that a way out over the land of the grantor was contemplated. That a road over the adjacent land of the grantor is more convenient and could be constructed at a lighter cost than one over the grantee's own land will not sustain a grant of such right on the theory of necessity, of course, but, if it is practically impossible to get out over the grantor's own land, there is as clear a case of necessity, within the reasonable meaning of the term, as if it were surrounded by adjacent land of strangers; for, in the latter case, a right of way can generally be secured if a sufficient amount of money is offered for it, just as a road can be made up such a cliff as is described here by the expenditure of an amount of money wholly disproportionate to the value of the land, and so great the grantee cannot be supposed ever to have intended to burden himself with it. Logically it is the necessity that gives rise to a grant by implication, not the character, or form or occasion thereof. Very few, if any, of the cases in which it has been held that a way of necessity does not exist when a man can get to his own property through his own land and that steepness or narrowness of the way does not prevent it, presented such as the situation we have here. In practically all of them the grantees had sought ways out over the grantors' lands on the ground of convenience and economy only. Such was the case of *Shaver v. Edgell*, 48 W. Va. 502, 37 S. E. 664. Of the evidence in that case Judge Brannon said: "It shows that his land runs a long distance along the public highway, and there is no obstruction of access to it, save some tolerably steep ground, and that a very usable road can be made to the highway at small expense, ranging from \$5 up to \$60, according to different witnesses, the most reliable putting the cost at \$15 or \$20." In cases like this the courts have said there need not be an absolute physical obstruction. The following text from *Jones on Easements*, § 316, is well sustained by authority: "The word is to have a reasonable and liberal interpretation. The way must be reasonably necessary. If it were limited to an absolute physical necessity, a way could not

be implied if another way could be made by any amount of labor and expense, or by any possibility. If, for example, the property conveyed were worth but one thousand dollars, it would follow from this construction that the purchaser would not have a right of way over the intervening piece as appurtenant to the land, provided he could make another way at an expense of one hundred thousand dollars." See *Pettingill v. Porter et al.*, 8 Allen (Mass.) 1, 85 Am. Dec. 671; *Smith v. Griffin*, 14 Colo. 429, 23 Pac. 905; *Oliver v. Pitman*, 98 Mass. 46; *Schmidt v. Quinn*, 136 Mass. 575; *Paine v. Chandler*, 134 N. Y. 385, 32 N. E. 18, 19 L. R. A. 99; *Goodall v. Godfrey*, 53 Vt. 219, 38 Am. Rep. 671; *O'Rourke v. Smith*, 11 R. I. 259, 23 Am. Rep. 440.

Applying the foregoing principles and authorities, we think the plaintiff is entitled to a way of necessity. The practicability of a way by a different course is relied upon, but, as it too would pass over a portion of lot No. 21 and be very inconvenient as compared with the road plaintiff now uses, the fact constitutes no defense.

The decree complained of will be reversed, and the injunction reinstated and perpetuated.

ROBINSON and LYNCH, JJ., dissenting.

(73 W. Va. 54)

CHAPMAN et al. v. BRANCH et al.

(Supreme Court of Appeals of West Virginia.
Feb. 28, 1913. Rehearing Denied
May 29, 1913.)

(Syllabus by the Court.)

1. JUDICIAL SALES (§ 54*)—RIGHTS OF PURCHASERS—REVERSAL OR VACATION OF DECREE.

The title of an immediate purchaser, or of a remote purchaser, not parties, cannot be disturbed or affected by reversal on appeal, or on setting aside of a decree of sale, for mere error therein not going to the jurisdiction of the court.

[Ed. Note.—For other cases, see *Judicial Sales*, Cent. Dig. §§ 108, 109; Dec. Dig. § 54.*]

2. INFANTS (§ 114*)—PURCHASES AT JUDICIAL SALES—REVERSAL OR VACATION OF DECREE.

This rule is applicable to infants as well as adults, proceeding by *prochein ami* before majority, as in proper person after majority, either under section 7, chapter 132, Code 1906; or by motion, original bill or bill of review to set aside such decree.

[Ed. Note.—For other cases, see *Infants*, Cent. Dig. §§ 323, 325; Dec. Dig. § 114.*]

3. INFANTS (§ 74*)—ACTIONS—MISNOMER.

Where in a suit by an administrator to sell a decedent's land to pay debts, one or more of the infant defendants are misnamed in the process or bill, but the correct name elsewhere appears in the record, by deposition or affidavit, the error in process or bill is correctible by the record.

[Ed. Note.—For other cases, see *Infants*, Cent. Dig. §§ 188-190; Dec. Dig. § 74.*]

4. INFANTS (§ 74*)—ACTIONS—MISNOMER.

If in such suit the answer of the guardian ad litem for infant defendants contains the same error in the name of an infant defendant, such error will not deprive the court of jurisdiction to decree sale of the land proceeded against.

[Ed. Note.—For other cases, see *Infants*, Cent. Dig. §§ 188-190; Dec. Dig. § 74.*]

5. INFANTS (§ 80*)—ACTIONS—GUARDIAN AD LITEM—APPOINTMENT.

Errors and irregularities in the appointment of a guardian ad litem, or in his answer filed, where no statute controls, will not deprive the court of its jurisdiction to pronounce decree.

[Ed. Note.—For other cases, see *Infants*, Cent. Dig. §§ 210-221; Dec. Dig. § 80.*]

6. EXECUTORS AND ADMINISTRATORS (§ 397*)—SALES UNDER ORDER OF COURT—CONVEYANCE—PROPERTY EXCLUDED.

If in a suit to subject a decedent's lands to sale to pay his debts the court by its decree authorizes the commissioner appointed to sell, to first offer the mineral and mineral rights in the land, and if these do not bring sufficient to pay the debts, then to sell the whole estate in the land, and the commissioner so advertises and sells such mineral and mineral rights for sufficient to pay the debts, the court on his report is without jurisdiction by subsequent decree of confirmation, the question not being therein otherwise presented or litigated, to include in such sale property and property rights not sold, and such decree and the deed of the commissioner to the purchaser to the extent of such property and property rights are void and confer no title on the purchaser, as against infant heirs and defendants, and in a suit subsequently brought by them showing cause against such decree and deed, the same and all subsequent deeds may be removed as clouds on their title to the property and property rights not sold.

[Ed. Note.—For other cases, see *Executors and Administrators*, Cent. Dig. §§ 1598-1604; Dec. Dig. § 397.*]

7. EXECUTORS AND ADMINISTRATORS (§ 356*)—SALES UNDER ORDER OF COURT—CONCLUSIVENESS OF DECREE.

If in such suit to sell a decedent's lands one not a party, or mentioned in the bill, and against whom no relief is sought, claiming to be assignee of an alleged oral contract of sale by decedent to another of a part of his land, intervenes by petition setting up such oral contract, praying for specific execution, and for deed, but not making parties thereto, and without process thereon, the court is without jurisdiction to decree specific performance of such alleged contract against infant heirs and defendants not parties and for whom no appearance or defense is made, and such decree and the deed of the commissioner appointed to convey such land to petitioner is void, and in a suit by such infants subsequently brought showing cause against such decree and deed the same and all subsequent deeds may be set aside and removed as clouds on the title of such infants.

[Ed. Note.—For other cases, see *Executors and Administrators*, Cent. Dig. §§ 1463-1467; Dec. Dig. § 356.*]

Robinson, J., dissenting.

Appeal from Circuit Court, Lincoln County.

Bill in equity by Lena Chapman and others against J. R. Branch and others. From a decree for defendants, plaintiffs appeal.

Decree reversed in part, affirmed in part, and cause remanded.

E. T. England and J. B. Ellison, both of Logan, for appellants. Enslow, Fitzpatrick, Alderson & Baker, of Huntington, for appellees.

MILLER, J. Plaintiffs, Garnett Ellis (née Chapman), and Lena Chapman, adults at the time of suit, Rodolph Chapman, then an infant, but now also an adult, and Leslie, Grace, and Elisha Chapman, then and now infants, all children and heirs at law of E. M. Chapman, deceased, and Olivia Chapman, his wife, said infants suing by Garnett Ellis, their next friend, on February 1, 1909, brought this suit against J. R. Branch, Branchland Coal Company, and others, seeking upon several grounds to set aside, annul and remove as alleged clouds on their title to a tract of one hundred and twenty-nine acres, and a half undivided interest in a tract of one hundred and thirteen acres of land in Lincoln County, certain decrees and orders and deeds made pursuant thereto, pronounced in a certain other suit, instituted by the said Olivia Chapman, as administratrix of their father, E. M. Chapman, against them or some of them, then all infants, and others, on September 25, 1899, to sell said lands to pay the debts of said decedent because of alleged deficiency of personal assets.

The process in the suit of said administratrix recited the names of all the infant defendants correctly, except Garnett; in her stead M. J. Chapman is named. In the bill all are impleaded correctly except Garnett and Elisha; in their places M. J. Chapman and Eliza Chapman are named. And the guardian ad litem answered for those named in the bill, and no answer was otherwise made for Garnett and Elisha.

The decrees of sale and confirmation of the mineral and mineral rights under the 129 acre tract complained of were pronounced on April 13, 1900, and August 22, 1900, respectively; and the decree made on petition of Johnson Ferguson, adjudging him entitled to said half undivided interest of said E. M. Chapman, in said 113 acre tract, and directing a deed to be made to him therefor, was also pronounced on April 13, 1900.

The grounds for relief alleged, briefly stated, are: First, that neither Garnett nor Elisha were ever made parties to the suit, or bill, and never appeared, and that both remained infants during the whole progress of the suit; that D. E. Wilkinson, appointed guardian ad litem, was a defendant, a creditor, and so interested as to render him an incompetent person to represent them, and that the court therefore never acquired jurisdiction to pronounce the decrees against them; second, that though the decree authorized sale of the 129 acres in fee, if the

mineral rights would not sell for sufficient to pay debts, yet only mineral rights were advertised and sold, but that in the decree of confirmation along with the mineral rights sold, the court undertook to confirm and the commissioner appointed to convey timber, building rights and other surface rights not sold, leaving plaintiffs, as owners of the surface, absolutely at the mercy of the purchaser of the mineral rights; third, that though E. M. Chapman, at his decease, was owner of said half undivided interest in the 113 acre tract, the court by one of the decrees complained of, on mere ex parte petition of Johnson Ferguson, without process, notice, or other proceedings against plaintiff and without appearance, on one and the same day allowed said petition to be filed, and decreed petitioner entitled to that interest, and appointed a commissioner to convey him the legal title thereto, in violation of the statute of frauds, of the rights of plaintiffs, and of all proper rules of procedure, and without having acquired jurisdiction to do so; fourth, that said sale was decreed, without giving the administratrix and heirs at law or some one for them, a day to pay the debts decreed; fifth, that the mineral and mineral rights were sold for a grossly inadequate price; sixth, that it was error to decree a sale of said land before assigning dower to the widow.

The bill shows that the lands and mineral interests in controversy and so affected by said decrees have come by sundry mesne conveyances to the possession and ownership of the defendant Branchland Coal Company; that its immediate predecessor, the Lincoln Coal Company, in 1901, took possession of said lands, especially the 129 acre tract, and immediately began cutting timber, building tram roads, and opening up coal mines; that it took possession of the whole of the land fronting on the river, about forty acres, and built houses thereon, also of the land on Four Mile Creek, for the distance of about one fourth of a mile, cut large ditches therein, built roads, and continued these operations for some time, until the Branchland Coal Company took charge and continued said operations; and that the whole of the merchantable timber has been cut from the land and used in building houses, barns and other buildings, and for cross ties and timber in its coal mines, and that the larger portion of the coal under said land has been mined and shipped away; that taken from the 129 acres being valued at \$15,000.00; and the one half of that taken from the 113 acres is estimated at \$2,500.00, for which and for other rents and profits, plaintiffs alleged they are entitled to an accounting with defendants. The purchaser, Smith, of the mineral and mining rights under the 129 acre tract, was a stranger to the suit, and so far as the record discloses was not otherwise interested; and the answers of J. R. Branch and Branchland Coal Company, put-

ting in issue all the material allegations of the bill, shows respondents to have been remote and innocent purchasers, without notice, otherwise than by what is disclosed by the record of the cause, of any infirmities in the title, and this fact is not controverted.

[1, 2] We think it settled law in this state, that the title of an immediate purchaser, and of remote purchasers, not parties under a judicial decree, cannot be disturbed or affected by reversal on appeal, or on setting aside of a decree of sale for mere error therein, not going to the jurisdiction of the court, and that Smith and those holding under him are now protected by section 8, chapter 132, Code 1906. *Sinnett v. Cralle's Adm'r*, 4 W. Va. 600; *Martin v. Smith*, 26 W. Va. 579, 586; *Dunfee v. Childs*, 45 W. Va. 165, 30 S. E. 102; *Stewart v. Tennant*, 52 W. Va. 560, 44 S. E. 223, 7 Syl.; *Perkins v. Pfalzgraff*, 60 W. Va. 121, 53 S. E. 913; *Hansford v. Tate*, 61 W. Va. 207, 56 S. E. 372. The reasons for this rule and the legal principles underlying it are sufficiently covered by the opinions in the cases cited, and particularly in the cases of *Dunfee v. Childs* and *Perkins v. Pfalzgraff*, supra, and we need not reiterate them. These cases or some of them apply this rule to infants as well as adults proceeding by prochein ami before majority, as they may, *Poling v. Poling*, 61 W. Va. 78, 55 S. E. 993, *Seymour v. Alkire*, 47 W. Va. 302, 305, 34 S. E. 953, and cases cited, or in proper person after disability removed either under section 7, chapter 132, Code, or by motion, original bill or bill of review to set aside such decree of sale.

It is quite apparent that the fourth, fifth and sixth grounds for relief relied on fall within this rule, and that no reversal of the decree of sale for alleged errors therein will entitle plaintiffs to any relief against the immediate purchaser Smith, or any subsequent grantee, and particularly respondents Branch, and Branchland Coal Company, and that as to them this question is a closed one.

[3, 4] Next, and with reference to this rule, let us consider the other grounds for relief. First, as to Garnett and Elisha Chapman. Did the court acquire jurisdiction to sell their interests in the land purchased by Smith? Four of the six plaintiffs, infant defendants in the former suit, were properly named in the summons, but two, Garnett and Elisha, were not named in the bill, otherwise than as M. J. and Eliza Chapman. Wilkinson was appointed guardian ad litem for the infant defendants, by the names designated in the bill, and so answered for them. No other answer appears to have been filed for Garnett or Elisha, and they were not served with process and did not otherwise appear. But their mother, the plaintiff and administratrix was examined as a witness in the cause, and gave the names of all these infant defendants correctly. Their true names were thus made to appear

on the record, whereby the error in process and bill could, on motion, have been corrected, certainly if the right party has been served, or, as in this case, where no process was necessary. 1 Daniell, Ch. Pl. and Pr. 430; section 13, chapter 125, Code 1906; Ferrell v. Ferrell, 53 W. Va. 515, 44 S. E. 187. As was the case in *Alexander v. Davis*, 42 W. Va. 465, 26 S. E. 291, a decree in the cause recites filing of the answer of the guardian ad litem, but no answer is found in the record. It was held that the recital of the decree was not conclusive, the certificate of the clerk making no allusion to the absence of the answer. The decree in that case was not treated as void, but voidable only, entitling the infant defendants, within six months after reaching their majority, to show good cause for setting it aside; but it was not intimated that because of the absence of the answer there was lack of jurisdiction to pronounce the decree complained of. It was regarded as error only. And so with respect to decrees in *McDonald v. McDonald*, 8 W. Va. 678, *Myers v. Myers*, 6 W. Va. 369, and *Roberts v. Stanton*, 2 Munf. (Va.) 129, 5 Am. Dec. 463.

[5] We find that in most jurisdictions, in practically all, except where controlled by statute, the omission to appoint a guardian ad litem, or irregularities therein, are not regarded as jurisdictional, but amount to reversible error only, not going to the jurisdiction of the court. 22 Cyc. 641; 15 Am. & Eng. Ency. Law, 9, and cases cited in notes. We have examined most of these cases and find them supporting the text. Examples of those cases controlled by statute, and per contra, are *Dohms v. Mann*, 76 Iowa, 723, 39 N. W. 823, 825; *Roche v. Waters* (Md.) 18 Atl. 866; *Brown v. Sceggell*, 22 N. H. (2 Fost.) 548. Apropos to this discussion we held in *Boal v. Wood*, 70 W. Va. 383, 73 S. E. 978, that "Where the court once legally acquires jurisdiction of an unborn heir by representation through living heirs of the same class, its subsequent birth without thereafter being made a direct party to the cause does not divest the court of jurisdiction to decree against it, though to do so is error."

But it is said, that as *Wilkinson* was a defendant and interested and antagonistic, his appointment as guardian ad litem for the infant defendants was illegal, rendering the decree of sale void, not merely voidable. For this proposition appellants rely on *Plant v. Humphries*, 66 W. Va. 88, 66 S. E. 94, 26 L. R. A. (N. S.) 558. But it does not support the proposition. That case simply holds that if a guardian ad litem purchases at a sale the infant's coal the sale will be voidable not void. No such question is here involved.

While these errors relating to misnomers, want of a proper guardian ad litem, and a proper answer by him, may amount to reversible error, we do not think them juris-

ditional, so as to deprive purchasers of the protection of section 8, chapter 132, Code 1906, defeating their title.

[6] As to the second ground of relief, relating to mineral rights and larger interests in the surface, including timber rights, than the decree of sale authorized, or the commissioner, appointed to make the sale, advertised or undertook to sell, given the purchaser by the decree of confirmation, a more serious question is presented. In *Core v. Strickler*, 24 W. Va. 689, it was held, that a sale by a commissioner not previously authorized to make it, after confirmation, was not void, but a mere irregularity which was cured by the decree of confirmation, and not reversible error on bill of review. And in *Castleman v. Castleman*, 67 W. Va. 407, 68 S. E. 34, 28 L. R. A. (N. S.) 393, we decided that a sale by a commissioner of land by the acre, not so authorized by the decree of sale, was not void, but a mere irregularity likewise cured by confirmation. But those cases do not cover the exact point now presented. They involved no error covered by the decree of confirmation. The decree of sale in this case authorizes the commissioner appointed to sell, to first offer the mineral and mineral rights in the land, and if these do not bring sufficient to pay the debts, then to sell the whole estate in the land. Sale of the minerals under such a decree would undoubtedly include reasonable mineral rights, adequate to enable the purchaser to mine and take out the coal and other minerals. We so held, in effect, in *Armstrong v. Coal Co.*, 67 W. Va. 589, 69 S. E. 195. If the commissioner had advertised the sale of the minerals and mineral rights and other rights as described in the decree, and the court had confirmed the sale thus made, *Castleman v. Castleman*, supra, would be applicable. The notice or advertisement of the sale we do not find in the record. The bill alleges that the special commissioner "advertised the mineral, mineral rights and privileges," and it concedes that if reasonable rights only had been included in the decree of confirmation and deed of the commissioner, there would be no error; but it is alleged that without previous advertisement and sale these larger surface rights, with all the timber, and other rights not so advertised and sold were by the decree of confirmation and the deed of the commissioner, erroneously invested in the purchaser. Is this error in the decree of confirmation jurisdictional and not covered by section 8, chapter 132, Code? The question is a close one, but we are persuaded to answer in the affirmative. In some jurisdictions as formerly in Wisconsin and Michigan, where sales of a decedent's lands to pay debts are authorized on mere license granted an administrator, the proceeding to obtain license is regarded as one in rem rather than in personam. And such being the character of the proceeding, the court having taken jurisdiction of the

rem, errors or defects in the proceedings are not treated as jurisdictional, voiding the title of purchaser. *Grignon v. Astor*, 2 How. 319, 11 L. Ed. 283; *Mohr v. Manierre*, 101 U. S. 417, 25 L. Ed. 1052. In the former case, Judge Baldwin, at pages 338, 339, of 2 How. (11 L. Ed. 283), says: "As the jurisdiction of such courts is irrespective of the parties in interest, our inquiry in this case is whether the County Court of Brown County had power to act in the estate of Peter Grignon, on the petition of the administrator under the law of Michigan, providing that where the goods and chattels of a decedent are not sufficient to answer his just debts, on representation thereof, and the same being made to appear to the County Court where he dwelt, or where his real estate lies, it may license the executor or administrator to make sale of so much as will satisfy the debts and legacies. No other requisites to the jurisdiction of the County Court are prescribed than the death of Grignon, the insufficiency of his personal estate to pay his debts, and a representation thereof to the County Court where he dwelt or his real estate was situate, making these facts appear to the court. Their decision was the exercise of jurisdiction, which was conferred by the representation; for whenever that was before the court, they must hear and determine whether it was true or not; it was a subject on which there might be judicial action."

But in this State by statute a suit whether by administrator or creditor to sell a decedent's lands to pay his debts is in personam as well as in rem. Section 7, chapter 86, Code 1906, requires that the widow, heirs, and devisees, if any, and all known creditors of decedent shall be made defendants, and the rights of all parties, infants and adults, must be protected by proper process and decree. Jurisdiction of the person as well as of the property must be acquired, to sell and to give good title to purchasers.

The troublesome question we have here is, did the court have jurisdiction by decree of confirmation to invest in the purchaser title to property not sold, or offered for sale, or authorized to be sold, except on condition that that offered for sale and reported as sold by the commissioner would not sell for sufficient to pay decedent's debts? If the mineral and mineral rights sold and authorized to be sold brought a sufficient amount, as they did, to pay the debts, the decree gave no authority to the commissioner to sell other or additional property and property rights, and the commissioner was therefore without authority under the decree to sell more, and the court, we think must be regarded as having been without jurisdiction to confirm to the purchaser other property or greater rights and interests therein than was sold or authorized to be sold. The purchaser was entitled only to the property actually purchased, and the court by confirmation

could not confer upon him title to property or property interests not purchased and not authorized to be sold except upon a condition, which did not happen.

We have high authority for holding that an order confirming a sale of property not authorized to be sold by the decree or order of sale is void and inoperative. *Freeman on Void Judicial Sales* (3d Ed.) section 44. In *M. & M. R. R. Co. v. Soutter*, 2 Wall. 609, 17 L. Ed. 886, it was held that a sale by a marshal, unauthorized by decree, is a nullity. The question in that case was whether certain rolling stock of a railroad company was decreed, and included in the sale by the master. Apropos to this case the court says: "Upon principle, the question is by no means free from difficulty. We are clear that a sale without a decree to sustain it would be a nullity, and we doubt if a court can make it valid by a mere general order of confirmation. If, however, an issue had been made by exceptions or other proper pleading, as to the question whether any particular piece of property had been included in the decree, or order of sale, and the court had decided that it was so included, it might be an adjudication upon the construction of the decree which would bind the parties. Nothing of the kind occurred here. There is every reason, on the contrary, to believe, that the court had no suspicion that the Marshal had sold more than the decree authorized." As in that case so in this, no exceptions to the commissioner's report raised or perhaps could have raised on the report as made any issue as to the right of the purchaser to other property or larger interests in property than were actually sold and reported as sold. There was therefore no valid adjudication of the rights of the purchaser to the additional property and property rights and interests covered by the decree of confirmation. It was the duty of the court to have guarded carefully the rights of the infant defendants and to have seen to it that no injustice or injury was done them.

The purchaser's right to the additional property and property rights not having been adjudicated and the error appearing in the decree of confirmation, we think the court was without jurisdiction to confer title to the additional property and property rights on the purchaser. It was held in *Dunfee v. Childs*, supra, that error in a decree of confirmation is not covered by the statute, and a purchaser is not protected thereby. Pertinent is the case of *Hilleary & Johnson v. Thompson*, 11 W. Va. 113. One of the questions in that case was whether or not the growing crop on the land was sold with it, and it was held that under the circumstances surrounding that case, and in view of the misunderstanding at the sale, the conduct of the auctioneer, and the inadequacy of the price bid, along with the consideration, that a court in acting upon a report of sale, does

not exercise an arbitrary but a sound legal discretion in the interest of fairness and prudence, and with a just regard to the rights of all concerned, the sale was illegal and void. That case it is true was decided upon appeal, the decree below being reversed for the error and the cause remanded.

In *Shriver v. Lynn*, 2 How. 43, 11 L. Ed. 172, more land was sold than was decreed or the court had jurisdiction to sell, but after the sale the court undertook to confirm it. At page 59, it is said: "Does the ratification of the sale bring it within the rule, which applies to a case where the court has jurisdiction, but has committed errors in its proceedings? Had the court jurisdiction of the tract of land in controversy?" The answer given at page 60, is, "No court, however great may be its dignity, can arrogate to itself the power of disposing of real estate without the forms of law. It must obtain jurisdiction of the thing in a legal mode. A decree without notice, would be treated as a nullity. And so must a sale of land be treated, which has been made without an order or decree of the court, though it may have ratified the sale. The statute under which the proceeding was had requires a decree; at least such has been its uniform construction." In *Townsend v. Tallant*, 83 Cal. 45, 91 Am. Dec. 621, it is said: "But if the order of sale was *coram non jure*, then the 'sale' was no sale, and it could not be made valid and binding by any number of so-called confirmations." In *Bethel v. Bethel*, 69 Ky. (6 Bush) 65, 99 Am. Dec. 655, it is held, that a sale of land is void when not made in pursuance of a decree, and that no invalid sale can be sanctified by a mere confirmation of a commissioner's report. In that case the first decree authorized the commissioner to sell land in parcels, limiting the price per acre. The sale made was under a second decree at another term, authorizing a sale of the whole of the land, and without restriction as to price. The sale was held void. In *Campbell v. Clay*, 6 Bush (Ky.) 500, the statute required the commissioners to report certain facts, as a condition of selling infants' lands. The report was not strictly in accordance with the requirements of the statute. The statute not having been complied with the decree and sale were held void. See, also, *Rorer on Judicial Sales* (2d Ed.) sections 53, 56, and 499.

Upon the principles of these authorities, we hold, that the decree of confirmation in this case in so far as it undertook to confirm to the purchaser property and property rights other than what were sold and reported by the commissioner is absolutely void, and that the purchaser by the decree of confirmation took no title thereto as against the infant defendants, plaintiffs in this suit. Those rights which we think should be eliminated from the decree of confirmation and the deed of the commissioner, consist in the right conferred to erect

coke ovens and manufacture coke; the right to erect and maintain buildings on said land, other than those necessary to conveniently remove the coal and the other minerals sold and conveyed; the right to take any of the timber therefrom, for any purpose; rights of way over and upon said land, for general railroad purposes; the right to erect and maintain store houses or other improvements thereon, not necessary for the convenient mining and removal of coal and other mineral substances fairly included within the mineral rights sold and purchased by the purchaser. In so far as such property and property rights and interests were by the said decree of confirmation confirmed to the purchaser, we hold it to be void and that it should be set aside, reversed and annulled, and that defendants should be required to account to plaintiffs therefor, and for the use and occupation of said lands, not legally authorized, and for the property and property rights taken which were not sold and purchased under the decree of sale.

[7] And lastly, as to the decree on the petition of *Johnson Ferguson*. The petitioner was not a party to the suit. There was no mention of him in the bill, nor of the land claimed by him, nor after his intervention was the bill amended. The petitioner simply intervened by his petition, and the order filing it made him a party, whether plaintiff or defendant the decree does not say. He set up an oral contract for the sale of land, of which he alleged he was assignee. The petition alleges that one *Midkiff* was the purchaser, and that after his alleged purchase in the fall of 1898, he moved on the land and built a small log house; that *Chapman* was to make him a deed the following spring, but died in the meantime and never had done so. Petitioner concedes that nothing was paid by the purchaser until after the death of decedent, when the contract price, \$50.00, was paid to the administratrix, the wife. The legal title to this land on the death of *Chapman* descended to his infant heirs. The petition made no one a party to it; did not pray for process, and no opportunity was given to defend the petition, not even the guardian *ad litem* answered or was required to answer, or made any defense. The bill in this case pleads the statute of frauds, and want of jurisdiction in the court to decree the land to the petitioner, or to dismiss it out of the suit. These defenses would have been available to plaintiffs if they had been adults. In *Glade Mining Co. v. Harris*, 65 W. Va. 152, 63 S. E. 873, we held it to be the duty of the court to protect the interests of infant litigants, and that this rule is applicable to appellate courts, and that on appeal an infant will be given the benefit of every defense of which he could have availed himself or which might have been interposed for him in the trial court. This is not literally an appeal from that decree, but it is a suit by infants show-

ing cause against it. But the particular question presented for decision now is, had the court jurisdiction of the parties to pronounce the decree? As there was no issue between plaintiff and petitioner presented by the bill, and the petition did not make parties thereto, the decree pronounced in favor of the petitioner without process we think was utterly void. To confer jurisdiction it is necessary to have pleadings presenting an issue to be tried, and also to have jurisdiction of the person by process or appearance. Many decisions say that where a case is made out between co-defendants by evidence arising from pleadings between complainant and defendant a court of equity may and should render a decree between the co-defendants, but that when there are no such pleadings a court of equity cannot render a decree between co-defendants. 8 Enc. Dig. Va. & W. Va. Rep. 286, and many cases cited. We do not think it can be properly said that a case was made out between the petitioner and the infant defendants on the pleadings between plaintiffs and defendants in the original suit.

Treating the petition of Ferguson as an answer seeking affirmative relief, the rule of *Turner v. Stewart*, 51 W. Va. 493, 41 S. E. 924, syllabus 15, is applicable. That rule is that where an answer is not intended for defense only, but to affect the rights of a co-defendant, it must make him a party and call for relief against him upon its facts, as in case of a cross bill, and the process to answer it must be served upon defendant. *Goff v. Price*, 42 W. Va. 384, 26 S. E. 287; *Kanawha Lodge v. Swann*, 37 W. Va. 176, 16 S. E. 462. See *Dudley v. Barrett*, 66 W. Va. 363, 372, 66 S. E. 507, and *Dudley v. Buckley*, 68 W. Va. 630, 647, 70 S. E. 376, affirming the same proposition.

Therefore, for want of jurisdiction of the subject matter and of the parties, and for want of pleading and process, we are of opinion that the court in the original suit and the decree therein was wholly without jurisdiction to pronounce decree in favor of Ferguson, and that the decree in his favor is utterly void, and that it and the deed therefor by the commissioner should be set aside and removed as a cloud upon the title of plaintiffs and appellants.

The decree below will, therefore, be reversed in the particulars herein indicated, but affirmed in all other respects, and the cause will be remanded to the circuit court for further proceedings to be had therein in accordance with the principles herein enunciated and further according to rules governing courts of equity.

ROBINSON, J. (dissenting). Point 6 of the syllabus does not meet my approval. Where a court has obtained jurisdiction of

the parties and the subject matter of the suit, that which it may improperly do in relation to them is error, but not total invalidity. The court in confirming the sale, since by process and pleading it had obtained jurisdiction of the parties and the land, had the power to construe its decree of sale as to what mineral or mining rights were meant to be sold, though it may have acted ever so erroneously or improperly.

(72 W. Va. 377)

BOGGESS v. BARTLETT.

(Supreme Court of Appeals of West Virginia.
April 29, 1913.)

(Syllabus by the Court.)

1. MINES AND MINERALS (§ 79*)—LEASE CONTRACT—PERFORMANCE OF CONDITIONS.

An agreement by a lessor with the lessee to procure a release of the lien of a deed of trust upon the premises by an assignee of the note representing the debt so secured, as a condition precedent to payment of part of the purchase money of the lease, is not discharged or performed by the procurement of a release of the lien by the original creditor.

[Ed. Note.—For other cases, see *Mines and Minerals*, Cent. Dig. § 209; Dec. Dig. § 79.*]

2. MINES AND MINERALS (§ 79*)—LEASE CONTRACT—PERFORMANCE OF CONDITION.

Nor is the effect of the agreement destroyed or performance of the condition excused by proof, in an action for recovery of the deferred purchase money, of payment of the debt secured by the deed of trust to the original creditor, before assignment, or its extinction by merger in the hands of an assignee.

[Ed. Note.—For other cases, see *Mines and Minerals*, Cent. Dig. § 209; Dec. Dig. § 79.*]

3. ACTION (§ 62*)—PREMATURE COMMENCEMENT—VALIDATION.

In such case, the surrender of the lease, under a provision thereof permitting it, after the commencement of the action, but before trial thereof, does not warrant recovery. It is requisite to the maintenance of a suit that there be a cause of action at the date of its institution.

[Ed. Note.—For other cases, see *Action*, Cent. Dig. §§ 718-721, 723; Dec. Dig. § 62.*]

4. CONTRACTS (§ 303*)—ACTIONS—DEFENSE—WAIVER OF BREACH.

A party to a contract causing, by his own default, a breach of one of its subsidiary or collateral provisions, the purpose of which was to suspend the time of payment of money by him to the other, is deemed to have waived the benefit thereof, and cannot rely upon the breach as a defense to an action for the money.

[Ed. Note.—For other cases, see *Contracts*, Cent. Dig. §§ 1409-1448; Dec. Dig. § 303.*]

5. CONTRACTS (§ 278*)—WAIVER OF BREACH.

In such case, if the collateral or subsidiary agreement is separable from the main contract, and was made for indemnity of the defendant, he is deemed to have elected to forego its benefit and rely upon the main or general contract for compensation in damages for violation of plaintiff's obligation under it.

[Ed. Note.—For other cases, see *Contracts*, Cent. Dig. §§ 1207-1213; Dec. Dig. § 278.*]

Error to Circuit Court, Marion County.

Action by Harriett A. Boggess against Fred W. Bartlett. Judgment for plaintiff, and defendant brings error. Affirmed.

W. S. Meredith, of Fairmont, for plaintiff in error. Harry Shaw, of Fairmont, for defendant in error.

POFFENBARGER, P. The judgment here complained of is for the amount of a check, \$1,250, representing part of the purchase money of a lease for oil and gas purposes, executed by the plaintiff to the defendant, and interest on said sum. It rests upon a verdict which was objected to on several grounds, all of which the court held untenable. The case was tried in the intermediate court of Marion county, whose judgment was affirmed by the circuit court of said county, from which the judgment comes here on a writ of error.

By agreement of the parties, admitted by the plaintiff as well as proved by the evidence, the money represented by the check was not to come immediately into her hands, but was either to remain in the hands of the defendant, or in the hands of a depository, until the plaintiff should free the lease of a claim to a prior lien on the land by one C. A. Snodgrass, as assignee of a note secured by a deed of trust. As to the nature or character of the deposit, there is controversy, but the agreement to make a deposit with W. S. Engle, until the lien should be released or the cloud dissipated, is admitted. To consummate the deal the defendant sent the plaintiff a check along with another and two notes by his agent. When this check was examined it was found to have been written for \$1,050, instead of \$1,250. Thereupon the agent drew another in the name of his principal for the correct amount, \$1,250, which he delivered to the plaintiff along with the other check and the notes. This check was exchanged at a bank in Fairmont for a certificate of deposit in an equal amount, which was forwarded to Engle, the depository. By order of the defendant, the drawer, payment of the check was refused, when it was presented at the bank at Mannington on which it was drawn, and thereupon it was protested and returned to the bank which had issued the certificate of deposit. Then, upon request, Engle returned the certificate of deposit, which was surrendered to the bank by which it had been issued and the check taken up. The action is in debt on the check, and defense is made under the general issue, and also a special plea charging failure of consideration. The action of the court in overruling the demurrer to the declaration is the ground of an assignment of error; but the assignment is unsupported by any argument, and we perceive no defect in the declaration.

The additional facts bearing upon the issues submitted to the jury are substantially

as follows: Owning a tract of land containing 121 acres, situate in Marion county, the plaintiff on March 23, 1905, conveyed it to James N. Shaw by a deed of trust, to secure the payment of a note for the sum of \$1,000, executed by the plaintiff and her husband, and payable to Eliza A. Rusk 12 months after date. Later, about November, 1906, she and her husband conveyed the land to one J. D. Charlton for the use and benefit of the Exchange Bank of Mannington. On November 10, 1906, Charlton drew his check for \$1,097.88, payable to Eliza A. Rusk, which was paid and bears her indorsement. It bears the following memorandum: "For note of E. A. Rusk against O. J. Boggess." Charlton took from her a written assignment of the note and the deed of trust. Having thus gotten the land and paid or bought the note, Charlton conveyed back to Mrs. Boggess, on the same day or a day or two later, an interest in the oil and gas in the tract. Then he conveyed the residue to the Exchange Bank of Mannington, for which he had acted as agent in the transaction. Early in March, 1909, Charlton and the bank united in a deed conveying the land to C. A. Snodgrass, and Charlton by direction of the bank executed written assignments of the note and deed of trust to him. The assignment is dated March 3, 1909, and was acknowledged October 26, 1909. Both assignments of the note were without recourse. By a letter dated March 6, 1909, Snodgrass gave Mrs. Boggess notice of his alleged purchase of the note and claim of right to enforce the deed of trust against her oil and gas interest in the land. Her husband responded to the notice for her and was fully advised of the claim. Acting for her, he effected the contract of lease of her interest to Bartlett April 17, 1909, a part of which was the agreement to deposit with Engle Bartlett's check for \$1,250 of the purchase money, or a certified check or certificate of deposit therefor (a question as to which the evidence conflicts), to be held until Mrs. Boggess should procure a release of the lien claim. Later, and long after she had parted with the note, Mrs. Rusk executed a release of the deed of trust. This action was brought July 27, 1909. Bartlett assigned the lease to N. F. Clark, who surrendered it in April, 1910, before the trial of this action, under a clause thereof permitting him to do so. Plaintiff's husband swears Charlton, or the bank whose agent he was, agreed to pay the Rusk note as part of the consideration for the conveyance of the land to him. Snodgrass, who as attorney for Mrs. Rusk collected the note from Charlton, says he does not know whether such was the agreement.

[1] Procurement of a release of the deed of trust from Mrs. Rusk did not constitute performance of the condition precedent to the payment of the \$1,250 to the plaintiff. At the time she executed it, Mrs. Rusk had no interest in the note or the deed of trust.

She had long since assigned the note to Charlton. The procurement of a release from her was an attempted evasion of the plaintiff's obligation. It was distinctly understood between her and Bartlett that the claim of Snodgrass, not Mrs. Rusk, was to be extinguished before absolute and final payment of the money.

Nor did the invalidity of Snodgrass' claim, assuming the note to have been paid and not purchased by Charlton, or the lien and debt to have been merged in the title to the property, when both came into the possession and ownership of Charlton, constitute any defense. On the face of the contract, as sworn to by the parties, there was no agreement to pay the \$1,250 to the plaintiff except upon condition. According to the witnesses for the plaintiff, the money or a certificate of deposit thereof, or a certified check therefor, was to go into the hands of Engle and to be held by him, as an indemnity in favor of Bartlett against the claim of Snodgrass, until that claim should be extinguished. According to the testimony of the witnesses for the defendant Bartlett's check only was to go into the hands of Engle. If this testimony states the contract truly, the money was not to be actually paid by Bartlett until after the procurement of the release. In neither case was there an obligation of direct payment to the plaintiff. She agreed with Bartlett to procure a release of the alleged lien on the subject-matter of the lease. He demanded the lease with a clear record title, and she agreed to give it in that way. As executed it was not such a lease, and she agreed to forego payment of the money in question until it should be made so. If the claim of Snodgrass was invalid, for either of the two reasons assigned, she could have compelled him to execute a release by proper proceedings, and agreed to do so. Her agreement was not to procure a release from any other person, for no other person was asserting any claim under the deed of trust. By her contract she precluded herself from absolute payment, and bound herself to the performance of the condition precedent. In such cases, recovery cannot be had without previous performance of the condition. Indeed, no right of action accrues until after such performance. *Plumbing Co. v. Carr*, 54 W. Va. 272, 46 S. E. 458; *Parker v. Building & Loan Ass'n*, 55 W. Va. 134, 147, 46 S. E. 811; *Reynolds v. Tompkins*, 23 W. Va. 229; *Wharton, Con. § 594*; *Hammond, Con. § 466*; *Chitty, Con. 833*.

[2] Plaintiff's effort to establish payment of the debt or extinction thereof against Bartlett in this suit is no performance of the agreement. She undertook to establish that fact against Snodgrass, and to make it conclusive by the procurement and recordation of a release from him. He is no party to this suit, and an adjudication of payment of the debt here against Bartlett would not conclude him or affect any right he may have.

[3] As the reason or purpose of the collateral agreement of indemnity ceased with the surrender of the lease, right of recovery might be founded on that fact, if the surrender had occurred before the institution of the action, but it did not. The action was commenced July 27, 1909, and the surrender occurred April 17, 1910, about a month before the trial of the action. As there was no right of recovery nor of action at the time the action was commenced, the proceeding was fatally and incurably defective. Subsequent acquisition of the right to sue for the debt described in the declaration conferred no right of recovery in this action. It was prematurely instituted. *Wildasin v. Long*, 82 S. E. 205, decided at this term, and not yet reported; *Frye v. Miley*, 54 W. Va. 325, 46 S. E. 135; *Sillings v. Bumgardner*, 9 Grat. (Va.) 273; *Lemon v. Hansbarger*, 6 Grat. (Va.) 301. A cause of action is incomplete until the occurrence of default on the part of the defendant, his invasion of the plaintiff's right, or neglect of the duty he owes the plaintiff, and the cause of action must exist at the date of the institution of the suit.

[4] As to the character and terms of the collateral agreement of indemnity, the testimony is oral and conflicting. Its terms, as contended for by the defendant are testified to by himself and two other witnesses, Hess and Weed. Plaintiff's husband testifies with equal emphasis to the different terms and provisions contended for by the plaintiff. Bartlett and his witnesses say Engle was to hold his check until the lease should be procured. Boggess says the money was to be actually paid or the check cashed, and the money loaned out and the evidence of indebtedness placed in the hands of Engle. The check was never placed in the hands of Engle. On the contrary, Bartlett sent the check by Weed along with the notes and an additional check for delivery to Mrs. Boggess. Owing to a mistake in it as to the amount, the check was destroyed, and Weed drew another for the correct amount and delivered it to her. His acts accord with the statement of the contract by Boggess rather than that by Bartlett and his witnesses. The delivery of the check occurred very soon after the agreement. Weed and Boggess went from Mannington to Parkersburg to close the contract, the former carrying with him the checks and notes. Upon this evidence, it was competent for the jury to find either way.

[5] If the contract was as stated and claimed by the plaintiff, the defendant violated it and prevented the consummation thereof by stoppage of payment of the check. The collateral agreement was for his benefit and protection. He had agreed to pay \$3,630 for the lease, and executed his obligations for that amount, two notes for \$1,000 each, his check for \$380, and another for \$1,250, but the money represented by the latter was to

go into the hands of a third party and there remain until the release of the deed of trust. There was consideration for the \$1,250. It was part of the purchase money. The deposit agreement was collateral, relating to the time of payment. This sum of money was part of the agreed value of the lease executed to him, but there was a collateral agreement made for his benefit and protection. The money was to be held as a trust fund until the condition for final payment to the plaintiff should be performed. The condition was one of indemnity, not satisfaction nor relinquishment. It could be waived, and, once waived, the money became due immediately. His stoppage of payment of the check prevented the consummation of the agreement. In so doing, he impliedly waived the benefit of it, elected not to perform his part of it, and yet claimed and held the benefit of all other provisions of the contract. The collateral agreement was not a necessary element of the contract in the sense that it could not have been omitted in the formation thereof. It could have been so framed as to permit the lessee to rely upon general legal and equitable rules and principles for his indemnity against the Snodgrass claim. He elected in the first instance not to rely upon the law for such protection, but upon an express contract. By refusal to perform his part of that subsidiary agreement, he virtually elected not to take the benefit thereof, and to stand as if it had not been made. In this situation, logic, equity, and law require him to pay the money as he would have done had the contract been closed without the collateral agreement, and rely upon the law and the right arising out of the general contract for redress of such injury as might result to him from the Snodgrass claim. Of course Mrs. Boggess agreed to procure the release before receiving the money, but she agreed to do that on condition that Bartlett should deposit it or pay it to her and intrust her to deposit it. He was to make the money secure in a certain way, before her duty respecting the release began. That act of his was a prerequisite to obligation on her part to move for the release for the purposes of the collateral or subsidiary agreement. Her obligation under her general agreement to furnish a lease with a clear record title was an entirely different thing, not affected by the failure of the special indemnity agreement.

The general principle underlying this conclusion was applied, under circumstances somewhat different from those of this case, in *Ashland Coal & Coke Co. v. Hull Coal & Coke Co.*, 67 W. Va. 503, 68 S. E. 124. The contract involved in that case was more executory in character than this, but the conduct of the parties here embraces all the equitable considerations and elements of estoppel found in that case. Bartlett has retained the benefit of the general contract, while re-

fusing to consummate the collateral or special agreement. His default induced that of the plaintiff upon which he relies as matter of defense, and the policy of the law denies to the wrongdoer the benefit of his wrongful act. Other cases illustrating the application of the principle of waiver, as applied to contracts containing dependent or concurrent covenants, are referred to in *Ashland, etc., Co. v. Hull, etc., Co.*, here cited.

The petition for the writ of error charges generally error in the rulings upon instructions. It specifies no particular ruling as being erroneous, nor does the brief. Not more than two instructions were given for the plaintiff, and one only was given for the defendant. These seem to have properly submitted the vital inquiry to the jury, namely, the terms of the special contract. Several instructions requested by the plaintiff and two by the defendant were refused. We perceive no error in the rulings upon any of them.

The judgment will be affirmed.

(139 Ga. 816)

CHICAGO BLDG. & MFG. CO. v. BUTLER
et al.

(Supreme Court of Georgia. April 16, 1913.
Rehearing Denied May 16, 1913.)

(Syllabus by the Court.)

1. APPEAL AND ERROR (§ 1173*)—DECISION—JUDGMENT ERRONEOUS IN PART ONLY.

Where a judgment excepted to is erroneous in part, and can be segregated so that the legal part can be separated from the illegal, it is not necessary to set aside the entire judgment, but only the part which is erroneous.

(a) Where a number of persons have been sued, and a verdict has been rendered in favor of all the defendants, and where on review the evidence shows that the verdict is sustained as to all the defendants except two, and there is no evidence to support the verdict as to them, the judgment of the trial court, overruling a motion for new trial, will be affirmed as to all of the defendants except the two in whose favor there was no evidence, and as to them the judgment will be reversed.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4562-4572, 4656; Dec. Dig. § 1173.*]

2. VENDOR AND PURCHASER (§ 44*)—ACTION ON SUBSCRIPTION CONTRACT—EVIDENCE.

It was not error to exclude the following evidence offered by the plaintiff, where it does not appear that the defendants were present and were connected in some way with the transaction, to wit: "When I commenced soliciting subscriptions, a meeting was held at the courthouse at Greensboro, Ga., and at this time I read the contract in full and explained exactly what would be necessary, and in fact that unless we were able to secure at least 50 signatures, covering 50 shares of stock, at \$100 each, the contract would be null and void, and not binding on any of the parties."

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. §§ 69-76; Dec. Dig. § 44.*]

3. EVIDENCE (§ 564*)—HANDWRITING—STANDARD OF COMPARISON.

Before a paper purporting to be signed by a person can be admitted in evidence, the pur-

pose of introducing which paper is to have a comparison by the jury of the signatures to the paper with the signature to another paper, which is sued upon, and to which a plea of non est factum has been filed, it is necessary that the signature to the former paper shall be legally proved, or acknowledged to be genuine.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 2385-2389; Dec. Dig. § 564.*]

4. EVIDENCE (§ 434*) — PAROL EVIDENCE — CONTRACT—FRAUD IN PROCUREMENT.

The general rule is that parol contemporaneous evidence is not admissible to contradict or vary the terms of a valid written instrument. But where a written instrument is sued upon, and the alleged makers file pleas of non est factum, and that the instrument was procured by fraud, evidence tending to support such pleas is admissible.

(a) In such a case, evidence tending to show that the alleged makers did not sign the alleged contract sued on, and that the contract was procured by fraud, is not admissible as contradicting or varying the terms of a valid written instrument. It denies the existence of such a contract.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 2005-2020; Dec. Dig. § 434.*]

5. PARTNERSHIP (§ 217*)—SALES—AUTHORITY OF PARTNER—EVIDENCE.

Where a member of a partnership signed the firm name to a contract, which was as to a matter not legitimately connected with the partnership business, and the partner so signing had no authority to sign such contract, it is not error to allow another member of the firm to testify, on the trial of a case in which the members of the firm were codefendants, that the firm had agreed among themselves that they did not want any stock in the business that the contract was signed to secure.

[Ed. Note.—For other cases, see Partnership, Cent. Dig. §§ 419-425; Dec. Dig. § 217.*]

6. HUSBAND AND WIFE (§ 137*) — SEPARATE PROPERTY OF WIFE—ACTION ON CONTRACT—ADMISSIBILITY OF EVIDENCE.

In this state a wife is a feme sole as to her separate estate, and her husband cannot bind her or her property without her authority. Consequently, where suit was brought against a wife on a contract alleged to have been signed by her, and to which she had filed a plea of non est factum, it was not error to exclude from the jury a postal card, written by the husband to the agent of the plaintiff, authorizing the agent to "put down one share" of the stock called for in the contract to the wife.

[Ed. Note.—For other cases, see Husband and Wife, Cent. Dig. §§ 512-523, 939, 940; Dec. Dig. § 137.*]

7. VENDOR AND PURCHASER (§ 315*) — SUBSCRIPTION TO BUY—EVIDENCE.

It was not error to refuse to allow the attorneys for the plaintiff to put in evidence a copy of a notice, and to testify, in connection therewith, that the same was a copy of a notice sent to each defendant in a suit brought to recover principal, interest, and attorney's fees for an alleged breach of a contract, showing that the attorneys held the claim sued on for collection, including attorney's fees.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. §§ 928-931; Dec. Dig. § 315.*]

8. PRINCIPAL AND AGENT (§ 108*) — SUBSCRIPTION TO BUY—DOCUMENTARY EVIDENCE—RECEIPT.

Where by the terms of a written contract a butter factory was to be built according to specifications by one of the parties and turned over to the other party thereto on the comple-

tion of the plant, a written receipt, accepting the plant as complying with the terms of the contract, and signed by persons other than the parties defendant to the suit, was not admissible in evidence as against those alleged to have breached the contract; it not appearing either that they signed the receipt, or that the committee signing the receipt was one appointed and acting under authority of the contract.

[Ed. Note.—For other cases, see Principal and Agent, Cent. Dig. §§ 278-293, 353-359, 367; Dec. Dig. § 103.*]

9. TRIAL (§ 296*) — INSTRUCTIONS — CURE OF ERROR.

The following charge of the court was not erroneous, because of the use of the word "requires": "Where you find there is a conflict in the evidence, the law requires you to reconcile that conflict without imputing willful perjury"—especially where the court followed this language immediately with the following: "If, however, you find a conflict in the evidence, and are unable to reconcile it, the law requires that you take the entire testimony, search it carefully for the truth, and where you find that truth to be, let that establish and control your verdict."

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 705-713, 715, 716, 718; Dec. Dig. § 296.*]

"Error from Superior Court, Greene County; B. L. Rawlings, Judge.

Action by the Chicago Building & Manufacturing Company against J. F. Butler and others. Judgment for defendants, and plaintiff brings error. Affirmed in part, and reversed in part.

F. B. Shipp and Jos. P. Brown, both of Greensboro, for plaintiff in error. Geo. A. Merritt and Noel P. Park, both of Greensboro, for defendants in error.

HILL, J. The Chicago Building & Manufacturing Company brought suit against F. J. Butler and 18 others, and alleged that the defendants were subscribers to a contract wherein each agreed to pay \$100, subject to the conditions of the contract, the material portions of which are hereinafter set out. The defendants were alleged also to be members of the Greensboro Creamery Association, referred to in the contract as the first party thereto. By the terms of the contract the plaintiff was to erect, build, equip, and deliver to the defendants a butter factory, in consideration of the purchase price of \$4,950. The contract stipulates that "for any unpaid or deferred balance of subscription all delinquent subscribers are jointly liable." It is also provided that, when "any payment is deferred, all necessary cost of collection and discount may be included, should second party so desire. All remaining subscriptions or note balance, after said association's entire indebtedness to second party has been paid, shall be duly assigned to said corporation for a working capital." Also: "Pursuant to the laws of his state and these conditions, it is agreed that each stockholder shall be liable for the amount of stock set opposite his or her name, and no more." It was alleged

that all the defendants signed and subscribed to said contract, or authorized their signature and subscription thereto, and became bound by the terms of the contract, and were each severally liable on the contract, as members of the Greensboro Creamery Association, to the plaintiff, for the balance due, amounting to \$2,000, besides 33½ per cent. of the amount recovered, which the plaintiff agreed to pay its attorneys of record. The prayer of the petition was for a joint and several judgment against all the defendants for principal, interest, and attorney's fees.

The defendants filed their plea of non est factum, and set up that the alleged contract was obtained from them by the agents of the plaintiff through fraud, in that the subscription list paper was folded by the plaintiff's agents so as to conceal from defendants the written contract on the other side, and by certain misrepresentations made by those agents as to matters not embraced in the contract; that the figures "1" to "100" representing respectively the number of shares of stock and the price thereof, appearing opposite their names, were not on the paper when they signed, and were not placed there by their consent or with their knowledge; and that the paper the defendants signed was a blank sheet, containing only the names of a sufficient number, as the agents of the plaintiff represented, to insure the building of the plant, and defendants did not know they were signing a contract with conditions as set out in the contract sued on. Demurrers in abundance were filed by both the defendants and the plaintiff, some of which were sustained and some overruled by the court. After much evidence pro and con, the case went to the jury, which returned a verdict for all the defendants. A motion for a new trial was overruled, and the plaintiff excepted.

[1] 1. The assignments of errors upon the overruling of the various demurrers are without merit. The verdict is supported by the evidence as to all the defendants except two, namely, W. F. Jackson and O. A. Parker. They filed the same answers and defenses as the other defendants; and we have searched the record and fail to see any evidence supporting their defense. The plaintiff made out a prima facie case against all the defendants. If the evidence supported the defense filed by these two defendants, we would have little difficulty in affirming the judgment of the court below as to all the defendants; but, there being nothing in the record to support the defense of the two defendants named, we are confronted with the question whether we can affirm the judgment as to the other defendants, and reverse it as to these two. We understand the rule to be that, where a judgment is entire and indivisible, it cannot be affirmed in part and reversed in part, but the whole must be set aside if there be reversible error therein.

8 Cyc. 448 (b); 1 Black on Judgments, § 211. But where a judgment appealed from can be segregated, so that the correct portions can be separated from the erroneous, the court will not set aside the entire judgment, but only that portion which is erroneous. 3 Cyc. 447 (2); *Austin v. Appling*, 88 Ga. 54 (5), 13 S. E. 955; *Caudell v. Caudell*, 127 Ga. 1 (3), 55 S. E. 1028; *Brown v. Tomberlin*, 137 Ga. 596, 601, 73 S. E. 947; *Crooker v. Hamilton*, 3 Ga. App. 190 (1), 59 S. E. 722. See *Powers v. Irish*, 23 Mich. 429, 438.

Assuming that the authorities last cited support the rule that the legal portion of a judgment can be separated from the illegal, let us turn to the evidence and see whether it supports a verdict for all the defendants except the two named above. Each of the defendants (other than the two named) testified substantially in support of their answers. The testimony of these witnesses tended to show that they did not sign the contract sued on and attached to the petition, nor did they authorize any one else to sign their names thereto; that all they signed was what purported to be a subscription list only for the tentative purpose of ascertaining, according to the representations of the agents of the plaintiff, whether the desired number of subscribers (50) could be secured. If a sufficient number could be obtained, then a meeting was to be called, and an organization was to be perfected by all the subscribers; but no liability was to attach to any of the subscribers until the requisite number were obtained and the meeting called. If any other paper containing a contract was attached to the subscription list, the agents of the plaintiff did not exhibit it to the defendants, but kept it concealed for the purpose of perpetrating a fraud upon the defendants. The agents represented at the time that no other obligation or contract was connected with the subscription list; that, if the creamery or butter factory could be organized, the plaintiff would put it in operation, and the subscribers could get 30 cents per pound for their butter; and that the plaintiffs had a process by which the onion and bitter weed taste and odor in milk and butter could be removed, and they would put in a pasteurizer to kill the germs, and the milk would not sour. The testimony for the defendants (other than the two named) tended to show that the butter made by the plaintiff at the creamery built by it did not bring 30 cents per pound, and the onion and bitter weed taste and smell were not removed from the milk and butter. The creamery after it was put in operation was not a success, and a great amount of butter was lost on account of the fact that there was no way to keep it, etc. One of the witnesses for the defendants testified (what was substantially testified by all who did testify) as follows: "I signed contract on those representations. Said he would guarantee it. Said would have meet-

ing in courthouse and would be fixed. Didn't see anything except list on that I signed. He said paper I signed was list of names. Told him I wouldn't pay one nickel for common creamery. There was no such contract as exhibited to me [indicating]. Paper I signed wasn't read over to me. Didn't see anything but names. Said, if got up, would call meeting and complete it. I signed, thinking it was going to be \$100 a share, provided they organized. He did not tell me I would be liable for anybody who didn't pay. He said nothing about being my agent. When I signed paper, it was doubled up and a clamp through there, so that all printing and writing were hidden, and nothing but the list of names could be seen. * * * I signed paper on his representations to get out bitter weed, onion, and souring, and to ship to Jacksonville, Fla., a good market." The testimony for the plaintiff was, in the main, in direct conflict with that of the defendants. From the evidence we think the jury was authorized to find a verdict for all the defendants except the two named above. As to these two there seems to be no evidence which would authorize the jury to find in their favor; and we therefore affirm the judgment of the court below as to all the defendants except the two named above, and reverse the judgment and order a new trial as to W. F. Jackson and O. A. Parker.

[2] 2. The seventh ground of the motion for a new trial assigns error because the following evidence contained in the interrogatories of one of the defendants' witnesses was withheld from the jury, to wit: "When I commenced soliciting subscriptions, a meeting was held at the courthouse at Greensboro, Ga., and at this time I read the contract in full and explained exactly what would be necessary, and in fact that unless we were able to secure at least 50 signatures covering 50 shares of stock at \$100 each, the contract would be null and void, and not binding on any of the parties." It is insisted that this evidence was material to rebut the pleas and answers of the defendants. It does not appear that the defendants were present and were connected with the meeting, and therefore the evidence was properly excluded.

[3] 3. Error is assigned because the court refused to allow the original tax returns containing the signatures of L. A. Boswell and J. E. Baynes, two alleged signers of the contract sued on, to go in evidence on the plaintiff's demand, after the reception of evidence by E. L. Lewis, the tax collector of Greene county, tending to show that he brought them into court under a subpoena duces tecum from his office, where they had been returned by the tax receiver of Greene county, and the further testimony of the receiver, Dolvin, which tended to show that he signed the returns as such receiver as a witness, and that he would not have signed as a witness if the returns had not been signed in

his presence, and to the best of his recollection it was the original signature of the party signing the returns. The court, after this, asked the tax receiver, Dolvin, if he knew it was L. A. Boswell's signature, and the witness answered, "No, sir." It is insisted that the returns should have been admitted to prove the signatures of Boswell and Baynes, the alleged signers of the contract sued on, by a comparison of the handwriting. The court did not err in excluding this testimony. Proof of handwriting may be resorted to, in the absence of direct evidence of execution. In such a case any witness is competent to testify, who will swear that he knows or would recognize the handwriting. Civil Code, § 5835. Other writings, proved or acknowledged to be genuine, may be admitted in evidence for the purpose of comparison by the jury. Civil Code, § 5836. But before a paper purporting to have been signed by one can be admitted in evidence, the purpose of tendering which paper is a comparison by the jury of the signature thereto with the signature to another paper sued upon, and to which a plea of non est factum has been filed, it is necessary that the signature to the former paper shall be legally proved or acknowledged to be genuine. *McVicker v. Conkle*, 96 Ga. 584, 24 S. E. 73.

[4] 4. Complaint is made that the court erred in admitting the testimony of A. S. Mosely, one of the defendants, to the effect that Moore, the plaintiff's agent, who procured the name of the witness to the contract sued on, represented to Mosely that the creamery would take out the onion and bitter weed taste from the milk and butter treated by the creamery. The objection is that this was extraneous parol evidence tending to add to, vary, and contradict the terms of a written contract. The general rule is that parol contemporaneous evidence is not admissible to vary or change the terms of a valid written contract. Civil Code, § 5788. If the defendants signed the contract sued on, the rule invoked would apply. But they deny signing it. They insist that there is no contract, and that what purports to be such was procured through the fraudulent representations of the plaintiff's agents. That is the issue in the case. If they only signed a blank sheet of paper, as they allege, instead of signing a written and printed contract, they are not liable on it; and the evidence tending to prove this was admissible. Under the allegations contained in the defendants' answer, we think the evidence was admissible. See Civil Code, § 5790.

[5] 5. Error is assigned because the court admitted, over objection, the testimony of G. S. Miles, one of the defendants, which was in substance that the firm of Miles, Ellard & Ruarks had agreed among themselves that they did not want any stock in the creamery. The objection is that the agreement was a private one between the partners of this firm, and could not bind the plaintiff. The evi-

dence was admissible as showing that the firm name was not authorized on the alleged contract, and that the firm would not be bound by the signature of the firm to a contract made by one member of the firm, not authorized to sign the firm name to a matter not legitimately connected with the partnership. It did not appear that the firm had authorized or ratified the signing of the firm name to the alleged contract. On the contrary, the testimony tended to show that it was not authorized. See Civil Code, § 3182.

[6] 6. The following evidence, offered by the plaintiff, was withheld from the jury: "A post card, acknowledged by J. P. McRae to have been written by him, postmarked Greshamville, Greene county, Ga., and addressed to D. W. Broadwater, Greensboro, Ga., as follows, to wit: '10/26/08. Mr. Broadwater—Dear Sir: My wife will take one share in your co-operative creamery, and pay you in four quarterly notes of \$25.00. I will stand by her and help her through. If this suits, you can put down one share, Mrs. J. P. McRae. If this doesn't suit, all right; if it does suit, let me know. Very Res., J. P. McRae.'" It is insisted that this postal card should have been admitted in evidence to show why the name of Mrs. McRae appeared on the contract as a subscriber. The court properly excluded this testimony. The husband would have no authority to sign his wife's name to the contract, or authorize any one else to do so, in the absence of express authority given by the wife. In this state a wife is a feme sole as to her separate estate, and no one can bind her or her property without her authority. See Civil Code, §§ 3007, 3011.

[7] 7. Error is assigned on the refusal of the court to allow the plaintiff's attorneys to put in evidence a copy of a notice, and to testify in connection therewith that the same was a copy of a notice sent to each defendant, showing that the attorneys held the claim of the contract sued on against them for collection, and that none of the defendants, except S. W. Tappan and J. L. Harris, came to see the attorneys, or made any response to the notice, until a year afterwards. It is insisted that the evidence was admissible as tending to show that by their silence the defendants admitted the claim held against them and to rebut the plea of non est factum made a year later. This evidence was not admissible for this purpose. The court did not err, therefore, in refusing to allow the attorneys for the plaintiff to put in evidence a copy of the notice, etc.

[8] 8. The following certificate and receipt

was admitted in evidence, and later in the trial was ruled out, to wit: "State of Georgia, 30th day of December. To the Chicago Building and Manufacturing Co., Chicago, Ill.—Gentlemen: We, the undersigned, executive committee, in behalf of and for the first party to the contract for the butter factory at Greensboro, county of Greene, state of Georgia, do hereby certify that in company with your special agent, Mr. W. P. Wort, have examined in detail the said butter factory and have checked off the specifications, and find nothing lacking to complete the same according to said contract and specifications aforesaid, and we have this day received the keys to the said factory. Jas. L. Brown, Chairman. J. R. Spinks. B. P. Kimbrough. T. A. Branch. J. A. Cathey." On the back of said certificate the following is written in ink: "Acceptance made with understanding and agreement that a pasteurizer is to be furnished by the Chicago Building & Manufacturing Company, at once. Said pasteurizer to be returned to said Chicago Building & Manufacturing Company, should the time ever come when it is not used by the creamery." It is insisted that the receipt was material, as showing that plaintiff had done what it undertook to do under the contract, and that the plaintiff had the right to have the written agreement of the acceptance. We think the receipt was properly excluded from the jury, as it nowhere connects the defendants with the acceptance, nor was it shown that the committee which signed the receipt was one appointed and acting under authority of the contract.

[9] 9. Complaint is made of the following charge of the court: "Where you find there is a conflict in the evidence, the law requires you to reconcile that conflict without imputing willful perjury." It is contended that the use of the word "requires" is erroneous, and is too strong a word to use in that connection. We think that the law does require the jury to reconcile the conflict in the evidence without imputing perjury to any witness; but, as the court further charged the jury in this immediate connection, "If, however, you find a conflict in the evidence, and are unable to reconcile it, the law requires that you take the entire testimony, search it carefully for the truth, and where you find that truth to be, let that establish and control your verdict," taking the whole charge on this question, the court did not err in giving the instruction complained of.

10. There is no merit in the other assignments of error.

Judgment affirmed in part, and reversed in part. All the Justices concur.

(129 Ga. 325)

ROLAND v. ROLAND et al.

ROLAND et al. v. ROLAND.

(Supreme Court of Georgia. April 18, 1913.
Rehearing Denied May 16, 1913.)*(Syllabus by the Court.)***1. JUDGMENT (§ 405*)—EQUITABLE RELIEF—**
GROUND.

Where a consent decree provided that a tract of land in dispute should belong to the defendant if he should pay to the plaintiff a specified sum by a date named, that if he should fail to do so the land should belong to the plaintiff, and that time was of the essence of the decree, equity would not relieve the defendant, or one who claimed to have purchased from him after the rendition of the decree, from the result of a failure to make the payment or a tender within the time limited, unless fraud preventing it, or some other sufficient ground of equitable relief, were shown.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 766, 767; Dec. Dig. § 405.*]

2. JUDGMENT (§ 874*)—PERFORMANCE—TENDER.

Where such a consent decree provided for the making of payment to the plaintiff by name, and was signed both by the clients and their attorneys, and where it was agreed and understood by them all, outside of the face of the decree, that such payment had to be made to the plaintiff in person, and not to the attorneys who had represented such plaintiff, and where, if such attorneys would otherwise have had an implied power to receive the money, it was revoked, a tender to one of them would not answer in lieu of tender or payment to the plaintiff in person.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 1643, 1644; Dec. Dig. § 874.*]

3. JUDGMENT (§ 461*)—EVIDENCE—PAROL EVIDENCE—CONTRADICTING DECREE.

Where the decree did not in terms provide for making payment to the attorneys of the plaintiff, but to such plaintiff by name, and the question of the right to make payment or tender to such attorneys depended on their general or implied powers, evidence was admissible to prove that it was agreed and understood by both clients and attorneys that the payment should be made to the plaintiff personally, and not to the attorneys, and that any authority of the latter to receive it was revoked with their consent. Such evidence was not objectionable on the ground that it contradicted the decree.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 892, 893, 895; Dec. Dig. § 461.*]

4. JUDGMENT (§ 682*)—PERFORMANCE.

If, after the rendition of such a decree, a third person purchased the land from the defendant, he took subject to the conditions of the decree; and if he was informed of the want of authority to receive the money on the part of the attorneys who had represented the plaintiff in ample time to have made a payment or tender to the plaintiff personally, but, instead of so doing, merely caused the money to be deposited in a bank, subject to the plaintiff's order, this was not a compliance with the decree.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 1203-1205; Dec. Dig. § 682.*]

5. TRIAL (§ 169*)—DIRECTION OF VERDICT—
GROUND.

Where both parties introduced evidence, and taken as a whole it required a verdict for the defendants, there was no error in the

court's directing such a verdict, instead of directing a nonsuit or dismissal *ex mero motu*.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 341, 381-387, 389; Dec. Dig. § 169.*]

6. DISPOSITION OF CASE.

The judgment complained of in the main bill of exceptions having been affirmed, the cross-bill of exceptions is dismissed.

Error from Superior Court, Colquitt County; W. E. Thomas, Judge.

Equitable action by J. P. Roland against Uretta Roland and others. Judgment for defendants on a directed verdict, and plaintiff brings error and defendants file cross-bill. Affirmed on the main bill, and cross-bill dismissed.

Mrs. Uretta Roland filed her equitable petition, seeking to cancel a deed which she had made to her husband. A demurrer was filed to the petition on certain grounds. It was overruled. The case was brought to this court by bill of exceptions, assigning error upon the overruling of the motion and striking certain parts of the answer. The judgment was reversed as to some of the rulings. 131 Ga. 579, 62 S. E. 1042. After the case was returned to the trial court, a settlement was had, and on April 4, 1910, a consent decree was taken covering the case, and also a petition for alimony which had been filed by the wife against the husband. It contained the following provisions: "(1) Geo. W. Roland is to pay to his wife, Uretta Roland, the sum of \$1,750 on or before December 1, 1910, without interest. (2) G. W. Roland is to have the rents, issues, and profits of said land for the year 1910, pay the taxes on same, and exercise acts of ownership over it. (3) The sum of \$1,750 is to be in bar of any suit for alimony damages, claims, rents, issues, or profits, and is to be in lieu of all claims whatsoever, in law or equity, which the wife may have against the husband, G. W. Roland, in the future. (4) If the said G. W. Roland pays the said \$1,750 by December 1, 1910, then the title to the said lands in question shall vest unconditionally in him, but if he does not pay said sum of \$1,750 on or by that time, then the title to the said lands shall vest in the wife, Uretta Roland, time being of the essence of this decree. (5) Geo. W. Roland shall pay all court costs in these two cases." The consent to this decree was signed by Mrs. Roland and her husband in person and also by their respective attorneys.

On March 13, 1911, J. P. Roland filed his equitable petition against Mrs. Uretta Roland, Benjamin A. Tucker, Zachie Whitfield, and Iola B. Morrison, and R. M. Morrison as administrators of the estate of John Morrison, alleging, in substance, as follows: At the date of the consent decree the land was reasonably worth \$3,500 to \$4,000, and it was not contemplated that Geo. W. Roland, the defendant therein, would fail to make the payment of \$1,750 to his wife and thus lose the

property. Geo. W. Roland was at the date of the decree, and still is, a resident of Florida, and is the brother of the present plaintiff. Shortly after the date of the decree Geo. W. Roland began negotiations with the plaintiff looking to the sale of the lands to the latter and the raising of the amount necessary to make the payment to his wife in compliance with the decree. Finally the present plaintiff bought the land from his brother, paying therefor the sum of \$3,000, and for the purpose of perfecting the title, at the instance of George W. Roland, placed on deposit to the credit of Mrs. Roland in the Citizens' Bank of Moultrie the sum of \$1,750, the whereabouts of Mrs. Roland being unknown to this plaintiff or to G. W. Roland at the time of the deposit, which was October 22, 1910. On that day this plaintiff and G. W. Roland paid to the clerk of the court the costs due under the decree, and G. W. Roland executed to this plaintiff a warranty deed to the land, and the latter, shortly thereafter, went into possession. This plaintiff did not know then or thereafter the place of residence of Mrs. Roland, and he charges that she concealed herself so that actual tender of the money fixed by the decree could not be made to her before the expiration of the date of payment therein named, and he also charges that she knew of the deposit in the bank long before December 1st. On December 2d she appeared in Moultrie, and was immediately tendered the money, which she refused. On that day she executed a warranty deed to Tucker for the recited consideration of \$2,750. On the same day Tucker, for the purpose of obtaining money to pay for the lands, executed to the Morrisons, as administrators, a security deed. On the next day Tucker executed to Zachie Whitfield a warranty deed for the recited consideration of \$3,000. The plaintiff charges that each of these parties took with notice of his rights and of the facts above stated. On December 5th Mrs. Roland procured from the judge of the superior court an order for a writ of possession, and under it this plaintiff was evicted and Zachie Whitfield entered into possession. The plaintiff has frequently asked Mrs. Roland and her attorneys to take possession of the deposit in the bank and to cause possession of the land to be surrendered to him. The prayers were for a cancellation of the deeds from Mrs. Roland to Tucker, from Tucker to the Morrisons as administrators, and from Tucker to Zachie Whitfield; for receiver and injunction; for the setting aside of the writ of possession and the order on which it was based, and the restoration of possession to the plaintiff; and for general relief and process.

In her answer Mrs. Roland denied any knowledge of the transactions between her husband and his brother, or that any money had ever been tendered to her under the consent decree. She also denied having con-

cealed herself, but alleged that she had continuously lived "in and around" the county where the suit was brought, either at the home of her mother or with her brothers and sisters, having nowhere else to go after her husband deserted her. She further denied that she knew anything about any deposit in the Citizens' Bank for her until after December 1, 1910, but alleged that the officers of the bank informed her on December 2d that the sum of \$1,750 was deposited in the bank for her, provided she would make a deed to the property in question, which she refused to do. She admitted selling and conveying the land to Tucker on December 2d, but alleged that the land belonged to her, that the decree had not been complied with, and that she had a perfect right to sell the property. The other defendants denied any knowledge or notice of any claim on the part of J. P. Roland, the present plaintiff, and alleged that the sale by Mrs. Roland to Tucker on December 2d, after the time for payment under the consent decree had elapsed without payment being made, was bona fide and for value, as was also the deed made by him to secure money with which to make the payment, and the sale by him on the next day.

By amendment the plaintiff alleged a tender to the attorneys of record of Mrs. Uretta Roland prior to December 1, 1910, and also a tender to her brother, who was alleged to be her agent, and a refusal of each tender.

As to some minor details there was conflict in the evidence; but taking it as to such matters most strongly in favor of the plaintiff, it showed the following facts: At the time when the settlement was made and the consent decree was taken, Mrs. Roland hesitated about agreeing, and stated that she was not willing for the money to be paid to any one but herself. Both she and her husband and the attorneys representing them agreed to this, and she was informed that unless the money was paid to her by December 1st, the land would be hers. There had been some discussion about writing the decree so that payment could be made to her or her attorneys, but, after her statement set out above, the decree was drawn with the provision that Roland should pay the money to his wife. The attorney who represented her in the transaction testified: "That was the absolute agreement. She withdrew my authority, if I ever had any, to receive the money. * * * I had no authority from the signing of the decree to accept the money or sell the land in any way. * * * She was to take the money in hand, and I run the risk of getting my fee. I could file a lien on the place. In fact she wouldn't consent to it any other way." On October 22d George W. Roland, the defendant in the former proceeding, went to Moultrie to close up a purchase of the land by his brother from him. They went to a person who appears to have been an officer of the bank, and J. P. Roland stated that his

brother wished to leave on a train which departed in a short time, and asked the official to assist him in winding up the matter. The attention of such official was called to the decree which had been rendered. He inquired where Mrs. Roland was, and they told him they did not know. He then inquired who were her attorneys, and was told that they were Messrs. Shipp & Kline. He said that, according to his understanding, they could receive the money. So they, or George W. Roland, asked him to go and pay it to the attorneys. He went to the office of the attorneys named, and said to Mr. Shipp that he supposed the latter represented the case (naming the case in which the decree had been rendered) and the attorney said he did. The bank official stated that there was a trade made and the money was ready, and he wanted to pay the attorney the amount specified in the decree. Arrangements had been made by which the money was ready to be paid. Mr. Shipp replied that he was not authorized to receive it, and that no one was so authorized except Mrs. Roland. The officer replied that he was a little surprised; that he thought, in a legal sense, one's attorneys were the same as himself and could receive the money. He then went back and conferred with the Rolands, and the three decided that the next nearest thing to paying it to her was to put it in her name on deposit, and that was agreed upon and done. There was no evidence of any tender to Mrs. Roland on or before December 1st, nor even to the attorney, except as above stated. Nor was there any evidence of any inquiry made as to her whereabouts from the attorneys, nor that she could not readily have been found. The only evidence tending in that direction was a statement on the part of J. P. Roland that: "I knew her [during] the months of November and December, 1910, but did not know where she lived at that time. I did make an inquiry to find out." What inquiry he made, or from whom, or when, or what difficulty there was in ascertaining her whereabouts, did not appear. George W. Roland left his wife, and she went to live with her mother. She did not leave the county, or conceal herself, or do anything else to prevent payment under the decree. Some time during the fall she heard in a casual way that "they" claimed to have money deposited to her credit in the bank of Moultrie, but no tender was made to her, nor did they ever tell her that they had money in the bank for her. She "just heard it like you would anything in the country." On December 1st she was in Moultrie and spent the day there. She met the attorney who had represented her husband in the litigation, and asked him if he was ready for a settlement, but was informed that her husband had left town some days previously, and that the attorney did not know where

he had gone. No tender was made to her, and nothing said to her about any money being in bank for her. On the 2d of December she again went to Moultrie and remained several days, during which time she conveyed the property to Tucker. The attorney who had represented the husband of Mrs. Roland in the previous litigation testified that he had endeavored to assist his client in raising money with which to pay the amount stated in the decree, but that the latter had gone to Florida without paying the attorney his fee, and the attorney did not know where he was, nor did he know anything of any deposit of money in the bank for Mrs. Roland until after December 1st. There was some difference among the witnesses as to the amount of this attorney's fee, and as to the statement of the witness in regard to it. There was some evidence tending to show that the officer of the bank was absent from Moultrie just before December 1st, and returned late on the evening of that day. There was other evidence which it is unnecessary to state in detail.

At the close of the evidence, on motion, the judge directed a verdict in favor of the defendants, and the plaintiff excepted. The defendants filed a cross-bill of exceptions assigning error on the overruling of certain demurrers.

James Humphreys and W. A. Covington, both of Moultrie, and Pope & Bennet, of Albany, for plaintiff in error. Shipp & Kline, of Moultrie, for defendants in error.

LUMPKIN, J. (after stating the facts as above). [1] 1. The consent decree required the husband to pay to his wife \$1,750 on or before December 1, 1910, in order for the title to vest in him, and provided that if he did not make such payment by that time, the title should vest in the wife. Time was expressly declared to be of the essence of the decree. He did not make the payment to his wife within the time specified, nor did he, or any person for him, make any tender to her. The evidence entirely failed to show any concealment of herself by the wife. Her husband having left her, she lived with her mother and kindred, but remained in the country from April 4th, the date of the decree, until after the 1st of December. No reason is shown why she could not have been found at any time between those dates. When the consent decree was taken, it was expressly agreed and understood by the parties and their attorneys that the payment must be made to the wife in person. The attorney who had represented her signed the agreement to the decree along with her, and testified that his power to receive the money was revoked, if he ever had any such authority. The only effort shown to pay or tender the money was a conversation between a bank official (with whom arrange-

ments had been made in regard to the money by the husband and his brother as the purchaser from him) and the attorney who had represented the wife in taking the decree. This occurred on October 22d, and the attorney expressly informed the officer that he did not have authority to receive the money, nor did any one else except the wife. Thus, after both the husband and his brother, who was purchasing from him, had been notified by the attorney of his lack of authority, no further effort was shown to pay or tender it within the time limited by the decree, except to deposit it in the bank for the wife. Of course this was neither payment nor tender to her. Time being of the essence of the consent decree, equity would not relieve the husband, or one claiming as a purchaser from him, after the rendition of such decree, from making payment within the time limited thereby, unless he were prevented from so doing by fraud, or for some other sufficient reason.

[2] 2. Unless the conversation between the bank official and the attorney who had represented Mrs. Roland, the wife, in obtaining the consent decree amounted to a tender binding on the wife, there was nothing showing any compliance with the decree on the part of the husband, or anything excusing compliance within the time fixed by it.

At common law an attorney's employment was generally held to end with the entry of judgment for or against his client, unless there was some additional agreement or circumstance continuing the relation or prolonging the authority. This general rule has been much modified. 4 Cyc. 940 (c), 952 (d). As early as 1791 the Court of Appeals of Virginia held, in *Hudson v. Johnson*, 1 Va. 10, that, in general, payment to an attorney at law who had prosecuted an action on a specialty was good, "on the custom of the country, particularly if he have possession of the specialty," though it was added that "under particular circumstances this rule might not apply, as if notice were given that no such power was vested in the attorney." In 2 Greenleaf on Evidence, § 518, the same rule is announced, but it is added that: "Proof of payment made to the attorney after his authority has been revoked will not discharge the liability of the party paying." In 8 Am. & Eng. Enc. Law (2d Ed.) 365, the rule is thus stated: "It is always an implied power of an attorney to receive payment of a claim intrusted to him for collection. A payment to him, while his authority is unrevoked, is therefore binding on his client unless it affirmatively appears that the party making the payment has actual notice of his want of authority." And on page 367 it is stated that: "A revocation of the attorney's authority, after judgment has been rendered but before payment, or an assignment of the judgment, will not affect the debtor paying to the attorney in

good faith relying on his authority to receive the payment, unless it appears that the debtor had notice of the revocation, or was chargeable with such notice." See, also, *Yoakum v. Tilden*, 8 W. Va. 167, 100 Am. Dec. 738; *Ruckman v. Alwood*, 44 Ill. 183. In *Erwin v. Blake*, 8 Pet. 18, 8 L. Ed. 852, Mr. Justice Story said that, where an attorney obtained a judgment and execution for his client, and levied on and caused to be sold property which was bid in by his client, and where the judgment debtor had a right to redeem the property within a particular period of time, by payment of the amount to the judgment creditor, there was strong reason to contend that the attorney was impliedly authorized to receive the amount, and thus indirectly to discharge the lien on the land; at least, if this was the common course of practice in the state where the transaction occurred. But it was said that it was not necessary to rely on that ground. See, also, *Gray v. Wass*, 1 Greenl. (Me.) 257. On the other hand, in *Re Grundysen*, 53 Minn. 348, 55 N. W. 557, it was said that the mere employment of an attorney to foreclose a mortgage does not give him authority to receive from the sheriff money paid after foreclosure to redeem the property from a sale to the mortgagee.

In this state a recovery of a judgment for money impliedly authorizes the attorney to collect it. Under the statute which gives to an attorney a lien upon suits and judgments (Civil Code, § 3364) a client cannot arbitrarily take from an attorney the right to enforce a judgment, without his consent, and so as to destroy his lien for an unpaid fee. But an attorney is not obliged to insist upon his lien or his right to collect the judgment or execution. He may waive it or submit to a discharge. One who pays to the attorney of record the amount of the judgment or execution without notice of any termination of his authority may well be relieved from further liability to the client. But if the attorney and client agree upon a discharge or a termination of his authority, and the judgment debtor is notified thereof, he cannot insist upon the right of the attorney to assert his lien or refuse to have his authority revoked. A case might occur where the question would arise whether such revocation of authority was a mere trick or device to prevent payment within the limited time, but the evidence presents no such situation here. It shows that all parties agreed and understood when the decree was taken that the payment was to be made to the client herself, and not to her attorney, and that his authority (if the decree in question falls within the general rule of the power of an attorney to collect) was revoked. It is not clear that the brother of the defendant in the former proceeding was not fully apprised of the situation throughout; but, if not, he was informed of it on October 22d, more than a month before the time for payment

had elapsed. Under such circumstances, if the conversation between the official of the bank and the attorney who had represented the wife in obtaining the consent decree had amounted to a tender to such attorney, it would not have taken the place of a tender or payment to the wife. Moreover, if it had been desired to insist that it was the right and duty of the attorney to receive the money, in spite of his declaration that he was without authority to do so, and that a tender could be made to him, it would seem an actual tender to him should have been made, and not a mere deposit of the money in bank.

[3] 3. Error was assigned on the admission of evidence to the effect that it was understood and agreed by both the attorneys and clients that payment should be made only to the wife, and not to the attorney, and that the latter was not authorized to receive payment. The ground of objection stated in the bill of exceptions was that this evidence was irrelevant. We think it was relevant. The ground of objection argued was that this was an effort to modify or change a consent decree by parol evidence. This argument rested upon a misconception of the basis of the relevancy of the evidence. The decree did not in terms authorize payment to the attorney of the wife, but to her. It declared that title should be vested in the husband if he should pay a certain sum to the wife on or before a fixed day. If this should be treated as in the nature of a decree for the recovery of money, the attorney's right to collect would not arise from the words of the decree, but from the general or implied authority of an attorney. Such authority could not be modified or withdrawn by an agreement to which the parties and attorneys assented. The evidence did not conflict with the decree, but showed a withdrawal or negation of an implied authority on the part of the attorney to proceed further, after its rendition.

[4] 4. The purchaser contracted with full knowledge of the decree and subject to its terms. The husband had no power to change those terms by a conveyance to his brother. The brother alleged that he had no notice of the want of authority on the part of the attorney to receive the money, and thus sought to excuse a tender to the client. He failed to show this; but, on the contrary, proved that, at least on October 22d, he had actual notice that the attorney asserted his want of authority, and that the money was deposited in a bank, where it lay until December 2d.

When the case between husband and wife was before this court on the question raised by demurrer, it was remarked by the writer of the opinion that "the difficulty with the petition is that it prays too much and alleges too little." In the present case this state-

ment may well be paraphrased, and it may be said of the plaintiff that his trouble was that he alleged too much and proved too little.

[5] 5. Both sides introduced evidence. There was no motion for a nonsuit or for a dismissal. The evidence as a whole required a verdict for the defendant, and it was not error for the presiding judge to so affirmatively instruct the jury, instead of granting a nonsuit *ex mero motu*.

[6] 6. The judgment complained of in the main bill of exceptions having been affirmed, the cross-bill of exceptions is dismissed.

Judgment affirmed on the main bill of exceptions. Cross-bill of exceptions dismissed. All the Justices concur.

(139 Ga. 511)

WILLIAMS et al. v. RAPER.

RAPER v. WILLIAMS et al.

(Supreme Court of Georgia. April 18, 1913.)

(Syllabus by the Court.)

1. TRIAL (§ 62*)—RECEPTION OF EVIDENCE—FRIGHTENING OF HORSES—REBUTTAL.

The reception in evidence of testimony of an impeaching nature, referred to in the opinion, will not require the grant of a new trial, in the light of all the evidence.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 148-150; Dec. Dig. § 62.*]

2. TRIAL (§ 191*)—INSTRUCTIONS—ASSUMING FACTS—DANGEROUS AGENCY—AUTOMOBILE.

The act of August 18, 1910 (Acts 1910, p. 90), regulates the speed and manner of operating automobiles on the public highways. Where the acts of negligence alleged to have caused the damage consist of the violation of that act, a new trial in the case is not required because, in an instruction applying the statute, the court charged as follows: "In this connection I charge you that the operators and owners of automobiles have the same right to use public roads as the owners of other vehicles or machines, but, it being a dangerous machine, the law has prescribed certain rules by which they are to be governed in running on the public highway; and if in running these machines, they come within the rule or comply with the law, and damage results therefrom, they are not liable."

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 420-431, 435; Dec. Dig. § 191.*]

3. INSTRUCTIONS APPROVED AND VERDICT SUSTAINED.

There is no merit in the other exceptions to the charge, and the evidence is sufficient to support the verdict.

Error from Superior Court, Whitfield County; A. W. Fite, Judge.

Action by J. W. Raper against Mrs. A. S. Williams and others. Judgment for plaintiff, and defendants bring error and file cross-bill. Affirmed on main bill, and cross-bill dismissed.

F. K. McCutchen, C. D. McCutchen, and Maddox, McCamy & Shumate, all of Dalton, for plaintiffs in error. Geo. G. Glenn and M. C. Tarver, both of Dalton, for defendant in error.

EVANS, P. J. The plaintiff alleged that he was driving a roadworthy horse to a buggy along a public road, and just as he was approaching a sharp curve an automobile of one defendant, operated by the other defendant, dashed around the curve, coming in his direction at the rate of 40 miles an hour, frightening his horse, and causing him to overturn the buggy, injuring the plaintiff and damaging his buggy and harness. The specific acts of negligence alleged consisted in running the automobile around a sharp curve at a rate of speed greater than 6 miles per hour, as provided in section 5 of the act approved August 13, 1910; in operating the automobile at a rate of speed greater than was reasonable and proper; in failing to give a signal of the approach of the automobile; and in failing, upon being signalled to do so, to bring the automobile immediately to a stop, as provided by the above-cited act. The defendants denied all acts of negligence as alleged, and denied that the plaintiff or his property were injured. A small verdict was returned in favor of the plaintiff. A motion for new trial was overruled, and the defendants excepted. By way of cross-bill the defendants excepted to the refusal of the court to dismiss the motion for new trial, because of certain alleged defects.

[1] 1. The evidence was conflicting upon every issue made by the pleadings, and particularly as to the rate of speed of the automobile. There was another automobile following the one alleged to have occasioned the injury, and was referred to by witnesses as a means of identifying it. The witnesses for the defendant testified that at the time of the occurrence the automobile was rounding the curve at a speed of less than 6 miles an hour, and that at no time during the trip was the speed of the automobile more than moderate; one of them did not believe that the speed exceeded 20 miles an hour at any time. In rebuttal of this evidence the court allowed two witnesses to testify that at a place on the same road they saw two automobiles going at a rapid rate of speed in the direction of, and not far from, the place where the injury is alleged to have happened; one of them estimating the speed at 40 miles an hour, and the other saying that the machine was running as fast as it could. The rebuttal testimony was objected to on the ground that it was not shown that either of these machines was the one in controversy. There was sufficient identification by one of the witnesses; and, though the other was not able to identify either of the automobiles as that of the defendant, yet, under all the circumstances of the case, we do not think the reception of this evidence was error.

[2] 2. The court charged: "In this connection I charge you that the operators and

owners of automobiles have the same right to use public roads as the owners of other vehicles or machines, but, it being a dangerous machine, the law has prescribed certain rules by which they are to be governed in running on the public highway; and if in running these machines they come within the rule or comply with the law, and damage results therefrom, they are not liable." It is urged that the use of the phrase "it being a dangerous machine" was prejudicial, and calculated to impress the jury that because of its dangerous quality the defendant was bound to exercise a greater degree of care than the law imposed. We do not think so. The General Assembly, in recognition of the character of the machine, its power and capabilities of speed, and possible danger to pedestrians and horse-drawn vehicles in its operation, have seen fit to enact a statute regulating the speed and manner of operation of automobiles on the public highways. Acts 1910, p. 90. The statement by the court of a reason for the enactment of the law, though not commendable, was not so improper as to require a new trial, under the facts of the case.

[3] 3. There is no merit in the exceptions to the other charges complained of, and they are not of such a nature that a discussion of them would be profitable. The evidence was conflicting, but was sufficient to support the verdict.

Judgment on main bill of exceptions affirmed. Cross-bill dismissed. All the Justices concur.

(13 Ga. App. 718)

THRASHER v. COBB REAL ESTATE CO.
(No. 4,748.)

(Court of Appeals of Georgia. May 20, 1913.)

(Syllabus by the Court.)

VENDOR AND PURCHASER (§ 307*)—ACTION FOR PRICE — FAILURE OF REPRESENTATIONS — BILLS AND NOTES.

Under the decision in *Printup v. Rome Land Co.*, 90 Ga. 180, 15 S. E. 764, the court erred in sustaining the demurrer to the defendant's answer, and in entering up judgment in favor of the plaintiff.

[Ed. Note.—For other cases, see *Vendor and Purchaser*, Cent. Dig. §§ 863, 872; Dec. Dig. § 307.*]

Error from Superior Court, Colquitt County; W. E. Thomas, Judge.

Action by the Cobb Real Estate Company against J. C. Thrasher. Judgment for plaintiff, and defendant brings error. Reversed.

McKenzie & Kline, of Moultrie, for plaintiff in error. Shipp & Kline and L. L. Moore, all of Moultrie, for defendant in error.

POTTLE, J. The plaintiff sued upon three promissory notes payable to one Aycock, and duly transferred to the plaintiff.

The defendant pleaded that the notes were given in part payment for certain lots in the city of Moultrie; that the defendant was induced to purchase the lots by statements of Aycock that he would guarantee the building of a railway depot adjacent to the property; that he would construct on the adjacent property a handsome residence for himself; and that he would maintain a boulevard traversing the property, and extend it through certain public roads—none of which promises have been performed. It was further alleged that the plaintiff was not an innocent purchaser of the notes, and took them with knowledge of the inducement which had been held out by Aycock. By amendment the defendant alleged: On December 15, 1909, the plaintiff had a public sale of certain lots of land, which had been laid off near the city of Moultrie, immediately south of the corporate limits, the survey being known as West Broad Heights. The public were invited to the sale, which was conducted on the land. The plaintiff and its auctioneer and agents represented to the defendant and the other bidders that the plaintiff would build, keep, and maintain a wide and magnificent boulevard, on the edges of which would be planted shade trees, and would keep and maintain numerous parks and pleasure grounds in front of and near to the lots, that the plaintiff would build a suburban depot on the right of way of the Georgia Northern Railway, traversing the land and adjacent thereto, and that the plaintiff would erect a handsome \$10,000 residence on the boulevard, near the lots, all of which statements were made by the plaintiff and its agents in the hearing of the defendant and the other bidders as an inducement for them to purchase. Relying upon these representations and promises, the defendant bought two lots for \$210, payable one-third cash, and the balance in equal installments in one and two years, and gave the notes sued on, for the deferred payments. The plaintiff executed to the defendant a bond for title to the lots. This bond was in usual form, and recites that the defendant has agreed to purchase two described lots of land, and has executed his notes for the balance due on the purchase price, and that upon the payment of the notes the obligor agrees to make a warranty deed to the lots. It is averred in the plea that the representation of the plaintiff and the exhibition of maps and plats showing the property as the plaintiff agreed to improve it were all wrongfully and deceitfully made for the purpose of inducing the defendant and the others to bid at the sale, and the plaintiff and its agents then knew that the representations and promises were not true and would not be carried out. The boulevard has never been maintained as promised, but it has been allowed to stay in its natural state, and it now appears as a deserted wilderness, covered with weeds and growing trees, with

naught but the whitewashed posts to mark the last resting place of these deserted lots. The beautiful parks have become merged with the desolate scene, and the decaying fences remind one of a deserted graveyard. The beautiful suburban depot has never further materialized than the word-picture drawn by the plaintiff and marked on the maps and plats. The \$10,000 residence is yet a dream fancy of the mind, though sufficient years have elapsed to have built it with one man, a hammer, and saw. The defendant avers that, by reason of the foregoing facts, the consideration of the notes has failed; that the lots are wholly valueless as town lots, and are not worth exceeding \$50 per acre; that the defendant has paid \$70 on the purchase price, and the lots bought are not reasonably worth more than \$15. The defendant offers to surrender the bond for title, and prays that he recover of the plaintiff \$55, being the difference between the cash payment and the actual value of the lots.

The plaintiff demurred on the grounds that the answer sought to vary the terms of an unconditional contract in writing; that it does not appear that the alleged representations were conditions of the contract of sale, such representations not being set forth in the bond for title, nor contained in the notes sued on; that it does not appear that the lots are of less value than they were before the sale; nor does it appear how the failure of the plaintiff to comply with the promises alleged to have been made affected the sale; nor does it appear within what time the promises alleged to have been made were to have been performed. The notes sued on were executed on December 15, 1909, were due, respectively, April 1, 1910, December 15, 1910, and December 15, 1911. The trial judge sustained the demurrer, struck the answer, and entered up judgment in favor of the plaintiff.

A discussion of the legal principles which control the case is rendered unnecessary by the decision of the Supreme Court in the case of *Printup v. Rome Land Co.*, 90 Ga. 180, 15 S. E. 764, upon the authority of which decision the judgment in favor of the plaintiff must be reversed. In that case suit was brought on notes given for the purchase price of lots which had been bought at an auction sale. The answer averred that the plaintiff and its auctioneer represented to the defendant and other bidders that a dummy street car line would be built and maintained through the lots being offered for sale, and exhibited maps and plans showing the location of such car line. It was further represented that arrangements had been made for the location of a manufacturing plant and factory in the immediate vicinity of the lots being sold. The seller executed to the purchaser a bond for title containing no stipulations except that the land should be conveyed upon certain payments being made. It

was further alleged that at the auction sale it was represented by the plaintiff that broad, graded avenues and streets had been laid out; that the property was connected by means of streets and the dummy line with the city of Rome, thereby rendering the lots convenient and desirable for homes, and that the defendant bought the lots relying upon the representations made at the sale. We can perceive no substantial difference between that case and the case now under consideration. In that case the sale took place on the land; therefore it is manifest that the purchaser could not have been deceived by any false representations as to what had already been done. A judgment striking the plea was reversed, and the decision of the Supreme Court must necessarily have been predicated upon the theory that the defendant was relieved from the payment of the notes by the false and fraudulent promises of the seller that certain things would be done to enhance the value of the property. The plea in the present case was not subject to demurrer because it failed to allege that the seller promised to make the improvements referred to within any definite time. No time being stipulated, the law would imply a reasonable time. The sale took place in 1909. The suit was filed in April, 1912, and, according to the answer, no steps whatever were taken during this period to comply with the promises made by the seller. The question of what is a reasonable time is one for the jury, but it would seem that, in the absence of some good reason for not doing so, a sufficient time had elapsed to require the seller to begin performance, if he intended to perform at all. In our opinion the case is controlled by the case above cited, and the court erred sustaining the demurrer to the plea.

Judgment reversed.

(12 Ga. App. 698)

NORMAN v. REHBERG. (No. 4,357.)

(Court of Appeals of Georgia. May 20, 1913.)

(Syllabus by the Court.)

CRIMINAL LAW (§ 1001*)—SENTENCE—SUSPENSION—VALIDITY.

Under the rulings of the Supreme Court in *Daniel v. Persons*, 137 Ga. 826, 74 S. E. 260, and *Neal v. State*, 104 Ga. 500, 30 S. E. 858, 42 L. R. A. 190, 69 Am. St. Rep. 175, so much of the judgment in the instant case as purported to suspend the sentence during the good behavior of the defendant was void and of no force and effect, and consequently the trial judge did not err in refusing to release the plaintiff in error upon the petition for habeas corpus, or in directing that the former sentence of the court be executed.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2554-2559; Dec. Dig. § 1001.*]

Error from City Court of Moultrie; J. D. McKenzie, Judge.

Petition of Albert Norman for writ of

habeas corpus against L. F. Rehberg. From an order denying the writ, petitioner brings error. Affirmed.

W. A. Covington, of Moultrie, for plaintiff in error. Alfred R. Kline, Sol., of Moultrie, for defendant in error.

RUSSELL, J. The plaintiff in error on August 14, 1911, entered a plea of guilty in the city court of Moultrie, Ga., to the offense of simple larceny. Upon this plea the judge of the city court entered the following judgment: "State v. Albert Norman, No. 99, page 15, in the City Court of Moultrie, Colquitt County, Ga. Whereupon it is ordered and adjudged and considered by the court that Albert Norman be placed and confined at hard labor in a chain gang on some public works in said county and state, or wherever the proper authorities may direct, for the term of eight months, and the payment of fifty dollars, including the costs of prosecution. The sentence of eight months to be suspended upon the payment of said fine, and pending the good behavior of said defendant." After the imposition of this sentence, the defendant paid the fine of \$50, and was set at liberty by the sheriff. On July 15, 1912, the judge of the city court of Moultrie passed an order stating the contents of the former sentence and setting out that there was a condition that, if said Albert Norman paid the fine of \$50, the chain gang sentence was to be suspended during his good behavior, but that, whereas there was an affidavit filed in the city court of Moultrie charging the said Albert Norman with committing larceny again, the court ordered that the suspension of the sentence be declared void, and that the sheriff proceed to enforce the original judgment by placing the said Albert Norman in the chain gang as provided in the sentence.

The plaintiff in error filed a petition for a writ of habeas corpus, setting up the foregoing facts, and averring that no notice was ever given to the petitioner, or his attorneys, of the order commanding the rearrest of the plaintiff in error prior to the issuance of the order, nor any opportunity afforded him to defend himself against the charge that he had violated the condition upon which the suspension of the sentence was based. The petition further alleged that the original plea of guilty was made upon the understanding that the petitioner should not be deprived of his liberty as long as he kept the laws of Georgia, and that his detention was unlawful for the further reason that more than eight months, during which time the petitioner had been constantly going in and out before the officers of the court, had elapsed since the imposition of the original sentence. Upon the hearing of the application for habeas corpus, all of the facts stated in the petition

were admitted by the respondent Rehberg to be true. After the hearing the application for release was refused, and the sheriff of Colquitt county was directed to enforce the sentence of the court in conformity with the order subsequent thereto.

Were it not for the rulings of the Supreme Court upon the questions involved, it might seem unfair and out of keeping with the spirit of our Constitution and laws (as insisted by counsel) to deprive this petitioner of his liberty, in view of the fact that it is admitted that the sentence was a conditional sentence, in which it was contracted that the prisoner should have his liberty, unless he violated the law, and that an adjudication that he had violated that contract was made without a hearing or any opportunity on his part to show that he had not in fact broken it. Under these rulings, the attempt to suspend the sentence was wholly void; and upon the petition for habeas corpus the judge was compelled so to hold. And, since the effort to suspend the sentence was void, the reasons for its suspension or the circumstances upon which the suspension depended were wholly immaterial. It was wholly immaterial whether the petitioner had by violating a criminal statute subsequently to the sentence broken the contract under which he was entitled to his liberty; for it was wholly beyond the power of the court that imposed the sentence to propose any condition compliance with which would have the effect of altering or voiding a sentence which the court had authority to impose. *Daniel v. Persons*, 137 Ga. 826, 74 S. E. 260.

The other question in this case, as to whether the fact that the period of eight months which had already expired since the sentence of eight months was imposed runs in favor of the defendant, is equally well settled by adjudications of the Supreme Court. In *Neal's Case*, 104 Ga. 509, 30 S. E. 858, 42 L. R. A. 190, 69 Am. St. Rep. 175, the sentence of six months, with provision for its suspension, was imposed on March 8, 1897, and on March 12, 1898, more than a year thereafter, the trial judge ordered his rearrest. Upon this state of facts, the Supreme Court held that "one upon whom such a sentence has been imposed cannot, though more than six months may have elapsed from the date of the sentence, be held to have served out the term therein mentioned, when in point of fact he has never been placed in the chain gang." It is true that in that case attention is called to the fact that the sentence itself provided that "the sentence begin and be counted from the time of the reception of said defendant in the chain gang under this sentence and judgment," and in this respect that sentence differs from the sentence now before us. But the ruling was placed upon the constitutional provision that "the legislative, judicial, and executive powers shall forever remain

separate and distinct, and no person discharging the duties of one shall at the same time exercise the functions of either of the others, except as herein provided." Civil Code, § 6379. Judge Fish, delivering the opinion of the Supreme Court, held that the attempt to suspend a sentence on the part of a court is an unwarranted interference with the powers, duties, and functions of the executive, and said: "If the execution of a sentence which has been imposed in accordance with the law can be suspended, either in whole or in part, as the judge may see fit, during the pleasure of the court, then the court may in this way indirectly grant a reprieve, commute a penalty, or remit any part of a sentence, and thus practically exercise powers which the Constitution imposes exclusively upon the Governor of the state. For a sentence, the execution of which is suspended during the pleasure of the court, may never be enforced, as it may never be the pleasure of the court to revoke the order of suspension and enforce its execution. If a court can indefinitely suspend the execution of a sentence, it may even indirectly exercise all the pardoning power conferred upon the executive of the state, except that portion of it which embraces the removal of disabilities imposed by the law in certain criminal cases as a consequence of conviction." From the reasoning upon which the ruling in the *Neal Case*, supra, is based it is apparent that the judgment was not affected by the fact that in that particular case the sentence was not to begin or to be computed until the time of the defendant's reception into the chain gang.

As to the point that the city court of Moultrie was without jurisdiction to suspend the sentence, see *O'Dwyer v. Kelly*, 183 Ga. 824, 67 S. E. 106; *Wall v. Jones*, 135 Ga. 425, 69 S. E. 548; *Roberts v. Wansley*, 137 Ga. 439, 73 S. E. 654; *Daniel v. Persons*, 137 Ga. 826, 74 S. E. 260, supra. In the latter case the Court of Appeals certified to the Supreme Court certain questions in reference to the apparent conflict in the decisions in *Neal v. State*, supra, *Gordon v. Johnson*, 126 Ga. 584, 55 S. E. 489, and the *O'Dwyer Case*, supra, and the Supreme Court demonstrated that the decisions in these cases were in harmony, the court pointing out at length the features in which the facts in each distinguished it from the other.

Since the trial court was without jurisdiction to suspend the sentence in the first instance, and the petitioner must be presumed to have known that that part of the sentence which related to its suspension was wholly void, the judgment of the trial judge upon the petition for habeas corpus is not affected by the fact that the accused was not called upon to show cause why the court should not pass an order requiring the execution of the sentence, and certainly could not claim the expiration of a sentence under which he had not served a single day

merely because the period of time which had elapsed was longer than the sentence originally imposed.

Judgment affirmed.

(13 Ga. App. 441)

CHARLESTON & W. C. RY. CO. v. McELMURRAY BROS. (No. 4,006.)

(Court of Appeals of Georgia. Feb. 11, 1913.
On Motion for Rehearing, March 1, 1913.)

(Syllabus by the Court.)

1. RAILROADS (§ 478*)—FIRE SET BY LOCOMOTIVE—PLEADING.

The petition, properly construed, based the plaintiff's right of action, not only upon the negligence of the defendant in so operating its engine as to cause an unusual emission of sparks, but also upon the negligence of the defendant in permitting the accumulation of combustible matter on its right of way. It therefore set forth a cause of action, and the court did not err in overruling the general demurrer. The special demurrers were without merit. The plaintiff was not required to state the particular agent of the defendant whom he notified of the company's negligence as to the accumulation of trash on its right of way, for the notice was unnecessary.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 1698-1705; Dec. Dig. § 478.*]

2. APPEAL AND ERROR (§ 592*)—BRIEF OF EVIDENCE—SUFFICIENCY.

There being no bona fide effort to brief the evidence as required by law, and the remaining assignments of error being dependent upon the evidence, the judgment of the lower court must be affirmed.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2618-2620, 3126; Dec. Dig. § 592.*]

On Motion for Rehearing.

3. RAILROADS (§ 478*)—FIRES — PETITION—SUFFICIENCY.

The demurrer, complaining generally that no cause of action is alleged in the plaintiff's petition against the defendant, was insufficient, in view of the allegations of the petition, to present to the consideration of the trial court the specific objection that the petition did not set forth clearly and distinctly a right of action in the plaintiff and against the defendant for negligently allowing the fire to escape. The allegations as to the accumulation of combustible matter upon the defendant's right of way, taken in connection with the other allegations in the petition, sufficiently charge the defendant with liability for negligently permitting the escape of fire from its right of way, to withstand a general demurrer.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 1698-1705; Dec. Dig. § 478.*]

4. APPEAL AND ERROR (§ 639*)—BRIEF OF EVIDENCE—REVIEW.

The provisions of section 3 of the act regulating practice in courts of review in this state, approved August 21, 1911 (Acts 1911, p. 150), are restricted to questions as to the sufficiency of the approval of the grounds of motions for new trial, the sufficiency of the approval of the brief of evidence, and the sufficiency of the filing of either the motion or the brief, and have no reference to the right of the reviewing court to determine whether a paper, filed and approved as a brief of the evidence, is such a brief of the evidence as is required by law.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2787, 2829; Dec. Dig. § 639.*]

Error from City Court of Richmond County; Wm. F. Eve, Judge.

Action by McElmurray Bros., for use, etc., against the Charleston & Western Carolina Railway Company. Judgment for plaintiffs, and defendant brings error. Affirmed.

W. K. Miller, of Augusta, for plaintiff in error. J. C. C. Black, Jr., of Augusta, for defendants in error.

RUSSELL, J. Judgment affirmed.

On Motion for Rehearing.

The action was for damage on account of fire alleged to have been caused by sparks from the locomotive of a passenger train passing the plaintiff's land. The petition alleges that the right of way of the defendant railway company, running through the land of the plaintiffs, and immediately adjoining that portion which was burned over by the fire alleged to have been set out by the defendant's locomotive, was, just previous to the said fire, in a foul condition from an overgrowth of dry grass, weeds, and brush, and that due notice had been given, in writing, to the railway officials of this condition, and of the danger to be apprehended from fire which might be set out by their passing locomotives, and, further, that there was no attempt on the part of the defendant railway company to clean off the said right of way. Paragraph 4 of the petition is as follows: "That said defendant negligently permitted large quantities of dry grass, weeds, trash, and underbrush to gather upon its said right of way, and, though it was advised in writing, prior to the date of the injury hereinafter stated, of the dangerous condition of said right of way, negligently allowed said inflammable and combustible material to remain upon the said right of way." In the fifth and sixth paragraphs it is alleged that on the 14th and 27th days of November, 1910, respectively, an engine operated by the defendant negligently emitted sparks which set fire to said right of way, which fire was communicated to the plaintiffs' adjacent fields, destroying specified property of the plaintiffs. It was alleged that "the defendant was guilty of negligence in this: (a) That the engines used by said defendant as aforesaid were without a safe and sufficient spark arrester, and safe and sufficient devices and appliances for preventing the emission of sparks, which set fire to the right of way as aforesaid. (b) That said engines were so carelessly and negligently operated as to allow the emission of sparks, which set fire to the right of way as aforesaid. (c) That said defendant negligently permitted large quantities of dry grass, weeds, trash, and underbrush to gather upon its right of way as aforesaid."

The defendant demurred as follows: (1) Because no cause of action is alleged in

plaintiff's petition against this defendant. (2) Defendant demurs to the following paragraphs of the petition, namely: To paragraphs 4 and 6, because no copy of the writing therein referred to is attached to the petition; to paragraph 5, because plaintiff fails to allege what particular kind of vetch was growing on his field on the 14th day of November, 1910; also because plaintiff fails to allege when he discovered the fire in question, and why he did not discover it sooner than he did." The court overruled the demurrer.

The trial resulted in a verdict for the plaintiffs. The defendant's motion for new trial was overruled, and it excepted to that judgment, as well as to the overruling of the demurrer.

RUSSELL, J. (after stating the facts as above). We declined to grant the motion for rehearing filed by the plaintiff in error. It is based upon the following grounds: "(1) That the point in its demurrer to the plaintiff's petition was that it had a right to set out fire, either intentionally or negligently, on its right of way, and that an adjoining property owner had no right to complain of such fire, if not damaged thereby. The fire being on its right of way, if it was allowed to escape from the right of way and damage the property of the adjoining landowner, his right of action would be for negligently allowing a fire to escape, none of which was alleged in the petition. (2) Relatively to the brief of evidence: This was, of necessity, fixed and approved by the court below, and no objection was raised thereto in this court. Plaintiff in error respectfully submits that since the act of August, 1911, section 3 (Public Laws, p. 150), this court should not refuse to adjudicate questions depending upon the evidence, because too much evidence was brought to this court. The presumption is that the court below did its duty and approved a proper brief of the evidence. What is too much evidence, or what is too little, must of necessity be determined by the court below. If this court should undertake to determine such questions without all the evidence before it, and then say what is or what is not a proper brief of the evidence, and after a hearing in this court on the merits of the appeal, litigants would have no fixed rule to guide them."

[3] 1. It will readily be seen by reading the demurrer that it did not direct the attention of the trial court with sufficient clearness to the specific point now insisted upon; and, as we have several times had occasion to remark, "demurrer, being a critic, should itself be free from imperfections." We think the allegations of the petition, in the absence of an appropriate special demurrer requiring a full statement of the plaintiff's cause of action, sufficiently set forth the right of action against the defend-

ant for negligently allowing the fire to escape. Where there is only an imaginary line separating the railway's right of way from the land of the adjoining landholder, and the railway company negligently permits its right of way to remain covered with dry grass, refuse, and other combustible material, it is reasonably to be assumed by the railway company that, if the right of way is set on fire, such fire will be communicated to adjacent premises, unless precautionary means are then at hand to confine the fire to the right of way. In the absence of a more specific objection to the allegation of the petition, the petition can very properly be construed to charge merely by way of inducement the negligent emission of the sparks. If the right of way had contained no combustible material, it is possible that there would have been no combustion injurious to the plaintiffs' property, although the defendant might have been negligent as to the emission of sparks from its engines. Be this as it may, it is clear that the specific point presented in the first ground of the motion for rehearing was not presented to the court below, and hence cannot be adjudicated here.

[4] 2. It is insisted, in the second ground of the motion for rehearing, that the brief of evidence was of necessity fixed and approved by the court below, and that, as no objection was there made to it, the Court of Appeals "should not refuse to adjudicate questions depending upon the evidence, because too much evidence was brought to this court." Section 3 of the act approved August 21, 1911 (Acts 1911, p. 149), is cited as authority for this position. The section referred to reads as follows: "That where the judge has finally passed on the merits of a motion for a new trial, and the parties have raised no question as to the sufficiency of the approval of the grounds of such motion, or of the approval of the brief of evidence, or of the filing of such motion or brief, or of the jurisdiction of the judge to entertain the motion at the time he did, if the parties acquiesced in his entertaining it at that time, no question as to these matters shall be entertained by the reviewing courts unless first raised and insisted on before the trial judge." It is very plain that the matters as to which there shall be no question raised in the reviewing courts, unless the subject is first raised and insisted upon before the trial judge, are expressly limited to three points: (1) The sufficiency of the approval of the grounds of the motion for a new trial; (2) the sufficiency and approval of the brief of evidence; and (3) the sufficiency of the filing of the brief of evidence and of the motion for a new trial. The act does not in any wise attempt to interfere with the power of the courts of review to determine when there has been a bona fide effort to prepare a brief of the evi-

dence, nor with the duty of this court to decline to consider questions whose determination is dependent upon a review of the evidence, when in fact the paper which has been approved and filed is not in a legal sense a brief of the evidence at all, but is a bulky and voluminous document, which, in some instances, is a great conglomeration of irrelevant matter, from which the reviewing court will not attempt to hunt for and separate such proof as is relevant to the issues involved. *Albany & Northern Ry. Co. v. Wheeler*, 6 Ga. App. 270 (1), 273, 64 S. E. 1114.

Section 3 of the act of 1911 confines itself to three matters, which may be said to be purely technical, and the Legislature very wisely determined that, if a litigant did not see fit to take advantage of these matters of practice before the trial court had lost jurisdiction of the case by the filing of a writ of error, he could very properly be held to have waived it. The Legislature, no doubt, also had in mind the fact that courts of review are always inclined, if possible, to consider cases upon their merits, and by the provisions of section 3 the General Assembly unquestionably saved the courts of review from the labor of investigating and considering certain questions which had, prior to the passage of this act, consumed a considerable part of the time of the courts, to wit: Whether the grounds of the motion, or the brief of evidence, had been sufficiently approved, or whether the motion or the brief had been properly filed. As above stated, however, it is very plain, from reading the statute, that the Legislature did not undertake to take away from the courts of review the right to say that a paper was not a legal brief of evidence, although no point could be made as to the fact that it had been approved as such by the trial judge. The formal approval of a brief of evidence by the trial judge, and the question as to whether the paper approved is in fact such a brief of evidence as is required by law, are two entirely separate and distinct matters; and it will not be inferred that the Legislature intended by implication to include the one in the other. That this is true is furthermore apparent from the fact that in most of the reported cases in which the Supreme Court and this court have declined to consider assignments of error dependent entirely upon the evidence, for the reason that there was no proper brief of evidence in the record, there was no question, and there could be no question, as to the sufficiency of the approval of the brief of evidence by the trial judge.

In regard to the statement in the motion for rehearing, that "what is too much evidence, or what is too little, must of necessity be determined by the court below," we need only to reply, in the language of Judge

Powell, speaking for this court in *Albany & Northern Railway Co. v. Wheeler*, 6 Ga. App. 274, 275, 64 S. E. 1114, 1116: "In this connection we may say that, when an improperly prepared brief of the evidence appears in the record without any explanation or contrary statement, it is presumed to be the work of counsel for the movant. Hence, if counsel for the movant has not in fact been derelict in this respect, and desires to save himself from this imputation, he should present what he conceives to be a correct brief to the judge; if opposing counsel objects, and the judge sustains the objection, and causes additions to be made, it is the privilege of moving counsel to cause this fact to appear, either by a note or memorandum, attached to the brief of the evidence and verified as a part of it, or by a recital in the bill of exceptions; and if, when the case reaches this court, it appears that the brief has been improperly added to at the instance of counsel for the respondent, it is within the discretion of this court to give such direction to the matter, by taxing the costs, or otherwise, as will protect the party not at fault." Assuming, as we must, under this ruling, that an improperly prepared brief of evidence is the work of counsel for the movant, it is his duty, in any case in which he is forced to submit to additions to the brief, to object before the trial court, and follow it up by a recital in the bill of exceptions. This practice is in exact conformity with the spirit of the act of August, 1911, as to the approval and filing of motions for new trial and briefs of evidence. We hold that the act of 1911, supra, has no relation to the question as to whether what is approved as a brief is in fact a proper brief of the evidence—such a brief as is required by law.

Motion for rehearing denied.

(12 Ga. App. 456)

HORSLEY v. WOODLEY. (No. 4,119.)

(Court of Appeals of Georgia. Oct. 9, 1912.
On Rehearing, March 1, 1913.)

(Syllabus by the Court.)

1. **BROKERS (§ 42*)—ACTIONS FOR COMMISSION—LICENSE—FAILURE TO REGISTER.**

The decision of this case is controlled by the ruling of this Court in *Ford v. Thomason*, 11 Ga. App. 359, 75 S. E. 269. The suit was brought for commissions alleged to be due the plaintiff by the defendant in the lower court for his services as real estate agent in aiding another real estate agent to make a sale. As it affirmatively appears that the plaintiff in the lower court had not registered with the ordinary, nor paid the tax to the tax collector, required by section 978 of the Civil Code of 1910, he cannot recover commissions accruing from the sale of real estate. *Ford v. Thomason*, supra. The court, therefore, erred in overruling the motion for a new trial.

[Ed. Note.—For other cases, see *Brokers*, Cent. Dig. § 43; Dec. Dig. § 42.*]

On Rehearing.

2. BROKERS (§ 42*)—"REAL ESTATE DEALER"—TAX.

One can carry on the business of a "real estate dealer," within the meaning of that term, and as such be subject to the provisions of section 978 of the Civil Code, though he may not succeed in carrying through a single sale which he attempts to make. Likewise one is a real estate dealer who, on his own account and as a business independent of that of another real estate agent, engages for a consideration to aid others, whether the owners of the property or their agents, in selling real estate which is offered for sale.

[Ed. Note.—For other cases, see Brokers, Cent. Dig. § 43; Dec. Dig. § 42.*]

For other definitions, see Words and Phrases, vol. 7, pp. 5937, 5938.]

3. NEW TRIAL (§§ 28, 128*)—APPEAL AND ERROR (§ 173*)—HEARING ON MOTION—SUFFICIENCY OF OBJECTIONS—ILLEGAL CONSIDERATION.

While it is the better practice to raise by plea, as a matter of affirmative defense, the point that the plaintiff's claim is founded upon an illegal or immoral consideration, still, upon the hearing of a motion for a new trial, the general assignment of error, averring that the verdict is contrary to law and without evidence to support it, is sufficient to demand an investigation of the evidence. If it appears, from a review of the evidence, either in the trial court or in this court, that the plaintiff's demand is void because the consideration was founded wholly on an immoral or illegal consideration, the verdict should be set aside. The law will not shut its eyes to the fact that the consideration of a contract is illegal, when that fact appears undisputed from the testimony, and the illegality of the consideration has not been expressly waived.

[Ed. Note.—For other cases, see New Trial, Cent. Dig. §§ 37-39, 257-262; Dec. Dig. §§ 26, 128.* Appeal and Error, Cent. Dig. §§ 1079-1089, 1091-1093, 1095-1098, 1101-1120; Dec. Dig. § 173.*]

Pottle, J., dissenting.

Error from City Court of Dawson; M. C. Edwards, Judge.

Action by J. M. Woodley against J. A. Horsley. Judgment for plaintiff, and defendant brings error. Reversed.

W. H. Gurr, M. J. Yeomans, and R. R. Marlin, all of Dawson, for plaintiff in error. H. A. Wilkinson, of Dawson, for defendant in error.

RUSSELL, J. Judgment reversed.

On Rehearing.

[2] Was Woodley a real estate agent? What is a real estate agent? Nothing more nor less than the agent of some one else who has real estate to sell, and who helps him to sell it. It is not necessary that the land to be sold shall belong to the principal. It is immaterial that it belongs to a third party. If the person in question is employed by a representative of the owner to sell a parcel of real estate, or to aid him in selling it, and it is understood and agreed that the owner has no knowledge of his contract of employment, the representative alone is liable

upon his contract, and the party employed to aid in effecting the sale is only the agent of the agent, but he is none the less *his* agent. Furthermore, the degree of proof essential to entitle a real estate agent to recover in an action brought for his commissions has nothing to do with whether a particular person is or is not carrying on the business of a real estate dealer in this state, so as to subject him to liability to the tax, and render him guilty of a misdemeanor if he deprives the state of its just revenue by dodging the payment of this tax. It matters not that one does not succeed in making a single sale as a real estate agent; if he is in the business and attempting to make sales, he is liable for the tax prescribed by law, provided he is to receive a commission, or other compensation, in case he effects a sale; and he should be none the less liable if he shares in the commissions of an actual sale merely because, by agreement between the parties, he is only to do a part of what is necessary to complete a sale (furnish the prospects), if his introduction of the customer results in a complete sale. If so, then those decisions in which it has been held that where a real estate agent introduces a customer, and the owner thereafter sells the property to the person thus introduced or procured, but upon the same terms as were originally stipulated, the owner is liable to the real estate agent for his commissions are all wrong. The theory on which these rulings are placed is that although it may be true that, but for the owner, the sale would not have been made, still, but for the agent, the owner might not have found a purchaser at all. In what respect does the present case differ in principle from those in which these rulings have been made? Clearly there is no difference whatever, except that in the cases to which we refer the persons who were suing for commissions were engaged in helping the owners to sell, and in the case at bar the plaintiff claims to have contracted with the agent of the seller of the land for a sufficient consideration to help him to sell it. It matters not that the commissions for which he sues are contingent. This does not affect an agency for the sale of land, for in a large majority of the adjudicated cases the real estate agent's commission is conditional in amount and contingent. The fact that one is the agent of a real estate agent does not prevent him from being himself a real estate agent in the transaction which is the subject-matter of investigation.

In the motion for rehearing learned counsel for the defendant in error contended that the judgment of this court, reversing the judgment of the court below in this case, was rendered under a misapprehension of the evidence, in that there is no evidence that Woodley was a real estate agent. If this be true, of course, the ruling of this court

was totally wrong. In our conception of the exclusive prerogative of the jury to determine all disputed issues of fact, we go even further than that, and declare without hesitation that the judgment heretofore rendered would be wrong if there were any legal testimony upon which the jury could find that Woodley, in this investigation, was not a real estate agent within the ruling in *Ford v. Thomason*, 11 Ga. App. 359, 75 S. E. 269. True, Woodley testifies, "I was not a real estate agent at the time;" but this was merely a conclusion of the witness, and wholly without probative value, if by law and under the facts upon which his conclusion is based it cannot otherwise legally be held than that the admitted facts constitute him a real estate agent within the terms of the act of 1909 (Acts 1909, p. 56). The statement of Woodley that he was not a real estate agent at the time, but that Horsley was a licensed real estate dealer, and he (Woodley) was co-operating with Horsley, is absolute demonstration of the fact that Woodley, whether liable or not, had not registered and paid the tax required by law; for there is no other reasonable inference upon this point which can be drawn from his denial that he was at the time of the sale a real estate agent, and that he was depending upon Horsley's license, if license was required.

Let us, then, see whether or not his conclusion that he was not a real estate dealer is supported by any evidence. He had a general arrangement with Horsley, by which he was to try and bring Horsley customers in the real estate business from South Carolina, and, if Horsley sold to them, the commissions upon the sales were to be divided. In pursuance of this agreement Woodley brought a Mr. Sublette to Horsley, and Horsley sold to him the I. P. Cocke place for \$40,000. The real estate dealer's commission was \$2,000. Horsley paid Woodley \$500, and the suit is brought for the remaining \$500. The original indebtedness was expressly denominated, in the statement of account attached to the plaintiff's own petition, as "one-half commissions on sale of Cocke place," and in the amendment the statement of the claim for commissions is merely amplified by stating the name of the purchaser.

Woodley's testimony shows, without contradiction, that he was not only interested in the sale which is directly involved, but that he was dealing in other real estate transactions in Terrell county; for he testifies that he did not turn Sublette over to Horsley until after he himself had failed to induce him to buy Mr. Lowry's farm (in the sale of which Horsley was not interested), and the letter of November 10th, from Horsley to Woodley, which Woodley says confirmed a prior verbal agreement, is a general promise on Horsley's part to pay Woodley "one-half of my commissions on any sale

made to parties brought down by you or influenced by you." It further appears from Woodley's testimony and his letters that he made more than one effort to earn commissions on sales of land which Horsley was handling in other instances than those to which we have already referred. From his letter of December 11th it is very apparent that his agreement with Horsley had interested him in a sale of land to one Rutledge; and Sublette, the purchaser of the land from the sale of which was derived the commissions now involved, testifies that, while Woodley did not especially recommend any particular farm, except the Lowry place, he came to Terrell county on Woodley's account.

If a real estate dealer is one who in consideration of an anticipated commission engages in the business of promoting sales of real estate, and who in thus dealing attempts to sell or aids in selling the land of another, then we think that under the ruling in *Ford v. Thomason*, as well as under the act of 1909, Woodley must be held to have been a real estate dealer, although (basing his conclusion on the fact that his principal business was the pursuit of some other calling) he may erroneously have adjudged that he was not. In the *Ford Case* we were dealing with a case in which there was a sale completed by the person whom we held to be a real estate dealer, subject to the provisions of section 978 of the Code, because the proof showed that he had made a sale such as would have entitled him to his commission if the statute embodied in that section had never been passed. But it was not intended to be held, and cannot be held, under the ruling in the *Ford Case*, that one is not a real estate dealer unless he has made a sale that will entitle him to recover his commissions under the well-settled rule that he produced a purchaser ready, able, and willing to buy on the terms proposed by the seller. I think the evidence in this case shows even this, for Sublette testifies that he would never have come to Terrell county but for Woodley's influence, and he was accepted as the purchaser by Horsley in behalf of Cocke.

But there can be no question that one can carry on the business of a real estate dealer without actually making more than an attempt to sell, or aiding others (whether the owners or their attorneys or agents) to sell, real estate which the owners wish to sell. It is perfectly practicable for a real estate dealer who does not wish to incur the expense of a costly office and of an office force, or whose health will not permit indoor confinement, to make an arrangement (and not in any sense a partnership) by which he can legitimately capitalize his acquaintanceship with men and property, and his experience as a business man, by inducing prospective purchasers of real estate to buy certain prop-

erty which otherwise they might never have bought or even heard of; and this, too, though the actual sale be made by another person who is the agent of the seller, as Horsley was. Transactions in which two real estate agents are engaged—the one the agent of the seller, and the other the agent of the buyer—are not infrequent. It could hardly be held in such a case that an agent of the buyer would not be entitled to compensation if, upon promise of a certain commission, he sought out and discovered for his principal the name and address of the owner of the property the latter wished to buy, and got the owner's consent to sell it at the price stipulated by his principal, the prospective buyer, and upon the very terms stipulated by him.

It is strenuously urged that, even if under the rule in *Ford v. Thomason*, supra, the plaintiff was not entitled to recover his commission, for the reason that he had not paid the tax required by law of real estate dealers, still the trial judge did not err in overruling the motion for a new trial, because the illegality of the contract or invalidity of the consideration should have been pleaded as a matter of affirmative defense. It is also strongly urged that the point was not made by the plaintiff in error himself until after the ruling of this court in the *Thomason* Case. This view is not controlling with the majority of the court. The general assignment of error, that the verdict is contrary to law and contrary to the evidence, at least demands an investigation of the evidence to determine whether the verdict is in fact so wholly without evidence as to be contrary to law. In a case where it appears undisputed that the consideration of a plaintiff's demand depends wholly upon an act or condition which is illegal or immoral, sound public policy would require the court to declare that there could be no recovery. Certainly this would be true in a case in which the defendant did not expressly waive the failure of consideration. In every case the plaintiff assumes the burden of proving his case, and if he utterly fails in that undertaking he is not entitled to recover. For myself, I do not see why this case does not fall within the well-settled rule announced in *Evans v. Josephine Mills*, 119 Ga. 448, 46 S. E. 674, and in similar cases, for if the plaintiff first established his case, he thereafter disproved it. The testimony must be construed most strongly against him.

It matters not that counsel for the plaintiff in error does not call the attention of the court to a specific ruling under which the particular finding is contrary to law, if, as a matter of fact, the court knows that the result reached in the trial was contrary to law. Counsel may not know the law; the courts must know it.

[3] While it is the better practice to raise by plea, as matter of affirmative defense, the

point that the plaintiff's claim is invalid, because it is founded upon an illegal or immoral consideration, still, upon the hearing of a motion for a new trial, the general assignment of error, averring that the verdict is contrary to law and without evidence to support it, is sufficient to demand an investigation of the evidence. If it appears, from a review of the evidence, either in the trial court or in this court, that the plaintiff's demand is void, because the consideration was founded wholly on an immoral or illegal consideration, the verdict should be set aside. The law will not shut its eyes to the fact that the consideration of a contract is illegal, when that fact appears undisputed from the testimony, and the illegality of the consideration has not been expressly waived.

The judgment of this court in this case, reversing the judgment of the court below, is adhered to.

POTTLE, J. (dissenting). The only defense filed in the trial court was a general denial of any indebtedness. I do not think the defense that the plaintiff had no license as a real estate dealer could be raised under the plea of the general issue. A general denial of indebtedness simply raises the question that the defendant does not owe the amount sued for. In the present instance he does owe it, because the plaintiff performed the services which he agreed to perform, and the defendant agreed to pay the sum sued for. But in the argument in this court it is contended that there is a special reason why the defendant should not be required to pay, or rather why the plaintiff should not be permitted to collect the amount sued for, and that is that he has engaged in the business of a real estate dealer without having registered with the ordinary and paid the license required by law, and so has been guilty of a misdemeanor. If the defendant wishes to urge the failure of the plaintiff to register and pay the license as a reason why he should not be allowed to recover, he ought, in my opinion, to set it up by way of special defense. A plea of the general issue did not put the plaintiff on notice that the defendant intended to rely upon any such special defense as the one above mentioned. Apparently the point was made for the first time in the Court of Appeals. It is manifestly an afterthought, and the point was not discovered until after the decision of this court in *Ford v. Thomason* (while the present case was pending). Indeed, it was not insisted on in the original briefs of the counsel for the plaintiff in error. In the argument on rehearing attention was called to this fact, and counsel for the defendant in error insisted that a point ought not to be raised by this court when it was not raised in the court below, nor even insisted upon in this court by counsel for the plaintiff in error. In this I think the counsel is right,

and that the point upon which the court bases the reversal is really not involved in the case.

But, further than this, I do not think Woodley is such a real estate agent as that he was required to obtain a license. This question must be determined solely by the nature of the transaction between Horsley and himself. It makes no difference that Woodley, generally speaking, may have been a real estate agent, and may have, as to other transactions, engaged in the real estate business. The question is: Was he a real estate dealer in reference to the particular transaction with Horsley for which he claims the right to recover for his services? Woodley had no connection with the owner of the land. There was no contract between them, and he could not have maintained an action against the owner for the recovery of commissions. Horsley was the real estate agent. He simply made an agreement with Woodley that if the latter would introduce him to a purchaser, and he should consummate a sale, he would pay Woodley a certain amount of money equal to one-half of his commissions. This, then, was the contract, as shown by the evidence. Woodley had no authority to negotiate a sale. He had no authority to even quote the purchaser a price. He had no authority to enter into any sort of a contract with the purchaser which would bind either Horsley or the owner of the land. Under his contract he was simply to send to Horsley a prospective purchaser. The owner paid but one commission, and that commission was paid to Horsley. If a real estate agent should say to another, "If you hear of a man who wants to buy a farm, send him to me, and if I trade with him I will pay you \$100," I do not think the person who sent the prospective purchaser to the real estate agent would himself be a real estate dealer. He is not a partner of the real estate agent, as was suggested in the argument, but was simply an employé of the agent. He had not the authority of a real estate agent, nor did he perform the duties of a real estate agent. His relation more closely resembled that of a servant or an employé of a real estate agent; and this court has held more than once that one employed to assist a Confederate veteran would be exempt from the payment of a license tax, upon the theory that he himself was not engaged in the business.

(12 Ga. App. 715)

SMITH v. KNOWLES. (No. 4,732.)

(Court of Appeals of Georgia. May 20, 1913.)

(Syllabus by the Court.)

1. COURTS (§ 189*)—CITY COURT—TERMS—TIME FOR TRIAL.

Under the act creating the city court of Floyd county (Acts 1882-83, p. 538, § 8), service of a petition and process is only required

to be made 10 days before the term to which the same is returnable, and ordinary suits stand for trial at the second term as in the superior court.

Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 409, 412, 413, 423, 458; Dec. Dig. § 189.*]

2. JUDGMENT (§§ 346, 384*)—SETTING ASIDE—GROUNDS—MOTION—SUFFICIENCY.

"A judgment valid in other respects will not be set aside as void because it adjudges that the plaintiff recover, in addition to the principal sum and interest, a named amount as attorney's fees." *Shahan v. Myers*, 130 Ga. 724 (1), 61 S. E. 702; *Latimer v. Sweat*, 125 Ga. 477, 54 S. E. 673. A general motion to set aside a judgment as a whole, upon the ground that the judgment is void, when in fact it is only in part void is so much too broad that it should be overruled, and especially is this true when, prior to the motion to set aside, the only error in the judgment has been corrected.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 678, 727-732; Dec. Dig. §§ 346, 384.*]

Error from City Court of Floyd County; J. H. Reece, Judge.

Action by W. A. Knowles against J. M. Smith. Judgment for plaintiff, and defendant brings error. Affirmed.

Knowles brought suit against Smith on two promissory notes. No defense was filed. On the call of the appearance docket the case was entered in default, and judgment was thereafter taken September 25, 1912, as in cases of default on unconditional contracts in writing, and signed by the judge of the city court. This judgment included attorney's fees. On November 26, 1912, upon motion of attorneys for the plaintiff, and before adjournment of the term at which the judgment was rendered, the court passed an order directing the plaintiff to write off the attorney's fees included in this judgment. On November 1st the defendant made a motion to set aside the judgment upon the ground (1) that it appeared from the record that the service of the petition and process was made less than 15 days prior to the return term of the court; and (2) that, this being true, the September term, 1912, of said court, was only the return term, and the court had no jurisdiction at this term to render a judgment in favor of the plaintiff. On the same date the judge issued a rule requiring the plaintiff to show cause why the judgment should not be set aside. On December 2d the judge passed an order superseding the judgment until a disposition of the motion to set it aside, and on December 16th the movant amended his motion by setting up that the judgment improperly included 10 per cent. attorney's fees, and further that the judgment is void because the judgment by default was signed by plaintiff's attorneys.

M. B. Eubanks, of Rome, for plaintiff in error. Dean & Dean and J. M. Hunt, all of Rome, for defendant in error.

RUSSELL, J. (after stating the facts as above). We need say nothing more as to the complaint that the plaintiff's attorney signed the judgment by default than that the judgment was signed by the presiding judge. That is the important point, and the question as to whether the plaintiff's attorney did or did not sign it is wholly immaterial. The signature of the plaintiff's attorney may be treated as surplusage, but it certainly cannot in any respect vitiate the judgment. The court did not err in overruling the motion to set aside the judgment upon any of the grounds stated therein or in the amendment thereto.

[1] 1. There is no merit in the contention that the defendant was served less than 15 days prior to the return term of the court; and, this being true, the second ground of the motion (in which it is insisted that the term at which the judgment was rendered was only the return term), of course, falls with the first ground. In suits upon promissory notes in the city court of Floyd county the petition and process need only be served 10 days before the appearance term of court. Section 8 of the act creating that court (Acts 1882-83, p. 588) provides that "in civil cases the original petition shall be filed in the clerk's office at least fifteen days before the term to which it is returnable, and, if filed within fifteen days, the clerk shall make the same returnable to the next succeeding term thereafter. The service of the process shall be made ten days before the term to which the same is made returnable." It is insisted that the clerk could not make this suit returnable to the June term, 1912, because the petition was not filed 15 days before the first Monday in June. The point made is that as the petition and process were not served as much as 15 days before the first Monday in June, 1912, the case was not properly returnable until the September term, 1912. If the petition was filed 15 days before the first Monday in June, 1912 (and this is not denied), 10 days' service was all that was necessary; and this requirement of the law was fulfilled, as appears from the movant's own petition to set aside the judgment. Consequently the case was in default at the June term, 1912, and stood for trial in September, 1912, the term at which the judgment by default was entered. The act referred to provides, that "ordinary suits stand for trial at the second term, as in the superior court."

[2] 2. The only remaining ground of the motion, then, is the insistence that the judgment be set aside because it included attorney's fees. As to this point, it seems that the plaintiff's attorneys discovered this defect before the movant did, and upon their motion the court corrected the judgment in this respect, before his attention was called thereto by the movant. Upon the plaintiff's

motion, the presiding judge on November 26, 1912, directed that the attorney's fees be stricken from the judgment, and the movant's amendment, asking that the judgment be set aside upon that ground, was not allowed until December 16th thereafter. However, this is immaterial, as, under the ruling of the Supreme Court in *Shahan v. Myers*, 130 Ga. 724, 61 S. E. 702, the court could have ordered the attorney's fees stricken from the judgment, or written off, and should not, unless the judgment was void, have set aside the judgment as a whole, even if the attention of the court had been for the first time directed to this error in the judgment by the movant himself. A judgment valid in other respects will not be set aside as void because it adjudges that the plaintiff recover, in addition to the principal sum and interest, a named amount as attorney's fees. *Shahan v. Myers*, supra. A general motion to set aside a judgment as a whole, upon the ground that the judgment is void when in fact it is only in part void, is so much too broad that it should be overruled, and especially is this true when, prior to the motion to set aside, the only error in the judgment has been corrected. As was said by Judge Lumpkin in *Latimer v. Sweat*, 125 Ga. 477, 54 S. E. 673: "The entire judgment was not void, and therefore the motion to set it aside as a whole fails." The defendant in error asks the award of damages as for a frivolous appeal, and this writ of error is to our mind so wholly unnecessary and so palpably without merit (when the learning and ability of the counsel who prosecuted it is considered) that we can only attribute it to a desire for delay; and damages are accordingly awarded.

Judgment affirmed, with damages.

(13 Ga. App. 712)

HARTFORD FIRE INS. CO. v. WIMBISH.
(No. 4,729.)

(Court of Appeals of Georgia. May 20, 1913.)

(Syllabus by the Court.)

1. INSURANCE (§ 146*)—POLICY—CONSTRUCTION.

Words used in a policy of insurance are to be given their ordinary and usual signification unless the context requires a different construction.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 292, 294-298; Dec. Dig. § 146.*]

2. INSURANCE (§ 425*)—AUTOMOBILE INSURANCE—POLICY—CONSTRUCTION.

Where a policy of insurance indemnifies an owner of an automobile against loss or damage occasioned by theft, robbery, or pilferage, the owner cannot, under this clause of the policy, recover for damage to a machine which had been taken by another and used without the consent of the owner, but without any intent to steal.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 1129, 1135, 1143; Dec. Dig. § 425.*]

3. INSURANCE (§ 425*) — AUTOMOBILE INSURANCE — POLICY — CONSTRUCTION — "THEFT" — "ROBBERY" — "PILFERAGE."

At common law, and under the statutes of this state, theft is synonymous with larceny. The word "robbery," as used in the contract sued on, should be given the same meaning as that set forth in the Penal Code of this state. "Pilferage" is petty larceny. The intent to steal is a necessary ingredient in all three offenses.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 1129, 1135, 1143; Dec. Dig. § 425.*]

For other definitions, see Words and Phrases, vol. 6, p. 5378; vol. 7, pp. 6258-6264; vol. 8, pp. 7792, 6938, 6939.]

Error from City Court of Savannah; Davis Freeman, Judge.

Action by Mrs. A. L. Wimblish against the Hartford Fire Insurance Company. Judgment for plaintiff, and defendant brings error. Reversed.

Adams & Adams, of Savannah, for plaintiff in error. Shelby Myrick and A. A. Lawrence, both of Savannah, for defendant in error.

POTTLE, J. The plaintiff sued the insurance company for damages to an automobile. The clause in the policy upon which the plaintiff relies for a recovery provides that the defendant insures the plaintiff "against actual loss or damage, if amounting to \$25, on each occasion by theft, robbery or pilferage, by persons other than those in the employment, service, or household of the insured." A demurrer to the petition as amended was overruled, and a verdict was returned in favor of the plaintiff. The defendant excepted to the overruling of the demurrer and to the refusal to grant a new trial. From the evidence it appears that on July 4, 1912, the plaintiff employed one Harris to clean out the muffler of an automobile. Harris began work on the machine about 11 o'clock and stated that he would have the work completed by 4 o'clock. Harris was seen driving the car down one of the public streets of Savannah. The plaintiff did not know that he had taken the car and gave him no permission to do so. The plaintiff's husband found the car about 10 o'clock at night, about three miles from the city, up against a tree and in a badly damaged condition. One of the witnesses testified that immediately after the automobile was wrecked in the afternoon of July 4th, he came upon the scene; that the car was going at a terrific rate of speed when it struck the tree; that there were four occupants in the car, three males and one female; that the car was badly broken up and the occupants were badly hurt; that the driver had evidently been drinking, and the other two male occupants of the car seemed to have been drinking also; and that the car was on the White Bluff road, headed for Savannah. The court charged the jury, in substance,

that if the automobile was taken by Harris without the consent or permission of the owner, and while in the possession of Harris was damaged, the plaintiff would have a right to recover, provided Harris was not in the employment of the owner at the time. The jury were further instructed that the word "theft," as used in the contract, was not to be given its usual or technical meaning; and the court declined to charge upon request that, before the plaintiff would be entitled to recover, it must appear that Harris intended to steal the machine, and that if he took the car out for a ride, intending to return it, the plaintiff could not recover.

[1] In construing a contract, the general rule is that words are to be given their usual and ordinary meaning, unless the context requires a different construction.

[2] There is nothing in the policy sued on in the present case which would justify the court in giving to the words employed, in the clause upon which the plaintiff relies for a recovery, a meaning different from that in which the words are ordinarily understood.

[3] It is argued that the word "theft," as used in this policy, means any unlawful taking; that is to say, a taking without the consent of the owner. But in our law the word "theft" has a well-defined meaning. Theft is synonymous with larceny. It is merely a popular name for larceny. See 4 Blackstone Commentaries, 229. This is also true in our Penal Code. For instance, in section 151 it is declared that "larceny or theft" consists of: (1) Simple theft or larceny; (2) theft or larceny from the person; (3) theft or larceny from the house; (4) theft or larceny after a trust or confidence has been delegated or reposed. In section 152 "simple theft or larceny" is defined; and in section 172 "theft or larceny from the person" is defined. It is apparent, therefore, that the word "theft" should be given the same meaning as the word larceny, unless there is something in the contract which requires a different construction. "Robbery," of course, has a well-defined technical meaning, and when used denotes a crime containing all the elements of that offense. The word "pilfer" means to steal, and to charge another with "pilferage" is the same thing as to charge him with stealing. Becket v. Sterrett, 4 Blackf. (Ind.) 499, 500. "Pilferage" is but petty larceny. One cannot be convicted of either theft, robbery, or pilferage unless he had the intent to steal. And we know of no authority for giving any different meaning to these words in a contract of insurance wherein it is stipulated that the company will be liable for loss or damage to an automobile, resulting from theft, robbery, or pilferage. Under this contract, if the thief carries away a machine with intent to steal it, and it is never recov-

ered and loss occurs, the owner may recover the full value of the automobile. If the thief be apprehended and the machine recovered, then the owner is entitled to recover for whatever damage has been done the machine, if it exceeds \$25. But in both cases it must appear that the person taking the machine intended to steal it. If he had the animus revertendi, he is not guilty of theft, or robbery, or pilferage, even though he took the machine without the owner's consent.

This may be a hard contract, but the parties thus have made it, and there is no reason in law or morals why they should not be bound by it. The plaintiff was not obliged to accept the policy in the form that it was offered; she might possibly have procured more liberal insurance elsewhere; but in any event the courts are not at liberty to extend by construction the plain and well-understood meaning of language used in the contract. There were some circumstances in the evidence which seemed to indicate that Harris did not intend to steal the machine. He took it out of the owner's garage in the daytime and drove it along a public thoroughfare leading from the city of Savannah, much frequented by the traveling public. He was seen going in the direction of a public pleasure resort, and when the accident occurred, was returning to the city late in the afternoon with several other persons in the car with him. All these circumstances tended to negative the intent to steal which ordinarily arises from an unlawful taking. The fact that Harris was guilty of a misdemeanor under section 9 of the "automobile act" of 1910 (see Georgia Laws 1910, p. 93) would not authorize a recovery by the plaintiff, for under that act it is a misdemeanor to use an automobile of another without his consent, even where there is no intent to steal. The question of an intent to steal should have been submitted to the jury, and it was error to charge, in effect, that the owner would be entitled to recover under the policy if the machine was unlawfully taken by Harris and without any intent to steal it. The evidence authorized a finding that Harris was not in the employment of the owner at the time he took the machine; the work which he had been employed to do having been finished. The demurrer to the petition as amended was properly overruled.

Judgment reversed.

(12 Ga. App. 696)

HORNSBY v. JENSEN. (No. 4313.)

(Court of Appeals of Georgia. May 20, 1913.)

(Syllabus by the Court.)

1. EVIDENCE (§ 318*)—HEARSAY—RECEIPT.

The writing purported to have been a receipt given by one who was not a party to the issue pending, and who was a competent wit-

ness. The receipt was therefore mere hearsay and not admissible in evidence.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 1193-1200; Dec. Dig. § 318.*]

2. APPEAL AND ERROR (§ 1094*)—GRANTING NEW TRIAL—EVIDENCE.

Since the evidence was strongly conflicting, and error in the admission of illegal evidence is presumptively injurious to the losing party, the discretion of the judge of the superior court in sustaining the certiorari and ordering a third trial will not be controlled.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4322-4352; Dec. Dig. § 1094.*]

(Additional Syllabus by Editorial Staff.)

3. APPEAL AND ERROR (§ 1006*)—REVIEW—EVIDENCE.

After two or more consecutive verdicts, the reviewing court, whether on certiorari or writ of error, will construe the evidence most strongly in favor of the prevailing party.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 8951-8954; Dec. Dig. § 1006.*]

Error from Superior Court, Fulton County; J. T. Pendleton, Judge.

Action between T. L. Hornsby and H. Jensen. From a judgment of the superior court sustaining a certiorari and ordering a new trial, Hornsby brings error. Affirmed.

J. W. and J. D. Humphries, of Atlanta, and W. F. Phillips, of Chipley, Fla., for plaintiff in error. Lowndes Calhoun, of Atlanta, for defendant in error.

RUSSELL, J. [3] The plaintiff in error insists that the judge of the superior court erred in sustaining the certiorari and in thereby setting aside a second consecutive verdict in his favor. It is, of course, well settled that after two or more consecutive verdicts the evidence is to be taken by the reviewing court, whether on certiorari or writ of error, most strongly in favor of the prevailing party. *Windsor v. Cruse*, 79 Ga. 635, 7 S. E. 141. In *Harrigan v. Railroad Co.*, 84 Ga. 793, 11 S. E. 965, it was held that the court erred in setting aside the verdict in favor of the plaintiff because no reversible error was committed on the trial, and the evidence supported the verdict; but that was the third verdict in the plaintiff's favor. In the instant case the judge of the superior court sustained the petition for certiorari and remanded the cause for a third trial; and, while the judge did not assign any special reason for the judgment, it is plain that another trial was granted to the petitioner in certiorari because of the admission in the justice's court of certain testimony which the judge of the superior court deemed to be prejudicial to the defendant's right to a fair and legal trial. Two questions, therefore, are presented by the present writ of error: (1) Was the evidence as to the receipt (to which timely objection was offered in the justice court) an error? And (2) if so, was

it such an error as required or authorized the grant of a third trial of the case?

[1] As was said in *Albany Phosphate Co. v. Hugger*, 4 Ga. App. 771 (6), 62 S. E. 533, it has long been the rule, when the admissibility of evidence is doubtful, to admit it and leave its weight and effect to be determined by the jury. If the trial court is in doubt as to the admissibility of certain evidence, the safer rule always is to admit it. But in the present case it seems to be clear that the testimony to which the defendant in the lower court objected was inadmissible. Personally we are inclined in every case to approve the opening of every avenue to truth, and the letting in of all the light, however feeble or brilliant it may be, which can illuminate the issue; but under the well-considered rulings of the Supreme Court in *Printup v. Mitchell*, 17 Ga. 558, 63 Am. Dec. 258, and *Clarke v. Alexander*, 71 Ga. 505, there can be no question that the justice's court erred in admitting (as corroborative of the testimony of the plaintiff, which was disputed and contradicted) what purported to be written evidence of the date of a payment as evidenced by an alleged receipt of a third person who was not a party to the cause. If the receipt was given by the printer on the day alleged, he was a competent witness to that fact, while the receipt itself was nothing more than hearsay (reduced to writing), a statement of a competent witness, and yet not under oath. In the case of *Printup v. Mitchell*, supra, the Supreme Court held that the receipt of one McAmis, which stated that *Printup* had paid him \$25 on account of a specific matter involved in the case, was properly excluded by the trial judge for the reason that, *McAmis* himself being a competent witness, his receipt was hearsay. In *Clarke v. Alexander*, supra, a letter from Mr. Fouché to *Clarke* was held to be, as to *Alexander & Wright*, res inter alios acta and hearsay, and the ruling of the trial court in excluding it was approved upon the ground that *Fouché* was a competent witness. So in this case, as the printer was a competent witness, the receipt which he had given to *Hornsby* should have been excluded upon the objection offered thereto.

[2] Being constrained to hold that it was error on the part of the trial court to permit the introduction of the printer's receipt, we are not prepared to hold that the error was so slight as that it should have been disregarded by the judge of the superior court, and that he should not have regarded it as of sufficient importance to warrant another trial. The issue between the parties was clearly defined, and the evidence was strongly conflicting as to a vital point in the case. Writings are naturally regarded with such respect, and the contents of a genuine writing are generally considered so much more accurate and reliable than mere memory that

it cannot be asserted as a fact that the writing which corroborated the plaintiff as to the date when he had the cards printed did not throw the scales in his favor in this close case. Though, as a general rule of law, hearsay has no probative value, this principle is likely to be overlooked by a jury when the court permits the introduction of such testimony. And when hearsay is admitted after an objection thereto has been overruled in the jury's presence, the jury, in obedience to the ruling of the court, is compelled to consider it. In any case in which hearsay is admitted over objection and the court gives no specific instruction as to its application as an exception to the general rule, the jury may fail to properly classify it and may treat it as competent evidence.

We find no error in the judgment of the superior court in sustaining the certiorari and in ordering a new trial. The introduction of incompetent evidence is erroneous, and ordinarily the error must be presumed to have injured the losing party. Hence it cannot be held that the judge of the superior court erred in setting aside even a second concurrent verdict and ordering a trial in which an error which may have controlled and must have influenced the previous finding of the jury will not enter.

Judgment affirmed.

(12 Ga. App. 702)

FLOOD v. STATE. (No. 4,829.)

(Court of Appeals of Georgia. May 20, 1918.)

(Syllabus by the Court.)

1. CRIMINAL LAW (§ 938*) — NEW TRIAL — GROUNDS.

The testimony was not sufficient to exclude every reasonable hypothesis save that of the guilt of the accused, and a new trial should have been granted.

[Ed. Note.—For other cases, see *Criminal Law*, Cent. Dig. §§ 2306-2315, 2317; Dec. Dig. § 938.*]

(Additional Syllabus by Editorial Staff.)

2. INTOXICATING LIQUORS (§ 224*)—CRIMINAL PROSECUTION—BURDEN OF PROOF.

In a prosecution for selling intoxicating liquors the burden is on the state to prove a sale, including the receipt or promise of a consideration, and to negative the idea of a gift or loan.

[Ed. Note.—For other cases, see *Intoxicating Liquors*, Cent. Dig. §§ 275-281; Dec. Dig. § 224.*]

3. CRIMINAL LAW (§ 552*)—CIRCUMSTANTIAL EVIDENCE—SUFFICIENCY.

In a prosecution for selling intoxicating liquors the sale may be proven by circumstantial evidence, but when such evidence is relied on it must be inconsistent with defendant's innocence.

[Ed. Note.—For other cases, see *Criminal Law*, Cent. Dig. §§ 1257, 1259-1262; Dec. Dig. § 552.*]

Error from Superior Court, Murray County; A. W. Fite, Judge.

Bill Flood was convicted of selling intoxi-

cating liquors, and he brings error. Reversed.

W. E. Mann, of Dalton, for plaintiff in error. Sam. P. Maddox, Sol. Gen., of Dalton, for the State.

POTTLE, J. The accused was convicted of selling intoxicating liquors, and his motion for a new trial was overruled. The motion is based upon the general ground that the verdict is contrary to the evidence, and upon a ground containing alleged newly discovered evidence.

[1] Only one witness to material facts was sworn in behalf of the state, and his testimony is substantially as follows: In company with four other persons the witness went into the mountains to look at some timber land, and came back by the house of the accused. They all stopped and talked a while, and all went away except the witness, who stayed at the house to get some whisky. While the accused was looking for something to put the whisky in, the witness went out where one of his companions was, got a dollar from him, and came back to the house and got a quart of whisky from the accused. He asked the accused what the whisky was worth, and the accused replied that it was worth \$1. The witness put the money on the table, and the accused told him to "take that dollar up"; that it might cost him \$500. The witness took up the money and, after a while, laid it on a shelf. The accused again told the witness to take the money. In reference to the money the witness testified as follows: "I do not remember whether I took it or not, but rather think I left it there. I hadn't been to dinner, and had been drinking some. My mind is not clear about it, but my recollection is that I left the money there. I did not give it back to Mr. Tyson. I would not have kept it. I felt in my pocket the next morning and did not have it. That was all the money I had." The person who gave the witness the money was in the state of Arkansas at the time of the trial. This person and the witness went to the house of the accused the next day after this transaction took place and got some whisky. The witness did not then see the accused, but his companion went in the house, stayed about 30 or 40 minutes, and returned with a gallon of whisky. The accused, in his statement at the trial, claimed that he refused to accept the dollar; that one of the men in the party had returned home on a visit, and that he told the witness that he was giving him the whisky for his old schoolmate; that he told the witness to take the money, and the witness picked it up and went away with it; that he was not at home the next day, and did not know about anybody getting any whisky from his house at that time. The alleged newly discovered testimony consisted of the affidavit of the witness for the state, upon whose testimony the conviction rested, that after the trial he

was discussing the matter with his wife and asked her about the clothes he wore the day he went to the house of the accused, and if he had on a vest at that time. His wife replied that he did wear a vest that he had bought from a store in Dalton. She thereupon took the vest out of the trunk and found therein a silver dollar. Affiant says that this was the same dollar that he offered the accused, and that after finding this money he now swears that he did not leave the money with the accused, and he is certain that the accused did not accept any money from him. The accused makes an affidavit that he knew nothing about the alleged newly discovered evidence until after the trial, and could not have discovered the same by the exercise of reasonable diligence. There are no affidavits in reference to the character of the affiant, nor any affidavit from the attorney of the accused, and for this reason the ground of the motion is not technically complete. But, since the state had offered the witness and thus vouched for his credibility, and since the witness himself did not at the time of the trial know the new facts, an affidavit of ignorance on the part of the defendant's counsel would have added no force to the ground.

In the light of the testimony of the state, however, we feel constrained to find that the ends of justice require a new hearing. In all criminal cases the guilt of the accused must be established beyond a reasonable doubt. It appears from the testimony of the state's witness, aside from the affidavit in the motion for new trial, that the accused declined to accept pay for the whisky. The witness does say his mind is not clear whether he left the money there, but his recollection is that he did; and he bases this recollection largely upon the fact that he did not give the money back to his companion from whom he had obtained it, and did not find it in his pants pocket the next morning. We have several times held that, where one obtains whisky from another and leaves money in a place accessible to the person furnishing the whisky, the jury would have the right to infer, in the absence of something to the contrary, that the money was accepted and appropriated by the owner of the whisky. See *Rucker v. State*, 77 S. E. 1132. In the present case, however, the evidence is undisputed that the accused refused to accept the money, and there is no evidence that he afterwards appropriated it to his own use. The jury evidently thought that a sale had been consummated, and were unwilling to accept the explanation as to the circumstances under which the whisky was obtained. The conviction was based wholly upon the testimony of one witness for the state, and since it was nowhere contradicted the jury must have accepted it in whole, or rejected it altogether. They were not at liberty to treat the testimony of the witness as they could the unsworn statement of the

accused—that is to say, believe it in part and reject it in part—unless the part rejected was contradicted or in some way shown to be untrue. It was not absolutely essential in the present case that the person who made the affidavit in reference to the newly discovered evidence should have been supported as to character, because he was the very same person who had been vouched for by the state and upon whose testimony alone the conviction was obtained. The case is a peculiar one. The witness must be assumed to have been honest and truthful. He subsequently discovered the fact which convinced him, and which would convince any jury, that he was mistaken in his original testimony. We by no means intend to hold that the trial judge should in all cases grant a new trial simply because the state's witness, after the trial, makes affidavit that he was mistaken as to a material matter. But it is extremely doubtful if the conviction was authorized without reference to the affidavit of the witness made after the trial.

[2] The burden is on the state to prove a sale, and to negative the idea of a gift or loan. Before a sale can be shown, it must appear that something was received or promised in consideration for the delivery of the intoxicating liquor. If the state attempts to show that the sale was for cash, it must prove that money was offered and accepted.

[3] This may be shown circumstantially, but when circumstances are relied on they must be inconsistent with innocence. In the present case they were by no means conclusive of the guilt of the accused. The trial judge may be acquainted with the parties, and from his knowledge of them he may have had reason to believe that the explanation of the transaction by the witness, who was friendly to the accused, was a mere pretext to enable him to escape the consequences of his act; but we must view the case upon the record as presented to us, and so considering it we feel constrained to order a new trial.

Judgment reversed.

(12 Ga. App. 706)

GATES v. STATE. (No. 4,640.)

(Court of Appeals of Georgia. May 20, 1913.)

(Syllabus by the Court.)

1. SUFFICIENCY OF EVIDENCE.

There is no complaint that any error of law was committed on the trial. The evidence was sufficient to authorize the jury to infer that the accused was carrying the pistol in question without having obtained the license required by law.

2. WEAPONS (§ 6*)—CARRYING WEAPONS—ELEMENTS OF OFFENSE—OWNERSHIP.

Upon the trial of one accused of violating the statute forbidding the carrying of a pistol without a license, the ownership of the pistol in question is immaterial, except in so far as the circumstances of ownership may tend to illustrate the guilt or innocence of the defendant.

The statute may be violated as well by one carrying the pistol of another as if the pistol carried were his own.

[Ed. Note.—For other cases, see Weapons, Cent. Dig. § 5; Dec. Dig. § 6.*]

3. CRIMINAL LAW (§ 938*)—NEW TRIAL—GROUNDS—NEWLY DISCOVERED EVIDENCE.

The alleged newly discovered evidence might, by the exercise of proper diligence, have been obtained at the trial.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2306-2315, 2317; Dec. Dig. § 938.*]

4. CRIMINAL LAW (§ 958*)—NEW TRIAL—GROUNDS—NEWLY DISCOVERED EVIDENCE—CHARACTER OF WITNESSES.

The witness by whose testimony it is stated the alleged newly discovered fact could be proved testified in the trial now under review, and, according to the record, knew at that time as much as he now knows in regard to the facts in the case. This case, therefore, differs as to its facts from the case of Flood v. State, 78 S. E. 268, this day decided. Furthermore, the judge did not err in overruling the ground of the motion, based on newly discovered evidence, for the reason that the character of the witnesses, whose affidavits were produced in support of the ground, was not vouched for, as required by law.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2396-2403; Dec. Dig. § 958.*]

Error from City Court of Jeffersonville; L. D. Shannon, Judge.

Horace Gates was convicted of carrying a pistol without a license, and he brings error. Affirmed.

Jas. D. Shannon and R. A. Harrison, both of Jeffersonville, for plaintiff in error. H. F. Griffin, Jr., Sol., of Jeffersonville, for the State.

RUSSELL, J. Judgment affirmed.

(13 Ga. App. 721)

McMILLAN v. WILCOX. (No. 4,755.)

(Court of Appeals of Georgia. May 20, 1913.)

(Syllabus by the Court.)

HUSBAND AND WIFE (§ 187*)—WIFE'S PROPERTY—SALE BY HUSBAND—ACTION BY PURCHASER.

In a suit to recover damages for breach of contract, the uncontroverted facts were as follows: The defendant made a written contract for a named consideration with the plaintiff, agreeing thereby to sell to him on specified terms certain real estate described in the writing. The real estate was not owned by the defendant when he made the contract, but the title thereto was in his wife. The wife had no knowledge of the contract, and did not authorize her husband to make it, and did not in any manner ratify or adopt it. These facts were known to the plaintiff when he took the contract. The wife repudiated the contract and refused to sell her real estate to the plaintiff. Held, that a verdict for the defendant was demanded; the plaintiff not being entitled to recover even nominal damages.

[Ed. Note.—For other cases, see Husband and Wife, Cent. Dig. §§ 722, 723; Dec. Dig. § 187.*]

Error from Superior Court, Jeff Davis County; C. B. Conyers, Judge.

Action by A. L. McMillan against A. J. Wilcox. Judgment for defendant, and plaintiff brings error. Affirmed.

J. C. Bennett, of Hazlehurst, and O'Steen & Wallace, of Douglas, for plaintiff in error. S. D. Dell and J. M. Wilcox, both of Hazlehurst, and F. Willis Dart, of Douglas, for defendant in error.

HILL, C. J. Judgment affirmed.

(12 Ga. App. 706)

ANDERSON v. ANDERSON. (No. 4,668.)
(Court of Appeals of Georgia. May 20, 1913.)

(Syllabus by the Court.)

1. ASSIGNMENTS (§ 41*)—RIGHT OF ACTION—TORT—WHAT CONSTITUTES.

Where a widowed mother had a cause of action against a railway company to recover damages for the homicide of her son, and she entered into a contract with her children, by the terms of which she agreed, in consideration of advances made by them to her for the purpose of defraying the expenses of prosecuting her cause of action, to share equally with them in any recovery she might obtain in her suit, this was not an assignment of the right of action for the personal tort.

[Ed. Note.—For other cases, see Assignments, Cent. Dig. §§ 76, 77; Dec. Dig. § 41.*]

2. CHAMPERTY AND MAINTENANCE (§ 4*)—EXISTENCE—PARTIES IN INTEREST—"CHAMPERTY."

The contract made by the children with the mother as indicated in the foregoing head-note is not one of maintenance or champerty. Maintaining the suit of another is lawful, if the person so maintaining has any interest in the suit, however remote, vested or contingent, or is connected with the suitor by some social relation, or by the ties of affinity or consanguinity, or is under any obligation to assist and aid the suitor.

[Ed. Note.—For other cases, see Champerty and Maintenance, Cent. Dig. §§ 4, 9, 11-19; Dec. Dig. § 4.*]

For other definitions, see Words and Phrases, vol. 2, pp. 1045-1050; vol. 8, pp. 7598, 7599.]

Error from Superior Court, Whitfield County; A. W. Fite, Judge.

Action by G. C. Anderson against Myra Anderson. Judgment for plaintiff, and defendant brings error. Affirmed.

M. C. Tarver, of Dalton, for plaintiff in error. C. N. King, of Spring Place, for defendant in error.

HILL, C. J. Plaintiff brought suit in a justice's court against his mother, to recover, under a written contract, for the sum of \$90.88, being one-ninth undivided interest in \$818, which the defendant had recovered as damages for the homicide of another son. The facts are as follows: Myra Anderson, the defendant, had a son, Noble Anderson, killed by a railway company in the state of Texas. She had a cause of action for her son's death. She had no money to prosecute

the cause of action, or to pay the necessary expenses of the litigation. Her nine children, among whom was the plaintiff, made an agreement with her that they would advance the money to her to prosecute her cause of action against the railway company in Texas and to defray the expenses of one of her sons in going to Texas to look after the suit, provided they should share equally with the mother in the recovery. She assented to this agreement. The money was advanced by the children, the son went to Texas, suit was instituted, and recovery had, and the present suit is brought by the son to recover his agreed proportion of the amount of the recovery. The justice of the peace sustained a general demurrer and dismissed the suit. The plaintiff took the case, by certiorari, to the superior court; his certiorari was sustained, and the writ of error challenges the correctness of the judgment sustaining the certiorari. Two questions are raised by the record.

[1] 1. It is contended that the contract in question was an effort to make an assignment of an interest in a right of action for a personal tort, and that, under the Code, a right of action for a personal tort is not assignable. Civil Code 1910, § 3655; Central R. Co. v. B. & W. R. Co., 87 Ga. 386, 388, 13 S. E. 520. Under the facts of this case, we do not think that there was any assignment of the right of action to the children by the mother for the personal tort arising from the homicide of her son, but it was simply a contract between the mother and her children by which they agreed to advance to her the necessary means to carry on the litigation in her own name and behalf for the death of her son, and to pay the expenses of one of her sons for the purpose of aiding her in the prosecution of her suit. The suit for the tort was prosecuted in Texas in the mother's name, and not in the name of her children.

[2] 2. The second question raised is whether the contract between the mother and her children was one of maintenance or champerty, and therefore void as against public policy. Section 4253 of the Civil Code is relied upon in support of this contention. This section is as follows: "A contract which is against the policy of the law cannot be enforced; such are contracts tending to corrupt legislation or the judiciary, contracts in general in restraint of trade, contracts to evade or oppose the revenue laws of another country, wagering contracts, contracts of maintenance or champerty." Was the contract in question one of maintenance or champerty? There are two essential elements in a champertous agreement: First, there must be an undertaking by one person to defray the expenses of the whole or a part of another's suit; and, second, an engagement or promise on the part of the latter to divide with the former the proceeds of the litigation in

the event it proves successful. The Supreme Court of this state has frequently held that a contract of this character was champertous and could not be enforced. *Moses v. Bagley*, 55 Ga. 283; *Meeks v. Dewberry*, 57 Ga. 263; *Johnson v. Hilton*, 96 Ga. 577, 23 S. E. 841. Champerty, maintenance, and barratry were defined and denounced as kindred offenses very early in the history of English law. 4 Black. Com. 135. Many states of this Union have statutes against such practices, as highly injurious to the peace of society, and as offenses which interfere with the course of public justice. Blackstone, in his Commentaries, speaks of the offense of champerty as one which "perverts the process of law into an engine of oppression."

It is, however, a well-defined exception to the law against maintenance or champerty that where one has a peculiar interest in a suit, or is related by the ties of consanguinity or affinity to either of the parties, he may rightfully assist in the prosecution or defense of such suit, either by furnishing counsel or contributing to the expenses, and may, in order to strengthen his position, purchase the interest of another party, in addition to his own, and that agreements of this character and under these circumstances are valid. See notes appended to the case of *Thallhimer v. Brinckerhoff* (N. Y.) 15 Am. Dec. 308, 319. In the principal case it was held by the Court of Appeals of New York that maintaining the suit of another is lawful, if the person so maintaining has an interest in the suit, vested or contingent, or is connected with the suitor in some social relation, or by the ties of affinity or consanguinity, or in the relation of landlord and tenant, master and servant, or attorney and client, or is moved by the impulse of charity; and in that case a contract between an heir and his brother-in-law, by which the latter promised to incur a half of the expenses in an action which was about to be brought, in consideration of a fourth of the property to be recovered, was held to be valid, and that if the suit were brought and compromised, and the property conveyed by the heir, the brother-in-law might, in an action of *indebitatus assumpsit* for money had and received, recover his share of the proceeds. See, also, *Small v. Mott*, 22 Wend. (N. Y.) 403.

From these decisions the rule is deducible that a champertous agreement is one made by a stranger to the subject of the litigation, who has no interest therein in law or in equity, or any expectancy by the ties of blood or

affinity, or who is under no filial or social obligation to assist or aid in the subject-matter of the litigation, but who agrees to assist, either from a pecuniary motive solely, or for the purpose of embroiling his neighbors in litigation, or to carry the suit through the different courts upon a stipulation that he shall receive a share of the fruits of the litigation as a reward for his assistance; and this character of contracts cannot be enforced, because they are against public policy.

In the present case the mother had a right of action for the death of her son. She was unable to prosecute her action. It was the duty of her children to assist her in that prosecution, and in recovering compensation to which she was entitled for the death of her son. This duty was upon the children, not only on account of the relationship which existed, but because there was really a common interest (although it may have been contingent to a large extent) of expectancy in the cause of action. Any interest in the cause of action, however remote, would free the contract from the taint of being champertous; and these children had an interest in whatever might be recovered by the mother, although that interest was one of expectancy, arising from the fact of a possible contingency of inheritance. The reason why champerty is denounced by the law and by the Code is that a contract of that character is against public policy. It certainly cannot be against public policy for the children of an indigent mother to aid her in the prosecution of her just rights under the law. Nor is such contract rendered champertous because, as a part of the agreement which the children made with the mother, in the event of a recovery she was to divide the proceeds equally with them. While it might have been their filial duty to make the advances to the mother without any compensation, yet the mother had the right to reimburse them for such advances and assistance, by agreeing to share with them equally in any recovery which she might obtain; and the children had the right to make with the mother a contract to reimburse them for the money which they had advanced. For these reasons we think the contract in this case, made by the children with the mother, was in no sense a contract of maintenance or champerty. It was for a valid consideration and enforceable, and therefore the judge of the superior court did not err in sustaining the certiorari.

Judgment affirmed.

(163 N. C. 467)

Ex parte BLACK.

(Supreme Court of North Carolina. May 28, 1913.)

1. CRIMINAL LAW (§ 1216*)—PUNISHMENT—CONCURRENT AND SUCCESSIVE SENTENCES.

A sentence of imprisonment may be given on each successive conviction of accused, and each successive term may commence on the expiration of the term next preceding; but the latter sentence must state that the term shall begin at the expiration of the former sentence or the sentences will run concurrently.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 3310-3319; Dec. Dig. § 1216.*]

2. CRIMINAL LAW (1216*)—PUNISHMENT—CONCURRENT AND SUCCESSIVE SENTENCES.

Where accused convicted of crime while at large under a conditional pardon appeared personally in court and withdrew his appeal and submitted himself to the sentence not stating that it should begin at the expiration of the prior sentence, and the conditional pardon was revoked and he was taken into custody, the two sentences ran concurrently, though the court failed to enter on its records the withdrawal of the appeal.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 3310-3319; Dec. Dig. § 1216.*]

Appeal from Superior Court, Swain County; Carter, Judge.

Proceeding for habeas corpus by W. P. Black for his discharge from imprisonment. From an order remanding the petitioner, he appeals. Reversed, and petitioner discharged.

W. P. Brown and J. Scroop Styles, both of Asheville, for appellant. The Attorney General and the Assistant Attorney General, for the State.

BROWN, J. The petitioner, Black, was brought before the judge in obedience to a writ of habeas corpus by the sheriff of Buncombe county, to try the legality of the imprisonment of the petitioner, who was then in prison by virtue of an order made by his honor B. F. Long at the December special term, 1912, of the criminal court of Buncombe county. At the November term, 1908, of the superior court of Buncombe county, the petitioner was found guilty of a nuisance, and was sentenced to a term of 22 months on the public roads of Buncombe county, from which judgment he took an appeal to the Supreme Court. The judgment was affirmed by the Supreme Court, and petitioner was taken in execution on said judgment on the 2d day of June, 1909. On the 18th day of January, 1910, petitioner was granted a conditional pardon. At the July special term, 1911, and while petitioner was at large by virtue of said conditional pardon, he was tried for keeping liquor for sale in Buncombe county, was convicted, and sentenced to a term of 12 months on the public roads of said county, from which judgment he gave due notice of appeal to the Supreme Court, and entered into the appearance bond required by the court

pending such appeal, was released from custody, but the petitioner did not prosecute the appeal. On the 4th day of August, 1911, petitioner was taken in custody upon the Governor's revocation of the conditional pardon aforesaid, and entered upon the service of the remainder of his said original term of 22 months. At the criminal term of superior court of Buncombe county which convened on the 14th day of August, 1911, petitioner appeared in open court and gave due notice of the withdrawal of his appeal from the last conviction aforesaid and announced his readiness to serve the term imposed upon said conviction; petitioner being at the time in custody and serving the sentence in the other case. The presiding judge had no entry made on the docket of August term, 1911, of the withdrawal of the appeal and of the submission of the prisoner to the judgment and sentence rendered at July special term. It is admitted and the judge finds as a fact that, if the sentence in the two cases runs concurrently, the prisoner has served the full term in both cases.

[1] It seems to be well settled by many decisions and with entire uniformity that, where a defendant is sentenced to imprisonment on two or more indictments on which he has been found guilty, sentence may be given against him on each successive conviction; in the case of the sentence of imprisonment each successive term to commence from the expiration of the term next preceding. It cannot be urged against a sentence of this kind that it is void for uncertainty; it is as certain as the nature of the matter will admit. But the sentence must state that the latter term is to begin at the expiration of the former one; otherwise it will run concurrently with it. Am. & Eng. Enc. of Law (2d Ed.) vol. 25, pp. 307, 308. It is absolutely essential that the last sentence shall state that the term of imprisonment is to begin at expiration of former sentence in order to prevent the prisoner from serving the two sentences concurrently with each other. U. S. v. Patterson (C. C.) 29 Fed. 775; In re Jackson, 3 MacArthur (D. C.) 24; Fortson v. Elbert County, 117 Ga. 149, 43 S. E. 492 (1903); Ex parte Gafford, 25 Nev. 101, 57 Pac. 484, 83 Am. St. Rep. 568; Ex parte Hunt, 28 Tex. App. 361, 13 S. W. 145.

[2] The fact that no entry was made on the records of the court at August term of the withdrawal of the appeal is immaterial. It is found as a fact that the prisoner appeared in court in person at said term and through his counsel withdrew his appeal and submitted himself to the sentence of the court. It was the duty of the judge to have then directed the proper entries. The prisoner had no control over the records and did all the law required of him. The oversight of the judge cannot prejudice the prisoner's rights.

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes 78 S.E.—18

As the second sentence failed to state that it was to begin at the expiration of the first, the two sentences ran concurrently.

The prisoner is discharged.

Reversed.

(162 N. C. 393)

BOGGS v. CULLOWHEE MINING CO.

(Supreme Court of North Carolina. May 28, 1913.)

1. DEPOSITIONS (§ 69*)—SIGNATURE BY WITNESS.

Revisal 1905, § 1652, providing for the taking of depositions, does not expressly require that a witness subscribe to his deposition, and a witness' signature is not essential if the deposition is otherwise sufficient.

[Ed. Note.—For other cases, see Depositions, Cent. Dig. §§ 158-160; Dec. Dig. § 69.*]

2. MASTER AND SERVANT (§ 270*)—INJURIES TO SERVANT—EVIDENCE—SUBSEQUENT REPAIRS.

While as a rule evidence of subsequent repairs by the employer is not admissible to establish negligence, such evidence may be admissible to show the conditions existing at the time of the accident, and to show whose duty it is to make the repairs when that is in issue.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 913-927, 932; Dec. Dig. § 270.*]

Appeal from Superior Court, Jackson County; Ferguson, Judge.

Action by J. Frank Boggs against the Cullowhee Mining Company. From a judgment for plaintiff, defendant appeals. Affirmed.

See, also, 76 S. E. 717.

There was allegation with evidence on the part of plaintiff tending to show that on March 17, 1910, plaintiff, in the course of his duty as an employé of defendant, was engaged in operating a dump car over defendant's tramroad and received serious physical injuries by reason of a defective brake and brake rod on said car, and that the company had been notified that said brake and rod, etc., were defective and likely to cause injury. There was evidence on the part of defendant tending to show that plaintiff, at the time, was doing the work by contract and was charged with the duty of keeping the tools and implements in proper repair, and further that plaintiff had assumed the risk of the alleged defects, and further that he was guilty of contributory negligence in the way he did the work and operated the car. On issues submitted, there was verdict for plaintiff. Judgment on the verdict, and defendant excepted and appealed.

Coleman C. Cowan, of Webster, for appellant. Walter E. Moore and Alley & Buchanan, all of Webster, and S. B. Shepherd, of Raleigh, for appellee.

HOKE, J. We have carefully examined the record and find no reversible error. The charge of the court on the different questions presented is in accord with our decisions, and the jury having accepted the plain-

tiff's version of the matter, an actionable wrong is clearly established.

[1] It was contended that the judge committed error in admitting for plaintiff a deposition of the witness H. A. Hein, when the witness had not signed the same. It is desirable always that the witness should subscribe the deposition; but the statute does not seem to require this, and, on authority, this is held not to be an essential, if the deposition is otherwise regular and satisfactorily identified. Revisal 1905, § 1652; Murphy v. Work, 2 N. C. 105; Rutherford v. Nelson, 2 N. C. 105; Moulson v. Hargrave, 1 Serg. & R. (Pa.) 201.

[2] It was further insisted that his honor erroneously admitted evidence of "repairs done to the car by defendant after the occurrence, and, with a view of continuing the work, overhauling the car and putting in new and heavier brakes, etc." Our decisions are to the effect that evidence of subsequent repairs are not, as a general rule, admissible as tending to establish negligence or an admission of it by the employer. Tise v. Thomasville, 151 N. C. 281, 65 S. E. 1007; Myers v. Lumber Company, 129 N. C. 252, 39 S. E. 960; Lowe v. Elliott, 109 N. C. 581, 14 S. E. 51. There are several recognized exceptions, however, one being when evidence of the kind in question is brought out in showing "conditions existent at the time of the accident," and another "when the evidence may become pertinent on the question of whose duty it is to make the repairs." 29 Cyc. p. 618; Blevins v. Cotton Mills, 150 N. C. 493, 64 S. E. 428. In the present case, the evidence offered was chiefly that of the witness Jesse Brown, who succeeded plaintiff in the work, and the testimony received, among other things, was to the effect that, just after the injury, the car was overhauled, the rod mended, in a way described, and stronger brakes added, etc., and this work was done by the company's blacksmith and by direction of the superintendent and general manager.

On the record, there was direct issue made between these parties as to whose duty it was to keep the car in proper repair and, without deciding whether the conditions presented would make the evidence competent under the first of the exceptions above stated, we are clearly of opinion that it came within the second, and was therefore properly admitted.

There were a good many exceptions to the refusal of the court to give certain prayers for instructions by defendant; but to the extent justified by the facts in evidence they were sufficiently embodied in the general charge of the court, and, as heretofore stated, after careful examination, we find no error to defendant's prejudice that would justify us in disturbing the results of the trial.

The judgment is therefore affirmed.

No error.

(162 N. C. 523)

LUNSFORDS et al. v. ALEXANDER et al.
(Supreme Court of North Carolina. May 23,
1913.)

1. APPEAL AND ERROR (§ 395*)—APPEAL BOND—NECESSITY.

In the absence of an affidavit for leave to appeal without bond, an appeal must be dismissed where a party neither gives the appeal bond nor makes a deposit in lieu thereof.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2058, 2064-2070, 2085, 2086, 3127; Dec. Dig. § 395.*]

2. APPEAL AND ERROR (§ 395*)—DISMISSAL—REINSTATEMENT.

Where appellants gave no appeal bond, and when the case was reached and appellees moved to dismiss, appellants' resident counsel did not offer to make a deposit in lieu thereof, the cause will not be reinstated upon a showing that the clerk of the Supreme Court was absent and did not advise appellants' nonresident counsel as to the time it would be reached.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2058, 2064-2070, 2085, 2086, 3127; Dec. Dig. § 395.*]

3. APPEAL AND ERROR (§ 395*)—FILING OF APPEAL BOND—DUTY OF COUNSEL.

Where the providing of an appeal bond is left to the counsel, he is acting as agent of the appellants and not as counsel, and his neglect is the neglect of the principal; therefore, the giving of an appeal bond being a condition precedent, it is no excuse to show that the failure to file one was due to the negligence of counsel.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2058, 2064-2070, 2085, 2086, 3127; Dec. Dig. § 395.*]

Caveat to a will by Nancy Lunsfords and others against Freel H. Alexander and others. From a judgment for defendants, plaintiffs appealed, and the appeal was dismissed on defendants' motion. On motion to reinstate. Motion denied.

N. Y. Gulley & Son, of Wake Forest, and McNeill & McNeill, of Lumberton, for plaintiffs. T. C. Bowle, of Jefferson, R. A. Dough-ton, of Sparta, and R. L. Ballou, of Jefferson, for defendants.

PER CURIAM. Motion to reinstate.

[1] When this case was reached in regular order for argument, on motion and by consent of counsel, it was set for hearing for the end of the Fourteenth district. It was again reached under this order on May 8th, and at request of one of plaintiffs' counsel it was laid over till an hour that would suit the convenience of said counsel. When reached the defendants moved to dismiss because no appeal bond had been filed. Counsel for the plaintiff was present and showed no excuse for failure to file the bond, and did not then and there offer to make a deposit in lieu of bond, which he would have been permitted to do. The case was then dismissed as required by the rule.

The decision of the court below is presumed to be correct. Any party not satisfied with such decision has the right to appeal, but only upon compliance with the condi-

tions required by the statute. Among these conditions is the execution of a bond, or making a deposit in lieu thereof, and, if the party is unable to do either of these things, the law, in its liberality, permits him to appeal without giving bond, upon filing the affidavit and certificate and procuring leave to appeal without bond, in the manner prescribed by law. The appellant chose to do neither of these things. He might have filed the deposit even after motion was made to dismiss for want of a bond, but he did not offer to do so.

[2] The appellant now moves on the last day of the term to reinstate the cause upon the ground that the clerk did not write him, upon application, the probable date at which the cause would be reached for argument. The clerk was absent from his office by illness, but the counsel making this affidavit, who is nonresident, had resident counsel who was present when the case was reached for argument and dismissed, and he should have learned from him as to the date at which the cause would be reached. This court has no daily calendar, and counsel must attend during the week for which the case is set under our rules. The clerk would probably have answered the letter, if he had been in his office; but this would have been merely a courtesy and not a right.

This court has repeatedly said that "when a man has a case in court the best thing he can do is to attend to it." *Pepper v. Clegg*, 132 N. C. 316, 43 S. E. 907. The appellant has not given this appeal such attention as entitles him to have this cause reinstated. Appellants are prone to forget that "appellees have rights" as well as themselves. The appellee has the right, if the appeal is not taken and prosecuted in the manner required by the statute, to have it dismissed, and the burden is upon the appellant to show that he has given the matter proper attention and that failure to comply with the requirement of the statute and rules has been without laches on his part. If this motion, made on the last day of the term, were to be granted, it would result in keeping the appellee six months longer in litigation. The appellant has made out no case which entitles him to deprive the appellee of the final disposition of the case which the court has already made.

[3] Providing appeal bond, if left to counsel, is a duty devolved on him, not as counsel, but as agent of appellant, and his neglect is the neglect of the principal. *Churchill v. Insurance Co.*, 92 N. C. 485; *Griffin v. Nelson*, 106 N. C. 235, 11 S. E. 414. In *Co-zart v. Assurance Co.*, 142 N. C. 523, 55 S. E. 411, the court says that compliance with the "regulations as to appeals is a condition precedent, without which (unless waived) the right to appeal does not become potential. Hence it is no defense to say that the negli-

gence is negligence of counsel and not negligence of the party." This has been cited and approved in *Vivian v. Mitchell*, 144 N. C. 477, 57 S. E. 167, and in many other cases.

Motion denied.

(162 N. C. 397)

A. BLANTON GROCERY CO. v. TAYLOR et al.

(Supreme Court of North Carolina. May 22, 1913.)

1. CHATTEL MORTGAGES (§ 282*)—ACTION TO FORECLOSE—INSTRUCTIONS—FRAUD.

Where the plea in an action to foreclose a chattel mortgage on a stock of goods raised the issue as to whether the mortgage was fraudulent, and there was at least a presumption of fraud justifying an answer thereto favorable to the defendant, the refusal to submit such issue was reversible error.

[Ed. Note.—For other cases, see *Chattel Mortgages*, Cent. Dig. § 568; Dec. Dig. § 282.*]

2. CHATTEL MORTGAGES (§ 201*)—VALIDITY—FRAUD—PRESUMPTIONS.

A mortgage upon a stock of goods, the possession of which is left to the mortgagor to secure a debt maturing in the future, which contains no provision for an account of sales and the application of the proceeds to the debt, is presumptively fraudulent as to existing creditors, and, since the intent of entering into the transaction is immaterial, the presumption cannot be rebutted by showing the absence of actual intent to defraud, but it may be rebutted by proof that there was no other creditor at the time of the registration of the mortgage, or that, if there was, that the mortgagor owned other property at the time, subject to the payment of the debt and sufficient to pay such creditor.

[Ed. Note.—For other cases, see *Chattel Mortgages*, Cent. Dig. § 860; Dec. Dig. § 201.*]

3. CHATTEL MORTGAGES (§ 192*)—VALIDITY—DEBTS CONTRACTED SUBSEQUENT TO REGISTRATION.

A mortgage upon a stock of goods, the possession of which is left with the mortgagor to secure a debt maturing in the future and containing no provision for an account of sales and the application of the proceeds to the debt, is valid as to debts contracted subsequent to its registration.

[Ed. Note.—For other cases, see *Chattel Mortgages*, Cent. Dig. §§ 434-437; Dec. Dig. § 192.*]

4. EVIDENCE (§ 213*)—ADMISSIONS—TENDER.

Under the express provision of Revisal 1905, § 860, a tender of judgment not accepted is to be deemed withdrawn and cannot be given in evidence.

[Ed. Note.—For other cases, see *Evidence*, Cent. Dig. §§ 745-751, 753; Dec. Dig. § 213.*]

5. COSTS (§ 42*)—GROUNDS OF RIGHT—EFFECT OF TENDER.

A tender of judgment under Revisal 1905, § 860, providing that the tender, when not accepted, is to be deemed withdrawn, and that it cannot be given in evidence, can only be used after verdict before the judge to enable him to adjudge who shall pay the costs.

[Ed. Note.—For other cases, see *Costs*, Cent. Dig. §§ 137-164; Dec. Dig. § 42.*]

6. APPEAL AND ERROR (§ 1064*) — TRIAL (§ 243*) — INSTRUCTIONS — INCONSISTENT INSTRUCTIONS.

In an action to recover the stock of goods claimed under a chattel mortgage, where the issue as to whether after-acquired goods passed under the mortgage was material, instructions that it was to be determined by the greater

weight of the evidence, and in another part of the charge, without correcting such error, that the evidence must be clear, strong, and convincing were inconsistent and constituted reversible error.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 4219, 4221-4224; Dec. Dig. § 1064.* Trial, Cent. Dig. §§ 564, 565; Dec. Dig. § 243.*]

Appeal from Superior Court, Rutherford County; Ferguson, Judge.

Action by the A. Blanton Grocery Company against J. W. Taylor and others. Judgment for plaintiff, and defendants appeal. New trial.

This is an action to recover a stock of goods; the plaintiffs claiming ownership under a chattel mortgage executed by the defendant J. W. Taylor on January 25, 1910, to secure a note of \$100 due March 3, 1910, in the form prescribed by section 1039 of the Revisal. The defendants are J. W. Taylor and J. C. Hampton; the latter claiming under a general assignment to secure creditors, executed to him by the said Taylor.

The plaintiffs alleged, among other things: "If as a matter of law the said mortgage does not cover all goods, without regard from whom purchased, subsequently added, up to the time of the satisfaction of the mortgage, then the same was incorrectly drawn by reason of a mutual mistake of both parties to said mortgage." The defendants denied this allegation, and also that there was anything due the plaintiffs, and the defendant Hampton further alleged: "That the chattel mortgage described in the complaint was fraudulent, as well as void, as to the creditors of J. W. Taylor, because it pretended to mortgage the stock of merchandise of the defendant J. W. Taylor, and allowing said defendant J. W. Taylor to sell the same without making provision for the application of the proceeds of sale of said stock of goods, and because the description in said chattel mortgage is not sufficient in law." The stock of goods was seized under proceedings in claim and delivery issued in the action and delivered to the plaintiffs, and sold by them under their mortgage, at which sale the goods were bought for the plaintiffs for \$450.

The defendants tendered the following issue, among others: "Second. If so, was the mortgage fraudulent and void as against other creditors of the defendant J. W. Taylor?" The court refused to submit the issue, and the defendants excepted.

Prior to the trial the plaintiffs made a tender of judgment under section 860 of the Revisal for \$395, with interest from March 24, 1911, and costs. The court permitted this tender to be offered in evidence, and the defendants excepted.

There was evidence on the part of the plaintiffs that the goods were not worth more than \$450, but it was admitted that after the sale they sold them for \$475, and

there was evidence for the defendants that the goods were worth \$800.

The verdict of the jury was as follows:

"(1) In what amount, if any, is J. W. Taylor indebted to plaintiffs? Answer: \$78.29.

"(2) Was there a mutual mistake in drawing the chattel mortgage by which the provision that the mortgage should cover all the merchandise subsequently added to the stock was omitted, as alleged? Answer: Yes.

"(3) What was the value of the property taken by the plaintiffs at the time of the seizure? Answer: \$462.50."

His honor charged the jury on the second issue: "The plaintiff contends that the parties agreed between themselves (that is, Taylor and Laughridge) that the mortgage should be so amended as to express that all goods, which might be in stock or hereafter bought (did not make any difference from whom the purchases were made), and that, having agreed upon that and understanding to put it in the mortgage, it was a mistake made by both Laughridge and Taylor in getting the expression necessary to convey the idea that the mortgage should be on goods which might hereafter be bought, not only from the Blanton Grocery Company, but from any other parties from whom he purchased. The burden is on the plaintiff to satisfy you by the greater weight of the evidence that such agreement was made and left out by mistake. In other words, that both parties understood what it was, and intended it should be so embraced by the mortgage, but, in failure to use proper words to convey their meaning as agreed upon, it was left out. They are not to satisfy you beyond a reasonable doubt, as in criminal cases, but by the greater weight of the evidence." Defendants excepted. And again: "When you come to the second issue, you will remember it is a rule of law that when people reduce their contract to writing the writing is presumed to express what they agreed upon, and the party who insists that something is left out of the writing which was agreed upon, by mutual mistake, is called upon to give to the court and jury a class of evidence which is clear within itself, and strong and convincing."

Judgment was entered upon the verdict, and the defendants excepted and appealed.

S. Gallert and McBrayer & McBrayer, all of Rutherfordton, for appellants. Quinn, Hamrick & McRorie, of Rutherfordton, and J. W. Pless, of Marion, for appellee.

ALLEN, J. [1,2] The issue of fraud is raised by the pleadings, and, if there was any evidence justifying an answer thereto favorable to the defendants, it was error to refuse to submit it. If we were dealing with any other class of property than a stock of goods, or if it was necessary in this case to prove a corrupt and fraudulent intent, we would hold there was no such evi-

dence, as there is nothing in the evidence suggesting that the plaintiffs had any unlawful or wrong purpose, but the character of the property and the admitted facts are such that there arose a presumption of a legal fraud, which the plaintiffs were required to rebut.

In *Cheatham v. Hawkins*, 76 N. C. 335, the court says, in commenting upon a mortgage of a stock of goods: "To secure a debt the bargainor conveys in mortgage an entire stock of miscellaneous merchandise, and at the same time in the deed expressly reserves the possession of them for at least nine months. The implication is irresistible, from the very nature of the business, that he was to continue in selling and trading as before; otherwise why retain possession of goods, which would be a dead incumbrance upon his hands, without the power of disposition? There is no provision for his accounting for the proceeds of sale. He could apply the money in payment of debts, other than the mortgage debt; he could apply it to family expenses, or even to the purposes of pleasure or waste. Substantially the proceeds belonged to him until the maturity of the Hawkins debt to be expended as he pleased; and in the meantime the entire stock of goods was to be secure from the reach of his creditors. * * * The power to sell was the power to destroy, and the sale was the destruction and extinction of the property. If there were other unsecured creditors at the time of this assignment, and no other property of the debtor than that conveyed in the mortgage out of which creditors could make their debts, the fraudulent intent would seem to be irrebuttable. A clear benefit is secured to the debtor, and a clear right is withheld from the creditor beyond what the law permits. * * * Here is not only a retention of possession by the assignor, which is presumptive evidence of fraud, but there is the further power to dispose of it for the debtor's benefit, and still more the exercise of that power annihilates the thing itself. We have, then, one of the strongest cases of presumptive fraud." And in the same case, 80 N. C. 161: "The only rebutting evidence adduced against the fraudulent purpose inferred from the provisions of the deed itself and their obvious and necessary effect upon the rights of creditors is found in the declaration of the several parties to the transaction that an intent to favor the mortgagor, or to delay or defraud his creditors, was not in their minds at the time. This cannot be allowed to remove the legal presumption arising from the facts. Acts fraudulent in view of the law because of their necessary tendency to delay or obstruct the creditor in pursuit of his legal remedy do not cease to be such because the fraud as an independent fact was not then in mind. If a person does, and intends to do, that which from its consequences the law pronounces fraudulent, he is held to in-

tend the fraud inseparable from the act." And this has been affirmed in *Holmes v. Marshall*, 78 N. C. 264; *Boone v. Hardie*, 83 N. C. 475; *Booth v. Carstarphen*, 107 N. C. 400, 12 S. E. 375; *Cowan v. Phillips*, 119 N. C. 28, 25 S. E. 711; *Edwards v. Supply Co.*, 150 N. C. 172, 63 S. E. 742.

The principles to be deduced from these authorities are:

(1) That a mortgage upon a stock of goods, the possession of which is left with the mortgagor, to secure a debt, maturing in the future, which contains no provision for an account of sales and the application of the proceeds to the debt, is presumptively fraudulent as to existing creditors.

(2) That the motive or intent entering into the transaction is immaterial, and that the presumption of fraud cannot be rebutted by proving the absence of an actual intent to defraud.

(3) That the presumption of fraud may be rebutted by proving that there was no other creditor of the mortgagor at the time of the registration of the mortgage, or if there was such creditor that the mortgagor owned other property at that time, which could be subjected to payment of the debt, sufficient to pay such creditor.

[3] It has also been held that such a mortgage as we have described is valid as to debts contracted subsequent to its registration. *Messick v. Fries*, 128 N. C. 454, 39 S. E. 59.

The case of *Bynum v. Miller*, 86 N. C. 559, 41 Am. Rep. 467, and the same case, 89 N. C. 393, proceed on a different principle. In those cases the contest was between the mortgagee and a purchaser from the mortgagor, and the court said, in 86 N. C. 562, 41 Am. Rep. 467: "Whatever diversity of views may exist elsewhere, the law is well settled by adjudications in this state that a subsequent purchaser of personal property from one who has previously made a fraudulent assignment of it, or an assignment without consideration and for his own benefit, whether the purchase be with or without notice and for a valuable consideration, and such assignment has been proved and registered as required by law, stands in the place of his assignor, and neither is permitted to impeach its force and validity. The estoppel upon the assignor extends to his subsequent vendee, and as to both the conveyance, though it may be void as to creditors, is equally efficacious as to them."

Nor is there anything in *Kreth v. Rogers*, 101 N. C. 270, 7 S. E. 682, which was approved in *Brown v. Dall*, 117 N. C. 46, 23 S. E. 45, in conflict with these views. It is true there were existing creditors in the *Kreth* Case, but these were paid in full, and

the controversy was between the first and a second mortgagee. In the first mortgage there were stipulations as to the manner in which the business should be conducted by the mortgagor, and among others that no purchases should be made except for cash, and it appeared that \$600 was paid on the debt in a short time, and upon these facts the court held, if there was a presumption of fraud, it was rebutted. Applying these principles, we are of opinion there was error in refusing to submit the issue of fraud.

[4, 5] We also think the tender of judgment ought not to have been admitted in evidence, although we doubt if, standing alone, this would justify a new trial, as it is not clear it was prejudicial to the defendants. The statute authorizing a tender of judgment (Revisal, § 860) says that the tender, when not accepted, "is to be deemed withdrawn, and cannot be given in evidence"; and while this provision is primarily for the protection of the one making the tender, and to prevent its introduction against him, the statute is a part of the wholesome scheme devised to encourage compromises and settlements, before and after action commenced, and the purpose of the statute can be best subserved by holding according to its language that a tender of judgment unaccepted "cannot be given in evidence," and can only be used after verdict, before the judge, to enable him to adjudge who shall pay the costs.

It appears to us a little remarkable that, after the plaintiffs introduced the tender and insisted on it, the defendants should have recovered less than the sum offered; the amount of the tender being \$395 and the judgment being for \$386.21, the last sum being obtained by deducting \$78.29, the answer to the first issue, from the value of the goods as found by the jury, \$462.50, although there is a mistake of \$2 in the calculation. The facts bearing on the second issue are not clearly stated, but we are inclined to the opinion that after-acquired goods did not pass under the mortgage as executed, and that the issue was material.

[6] If so, his honor instructed the jury in one part of the charge that it was to be determined by the greater weight of the evidence, and in another, without correcting this error, that the evidence must be clear, strong, and convincing. These instructions are inconsistent and constitute reversible error. *Patterson v. Nichols*, 157 N. C. 412, 73 S. E. 202. The verification of the account complies substantially with the requirements of the statute.

For the errors pointed out, there must be a new trial.

New trial.

(153 N. C. 400)

ANDERSON v. MEADOWS et al.

(Supreme Court of North Carolina. May 28, 1913.)

1. ADVERSE POSSESSION (§ 97*)—POSSESSION WITHOUT COLOR OF TITLE—EXTENT OF TITLE ACQUIRED.

Title acquired by adverse possession without color of title is limited to the land actually occupied.

[Ed. Note.—For other cases, see Adverse Possession, Cent. Dig. §§ 537-541; Dec. Dig. § 97.*]

2. ADVERSE POSSESSION (§ 100*)—SUFFICIENCY OF EVIDENCE—COLOR OF TITLE.

Where the plaintiff claims title by adverse possession with color of title by will, but a description of the land devised does not appear in the record, and there is no evidence that it extended beyond that to which the devisee had title by deed from defendant's remote grantor, the will cannot constitute color of title where by the possession is extended beyond the land actually occupied.

[Ed. Note.—For other cases, see Adverse Possession, Cent. Dig. §§ 547-574; Dec. Dig. § 100.*]

3. ADVERSE POSSESSION (§ 100*)—POSSESSION WITHOUT COLOR OF TITLE—EXTENT—CLAIM.

Adverse possession does not extend beyond the claim, although that may fall short of the lines of the deed under which the claimant is in possession.

[Ed. Note.—For other cases, see Adverse Possession, Cent. Dig. §§ 547-574; Dec. Dig. § 100.*]

Appeal from Superior Court, Macon County; Long, Judge.

Action by A. I. Anderson against Emils Meadows and others. Judgment for the defendants, and plaintiff appeals. Affirmed.

See, also, 74 S. E. 1019.

This is an action brought by A. I. Anderson to recover a tract of land, and damages for trespasses alleged to have been committed thereon. The plaintiff introduced state grant No. 2,596 to Jacob Shope, recorded in Book J, p. 290, dated January 25, 1862, and recorded December 2, 1862; also, the will of Jacob Shope, probated September 18, 1876, and recorded in Book of Wills No. 2, p. 29, which plaintiff claims conveys the property in question to the plaintiff.

Jacob Anderson, for the plaintiff, testified that the land embraced under state grant No. 2,596 came into the possession of A. I. Anderson, the plaintiff, who is the mother of witness, in the year 1881, at Grandmother Shope's death, and that the plaintiff in 1882 had cleared up a field upon the land embraced in that grant and had cultivated it in corn and wheat for about six years in succession, and had pastured it for eight or nine years thereafter, and it had been in cultivation by them ever since; that this field was within the boundary of state grant No. 2,596, and within the boundary of state grant No. 2,934, and entirely within the boundary of the land conveyed by J. S. Woodard to J. R. Anderson; and that they had had no possession outside of the bound-

ary covered by the deed from Woodard to J. R. Anderson.

Mrs. A. I. Anderson, plaintiff, testified that she had had possession of the lands described in the complaint ever since 1882, when her grandmother died; that the land had been in corn, wheat, and pasture ever since; that she went into possession of that land under the will of Jacob Shope; and that her son, Bud Anderson, was living there now by her permission.

Jacob Anderson further testified that, at the time the field was cleared on the land, his father had taken the boys upon the land and cleared the field, claiming under title that their grandfather, Jacob Shope, and grandmother, Isabella Shope, had left them.

The defendants introduced state grant No. 2,934, issued to Clark Byrd in 1864, embracing section No. 11, district No. 17, of Macon county, acquired by treaty from the Cherokee Indians and surveyed by the state in 1820, and a chain of mesne conveyances from Clark Byrd to the defendants.

The court charged the jury, among other things, as follows: "If the jury shall find from the evidence that in the year 1881 J. R. Anderson, husband of the plaintiff, bought from J. S. Woodard a portion of the land embraced in section No. 11, and procured Woodard's deed therefor, that about the year following, viz., in 1882, J. R. Anderson and his boys entered upon the tract purchased from Woodard, cleared it, and have had it in actual possession since that time, but have had no actual possession on section No. 11 outside of the deed from Woodard to Anderson, then the court charges you that the plaintiff is not the owner of the land in dispute, and you should answer the first issue, 'No,' or 'No, except so much thereof as is covered by the Woodard deed to Anderson.'" The plaintiff excepted. The will of Jacob Shope is not in the record, and no evidence was introduced to show what land was devised by it to the plaintiff. There was a verdict in favor of the defendants, and a judgment rendered, declaring the plaintiff the owner of the land in the Woodard deed, and the defendants the owners of the land in controversy outside of that deed. The plaintiff excepted and appealed.

Robertson & Benbow and J. F. Ray, all of Franklin, for appellant. Johnston & Horn, of Franklin, for appellees.

ALLEN, J. The grant under which the plaintiff claims was declared invalid on the facts appearing in the record, upon the former appeal in this action (Anderson v. Meadows, 159 N. C. 404, 74 S. E. 1019), and therefore the plaintiff cannot recover any of the land outside of the Woodard deed upon a connected chain of title from the state. She must then rely upon proof of

title by adverse possession, with or without color.

[1] If she relies upon adverse possession alone, her action must fail, because her actual possession has not extended beyond the Woodard deed, and title acquired by adverse possession, without color, is confined to the land occupied. *Malone*, Real Prop. 280.

It is true that some of the witnesses speak of entering into possession of grant 2,596; but the Woodard tract is within the bounds of the grant, and, when the evidence is considered as a whole, it is evident they referred to possession of the Woodard land, and it is so treated in the brief of appellant.

[2] The last position left open to the plaintiff is that the will of Jacob Shope, which is the only paper title under which she claims, is color of title, and that her possession of the Woodard land extends to the boundaries of her color; but this contention cannot be maintained, for the reason that the description of the land devised does not appear in the record, and there is no evidence that the land in the will extends beyond the Woodard deed.

[3] There is also no evidence of a claim by the plaintiff beyond the Woodard deed, and adverse possession does not extend beyond the claim, although this may fall short of the lines of a deed, under which one is in possession. *Haddock v. Leary*, 148 N. C. 382, 62 S. E. 426.

It also appears inferentially that the defendants have had possession for many years of the land outside of the Woodard deed.

We are therefore of opinion that the plaintiff could not, in any view of the evidence, recover more than the land in the Woodard deed, and this has been awarded to her.

No error.

(162 N. C. 526)

SPRUILL et al. v. HOPKINS et al.

(Supreme Court of North Carolina. May 28, 1913.)

EVIDENCE (§ 317*)—HEARSAY—DECLARATIONS—LIVING DECLARANT.

Evidence of the declarations of a living person that certain land in controversy was a part of the C. tract, it appearing that neither party claimed under the declarant and that he was but an agent in possession of the adjoining lands, was inadmissible as hearsay.

[Ed. Note.—For other cases, see *Evidence*, Cent. Dig. §§ 1174-1192; Dec. Dig. § 317.*]

Appeal from Superior Court, Tyrrell County; Webb, Judge.

Action by R. H. Spruill and another against W. T. Hopkins and others. Judgment for plaintiffs, and defendants appeal. Reversed.

This is an action to recover damages for cutting timber on a strip of land, claimed by the plaintiff to be a part of the Clayton tract

of land. The defendants admit that the plaintiffs are the owners of the Clayton tract, but they deny that the land in controversy is a part of that tract. The Belgrade and Holly Grove tracts of land adjoin the Clayton tract.

Both parties claim title under W. S. Pettigrew, who was the father of Charles Pettigrew. Charles Pettigrew is now living, and there is no evidence in the record that he was at any time the owner of the land in dispute, or of the Belgrade land, or of the Holly Grove land.

Mr. Nooney testified for plaintiff: "Am 69 years old. I was overseer for Mr. Chas. Pettigrew. I know the Clayton tract of land. Mr. Chas. Pettigrew, while in possession of the Holly Grove and Belgrade tracts, told me not to cut on the land now in dispute. Said it was a part of the Noah Spruill's Clayton land." Defendants excepted.

There was a verdict and judgment for the plaintiffs, and defendants excepted and appealed.

I. M. Meekins, of Elizabeth City, and Ward & Grimes, of Washington, N. C., for appellants. M. Majette, of Columbia, and W. M. Bond, of Edenton, for appellees.

PER CURIAM. The evidence of the witness Nooney was very important on the issue before the jury, and was clearly hearsay and incompetent. It is not brought within the rule admitting the declarations of a deceased witness, as the declarant is living, nor does it appear that either party claims under him, or that he was more than an agent in possession of the Belgrade and Holly Grove lands. *Cansler v. Fite*, 50 N. C. 426; *Lawrence v. Hyman*, 79 N. C. 211; *Perkins v. Brinkley*, 133 N. C. 350, 45 S. E. 652.

The evidence also fails to show that Mr. Pettigrew had any knowledge of the boundaries, or that he was doing more than expressing an opinion that the land in dispute was a part of the Clayton tract.

There must be a new trial.

New trial.

(162 N. C. 548)

MEYERS v. NORFOLK & W. RY. CO.

(Supreme Court of North Carolina. May 22, 1913.)

1. COMMERCE (§ 27*)—INJURIES TO SERVANT—EMPLOYER'S LIABILITY ACT — INTERSTATE COMMERCE.

A servant of a railroad company cannot recover for injuries under the federal Employer's Liability Act (Act April 22, 1908, c. 149, 35 Stat. 65 [U. S. Comp. St. Supp. 1911, p. 1322]), unless he was engaged in an act of interstate commerce at the time of his injury.

[Ed. Note.—For other cases, see *Commerce*, Cent. Dig. § 25; Dec. Dig. § 27.*]

2. COMMERCE (§ 27*)—INJURIES TO SERVANT—EMPLOYER'S LIABILITY ACT — INTERSTATE COMMERCE.

Plaintiff, a laborer in connection with a work train on defendant's railroad, was in camp

on a Sunday, when his assistant foreman ordered him to catch a passing freight train and go to N. for the mail for the camp. In attempting to board the train he fell under it, and was injured. Held, that he was not engaged in interstate commerce at the time of his injury, and could not recover under the federal Employer's Liability Act.

[Ed. Note.—For other cases, see Commerce, Cent. Dig. § 25; Dec. Dig. § 27.*]

Appeal from Superior Court, Wilkes County; Daniels, Judge.

Action by Maurice L. Meyers against the Norfolk & Western Railway Company. Judgment for plaintiff, and defendant appeals. Reversed.

Civil action tried upon these issues:

"(1) Was the plaintiff injured by the negligence of the defendant? A. Yes.

"(2) Did the plaintiff, by his own negligence, contribute to his own injury? A. Yes.

"(3) Did the plaintiff execute the release offered in evidence by the defendant? A. Yes.

"(4) Was the plaintiff induced to sign the release by the fraud and deceit of the defendant's agent? A. Yes [but set aside on motion of defendant].

"(5) Was the plaintiff 21 years of age when he signed the receipt, and has he since ratified it? A. No.

"(6) What damage is the plaintiff entitled to recover of the defendant? A. \$1,000."

From the judgment rendered, the defendant appealed.

Watson, Buxton & Watson, of Winston-Salem, for appellant. Chas. B. Spicer, of Jefferson, for appellee.

BROWN, J. This action was tried under the act of Congress known as the federal Employer's Liability Act.

The evidence tended to prove these facts: Plaintiff, a resident of Wilkes county, N. C., was employed by the defendant company, and in February, 1911, was working in West Virginia as a hand on an extra force on a work train. His business was to assist in surfacing up the roadbed, straighten out freight wrecks, and when there were slides to clean them up. He was working under Mr. Shaw, general foreman of the work train, and under Mr. Lineberry, the assistant foreman. On Sunday, February 12, 1911, the defendant was not working, but some time during the afternoon he attempted to catch a freight train, which was passing the camp, and running from six to eight miles an hour. The plaintiff claimed he was ordered by the foreman to catch this moving train to go for the mail. He failed to catch the train, and fell under it and had his leg cut off.

According to the plaintiff's own evidence, we do not think he was engaged in interstate commerce, and therefore his action was erroneously tried under the act of Congress. He testifies that he was engaged solely in local

repair work on the track in West Virginia as a workman on a work train.

At the time of his injury he was not engaged in any service whatever for the defendant. On Sunday, February 12th, the work train hands were in camp, when plaintiff was told by Lineberry to catch a passing freight train and to go to Naugatuck for the mail for the camp.

[1] One of the essentials is that the employé, when injured, must be engaged in an act of interstate commerce. Horton, in Horton v. Railroad, 157 N. C. 146, 72 S. E. 958, was engineer of a train engaged in interstate commerce when injured; and so was Fleming, in Fleming v. Norfolk Southern R. Co., 76 S. E. 213.

[2] In Zachary's Case, 156 N. C. 496, 72 S. E. 858, we held that the act of Congress applies only to a carrier by rail while engaged in interstate commerce, and only to an employé suffering injury while he is employed by such carrier in such commerce. In that case we said: "We do not think the federal act applies, for the reason that the deceased, at the time when killed, was not employed by the Southern Railway, the lessee, in interstate commerce. At the time he was killed, the deceased was not engaged in an act of any kind of commerce. He was on the way to his boarding house, for a purpose entirely personal to himself, and not on the carrier's business."

This case is directly supported by federal authorities. Lamphere v. Oregon R. & Nav. Co. (C. C.) 193 Fed. 248. In this case it is held "that the employé at the time of the injury must have been employed in such interstate commerce." It is also held that an extra conductor in the employ of a railroad company directed, on reporting for work, to ride to another point within the same state for service on a work train working in that state, and who was injured while proceeding to his work train, was not at the time of the injury engaged in interstate commerce, within the Employer's Liability Act. Feaster v. Railroad (D. C.) 197 Fed. 581; Pedersen v. Railroad, 197 Fed. 537, 117 C. C. A. 33. In this last case the subject is fully discussed by Buffington, Circuit Judge, and it is held that the act applies only to such employés as at the time of the injury have a real and substantial connection with an act of interstate transportation, citing Employer's Liability Cases, 207 U. S. 463, 28 Sup. Ct. 141, 52 L. Ed. 297, and Adair v. U. S., 208 U. S. 161, 28 Sup. Ct. 277, 52 L. Ed. 436, 13 Ann. Cas. 764.

On the occasion when injured the plaintiff was not engaged in any kind of commerce. He had been directed by Lineberry to go to Naugatuck for the mail for the working force, and was injured while endeavoring to board a passing freight train for that purpose and no other.

It is contended that according to plaintiff's evidence, on the occasion when injured, he was not engaged in any act of service for defendant, and if Lineberry or Shaw directed him to catch the freight and go for the mail for the camp they were not acting within the scope of their authority, or in furtherance of the defendant's work. It is unnecessary to decide this now. Another trial may develop the facts more fully.

New trial.

(162 N. C. 404)

LATHAM v. SPRAGINS et al.

(Supreme Court of North Carolina. May 28, 1913.)

1. CARRIERS (§ 58*) — BILLS OF LADING — RIGHTS OF TRANSFERREE AS AGAINST CONSIGNEE.

Where a vendor of goods consigns them to the purchaser, taking a bill of lading from the carrier, and, intending to resume the right of control over them, at the same time draws upon the purchaser for the price and delivers the draft with the bill of lading attached to an indorsee for a valuable consideration, the consignee, upon receipt of the goods, takes them subject to the rights of the holder of the draft and bill of lading, and cannot retain the price of the goods on account of a debt due him from the consignor.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 179-190; Dec. Dig. § 58; * Sales, Cent. Dig. § 649.]

2. CARRIERS (§ 59*) — BILLS OF LADING — RIGHTS OF TRANSFERREE AS AGAINST CONSIGNEE.

While the mere discounting and crediting the amount of a draft to a depositor's account, without making payment or incurring any increased obligation, would not make a bank a purchaser for value of the draft and an attached bill of lading, where the depositor was indebted to the bank, and the net proceeds of the draft so discounted was placed to his credit in extinguishment of the debt, and there was no agreement that if the draft was unpaid it should be charged back to his account, the bank was a purchaser for value, and acquired title to the property represented by the bill of lading.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 170-190; Dec. Dig. § 59.*]

3. CARRIERS (§ 58*) — BILLS OF LADING — RIGHTS OF TRANSFERREE AS AGAINST CONSIGNEE.

Where a bank, which discounted a draft to which was attached a bill of lading, upon its return unpaid charged it to the drawer's account, if he had a sufficient balance to pay the draft, it was thereby satisfied and its claim on the property represented by the bill of lading extinguished.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 179-190; Dec. Dig. § 58; * Sales, Cent. Dig. § 649.]

4. CARRIERS (§ 58*) — BILLS OF LADING — RIGHTS OF TRANSFERREE AS AGAINST CONSIGNEE.

A bank, which discounted a draft to which was attached a bill of lading and which was returned unpaid, did not lose its title to the draft and bill of lading by charging it to the drawer's account, if there was nothing to his credit with which to pay it, and it continued to hold the draft and bill of lading; and hence proof that it did so charge it to his account, al-

though evidence of payment of the draft by the drawer, was not conclusive, but was open to explanation.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 179-190; Dec. Dig. § 58; * Sales, Cent. Dig. § 649.]

5. BANKS AND BANKING (§ 156*)—COLLECTIONS—RELATION OF PARTIES.

A bank, which discounts its depositor's drafts under an agreement that if they are returned unpaid they shall be charged back to his account and returned to him, is merely an agent for collection.

[Ed. Note.—For other cases, see Banks and Banking, Cent. Dig. §§ 539-546; Dec. Dig. § 156.*]

Appeal from Superior Court, Guilford County; Peebles, Judge.

Action by J. E. Latham against J. D. Spragins, in which the Elk Horn Bank & Trust Company interpleaded. From a judgment for plaintiff, the interpleader appeals. New trial ordered.

Civil action tried upon these issues:

"(1) Is the Elk Horn Bank & Trust Company the owner and entitled to the possession of the property in controversy? Answer: No.

"(2) What damage, if any, is the plaintiff entitled to recover of J. D. Spragins, defendant? Answer: One thousand four hundred sixty-eight dollars and forty-four cents (\$1,468.44), with interest from October 31, 1910.

"(3) What was the value of the cotton seized and replevied in this action? Answer: Sixteen hundred seventy-three dollars and twenty-two cents (\$1,673.22)."

From the judgment rendered, the interpleader, the Elk Horn Bank & Trust Company, appealed.

S. Clay Williams, of Greensboro, for appellant. King & Kimball and Thos. S. Beall, all of Greensboro, for appellee.

BROWN, J. The plaintiff recovered judgment in this action against the defendant Spragins for damages in sale of cotton. Plaintiff also sued out in this action a writ of attachment and seized a lot of cotton at Greensboro. The Elk Horn Bank & Trust Company interpleaded, claiming the cotton. Spragins shipped the cotton attached to plaintiff at Greensboro, and drew on him with bill of lading attached. The draft was payable to and discounted by the interpleader, and the net proceeds placed to Spragins' credit. This draft with bill of lading attached was duly presented, and, payment being refused, it was protested and returned to the interpleader, and charged up to Spragins' account.

The interpleader requested the court to charge the jury as follows: "If you believe the evidence of the witnesses J. D. Spragins and W. E. Barkman, whose depositions have been read to you on behalf of the interpleader, you shall answer the first issue 'Yes.'" This was refused, and interpleader excepted.

His honor charged as follows: "The bank has shown no evidence sufficient to show that they were the owners of that cotton. They were not out any money. Spragins owed them already, and they just took that draft and credited his account with it, and when it came back unpaid, they charged it back to him, and they were in the same fix after the transaction as before, and the Supreme Court has held that don't constitute a bank a purchaser for consideration; and you will answer that issue 'No.'" To this charge the interpleader excepted.

[1] It is well settled that, when the vendor of goods consigns them to the purchaser, taking a bill of lading from the carrier and, intending to resume the right of control over them, at the same time draws upon the purchaser for the price and delivers the bill of exchange with the bill of lading attached to an indorsee for a valuable consideration, the consignee, upon receipt of the goods, takes them subject to the rights of the holder of the bill of lading to demand payment of the bill of exchange, and cannot retain the price of the goods on account of a debt due to him from the consignor. *Manufacturing Co. v. Tierney*, 133 N. C. 636, 45 S. E. 1026; *Mason v. Cotton Co.*, 148 N. C. 498, 62 S. E. 625, 18 L. R. A. (N. S.) 1221, 128 Am. St. Rep. 635.

It is contended, however, that in any view of the evidence the interpleader is not a bona fide purchaser for value, but that the transaction constituted merely a bailment for collection.

The cashier, Barkman, testifies as follows: "On September 8, 1910, I had a transaction in my office at said bank with Mr. J. D. Spragins, in regard to a cotton draft drawn on J. E. Latham, at Greensboro, N. C., on that date. At that time the five bills of lading, referred to by Mr. Spragins in his testimony and marked 'Exhibits A, B, C, D, and E,' were delivered to me by Mr. Spragins, attached to the draft for \$1,793.35, drawn by said J. D. Spragins on J. E. Latham, Greensboro, N. C. The draft delivered to me was the same referred to by Mr. Spragins in his testimony, and marked 'Exhibit F.' The bills of lading were assigned to me and delivered with the draft, and I paid J. D. Spragins the sum of \$1,793.35, less the usual exchange for the same. We had no agreement of any kind. I took it as a cash item, as any other bill of lading, and forwarded it. Neither the bank nor any one for it has received payment of the draft in question. It was protested and returned." The same witness further testified: "At the time I paid Mr. Spragins \$1,793.35 (for the draft), with bills of lading attached, he was overdrawn \$1,636.86, which was money which the bank furnished him to buy cotton with. When I received the draft from Mr. Spragins I credited his account with it, and when the draft was protested, I charged back to his

account the amount of the draft." The witness also stated that in recharging Mr. Spragins' account with the amount of the protested draft they were following out their system of bookkeeping. "It was recharged to Mr. Spragins' account to keep our records clear as to the transaction and make disposition of this item. It is still charged to Mr. Spragins' account, and has never been paid."

Defendant Spragins testified: "After drawing said draft and attaching the bills of lading thereto I delivered the draft and bills of lading to Mr. W. E. Barkman, cashier of the Elk Horn Bank & Trust Company. The only terms were that Mr. Barkman either gave me cash or credit for it. We had no agreement; it was taken as a cash transaction, and the Elk Horn Bank & Trust Company placed that amount of money to my credit." The same witness further testified that he had no agreement to the effect that he would protect the bank in the event that the plaintiff is successful in asserting his claim against the property in controversy in this action. He also stated that when the bank accepted the draft and bills of lading he considered the deal closed so far as he was concerned, and that he did not regard himself under any legal obligation to pay the bank.

We are of opinion that his honor was correct in refusing the interpleader's prayer for instruction, but that he was wrong in directing, as a matter of law, that the jury answer the first issue "No."

[2] The evidence tends to prove that when Spragins drew the draft, with bill of lading attached, payable to the interpleader, and discounted it, he was indebted to the interpleader, and that the net proceeds went to Spragins' credit in extinguishment of his debt. If those facts are true, then the bank became a purchaser for value, and acquired title to the cotton as security for the bill of exchange discounted. 6 A. & E. 298; 7 Cyc. 929; *Bank v. McNair*, 114 N. C. 342, 19 S. E. 361. If at the time Spragins had owed the bank nothing, the case would be different, for the mere discounting and crediting of the amount on the depositor's account, without making payment or incurring any increased obligation, is not sufficient to make the bank a purchaser for value.

[3, 4] Nor do we think that the mere fact that, when the draft was returned unpaid, the cashier had it charged up to Spragins' account, as a matter of law, necessarily deprives the bank of the security of the draft and bill of lading. If at the time it was charged up Spragins had a balance to his credit sufficient to pay the draft, the charging it up would have satisfied the draft and extinguished the lien on the cotton. But Spragins had nothing to his credit with which to pay the draft, for the cashier testifies that the bank has never been paid, and that he charged up the draft simply as a matter of bookkeeping. The draft and bill of lading at-

tached have not been surrendered by the bank to Spragins, or any one else.

[8] We do not dispute the proposition that, where there is a general agreement between the bank and its customer that if drafts, deposited by the customer for his credit, are returned unpaid, they shall be charged back to the customer's account and returned to him, this constitutes only an agency for collection. *Davis v. Lumber Co.*, 130 N. C. 176, 41 S. E. 95; *Cotton Mills v. Weill*, 129 N. C. 452, 40 S. E. 218. But the facts testified to in this case take it out of that general rule, and differentiate it from those cases. If Spragins was in debt to the bank, and the draft was discounted by it and the proceeds applied in discharge of such balance, the bank became the owner of the draft, and as a purchaser for value to that extent of the cotton described in the bills of lading. The fact that, upon return of the draft protested, the cashier charged it up to Spragins' account is some evidence to the jury of a cancellation of the transaction, and of a payment of the protested draft by Spragins, but it is not conclusive evidence, and is open to explanation. If Spragins had nothing to his credit with which to pay the draft, and the bank continued to hold, as its property, the draft and bills of lading, it would not be a payment of the draft or a cancellation of the original transaction.

In directing a verdict for the plaintiff upon the first issue, his honor erred.

New trial.

(162 N. C. 395)

AMERICAN LUMBER CO. v. QUIETT MFG. CO.

(Supreme Court of North Carolina. May 28, 1913.)

1. TRIAL (§ 350*)—SUBMISSION OF ISSUES.

Where the issue submitted by the court embraced every issuable fact and enabled the plaintiff to present fully its side of the case, it was proper to reject issues tendered by plaintiff which if adopted would have tended to great prolixity.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 823-833; Dec. Dig. § 850.*]

2. SALES (§ 6*)—CONTRACTS—CONSTRUCTION.

A contract by which a party bargained to sell, convey, and deliver 500,000 feet of lumber for \$2,000 in cash and the advancement of \$10 a thousand feet on or before the 15th day of each month for all lumber sawed and put on the sticks the preceding calendar month, the \$2,000 to be deducted from the first estimate and no further advance made until 200,000 feet to cover such \$2,000 had been put on the sticks, and the advance of \$10 a thousand to be deducted from settlement made to the seller, was a contract of sale, and not a mere security for the advancements made to the seller by the buyer.

[Ed. Note.—For other cases, see Sales, Cent. Dig. § 14; Dec. Dig. § 6.*]

3. SALES (§ 418*) — BREACH BY SELLER — MEASURE OF DAMAGES.

In an action for failure to deliver lumber pursuant to a contract of sale, the court erred in refusing to permit the buyer to recover the

difference between the contract price and the market value of the lumber at the time and place fixed for delivery; such difference not being speculative, but being within the contemplation of the parties and constituting the usual measure of damages.

[Ed. Note.—For other cases, see Sales, Cent. Dig. §§ 1174-1201; Dec. Dig. § 418.*]

4. SALES (§ 418*) — BREACH BY SELLER — MEASURE OF DAMAGES.

Damages which are certain and must have been reasonably contemplated by the parties are recoverable for the breach of a contract of sale; but, if purely speculative or fanciful and subject to possible exigencies not likely to be foreseen, they are considered too remote and subtle in their influence to be reached or established by legal proof or judicial investigation, and are therefore rejected as an element of compensation.

[Ed. Note.—For other cases, see Sales, Cent. Dig. §§ 1174-1201; Dec. Dig. § 418.*]

Appeal from Superior Court, Haywood County; Foushee, Judge.

Action by the American Lumber Company against the Quiett Manufacturing Company. From a judgment for plaintiff for insufficient relief, it appeals. New trial granted.

Civil action to recover damages for the breach of a contract to sell and deliver lumber. Defendant "bargained" with plaintiff to "sell, convey and deliver to it at Eli and Epps Springs, by the Appalachian Railroad, 500,000 feet of poplar, oak and basswood lumber" of certain grades stated in the contract, for \$2,000 in cash and the advancement of \$10 per thousand feet on or before the 15th day of each month for all lumber sawed and put on the sticks the preceding calendar month, the \$2,000 to be deducted from the first estimate, and no further advance to be made until the manufacturing company had put on the sticks 200,000 feet to cover the \$2,000 advanced; deliveries of the lumber to be made as follows: 150,000 feet to be loaded at Cherokee, N. C., and delivered at Eli, N. C., and the remainder, or 350,000 feet, at Epps Springs, N. C., or Whittier, N. C. The following provisions are in the contract: "Lumber is to remain on sticks until in shipping-dry condition and is to be well manufactured, well edged and trimmed, and put up in piles not to exceed six feet in width, with at least four feet space between each pile. Lumber is to be delivered at Epps Springs, is to be cut from a tract of timber purchased by the parties of the first part from J. E. Bird, lying on the waters of Cane Break branch and Tuckaseegee river, consisting of 580 acres, more or less. That which is to be delivered at Eli is to be cut from what is known as the King and Wyatt land, lying on the waters of Couche's creek, consisting of 168 acres, more or less. The said advance of \$10 per thousand is to be deducted from settlement made to parties of the first part by party of the second part, from time to time as the lumber is shipped. All the above said lumber is to be delivered

on or before January 1, 1912. To be inspected by party of the second part, or one of their representatives, according to the National Hardwood Rules and if inspected by parties of the first part, they shall guarantee said inspection. It is estimated by the parties of the first part that there is now sawn and on sticks one hundred thousand feet cut from the King and Wyatt lands, which lumber is in shipping-dry condition, which they agree to begin to deliver at once to Cherokee, North Carolina, and finish sawing and put on sticks the balance of said timber within thirty days. The parties of the first part further agree to begin sawing the Bird timber on or before May 1st, and to cut at least 75 per cent. of the oak 8-4; that there is now logged about 200,000 feet of said timber."

J. E. Coburn and William Quietl guaranteed the performance of the contract, and are defendants in this action. The court submitted this issue to the jury: "Are the defendants indebted to the plaintiff, and, if so, in what amount?" The court charged the jury that, if they believed the evidence, their answer to the issue would be \$1,995.66, with interest at 6 per cent. from April 17, 1911; "It being the amount of money advanced by the plaintiff, less a credit for the lumber shipped to it." Plaintiff excepted to this charge, and from the judgment appealed, assigning the same as error.

W. T. Crawford and Alley & Gilmer, all of Waynesville, for appellant. Bryson & Black, of Bryson City, for appellee.

WALKER, J. (after stating the facts as above). [1] Plaintiff tendered numerous issues, but as the one submitted by the court embraced every issuable fact in the case, and enabled the plaintiff to present fully its side of the case to the jury, it was proper to reject plaintiff's tender and refuse to multiply the issues, which course, if it had been adopted, would have tended to great prolixity, and this should always be avoided. *Black v. Black*, 110 N. C. 398, 14 S. E. 971; *Hatcher v. Dabbs*, 133 N. C. 239, 45 S. E. 562; *Tuttle v. Tuttle*, 146 N. C. 484, 59 S. E. 1008, 125 Am. St. Rep. 481.

[2] We were told on the argument that the judge construed the contract to mean that the lumber was not sold to the plaintiff, but was intended to be a mere security for the advancements made by it to the defendant company. This construction is not permissible, as the language of the parties plainly expresses the contrary.

[3] It may be the court took the view that, while it was a contract for a sale of the lumber by the defendant, the damages now claimed for its breach are speculative. The plaintiff only seeks to recover the difference between the contract price and the market value of the lumber at the time and place fixed for its delivery, and to this it is clearly entitled. It is the usual rule by which to

measure damages in such cases, and such a loss by the plaintiff was surely in the contemplation of the parties, at the time they made the contract, as the one which would naturally and probably result from a breach by the defendant. We have held at this term that the correct rule for the assessment of damages, when there has been a breach in failing to deliver the goods bargained for, is the difference between the agreed price and the market value at the time and place of delivery. *Barberry v. Tombacher*, 77 S. E. 412, citing many authorities. We were cited by defendant's counsel to *Machine Co. v. Tobacco Co.*, 141 N. C. 284, 53 S. E. 885, and *Wilkinson v. Dunbar*, 149 N. C. 20, 62 S. E. 748; but those cases in no degree conflict with the general rule now applied to this case. The first of them decides, as the syllabus shows: "(1) Where one violates his contract, he is liable for such damages, including gains prevented as well as losses sustained, which may fairly be supposed to have entered into the contemplation of the parties when they made the contract, that is, such as might naturally be expected to follow its violation, and they must be certain, both in their nature and in respect to the cause from which they proceed. (2) The law seeks to give full compensation in damages for a breach of contract, and in pursuit of this end it allows profits to be considered when the contract itself, or any rule of law, or any other element in the case, furnishes a standard by which their amount may be determined with sufficient certainty. (3) In an action for damages for a breach of contract, in the absence of some standard fixed by the parties when they made their contract, the law will not permit mere profits, depending upon the chances of business and other contingent circumstances, and which are perhaps merely fanciful, to be considered by the jury as part of the compensation." In the second case, we said: "In an action for damages, the plaintiff must prove, as part of his case, both the amount and the cause of his loss. Absolute certainty, however, is not required; but both the cause and the amount of the loss must be shown with reasonable certainty. Substantial damages may be recovered though plaintiff can only give his loss approximately. * * * A difficulty arises, however, where compensation is claimed for prospective losses in the nature of gains prevented; but absolute certainty is not required. Compensation for prospective losses may be recovered when they are such as, in the ordinary course of things, are reasonably certain to ensue. 'Reasonable' means reasonable probability. Where the losses claimed are contingent, speculative, or merely possible, they cannot be allowed. * * * Profits which would certainly have been realized but for the defendant's fault are recoverable; those which are speculative and contingent are not. The broad general

rule in such cases is that the party injured is entitled to recover all his damages, including gains prevented as well as losses sustained; and this rule is subject to but two conditions: The damages must be such as may fairly be supposed to have entered into the contemplation of the parties when they made the contract, that is, must be such as might naturally be expected to follow its violation; and they must be certain, both in their nature and in respect to the cause from which they proceed. * * * It is not necessary that such damages shall be shown with mathematical accuracy." See *Hale on Damages*, pp. 70, 71; *Griffin v. Colver*, 16 N. Y. 489, 69 Am. Dec. 718; *Masterton v. Mayor*, 7 Hill (N. Y.) 61, 42 Am. Dec. 38. This statement of the rule is in substantial accord with *Machine Co. v. Tobacco Co.*, supra, and the two cases collect the principal authorities upon the subject.

[4] If the damages are certain, and such as must have been reasonably contemplated by the parties, they are recoverable for the breach of the contract of sale; but, if purely speculative or fanciful and subject to possible exigencies not likely to be foreseen, they are considered too remote and subtle in their influence to be reached or established by legal proof or judicial investigation, and are therefore rejected as an element of compensation. *Masterton v. Mayor*, supra. But the difference between the price and the market value at the time and place of the delivery fixed by the contract is not speculative, but furnishes a certain standard by which to estimate the loss in case of a breach, and is the one which the very nature of the contract suggests was contemplated by the parties. "Damages are given as a compensation, recompense, or satisfaction to the plaintiff for an injury actually received by him from the defendant, and should be precisely commensurate with the injury, neither more nor less. 2 Greenleaf, Ev. § 253. The amount should be what he would have received if the defendant had complied with the contract. *Alden v. Kelghly*, 15 M. & W. 117." *Lumber Co. v. Iron Works*, 130 N. C. 584, 41 S. E. 797.

The court erred in not applying the proper rule to the case, whereby it excluded from the recovery substantial damages to which the plaintiff was entitled, if the jury had found the facts according to his testimony.

New trial.

(162 N. C. 533)

HOPKINS v. EMPIRE LUMBER CO. et al.
(Supreme Court of North Carolina. May 28, 1913.)

1. TRESPASS (§ 67*) — LOCATION OF LAND — QUESTION FOR JURY.

In an action to recover for trespass upon several tracts of land, where definite points called for were sufficient when proven to locate

the tracts, the question of location was largely a question of fact for the jury.

[Ed. Note.—For other cases, see *Trespass*, Cent. Dig. § 150; Dec. Dig. § 67.*]

2. DEEDS (§ 96*)—PRESUMPTION—SEAL.

In case of an ancient deed, which is not produced but is proved from the record, and which fails to show that it was sealed, a presumption that it was sealed arises from a recital therein to that effect.

[Ed. Note.—For other cases, see *Deeds*, Cent. Dig. §§ 256-260; Dec. Dig. § 96.*]

Appeal from Superior Court, Cherokee County; Lane, Judge.

Action by W. R. Hopkins against the Empire Lumber Company and others. Judgment for plaintiff, and defendants appeal. No error.

W. M. Axley, of Murphy, for appellants.
M. W. Bell, of Murphy, and Zebulon Weaver, of Asheville, for appellee.

PER CURIAM. [1] This action is brought to recover damages for trespass upon three tracts of land. These three tracts have definite points called for which are sufficient when proven to locate the lands conveyed. We think the evidence amply sufficient for that purpose, and that the matter is one largely one of fact and was properly submitted to the jury.

The plaintiff introduced three grants and connected himself with them, but in deraigning his title introduced a copy from the registration books of a deed from Lyman W. Gilbert to W. H. Peet dated March 1, 1861. There is no seal after the grantor's name, but the instrument concludes as follows: "In testimony whereof I have hereunto subscribed my name and affixed my seal this the first day of March, 1861."

[2] In case of an ancient deed, which is not produced, but is proved from the record, which fails to indicate in any way that the deed was sealed, there is a presumption that the deed was sealed, arising from a recital in the instrument itself that it is sealed. *Jones on Real Property*, §§ 1073-1075; *Aycock v. Railroad*, 89 N. C. 323; *Heath v. Cotton Mills*, 115 N. C. 202, 20 S. E. 369; *Beardsly v. Day*, 52 Minn. 451, 55 N. W. 46; *Smith v. Dall*, 13 Cal. 510; *Gronwing v. Behn*, 10 B. Mon. (Ky.) 383.

Upon a review of the record, we find no error.

(162 N. C. 531)

FISHER et al. v. MONTVALE LUMBER CO.
(Supreme Court of North Carolina. May 24, 1913.)

APPEAL AND ERROR (§ 657*) — RULES OF COURTS—NECESSITY OF COMPLIANCE.

The Supreme Court must enforce the Supreme Court rule, providing that the evidence in a case on appeal shall be in narrative form, except that a question and answer may be set out when the subject of a particular exception, and when the rule is not complied with, and the case on appeal is settled by the judge con-

taining the evidence as taken by the stenographer under his order, the court will remand for a settlement, to conform to the rule.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2830-2833; Dec. Dig. § 657.*]

Action by Mrs. F. C. Fisher and others against the Montvale Lumber Company. Judgment for defendant, and plaintiffs appeal. Motion to dismiss plaintiffs' appeal or affirm the judgment. Cause remanded to prepare and serve case on appeal.

The appellee moves to dismiss the appeal or to affirm the judgment for that the evidence in the case on appeal is not stated in narrative form, but by question and answer. An inspection of the record discloses that the evidence, as taken by the stenographer, by question and answer, is made a part of the case, but that this was done by order of the judge.

F. C. Fisher, of Bryson City, for plaintiffs. Frye, Gantt & Frye, of Bryson City, W. L. Taylor, of Baltimore, Md., and Bryson & Black, of Bryson City, for defendant.

PER CURIAM. On February 19, 1913, this court adopted the following rule: "The evidence in case on appeal shall be in narrative form, and not by question and answer, except that a question and answer, or a series of them, may be set out when the subject of a particular exception. When this rule is not complied with, and the case on appeal is settled by the judge, this court will in its discretion hear the appeal, or remand for a settlement of the case to conform to this rule. If the case is settled by agreement of counsel, or the statement of appellant is the case on appeal, and the rule is not complied with, and the appeal is from a judgment of nonsuit, the appeal will be dismissed. In other cases the court will in its discretion dismiss the appeal or remand for a settlement of the case on appeal."

The enforcement of the rule is a necessity. The use of the stenographer in trials in the superior court is increasing, and the temptation to incorporate all of his notes in the case, instead of taking the time to prepare a case on appeal, is great. If permitted, we will frequently be required to read hundreds of pages of evidence that have no bearing on the points raised by the appeal, and the costs in this court will become burdensome to litigants.

It is therefore ordered, in accordance with the rule (the stenographic notes having been incorporated in the case by order of the judge), that the cause be remanded to the end that a case on appeal be stated. The appellant will have 15 days after this opinion reaches the superior court of Swain to prepare and serve his case on appeal, and the appellee 10 days after such service to prepare and serve exceptions or counter case.

Remanded.

HERNDON v. SOUTHERN RY.

(Supreme Court of North Carolina. May 22, 1913.)

TRIAL (§ 236*)—INSTRUCTIONS—CREDIBILITY OF WITNESSES.

An instruction that the jury should weigh all the evidence, and in doing so might consider the interest of the parties, the conduct of the witnesses on the stand, their demeanor, interest that they may have shown, or bias, on the stand, the means they had of knowing that to which they testified, and their character and reputation so as to arrive at the truth, applied with equal force to defendant as to plaintiff and to all the witnesses alike, and was not objectionable as an intimation by the judge concerning the weight of the evidence.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 531-533; Dec. Dig. § 236.*]

Clark, C. J., dissenting.

Appeal from Superior Court, Mecklenburg County; Justice, Judge.

Action by Sallie R. Herndon against the Southern Railway. Judgment for plaintiff for less than the relief demanded, and she appeals. Affirmed.

Civil action tried at September term, 1912, Mecklenburg Superior Court, Justice, Judge, upon these issues: (1) Was the feme plaintiff, Sallie R. Herndon, injured by the negligence of defendant, as alleged in the complaint? Answer: Yes. (2) What damages are the plaintiffs entitled to recover of the defendant? Answer: \$500. From the judgment rendered, plaintiff appealed.

Maxwell & Keerans, of Charlotte, for appellant. O. F. Mason, of Gastonia, and Shannonhouse & Jones, of Charlotte, for appellee.

BROWN, J. The only assignment of error is directed to the charge of the court. It must be admitted by any one who reads the charge in this case that it is a full, clear, and accurate statement of the law bearing upon each issue. As each issue is found for plaintiff, it would seem that she has no reason to complain of the judge. If she was not awarded as large damages as she hoped for, it was evidently because the jury did not think she had sustained them. The charge upon the issue of damage was especially liberal to plaintiff, and permitted the jury to take into consideration every possible element of damage permissible in such cases, especially suffering in body and mind and shock to the nervous system. Taking the charge as a whole, we find nothing that either party can justly complain of. Speight v. Railroad, 76 S. E. 686.

His honor, after charging fully, fairly, and correctly on each issue, concluded his charge with these words, to which plaintiff excepts, to wit: "Weigh all of this evidence, gentlemen, in every way, and in weighing it you have a right to take into consideration the interest that the parties have in the result of your verdict, the conduct of the witnesses

upon the stand and their demeanor, the interest that they may have shown, or bias, upon the stand, the means they have of knowing that to which they testify, their character and reputation in weighing this testimony so as to arrive at the truth of what this matter is; take the case, gentlemen." This is but an admonition to the jury and not pointed to any particular witness or party. It applies with equal force to the defendant as to plaintiff and to all witnesses alike. The record shows that the defendant introduced quite a number of witnesses including some in its employ. In no sense can the charge quoted be considered as an expression of opinion upon the facts upon the part of the judge, and it is hard to see how it could be prejudicial to one party more than to the other. His honor's charge is but a caution to the jury, and is supported by authority.

In *Hill v. Sprinkle*, 76 N. C. 353, the trial judge was requested to instruct the jury "that when there is a conflict of testimony between witnesses of equal respectability, one of whom is a party in interest and the other not, the jury have the right to consider the question of interest in deciding upon the credibility of the witnesses"; and the court said: "His honor did not give the instructions in so many words, but told the jury 'that they had a right to consider all the circumstances attending the examination of the witnesses on the trial and to weigh their testimony accordingly.' The plaintiff had a right to the instructions asked, and it may be that the court intended those given as a substantial compliance with the prayer for instructions. But we do not think that they were or that the jury so understood them. It is questionable whether they or others understood that the interest of the defendant in the suit as affecting his credibility was a circumstance attending the examination of a witness as distinguished from deportment, intelligence, means of knowledge, and the like, which are more frequently understood as circumstances attending the examination of witnesses. At all events, the charge is not such a clear and distinct enunciation of an important principle of evidence as could leave no reasonable doubt of its meaning in the minds of the jury. The prayer was distinct, and the response should have been equally so. For generations past and up to within the last few years, interest in the event of the action, however small, excluded a party altogether as a witness, and that upon the ground, not that he may not sometimes speak the truth, but because it would not ordinarily be safe to rely on his testimony. This rule is still applauded by great judges as a rule founded in good sense and sound policy. * * * The parties to the action are now competent witnesses, but the reasons which once excluded them still exist, to go only to their credibility."

It is said in 30 A. & E. Ency. 1094: "While the testimony of a party in interest, as that of any other witness, must be submitted to the jury, the interest * * * is a matter to be considered by the jury in weighing the testimony and determining what force it shall have."

"It is very generally held proper to instruct the jury that they may take into consideration the interest of a party or other witness in determining the credibility of his testimony, and according to the weight of authority the court may instruct the jury that they should consider such interest. Instructions of this character are not objectionable as charging the jury with respect to matters of evidence, and the refusal of such instruction is error, and the error is not cured by a general instruction that the jury are the judges of the credibility of the witnesses and the weight to be given to the testimony of each, nor by an instruction that the jury are to use their common sense and experience in regard to the credibility of witnesses." 38 Cyc. 1729.

"An instruction to the jury that they may consider the relations of the parties and witnesses, their interest, temper, bias, demeanor, intelligence, and credibility in testifying, is not a violation of the constitutional provision prohibiting judges from charging juries with respect to matters of fact, or commenting thereon." *Klepsch v. Donald*, 4 Wash. 436, 30 Pac. 991, 81 Am. St. Rep. 936; *Salazar v. Taylor*, 18 Colo. 538, 33 Pac. 369; 46 Cent. Dig. tit. "Trial," 418, 193.

The instruction was not only very general in its character, but was not even imperative. It did not require the jury to scrutinize the testimony or even to consider the interest of parties, but stated simply that the jury had the right so to do.

In this respect the case is clearly distinguishable from the cases relied upon by the learned counsel for plaintiff. In those cases, the court directed the jury to "scrutinize all the evidence with great caution, considering their interest in the result of the verdict," or that it should "be regarded with suspicion and carefully scrutinized," or "to scrutinize the testimony of the defendants and receive it with grains of allowance on account of their interest," or that "it was their duty to scrutinize the testimony," or to "scrutinize the testimony and receive it with grains of allowance," or some similar direction; whereas, in the case at bar, the trial judge simply informed the jury that they had "a right to take into consideration the interest that the parties have in the result of your verdict, the conduct of the witnesses upon the stand, and their demeanor, the interest that they may have shown or bias upon the stand, the means they have of knowing that to which they testified, their character and reputation, in weighing this testimony, so as to arrive at the truth of what the matter

is." This charge did not single out the plaintiff as an object of suspicion, as in *State v. Holloway*, 117 N. C. 732, 23 S. E. 168, in which the court instructed the jury "they had a right to scrutinize closely the testimony of the defendants, and receive it with grains of allowance, on account of their interest in the event of the action." To same effect is *State v. Graham*, 133 N. C. 652, 45 S. E. 514, and *State v. McDowell*, 129 N. C. 532, 39 S. E. 840; *State v. Vann*, 77 S. E. 298. In *Speight v. Railway*, 76 S. E. 686, the court singled out the plaintiff and charged, "It is your duty to carefully consider the testimony of the plaintiff and ascertain as best you can what influence the interest she has in the suit would have upon * * * her testimony," etc. It is useless to comment further upon the cases cited by plaintiff, for in none of them was the charge so general and so applicable to all parties and all witnesses alike as in this case.

We fully agree with what Mr. Justice Walker well says in *State v. Ownby*, 146 N. C. page 678, 61 S. E. 630, that "the slightest intimation from a judge as to the strength of the evidence, or as to the credibility of a witness, will always have great weight with the jury, and therefore we must be careful to see that neither party is unduly prejudiced by any expression from the bench which is likely to prevent a fair and impartial trial." But we cannot agree with counsel for plaintiff that the charge quoted is the slightest expression of opinion upon the facts. It is but the statement of a proposition, the truth of which is self-evident, and was applied alike to all parties and their witnesses.

No error.

CLARK, C. J. (dissenting). The feme plaintiff was seriously injured in a derailment. The defendant placed no witness on the stand to explain the cause of the derailment or to testify to the extent or nature of the injuries sustained by the feme plaintiff. The only witnesses testifying as to these injuries and the derailment were the plaintiff herself and her son. The defendant did not put upon the stand a single witness who was, or had been, in its employ. The physicians on both sides testified that they could not tell exactly how severe nervous shocks affected patients, and had to rely upon what the patient told them in the treatment thereof.

Not a single witness on either side had, or claimed to have, any interest in the result of the action except the feme plaintiff, her husband, and her son. These alone knew the extent of her suffering and injuries. The verdict of the jury on the second issue as to damages was dependent almost entirely upon the testimony of these witnesses. While there were other witnesses, the testimony of these was the foundation upon which the jury had to rely in awarding damages. The

defendant contended before the jury that these witnesses had magnified plaintiff's injuries, and that she was not really injured at all. The court told the jury "Weigh all this evidence, gentlemen, in every way, and in weighing it you have a right to take into consideration the interest that the parties have in the result of your verdict." No parties testified in the action who had any interest in the same except the feme plaintiff, her husband, and son. No one else, on either side, had any interest in the result. The instruction of the court therefore could apply only to them and was a caution to the jury to consider their evidence with suspicion, or at least in a different way from the other witnesses testifying, because they were interested in the result of the verdict and might be disposed to magnify the injuries of the feme plaintiff—as was contended by the defendant. Upon all the authorities in this state, this charge, when nothing further is said by the court, is contrary to our statute, which forbids any intimation upon the weight of the evidence by the judge. There are decisions to the contrary in those states which have no statute like ours, and in which, as also in the federal court, the judge is not forbidden to express an opinion upon the evidence.

Under the unbroken line of authorities in this state, it has always been error for the judge to caution the jury as to the interest of witnesses in the result of the verdict, unless he goes further and explains to the jury that, notwithstanding the interest of the parties in the result of their verdict, their testimony as such witnesses may be believed, and, if believed, should be given the same weight as that of disinterested witnesses. It is plain that if this added instruction is not given, and the testimony of such witnesses goes to the jury with the criticism upon the interest they have, the judge has depreciated seriously the weight which should be given to their testimony.

In *State v. Graham*, 133 N. C. 645, 45 S. E. 514, this court, speaking through Connor, J., said: "It is error to instruct the jury that because of interest they should carefully scrutinize the evidence of defendants, *without adding that if the jury believe the evidence it should have the same weight as if the witness was not interested.*"

In *State v. McDowell*, 129 N. C. 532, 39 S. E. 848, the court said: "If they find the witness to be credible, and that he has sworn to the truth, his testimony should have the same weight as if he was not interested; *and it was error in the court, when charging the jury upon the subject of interest, not to so have charged the jury.*"

In *State v. Holloway*, 117 N. C. 732, 23 S. E. 168, the court below instructed the jury: "They had a right to scrutinize closely the testimony of the defendants, and receive it with grains of allowance on account of their interest in the event of the action." This

court said thereon: "*This charge is capable of misleading the jury into the impression or belief that the evidence of interested parties is to some extent discredited, although the jury may think the witness is honest and has told the truth. His honor should have gone further and have explained to the jury, after having properly called their attention to the interested relation of the witness, that, if they believed the witness to be credible, then they should give to this testimony the same weight as other evidence of other witnesses.*" This rule has been approved. State v. Boon, 82 N. C. 648; State v. Byers, 100 N. C. 577, 6 S. E. 420; State v. Collins, 118 N. C. 1203, 24 S. E. 118; State v. Lee, 121 N. C. 545, 28 S. E. 552; State v. Apple, 121 N. C. 585, 28 S. E. 469.

In Speight v. Railroad, the court approved the following charge: "It is your duty to carefully consider the testimony of the plaintiff and ascertain as best you can what influence the interest which she has in the suit would have upon the truthfulness of her testimony, and take into consideration all the testimony. If you find she told the truth, then you must give to her testimony the same faith and effect that you would to the testimony of any disinterested witness." To the same effect is the statement of the rule as laid down by Walker, J., in the still more recent case of State v. Vann, 77 S. E. 295.

The Act of 1796, c. 452, now Revisal, § 535, prohibits a judge, in this state, to intimate directly, or indirectly, to the jury any opinion as to the credibility of a witness, whether they are interested or not. That is the province of the jury. Here the weight to be attached to the testimony of the feme plaintiff and her husband and son (who are the only witnesses who were interested in the result of the action) was a vital matter, and the court told the jury that such testimony was to be considered with allowance for their interest. He therefore disparaged it greatly in the eyes of the jury, and it was error under our authorities, and under a just construction of our statute, to fail to tell the jury that notwithstanding such interest they were at liberty to give to the testimony of these witnesses the same weight as if they were disinterested, if the jury believed what they said.

In State v. Ownby, 146 N. C. 678, 61 S. E. 630, Walker, J., says: "The slightest intimation from a judge as to the strength of the evidence, or as to the credibility of a witness, will always have great weight with a jury, and therefore we must be careful to see that neither party is unduly prejudiced by any expression from the bench which is likely to prevent a fair and impartial trial."

The instruction here given very clearly discredited the parties as witnesses, because of their interest in the event of the action.

The judge told the jury that it was their

duty to consider the fact that the parties named were interested. The jury certainly must have understood that greater weight would be given to the testimony of disinterested parties and that less weight would be given to the testimony of these witnesses because they were not disinterested. This was error. There are numerous opinions in other states to this effect. But the decisions under our statute have been so clear and uniform that nothing can be added to them from outside sources.

Further the court erred, as claimed in the second exception, in telling the jury that they should "take into consideration the interest that they (the parties testifying) may have shown, or their bias, on the stand." This assumes that the witnesses have shown interest or bias, because the judge did not add that it was for the jury to determine if they had shown such interest or bias in testifying. The judge did not say "if you find they have shown such bias."

The amount of the verdict shows very clearly that the jury did not give full weight to the testimony of these witnesses. If the judge had told them that they could give to the testimony of these witnesses the same faith and weight as if they were disinterested, and then the verdict had been as it is, the result would clearly be due to the fact that the jury did not believe these witnesses. But when the judge told them that the testimony of interested parties was discredited by the mere fact of interest, and did not add (as our statute and our decisions require) that such interest was merely a circumstance, and that the jury could, notwithstanding, give that testimony such weight as they thought proper, the plaintiff was deprived of the benefit of having the testimony placed impartially before the jury with entire freedom to give it full credit without any suspicion being cast upon it, as a matter of law, as was done by the charge in this case.

To call attention to any circumstance which will impair the weight of testimony is erroneous unless the judge shall further explain that it is not a matter of law, but merely a circumstance for the jury to consider in giving such weight to such testimony as in their opinion and belief it is entitled to, untrammelled by any rule laid down by the court.

(162 N. C. 232)

HAYES et al. v. PACE et al.

(Supreme Court of North Carolina. May 22, 1913.)

1. MORTGAGES (§ 362*)—MORTGAGE SALE—PURCHASE.

The owner of a debt secured by a deed of trust made to a third person as trustee with power of sale may lawfully bid and purchase

at the sale where there is no fraud or collusion between the creditor and trustee.

[Ed. Note.—For other cases, see Mortgages, Cent. Dig. §§ 1080-1084; Dec. Dig. § 362.*]

2. MORTGAGES (§ 242*)—ASSIGNMENT—EFFECT.

A mere assignment of a mortgage, in terms which does not profess to act upon the land, does not pass the mortgagee's estate in the land, but only the security it affords to the holder of the debt.

[Ed. Note.—For other cases, see Mortgages, Cent. Dig. §§ 627, 628; Dec. Dig. § 242.*]

3. MORTGAGES (§ 369*)—FORECLOSURE—VACATION OF SALE.

Where a mortgagee with power to sell indirectly purchases at his own sale, the sale may be avoided, consequently where the beneficiary of a deed of trust by means of the collusion of the trustee was enabled to purchase the property at much less than its actual value, to the prejudice of junior lienholders, the sale may be vacated.

[Ed. Note.—For other cases, see Mortgages, Cent. Dig. §§ 1093-1100; Dec. Dig. § 369.*]

4. MORTGAGES (§ 369*)—FORECLOSURE—VACATION OF SALE—POWER OF COURT OF EQUITY.

A court of equity has the power to vacate foreclosure sales which are attended by fraud and deceit.

[Ed. Note.—For other cases, see Mortgages, Cent. Dig. §§ 1093-1100; Dec. Dig. § 369.*]

5. MORTGAGES (§ 369*)—FORECLOSURE—VACATION OF SALE.

A junior mortgagee or lienholder will be protected by courts of equity, the same as a mortgagor, from a fraudulent sale.

[Ed. Note.—For other cases, see Mortgages, Cent. Dig. §§ 1093-1100; Dec. Dig. § 369.*]

6. MORTGAGES (§ 338*)—FORECLOSURE—SALE—INJUNCTION.

Where the advertisement of the sale of premises under a deed of trust did not specify the hour, that fact alone is such strong evidence of the fraudulent purpose to deceive and mislead bidders as to warrant restraining the sale at the suit of junior mortgagees and lienholders.

[Ed. Note.—For other cases, see Mortgages, Cent. Dig. §§ 1026-1035; Dec. Dig. § 338.*]

7. INJUNCTION (§ 163*)—TEMPORARY RESTRAINING ORDER—STATUS OF PARTIES.

Where a temporary restraining order is issued pending trial, the status of the parties should be preserved until the case is disposed of on the merits.

[Ed. Note.—For other cases, see Injunction, Cent. Dig. §§ 357-371; Dec. Dig. § 163.*]

Appeal from Superior Court, Henderson County; Lyon, Judge.

Action by Robert G. Hayes, as trustee, and another against M. Toms Pace, trustee, and another. From an order restraining sale until final hearing, defendants appeal. Affirmed.

Smith, Shipman & Justice, of Hendersonville, for appellants. Brooks, Sapp & Hall, of Greensboro, for appellees.

BROWN, J. This litigation grows out of the case of C. E. Roper et al. v. National Fire Ins. Co. et al., 76 S. E. 869, at last term. In the present action the judge re-

strained the defendants from completing the sale of certain lands referred to in the pleadings.

From the pleadings and affidavits in the record these facts appear: On November 28, 1908, C. E. Roper and wife executed to A. L. Holmes a deed of trust to secure \$3,200 and interest; the land included in the conveyance being a boundary of about 300 acres situated near Hendersonville. The grantors subsequently built a hotel on one of the lots included in the boundary, and gave other mortgages and deeds of trust upon the same property. On the 6th day of May, 1910, C. E. Roper individually, and as executor of his wife, executed a deed of trust upon the same property to Smith, as trustee for J. M. Stepp, and thereafter procured a fire insurance policy on the hotel to be written by the plaintiff, the National Fire Insurance Company, with a standard mortgage clause payable to J. M. Stepp. Thereafter the hotel was destroyed by fire, and the National Fire Insurance Company, in obedience to a decree of this court at its last term, paid the amount due on the mortgage, with interest, to G. H. Valentine, trustee in bankruptcy for J. M. Stepp, and took an assignment of the said deed of trust. That subsequent to the execution of the Stepp deed of trust in 1910 several parties filed liens against C. E. Roper for materials furnished in the construction of his hotel. Subsequently judgments were taken thereon. That R. C. Clark was one of these junior judgment holders, having purchased the hotel tract at a sheriff's sale under one of these judgments, know as the Loenhardt and Garren judgment, for the sum of \$265, and took deed therefor. Thereafter, in order to forestall the rights of the National Fire Insurance Company as assignee of the Stepp mortgage, Clark caused an insolvent clerk in his employ, M. Toms Pace, to purchase for him the Holmes mortgage of \$3,200 and interest, and take an assignment of the said mortgage to the said M. Toms Pace as assignee and trustee for Clark. Following this up, Clark requested Pace, assignee of the Holmes mortgage, to advertise the Roper lands for sale on the 14th day of February, 1913, and engaged K. G. Morris to attend the sale as his agent and bid for the land, with the understanding between himself and M. Toms Pace at the time that it was to be sold in separate lots. On the day of the sale plaintiffs offered to pay to Pace the entire amount of his mortgage, interest, costs, and expenses, and take an assignment of the mortgage, without prejudice, to await a settlement of the equities between the parties. This was declined. The plaintiffs then requested that the land be sold en masse. This was refused. Immediately after the last lot of land was knocked down to K. G. Morris, he having purchased it all, as per prior agreement, at the price of

\$394, the plaintiffs offered \$4,000. This bid was declined.

The following notice in writing was read by plaintiffs at and immediately preceding the sale: "Notice to all Bidders and Prospective Purchasers: Representing a mortgage creditor who holds a deed of trust upon the property included in the advertisement of this sale, I have offered, and do here and now offer, to pay to A. L. Holmes or his assignee or attorney all the principal, interest, cost and taxes due him or them, and for which he or they are liable to account at this sale, if he or his representatives will assign the said mortgage to me, to be held without prejudice to await the settlement of the equities, by the court, of subsequent creditors to this mortgage. This has been refused. I demand that A. L. Holmes and his representatives conducting this sale shall offer all the property included in his mortgage for sale en masse, so that the largest possible amount may be obtained from this sale, satisfying his mortgage, and providing, if possible, other fund to be distributed among the junior creditors of C. E. Roper and C. E. Roper, executor of F. A. Roper, deceased, the makers of this mortgage, and against whom the junior liabilities exist. [Signed] Robert G. Hayes."

It appears from the affidavits that the land is worth \$7,000 to \$8,000, and that it was bid off for Clark at \$394. It does not appear in the record that Holmes, the original trustee in the deed in trust, executed a formal deed to Pace conveying the land subject to the trusts and with the consent of the cestui que trust. As the record appears, he merely assigned the papers to Pace. However that may be, we think that his honor committed no error in continuing the injunction, restraining the making of deeds, and passing the title to Clark upon the facts disclosed in the record. It clearly appears that Pace was the trustee and personal agent of Clark, who had purchased several of the mortgages and the liens filed upon this property, and that he sold the property for Clark and to Clark, through another agent, at a price which, as stated by this court in a former case, is calculated to cause the bystanders to exclaim that he got the property for nothing.

[1] We do not controvert the proposition, supported by abundant authority, that the owner of a debt secured in a deed in trust made to a third party as trustee with power of sale may lawfully bid and purchase at the sale, where there is no allegation or evidence of fraud or collusion between the creditor and the trustee. *Monroe v. Fuchtlar*, 121 N. C. 101, 28 S. E. 63.

[2] There is a difference between an assignment of a mortgage and the substitution of another trustee in a deed in trust by all the parties interested in it. A mere assignment of a mortgage, in terms which do not profess to act upon the land, does not pass

the mortgagee's estate in the land, but only the security it affords to the holder of the debt. *Williams v. Teachey*, 85 N. C. 403.

[3, 4] But, whatever may be the form of the assignment by Holmes to Pace, the evidence of collusion between Pace and Clark is plenary, and a sale conducted under such circumstances, even by a legal trustee, would not be permitted to stand by a court of equity. There is no question that a court of equity has power to vacate a foreclosure sale which is shown to be tainted with fraud or deceit, or to have been made in pursuance of a corrupt scheme to gain possession of the premises inequitably.

In *Jones v. Pullen*, 115 N. C. 471, 20 S. E. 624, it is said: "There is no question, according to our authorities, that if a mortgagee, with power to sell, indirectly purchases at his own sale, the mortgagor may elect to avoid the sale, and this without reference to its having been fairly made, and for a reasonable price. This is an inflexible rule, and it is 'not because there is, but because there may be, fraud.'" *Gibson v. Barbour*, 100 N. C. 192, 6 S. E. 766; *Froneberger v. Lewis*, 79 N. C. 426; *Cole v. Stokes*, 113 N. C. 270, 18 S. E. 321.

In *Mosby v. Hodge*, 76 N. C. 388, *Pearson*, Chief Justice, said: "The exercise of the power is only allowed in plain cases when there is no complication and no controversy as to the amount due upon the mortgage debt and the power is given merely to avoid the expense of foreclosing the mortgage by action; but that, when there is such complication and controversy, the court will interfere and require the foreclosure to be made under the direction of the court after all the controverted matters have been adjusted and the balance due is fixed, so that the property may be brought to sale when purchasers will be assured of a title, and not to be deterred by the idea that they are 'buying a lawsuit.'" This case is cited with approval in *Menzel v. Hinton*, 132 N. C. 670, 44 S. E. 385, 95 Am. St. Rep. 647.

Chief Justice Merrimon in *Gooch v. Vaughan & Barnes*, 92 N. C. 615, says: "Courts regard such powers with suspicion and watchfulness, and never fail to scrutinize the exercise of them, when it appears that there is ground to apprehend that injustice in any respect is done, or about to be done, to the mortgagor. The mortgagor is, in an important sense, completely in the power of the mortgagee, and besides the latter is a trustee, first, to control the property and apply the proceeds of it when sold to the payment of the mortgage debt, and, secondly, for the mortgagor as to any surplus, and he is held to a strict account."

[5] The junior mortgagee or lien creditor will be protected by the courts to the same extent as the mortgagor.

In 27 Cyc. p. 1718, it is said: "And where the fraud takes the form of causing the sale to be made for a larger sum than is due, or

collusion between the mortgagee and the purchaser, to the injury of the mortgagor's rights, or of misrepresentation and deceit, practiced upon the purchaser or upon a junior lien creditor, the sale may be set aside."

The books are full of cases where courts of equity have interfered to guard the rights of mortgagors, junior mortgagees, and lien creditors with jealous care, and have set aside sales made by mortgagees and trustees where manifest wrong and oppression are made to appear.

[6] The affidavits not only show abundant evidence of collusion and that Pace was Clark's agent acting for him and under his control, but it appears further that the advertisement of sale mentioned no hour when the sale was to take place.

In 27 Cyc. p. 469, the rule with respect to the time and place of sale is stated as follows: "The notice must specify the place at which the sale will be held with a degree of certainty that intending bidders will not be misled, but will be able to find it, and it must also give the time of the sale with equal certainty, stating not only the day, but also the hour at which it will be held." Fitzpatrick v. Fitzpatrick, 6 R. I. 64, 75 Am. Dec. 681.

The omission of such an essential requisite to make a valid sale is strong evidence of a fraudulent purpose to deceive and mislead probable bidders. This fact alone is sufficient to justify the judge in continuing the injunction, and, if it be shown at the final hearing that no time of sale was given in the advertisements, the sale should be set aside.

[7] It is a familiar principle of equity jurisprudence that the status of the parties should be preserved pending a trial upon the merits.

The order continuing the injunction is affirmed.

(162 N. C. 656)

STATE v. ROGERS et al.

(Supreme Court of North Carolina. May 28, 1913.)

1. JURY (§ 32*)—NUMBER OF JURORS.

As understood at common law and as used in the federal and state Constitutions, a "jury" signifies 12 men, duly impaneled, and a less number is not a jury.

[Ed. Note.—For other cases, see Jury, Cent. Dig. §§ 221-225; Dec. Dig. § 32.*]

For other definitions, see Words and Phrases, vol. 4, pp. 3880-3894.]

2. JURY (§ 29*)—WAIVER OF DEFECT.

Where accused pleads not guilty in a homicide case, he must be tried by a jury of 12 men and could not agree to waive his right to such a jury by accepting a jury of 11 men, when the twelfth juror was excused because mentally unfit.

[Ed. Note.—For other cases, see Jury, Cent. Dig. §§ 197-203; Dec. Dig. § 29.*]

Clark, C. J., dissenting.

Appeal from Superior Court, Haywood County; Foushee, Judge.

Robinson Rogers and another were convicted of manslaughter, and appeal. Reversed, and new trial granted.

Before impaneling the jury, the solicitor announced that he would not ask for a verdict of murder in first degree. One of the jurors was taken ill, and the trial proceeded with 11 jurors. The defendants were convicted of manslaughter and sentenced to the penitentiary. In apt time they moved in arrest of judgment as well as for a new trial upon the ground that they were not tried by a lawful jury of 12 men. His honor, upon such motion, rendered the following judgment:

"Findings of Fact.

"As the ground for a new trial contained in said two affidavits of defendants, to wit, that they were tried by a jury composed only of 11 men, the court is of the opinion that the defendants are not entitled to any finding of fact on this matter and so holds; but, if the Supreme Court is of a contrary opinion, then he makes the following findings of fact:

"That this case was called for trial on Wednesday morning of the first week, when the solicitor moved for a continuance on the ground of the absence of two witnesses to the shooting; one being sick in bed in Canton and the other in South Carolina. Defendants resisted the continuance and insisted on a trial at this term, and the court denied the motion for continuance. That the entire afternoon was consumed before a jury was selected. That the defendants did not exhaust their peremptory challenges. That the jury after being impaneled was in charge of an officer for the night who was duly sworn. That Thursday morning, before any evidence had been offered, the solicitor asked that the jury be excused and in the absence of the jury stated to the court that since the adjournment he and counsel for the defendant had discovered that one of the jurors selected was subject to fits, that he had recently been in Johns Hopkins Hospital and had a part of his brain removed, and that he was liable to lose his mental balance if subjected to much mental strain, and that in the opinion of counsel he was not mentally competent to sit on the jury. That the state was willing to call in another juror or to make a mistrial or to get an entirely new panel. That counsel for defendants insisted on proceeding with 11 men, and thereupon it was agreed in open court by the defendants speaking in open court through their counsel and the solicitor for the state that the case would proceed with 11 jurors, and that the clerk should make no record of the fact that one of the jury had been excused by consent. That defendants waived their right to have a full panel, and that no point should ever be raised that only 11 men were in the jury box.

And thereupon the court excused said juror and directed the trial to proceed. That the two defendants are men of more than ordinary intelligence; that McCracken is about 27 or 28 years of age, and the defendant Rogers, about 40 years of age, and their families are prominent and wealthy. That both these defendants are possessed of sufficient mental capacity to understand and did understand that both they and their counsel were entering into said agreement and electing to proceed with 11 jurors by their assent and that the court consented to this course.

"These defendants were represented by four able and experienced counsel, one of whom has filled the office of solicitor for two terms. That the trial proceeded through Thursday, Friday, Saturday, and on Monday the court delivered the charge to the jury; that the defendants were present during this time, during the sessions of court (being under good bonds the court did not order them in custody during the progress of the trial); that the jury returned their verdict Monday afternoon. At the request of defendant's counsel, the court gave them until Wednesday of the second week before pronouncing the judgment of the court, and on Wednesday the defendants again stated that they were not ready and asked for another day, so the court gave them until Thursday, a. m. On Thursday the defendants filed said affidavits, and this was the first time it was suggested that they would attempt to repudiate their solemn agreement. That the defendants were represented by the same counsel throughout the entire term of court. That the defendants did not ask to discharge their original counsel, nor did said counsel ask to withdraw from the case, but the same counsel who made the agreement made the motions aforesaid for a new trial.

"Wherefore the court is of the opinion that by their conduct defendants are estopped to set up the claim that there were only 11 men in the jury box, and the court denies the motion, and the defendants except. Wherefore the court denies the motion, and the defendants except."

W. T. Crawford, of Waynesville, Bryson & Black, of Bryson City, J. M. Queen, of Waynesville, and J. W. Stamey, of Clyde, for appellants. The Attorney General and Assistant Attorney General, for the State.

BROWN, J. [1] It is elementary that a "jury," as understood at common law and as used in our Constitutions, federal and state, signifies 12 men duly impaneled in the case to be tried. A less number is not a jury. *Traction Co. v. Hof*, 174 U. S. 1, 19 Sup. Ct. 590, 43 L. Ed. 873. In *Lamb v. Lamb*, 4 Ohio St. 167, Chief Justice Thurman said: "That the term 'jury,' without addition or prefix, imports a body of 12 men in a court of justice, is as well settled as any legal proposition can be." Opinion of the

Justices, 41 N. H. 550; *United States v. 1,363 Bags of Merchandise*, 2 Spr. 85, Fed. Cas. No. 15,964; *United States v. Philadelphia & Reading R. R. Co.*, 123 U. S. 113, 8 Sup. Ct. 77, 31 L. Ed. 138. In *State v. Scruggs*, 115 N. C. 805, 20 S. E. 720, it is held that: "The jury provided by law for the trial of indictments is composed of 12 men; a less number is not a jury, and a trial by jury in a criminal action cannot be waived by the accused." In *State v. Stewart*, 89 N. C. 564, an indictment for assault and battery, Justice Ashe says: "It is a fundamental principle of the common law, declared in 'Magna Charter,' and again in our Bill of Rights, that 'no person shall be convicted of any crime but by the unanimous verdict of a jury of good and lawful men in open court.' Article 1, § 13. The only exception to this is where the Legislature may provide other means of trial for petty misdemeanors with the right of appeal. * * * The court here has undertaken to serve in the double capacity of judge and jury, and try the defendant without a jury, which it had no authority to do, even with the consent of the prisoner"—citing 1 Bish. Prim. Law, 759. In *State v. Holt*, 90 N. C. 750, 47 Am. Rep. 544, an indictment for cruelty to animals, it is held that a jury trial cannot be waived by the defendant in a criminal action.

[2] The defendant may plead guilty, or nolo contendere, or autrefois convict, and of course the impaneling of a jury is unnecessary; but when he pleads not guilty in cases, such as this, where a trial by jury is guaranteed by the organic law, he must be tried by a jury of 12 men and he cannot waive it. *State v. Moss*, 47 N. C. 66; *Cancemi v. People*, 18 N. Y. 128. It would have been much safer for his honor to have followed the settled precedents of this court, and have discharged the jury and impaneled another.

Innovations in settled methods of procedure are generally unwise, especially in criminal cases. In this connection it is well to remember the words of Chief Justice Merriam: "A greater danger arises from practices and precedents that insidiously gain a foothold and power in courts of justice, by inadvertence and lack of due consideration. * * * In the economy of time, the hurry of business, lack of attention, hasty consideration, irregular and unwarranted methods of trial are adopted, allowed, tolerated, and thus vicious practices spring up, creating sources of danger to constitutional right." *State v. Holt*, supra.

New trial.

CLARK, C. J. (dissenting). The Constitution, art. 1, § 13, provides: "No person shall be convicted of any crime but by the unanimous verdict of a jury of good and lawful men in open court." Section 19 of the same article provides: "In all controversies at law respecting property, the ancient mode of trial by jury is one of the best securities

of the rights of the people, and ought to remain sacred and inviolable." The right to trial by jury is beyond controversy, both in civil and criminal cases.

There can be no controversy either that the jury here referred to means "12 men," not because there is any reference to trial by jury in Magna Carta, or that it would have any authority if there was, but because our Constitution, made by our people for our own government, provides for a jury and the word "jury" must be given the signification which it had at that time, which was a jury of "12 men." In some states a jury now may consist of less than 12, and in several a unanimous verdict is not required. The Supreme Court of the United States in passing upon this matter has held, in several cases, that the number that should compose a jury, and whether unanimity should be required or not, is entirely a matter for the people of each state, and that the fourteenth amendment does not impose any restrictions upon the states in this regard. The requirement in the fifth and sixth amendments to the federal Constitution of a jury trial is held also to apply only to the federal courts. This matter has been fully discussed and has been settled in *Hurtado v. Cal.*, 110 U. S. 516, 4 Sup. Ct. 111, 292, 28 L. Ed. 232; *Caldwell v. Texas*, 137 U. S. 692, 11 Sup. Ct. 224, 34 L. Ed. 816; *Leeper v. Texas*, 139 U. S. 462, 11 Sup. Ct. 577, 35 L. Ed. 225; *Brown v. New Jersey*, 175 U. S. 172, 20 Sup. Ct. 77, 44 L. Ed. 119; and many other cases.

In *Maxwell v. Dow*, 176 U. S. 581, 20 Sup. Ct. 448, 494, 44 L. Ed. 597, in sustaining a conviction by a jury of 8 as provided by the Constitution of Utah, Mr. Justice Peckham reviews the authorities to the above effect, approves them, and says among other things: "It is emphatically the case of the people by their organic law, providing for their own affairs, and we are of opinion they are much better judges of what they ought to have in these respects than any one else can be. The reasons given in the learned and most able opinion of Mr. Justice Mathews, in the *Hurtado Case*, for the judgment therein rendered, apply with equal force in regard to a trial by a jury of less than 12 jurors. The right to be proceeded against only by indictment, and the right to a trial by 12 jurors, are of the same nature, and are subject to the same judgment, and the people in the several states have the same right to provide by their organic law for the change of both or either." See, also, *Cooley, Cons. Lim.* (7th Ed.) 455 et seq.

Neither the federal Constitution nor Magna Carta has any bearing upon the subject. There have been lawwriters and judges who have stated that Magna Carta, c. 39, guaranteed the right of trial by jury; but this view originated at a time when historical statements were received with less investigation than at present. Magna Carta was but

one of several agreements made between King John (and later by his son Henry III) on the one side, and the insurgent barons, on the other. Magna Carta was sealed (not signed) on Friday, June 19, 1215, in the meadow of Runnymede (then a little island) on the river Thames three miles below Windsor Castle and in sight from its towers. It was an agreement between the King on the one hand, and the great barons on the other. The words therein "*judicium suorum parium*" had no reference to a trial by jury. McKechnie, *Magna Carta*, 158, 456, 457; 1 Pollock & Maitland, *Hist. Eng. Law*, 392, 581. About 50 years before, at the Assizes of Clarendon, 1166, Henry II instituted the germ of the grand jury which at first consisted of 12 men (1 Pollock & Maitland, 131); but thorough investigation has shown that the petty jury was not known in England till nearly 150 years after Magna Carta. At first the verdict was rendered by a majority; that is, 7 was a valid verdict. Britton I, 81. There had been further back, in remoter times, instances in which the witnesses were called upon to aid the judicial officer in passing upon a criminal offense. But that cannot be mistaken for the jury which when gradually instituted soon became of the fixed number of 12 and from which witnesses are excluded. Magna Carta could not refer to the "jury," which was then unknown.

Besides, the word "*judicium*" does not mean "jury," but "judgment." McKechnie, *Magna Carta*, 407. What the barons meant in Magna Carta was not that every one should have the right to an impartial trial by jury, for at that time juries were unknown and the common people had indeed less consideration from the mail-clad barons than from the King. What the barons did stipulate for was a "special privilege" for themselves. The King, when in need of money, had been in the habit of sending his officials and judges to try charges, most often trumped up, against wealthy barons, and extorted large supplies out of them. Therefore this stipulation in Magna Carta granted the special privilege that when the King had any charge against one of their order he should not send his judges against them, but the charge must be tried by men of their own order, i. e., by barons. They were to be convicted and sentenced, not by the King's judges, as the common people were, but they were subject only to "*judicium suorum parium*," i. e., to the "judgment of their equals." The common people might be tried by the judges, who were all appointed by the King and removable at his pleasure. But they made him agree that when he had any charge against barons they should be tried and judged "by their peers"; that is, by men of their own order. The judges were commoners, and not the peers or equals of the barons, who would have scorned the idea of being tried by them. 1 Pollock & Maitland, *Hist. Eng. Law*, 152, 539, 581. The judges were

the equals of other freemen and could try them. As to the vast masses of the people who were not even freemen, they were guaranteed no trial except in the barons' courts, who were practically their owners. The barons, therefore, in stipulating for a trial of "every freeman" by their peers, were stipulating for a special privilege exempting themselves from the jurisdiction of the King's courts. This privilege under the circumstances may have been very necessary for their protection, for the judges were the King's agents. But the provision cannot be lauded as guaranteeing to us "trial by jury," which was then an unheard of institution, and to which the barons would under no circumstances have submitted. In McKechnie on Magna Carta, the original sources of information are marshaled and interestingly discussed.

King John possessed no power he could confer upon or withhold from the people of this state. No agreements made between him and his barons, which were constantly broken, can restrict or bind us. Magna Carta and other similar contracts between them are of interest as historical documents of a stage far below ours in the development of human rights. They confer no rights upon us, still less do they restrict our right to self-government. We base our right to this, not upon the grant of any King, but upon the inherent power to govern ourselves, restricted only by the Constitution and laws which we ourselves have made. These old documents are useful only to explain the meaning of words which we have used.

It is universally held that in civil cases trial by jury is simply a right or privilege and can be waived, unless there is some statute forbidding it. 24 Cyc. 149; 17 A. & E. (2d Ed.) 1097; and numerous cases cited by both. Embraced in these decisions is also, as a corollary, the proposition that in civil cases by consent less than 12 may find a verdict.

In criminal cases there is a wide diversity in the courts. In some states it is held that a jury can be waived in all criminal cases, as in civil cases, and in others it is held that a jury cannot be waived except in misdemeanors, and in still others it has been held that a jury cannot be waived in any criminal case. There is nearly the same diversity as to the right in criminal cases of the defendant to agree that the verdict may be rendered by less than 12 men or dispensing with unanimity, except that there are two or three states which, while holding that a jury cannot be waived, yet hold that by consent of the defendant the jury may consist of less than 12 men, when, as in this case, otherwise there would be a mistrial. The authorities on these propositions may be found in 24 Cyc. 150, 153, and 17 A. & E. (2d Ed.) 1098, in numerous cases there cited. For centuries in criminal cases a defendant

retained his right to the ancient mode of "trial by battle" and could not be tried by a jury except by his consent. Hence the formula we still retain, "How will you be tried," and the reply, "By God and my country," i. e., by a jury. 1 Legal Hist. Essays, 657.

As the right to a trial by jury is guaranteed equally by the Constitution in civil and in criminal cases alike, it is difficult to understand why, if it is a requirement and not merely a privilege, it can be waived in one class of cases and not in the other. This distinction is not based upon the Constitutional phraseology, but upon the view which has happened to be taken by the incumbents of the bench in each state. Among the states which hold that a jury trial can be waived in criminal cases are Arkansas, Connecticut, Iowa, Kentucky, Louisiana, Nevada, New Jersey, Massachusetts, Michigan, Missouri, Minnesota, and Pennsylvania. Among the cases on the point whose reasoning is most worthy of consideration are *State v. Kaufman*, 51 Iowa, 579, 2 N. W. 275, 33 Am. Rep. 148; *Com. v. Dailey*, 66 Mass. (12 Cush.) 80; *Murphy v. Com.*, 58 Ky. (1 Metc.) 365; *State v. Sackett*, 39 Minn. 69, 38 N. W. 773; *Com. v. Sweet*, 4 Pa. Dist. R. 136; *State v. White*, 33 La. Ann. 1219; and there are others.

In this state it has been held that, while in civil cases a jury trial can be waived, this cannot be done in criminal cases. *State v. Stewart*, 89 N. C. 564; *State v. Holt*, 90 N. C. 749, 47 Am. Rep. 544. *State v. Scruggs*, 115 N. C. 805, 20 S. E. 720, holds, as in *State v. Holt*, that a jury trial cannot be waived; but it does not directly pass on the point whether by consent a verdict may not be rendered by a lesser number, though that is a reasonable inference.

There can be no reason shown upon the face of the Constitution why a jury trial should be held to be a privilege in civil cases but an iron-clad requirement in criminal. We, however have, as just said, no case in which it has been expressly held that the trial, at the request of the defendant, cannot proceed with 11 jurors. It should seem that it could, as the Constitution also guarantees the defendant a right to a "speedy trial." Among able opinions to this effect are: *Shaw, C. J.*, in *Com. v. Dailey*, 66 Mass. (12 Cush.) 80; *State v. Sackett*, 39 Minn. 69, 38 N. W. 773; *Simpson, C. J.*, in *Murphy v. Com.*, 58 Ky. (1 Metc.) 365. To similar purport: *State v. Borowsky*, 11 Nev. 119; *Connelly v. State*, 60 Ala. 89, 31 Am. Rep. 34; *State v. Kaufman*, 51 Iowa, 578, 2 N. W. 275, 33 Am. Rep. 148. The following cases also hold valid the waiver of any jury in criminal cases. *State v. Worden*, 46 Conn. 349, 33 Am. Rep. 27; *Dillingham v. State*, 5 Ohio St. 280; *Edwards v. State*, 45 N. J. Law, 419; *Ward v. People*, 30 Mich. 116; *State v. Mansfield*, 41 Mo. 470; *State v. Cox*, 8 Ark. (3 Eng.) 436; and there are others.

It was at the instance and by the request of the defendants in this case that, one of the jurors becoming incapacitated, no mistrial was entered, and it was agreed that the case should proceed with 11 jurors and that no entry should be made. The judge finds as facts that "the solicitor moved for a continuance on ground of the absence of two witnesses to the shooting; one being ill and in bed, and the other in South Carolina. The defendants resisted the continuance and insisted on a trial at this term and the court denied the motion for continuance. The defendants did not exhaust their peremptory challenges. The jury was impaneled and an officer sworn, Wednesday. The next morning, before any evidence had been offered, the solicitor asked for the withdrawal of a juror because since the adjournment he and the counsel for the defendants had ascertained that one of the jurors was subject to fits and that counsel did not think he was mentally competent to sit on the jury; that the state was willing to call in another juror or to make a mistrial or to get an entirely new panel. Counsel for defendants insisted on proceeding with 11 men, and thereupon it was agreed in open court, the defendants speaking in open court through their counsel, and the solicitor for the state, that the case would proceed with 11 jurors, and that the clerk should make no record of the fact that one of the jury had been excused by consent; the defendants waived their right to have a full panel and stated that no point should ever be raised that only 11 men were the jury box; and thereupon the court excused said juror and directed the trial to proceed. The two defendants are men of more than ordinary intelligence, McCracken being 27 or 28 years of age, and the defendant Rogers about 40 years of age, and their families are prominent and wealthy. Both these defendants are possessed of sufficient mental capacity to understand, and did understand, that both they and their counsel were entering into said agreement and electing to proceed with 11 jurors by their assent and that the court consented to this course. These defendants were represented by four able and experienced counsel, one of whom has filled the office of solicitor for two terms." The trial occupied four days. No objection was made as to the juror being excused until two days after the verdict. The defendants did not ask to discharge their counsel, nor did counsel ask to withdraw, and the same counsel who made the agreement made the motion in arrest of judgment upon the ground that it was invalid.

The prisoners have had every right and privilege which is guaranteed them by the Constitution. They thought it was to their benefit to proceed with 11 jurors and asked that it should be done. The courts may well scrutinize closely all offers to waive a jury

trial in criminal cases, because the defendants may act unadvisedly in some cases, and the consequences may be serious; but this should not cause the Constitution to be construed differently as to the trial by jury in civil cases and in criminal cases.

In the present case the court finds as facts that the prisoners were men of intelligence and means and were represented by several able counsel, one of whom was formerly solicitor for that district for eight years. The prisoners do not show that they suffered any detriment in the course of the trial. They have had a fair trial, and they have been deprived of no constitutional right.

A defendant has a constitutional right to a speedy trial by jury. Yet he waives this provision by obtaining a continuance. A plea of guilty dispenses with a jury trial altogether. Why therefore cannot a defendant agree to accept a verdict by 11 jurors when he has competent counsel and is himself intelligent and both his counsel and himself think it for his interest to do so? Especially when this is done with the consent of the court and the solicitor representing the state. There is nothing to indicate that the prisoners suffered any prejudice from the absence of the other juror, and they ought not to obtain any benefit by their breach of good faith.

(193 N. C. 314)

WADSWORTH LAND CO. v. PIEDMONT TRACTION CO. et al.

(Supreme Court of North Carolina. May 22, 1913.)

1. EMINENT DOMAIN (§ 10*)—CONDEMNATION OF LAND—TRACTION COMPANY—RIGHT OF WAY—CHARTER POWERS.

Where a traction company had the power of eminent domain, not only by virtue of its charter, but expressly conferred by Revisal 1905, §§ 1138, 2575, it was no objection to its exercise thereof that its charter also authorized it to engage in private business in addition to its authority to operate a street railway.

[Ed. Note.—For other cases, see Eminent Domain, Cent. Dig. §§ 35-48; Dec. Dig. § 10.*]

2. EMINENT DOMAIN (§ 13*)—STREET RAILROADS—LAND—AUTHORITY TO CONDEMN—PRIVATE PURPOSE.

Where a traction company was also authorized to generate electricity for public use, and was given the power of eminent domain by its charter and by general statute, it was no answer to its application to condemn land that it intended to use the same for private, as distinguished from the public, purpose, since if, after acquiring the land for public use, it devoted it to a private purpose, such use could be terminated by quo warranto.

[Ed. Note.—For other cases, see Eminent Domain, Cent. Dig. §§ 51-53; Dec. Dig. § 13.*]

3. EMINENT DOMAIN (§ 191*)—PETITION—"COMMERCIAL RAILWAY."

The words "commercial railway," as used in the petition of a traction company for condemnation of land, meant a company en-

gaged in commerce by the carriage of articles of merchandise.

[Ed. Note.—For other cases, see Eminent Domain, Cent. Dig. §§ 509-518; Dec. Dig. § 181.*]

For other definitions, see Words and Phrases, vol. 2, p. 1303.]

4. CARRIERS (§ 7*)—CHARTER — INTERSTATE BUSINESS.

Where a traction company was authorized to operate a railroad line between certain points within the state, it was not a violation of its charter to accept freight or passengers to be delivered at either terminus to other carriers to be transported beyond the limits of the state in interstate commerce.

[Ed. Note.—For other cases, see Carriers, Dec. Dig. § 7.*]

Appeal from Superior Court, Mecklenburg County; Webb, Judge.

Action by the Wadsworth Land Company against the Piedmont Traction Company and others. Judgment for defendants, and plaintiff appeals. Affirmed.

Burwell & Cansler, Tillett & Guthrie, and Maxwell & Keerans, all of Charlotte, for appellant. Osborne, Cooke & Robinson and Pharr & Bell, all of Charlotte, for appellees.

CLARK, C. J. [1] The plaintiff contends that the Piedmont Traction Company cannot exercise the power of eminent domain because under its charter it is authorized to engage in private business in addition to its authority to operate a street railway, which is a quasi public business. We think the law is clearly stated thus in 15 Cyc. 579: "But the fact that the charter powers of the corporation, to which the power of eminent domain has been delegated, embrace both private purposes and public uses does not deprive it of the right of eminent domain in the promotion of the public uses." The traction company has the power of eminent domain, not only by virtue of its charter, but by Revisal, §§ 1138 and 2575; *Street R. R. Co. v. Railroad*, 142 N. C. 423, 55 S. E. 345, 9 Ann. Cas. 683.

In *McIntosh v. Superior Court*, 56 Wash. 214, 105 Pac. 637, it is said: "It is next contended that, while the company is authorized to construct and build railroads, it is also authorized to engage in private business. Conceding this to be true, the company may condemn and appropriate land in aid of its public purposes for public uses only." To same purport, *Power Co. v. Webb*, 123 Tenn. 596, 133 S. W. 1105.

[2] The plaintiff further objects that the defendant's charter shows that a great many of its purposes are private, and that the petition does not show that the lands sought to be taken will not be used for such private purposes. Looking into the petition, it is there stated that the defendant desires this land in connection with its works for the production of power "to generate electricity for the use and benefit of the public." It

has the power of condemnation under its charter and the general statute, and nothing in this record discloses that the petitioner is seeking the land for any other than public purposes. We cannot presume it to be acting in bad faith. If, after acquiring the land under condemnation for a public use, the petitioner should devote it to private purposes, there is a remedy by quo warranto and otherwise. The mere possession of incidental powers under the charter to engage in private enterprises will not be held to deprive the corporation of the right of eminent domain to effectuate its public purposes, and when it is seeking to exercise this right for the public uses which it is authorized to undertake. *Walker v. Power Co.*, 160 Fed. 856, 87 C. C. A. 660, 19 L. R. A. (N. S.) 725; *Brown v. Gerald*, 100 Me. 351, 61 Atl. 735, 70 L. R. A. 472, 109 Am. St. Rep. 526; *Collier v. Railroad*, 113 Tenn. 121, 83 S. W. 155; *Lewis on Em. Dom.* (3d Ed.) 314.

In *Street R. R. v. Railroad*, supra, it was contended that the plaintiff was not pursuing the public purpose expressed in its charter of building a street railroad in Fayetteville, but was building a branch line in the country and was therefore acting ultra vires. The court said that such objections, "even if valid, can only be made available by direct proceedings instituted by some member of the company for unwarranted or irregular procedure on the part of the officers or by the state for abuse or nonuse of its franchise, and are not open to collateral investigation in a case of this character nor at the instance of the defendant."

The traction company has taken out its charter under the general corporation law, as authorized by Revisal, § 1138, and that section provides that the term "street railway" includes railways operated by steam or electricity or any other motive power, used and operated between different points in the same municipality or between points in municipalities lying adjacent to each other, and that such railways may carry and deliver freight, etc., with the restriction that the line so operated shall not extend in any direction more than 50 miles from the municipality in which the home office is situated.

[3] We do not see anything in the petition of an intention on the part of the traction company to use the property sought to be condemned for any other than quasi public purposes. It is true, as the plaintiff contends, that the petition uses the words "commercial railway." But that is purely a matter of phraseology, for the company is engaged in commerce when it carries articles of merchandise.

[4] The plaintiff contends that the traction company proposes to engage in interstate business. The traction company, however, is now operating only between Char-

lotte and Gastonia. It would not be in violation of the terms of its charter if it should take freight or passengers to be delivered at either terminus to other carriers to be transported beyond the limits of the state. This is what every railroad company does under its charter. The traction company would not thereby be exceeding its chartered rights, and, if it did, the remedy is, as already stated, not to be found by refusing the company the right to condemn an easement through the land, which certainly is within the scope of its chartered powers, for the transaction of legitimate business. The court will not sustain a collateral attack, and deny the right of condemnation, upon a suggestion that the petitioner may exceed its chartered right in the use of the property thus acquired by condemnation.

Affirmed.

(163 N. C. 508)

WADSWORTH LAND CO. v. PIEDMONT TRACTION CO. et al

(Supreme Court of North Carolina. May 28, 1918.)

1. STREET RAILROADS (§ 48*)—RIGHT OF WAY—ADDITIONAL BURDEN.

An electric railroad company acquiring a right of way could not convey to a traction company the right to impose additional burdens thereon, but the traction company could only acquire the right to impose such additional burdens and to use additional land for its purpose by condemning the same and paying damages to the owners.

[Ed. Note.—For other cases, see *Street Railroads*, Cent. Dig. §§ 123, 124; Dec. Dig. 48.*]

2. EMINENT DOMAIN (§ 202*)—EVIDENCE—DAMAGES.

In a proceeding to condemn land for a right of way by a traction company, evidence that the landowner intended to develop the property as a city addition and to convert a part thereof into an artificial park was inadmissible.

[Ed. Note.—For other cases, see *Eminent Domain*, Cent. Dig. § 541; Dec. Dig. § 202.*]

3. EVIDENCE (§ 142*)—VALUE—SALES OF OTHER PROPERTY.

In a proceeding to condemn land for a railroad right of way, the proper measure of damages is the difference between the market value of the land before and after the appropriation, and hence evidence of specific sales of other property not similarly located or developed was inadmissible, though it was intended to develop the property in question.

[Ed. Note.—For other cases, see *Evidence*, Cent. Dig. § 377; Dec. Dig. § 142.*]

Appeal from Superior Court, Mecklenburg County; Webb, Judge.

Action by the Wadsworth Land Company against the Piedmont Traction Company and another. Judgment for plaintiff, and defendants appeal. Reversed.

Osborne, Cocke & Robinson and Pharr & Bell, all of Charlotte, for appellants. Burwell & Cansler, Tillett & Guthrie, and Maxwell & Keerans, all of Charlotte, for appellee.

CLARK, C. J. The defendant, the Charlotte Electric Railroad Company, had acquired from the grantors of the plaintiff the right of way to maintain and operate its street railway system. The Piedmont Traction Company, under contract with the Charlotte Electric Railroad Company, is operating its freight and passenger interurban cars over the right of way which had been acquired by said electric railroad company, and has erected additional poles, wires, and other apparatus thereon for its own purposes and besides, since this action began, has instituted a proceeding before the clerk to condemn said right of way for the additional burdens thus placed on it, and also to condemn 21 additional feet in width for its use. By consent the two proceedings have been consolidated in this action.

[1] Exception 1. The court properly held that the electric railroad company could not convey to the traction company the right to impose the additional burdens, but that the plaintiff was entitled to compensation therefor. The traction company is imposing a new burden and service upon said right of way, and is clearly liable in damages therefor to the plaintiff for its use of the 24 feet right of way used by the electric railroad company, as well as for the value of the additional 21 feet which the traction company is now seeking to condemn. This has been very fully discussed and demonstrated in *Phillips v. Telegraph Co.*, 130 N. C. 520, 41 S. E. 1022, 89 Am. St. 868; *Hodges v. Telegraph Co.*, 133 N. C. 225, 45 S. E. 572; *Brown v. Power Co.*, 140 N. C. 334, 52 S. E. 954, 3 L. R. A. (N. S.) 912; *Beasley v. Railroad*, 145 N. C. 272, 59 S. E. 60. In *McCullock v. Railroad*, 146 N. C. 318, 59 S. E. 882, the court said, upon facts very similar to these: "The plaintiffs are entitled in this action to have permanent damages assessed, in the nature of condemnation, for the additional burden placed upon the lot by its use for purposes other than those for which defendant uses the lot purely as lessee of the North Carolina Railroad Company. *Hodges v. Telegraph Co.*, 133 N. C. 225 [45 S. E. 572], in which case this proposition is so clearly and fully reasoned out by Connor, J., with full citation of authorities, that further discussion here would be idle repetition."

[2] Passing by other exceptions, we think, however, that his honor erred in admitting evidence as to the speculative uses to which the owner intended to put the property and as to its contemplated improvement and in allowing the jury to consider these matters. The assignments of error presenting these points are Nos. 3, 5, 6, 11, 13, 16, 18, 34, 41, 48, 49, 50, and 60. Of these, 3, 5, 13, 16, 18, and 34 are exceptions to the admission of evidence, over objection by the traction com-

pany as to the intention of the owner to convert a part of its property, consisting of about 100 acres of bottom land into an artificial park. Nos. 6 and 11 are to the admission of evidence as to the probable value of the lots into which the property might be subdivided. No. 34 is to the refusal of the court to instruct the jury, as requested, that they could not consider this intended development by the owner of the property. Nos. 48, 49, 50, and 60 are to the charge wherein the court instructed the jury that they should take into consideration the plans of the owner for the future improvement of the property and the uses to which it was intended to be put.

In *Brown v. Power Co.*, 140 N. C. 333, 52 S. E. 954, 3 L. R. A. (N. S.) 912, which we reaffirm, the court held that it was proper for the jury to take into consideration, not only the present condition of the property condemned and the uses to which it was then applied, but also all other uses to which it might be applied for which it was naturally adapted.

In the present case the plaintiff was allowed to go beyond this rule and show the uses to which the owner intended to put the property and its future improvement. The plaintiff proved, without objection, the capabilities of the property and all the uses for which it contended the property was adapted, its nearness to the city of Charlotte, and that the property as a whole was well situated for development as a residential section. To all this no objection was offered by the traction company. The error was in permitting the plaintiff to go further and to show that 100 acres of this property, consisting of bottom land not suited for development as a residential property but subject to overflow, the owner intended to make into a park and beautify it by laying off walks and building summer houses and otherwise, and that such improvement would enhance in value the remaining portion of the property. We think this was too remote and improperly enhanced the damages allowed. It was purely speculative and should have been excluded.

In *Elliott, Roads & Streets*, 273, it is said: "It is held that, although it may be proper to show the location and surroundings and the uses to which the land is adapted, yet it is not competent to prove by the owner the use to which he intends to devote it." Among many cases to support that proposition are *Railroad v. Railroad*, 103 Va. 399, 49 S. E. 512; *Pinkham v. Chelmsford*, 109 Mass. 225.

In *Railroad v. Stocker*, 128 Pa. 233, 18 Atl. 399, it was held that the jury could not value a tract upon the theory of what it might bring, when platted and divided up into building lots; but they could inquire what a present purchaser would be willing to pay for it in its present condition, and

not what a speculator might be able to realize out of a resale in the future. To same purport, *Railroad v. Abell*, 18 Mo. App. 637; *Railroad v. Cleary*, 125 Pa. 451, 17 Atl. 468, 11 Am. St. Rep. 918.

In 2 *Lewis*, Em. Dom. 1056, 1057, it is said: "The conclusion from the authorities and reason of the matter seems to be that witnesses should not be allowed to give their opinion as to the value of property for a particular purpose, but should state its market value in view of any purpose to which it is adapted. The condition of the property and all its surroundings may be shown and its availability for any particular use. If it has a peculiar adaptation for certain uses, this may be shown; if such peculiar adaptation adds to its value, the owner is entitled to the benefit of it. But when all the facts and circumstances have been shown, the question at last is what is it worth in the market." To same effect, *Boom Co. v. Patterson*, 98 U. S. 403, 25 L. Ed. 206; *Railroad v. Humphreys*, 90 Va. 436, 18 S. E. 901.

[3] The court also erred in admitting the evidence as to the value of other property, and the sales of specific parts thereof, and in charging the jury that they might consider such evidence in arriving at their verdict. Assignments of error Nos. 27, 28, 29, 31, and 33 were to the admission of evidence to the above effect, and No. 47 was to the charge to the jury on that point. Such evidence was held incompetent in *Warren v. Makeley*, 85 N. C. 12; *Bruner v. Threadgill*, 88 N. C. 365; *Cline v. Baker*, 118 N. C. 782, 24 S. E. 516; *Rice v. Railroad*, 130 N. C. 330, 41 S. E. 1031; *Railroad v. Patterson*, 107 Pa. 463.

In *Railroad v. Patterson*, above cited, the court said: "It is well settled by numerous decisions of this court that the proper measure of damages where lands are taken for railroad purposes is the difference between the market value of the land before and after appropriation of the right of way. And it seems to be equally well settled under the law of this state that evidence of particular sales of alleged similar property, under special circumstances, is inadmissible to establish market value. * * * The selling price of lands in the neighborhood at the time is undoubtedly a test of value, but it is the general selling price, not the price paid for particular property. The location of the land, its uses and its products, and the general selling price in the vicinity, may determine the market value. The price which, upon a consideration of the matters stated, the judgment of well-informed and reasonable men will approve is the market value. A particular sale may be a sacrifice compelled by necessity or it may be the result of mere caprice or folly. If it be given in evidence, it raises an issue collateral to the subject of inquiry, and these collateral issues are as numerous as the

sales. * * * The introduction of evidence of particular sales is therefore not allowable under our decisions to establish market value."

The evidence as to sales of other property was as to sales of property in residential suburbs of Charlotte which had already been developed by the laying out of modern improvements and had already been largely settled as home sections. The plaintiff was erroneously permitted by this evidence to compare its property not similarly located with property already developed upon the ground that it intended to develop this property by the expenditure of large sums of money.

These errors entitle the defendants to a new trial, and it is not necessary to consider the other assignments of error, though it may be said, without passing an authoritative opinion, that it does not now seem to us that there are errors in the other exceptions.

Error.

(162 N. C. 479)

GREGG v. BOARD OF COM'RS OF RANDOLPH COUNTY.

(Supreme Court of North Carolina. May 28, 1913.)

1. STATUTES (§ 16*)—ENACTMENT—READING STATUTES.

Priv. Acts 1911, c. 465, providing for holding elections in special school districts on the question of issuing bonds for school purposes, applied to the whole state as introduced in the House of Representatives, and passed the House on three several days with an aye and no vote on the second and third readings, which was entered on the journal, and in the Senate the act passed the three readings on separate days, and on the second and third readings the ayes and noes were called and entered, but on the third reading the Senate adopted an amendment limiting its operation to Liberty school district in Randolph county, which amendment was concurred in by the House of Representatives without an aye and no vote. *Held*, that the act was not void because not read three times in each house on separate days after the amendment was adopted in the Senate.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. §§ 14-16; Dec. Dig. § 16.*]

2. EVIDENCE (§ 83*)—PRESUMPTIONS.

There is a presumption in favor of the legality and regularity of the acts of public officers.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 105; Dec. Dig. § 83.*]

3. SCHOOLS AND SCHOOL DISTRICTS (§ 111*)—ISSUANCE OF BONDS—TIME OF ISSUANCE.

Since Priv. Acts 1911, c. 465, authorizing the holding of elections for issuing bonds for school purposes in Liberty school district in Randolph county, prescribes no time limit within which the bonds shall be issued after the election, delay in issuing bonds under an election held in September, 1911, is not ground for restraining their issuance, at suit of a taxpayer, in the absence of evidence of abuse of power in delaying their actual issuance.

[Ed. Note.—For other cases, see Schools and School Districts, Cent. Dig. §§ 265-268; Dec. Dig. § 111.*]

Appeal from Superior Court, Randolph County; Long, Judge.

Action by J. D. Gregg against the Board of Commissioners of Randolph County. From a judgment for defendants, plaintiff appeals. Affirmed.

This is an action brought by the plaintiff, a resident taxpayer of Liberty school district, in Randolph county, to restrain the issuance and sale of the bonds of said district; the defendants having prepared said bonds for issuance and offered the same for sale. The defendants claim the right to issue said bonds under the authority of chapter 465 of the Private Acts of 1911, and an election held pursuant to said act. The court denied plaintiff's motion for an injunction, and plaintiff appealed.

The act, as introduced in the House of Representatives, applied to the whole state, and provided for holding elections in special school districts on the question of issuing bonds for school purposes, the election to be ordered by the county commissioners, upon petition of one-fourth of the freeholders of the district, indorsed by the county board of education. The act passed the House of Representatives on three several days, and on the second and third readings there was an aye and no vote, which was entered on the journal. In the Senate, the act passed the three readings on separate days, and on the second and third readings the ayes and noes were called and entered on the journal. On the third reading in the Senate an amendment was adopted, limiting the operation of the act to Liberty school district in Randolph county, which amendment was concurred in by the House of Representatives, but without an aye and no vote.

At the meeting of the board of county commissioners of Randolph county, held on the 7th day of August, 1911, the following petition was presented to the said board:

"To the Board of County Commissioners of Randolph County: We, the undersigned freeholders, within Liberty school district, in Randolph county, a special school district formed by the county board of education of said county heretofore, as prescribed by section 4115 of the Revisal, respectively petition your board to grant and provide an election to be held under and in accordance with an act of the General Assembly of North Carolina at its regular session in the year 1911, entitled 'An act to authorize the issuance of bonds by Liberty school district, in Randolph county,' upon the question as to whether bonds shall be issued by said district for school purposes, as in said act provided, in the amount of eighty-five hundred dollars (\$8,500.00), to bear interest at the rate of five per centum per annum, payable semi-annually, to mature twenty years from date of same, which said bonds shall not be sold for less than par value. And your petition-

ers further ask that, in case the issuance of bonds be authorized at an election held in accordance herewith and actually issued, there be levied and collected an amount of tax sufficient to pay the interest on said bonds and provide a sinking fund to pay the same at maturity.

"This the 25th day of July, 1911.

"Signatures: J. Rom Smith and Others.

"J. H. Johnson."

Said petition having been indorsed and approved by the board of education of Randolph county, the following order was made by the Board of County Commissioners, being indorsed on the petition itself, to wit:

"Election granted and ordered to be held in the town of Liberty, on the 12th day of September, 1911. C. R. Curtis is hereby appointed registrar and J. C. Kirkman and R. C. Troy poll holders.

"[Signed] H. T. Caviness,

"Chairman Board of County Commissioners."

And the said petition and order recorded in the minutes of the said Board of Commissioners.

The town of Liberty is embraced within Liberty school district, though the town and the district are not coterminous. The usual polling place for the town was, and is, the place where the election was held under the aforesaid order, and also at the place where the polling or voting was done at the only election ever held in Liberty school district prior to that time, and the said election held in pursuance of said order aforesaid was in all respects conducted as an election for the said Liberty school district. At the election held pursuant to said order of the Board of County Commissioners a majority of the qualified voters voted "for bonds." And, on returns of said election being made to the said Board of County Commissioners, it was adjudged by said board that the election had been carried in favor of the issuance of the bonds, and it proceeded to make arrangements for the issuance thereof, and have prepared bonds in the sum of \$8,500 of the said Liberty school district, in Randolph county, for school purposes in said district, pursuant to the said act, petition, order, and election, and are now offering said bonds for sale.

The contentions of the plaintiff are: (1) That the act is void because not read three times in each house on separate days after the amendment was adopted in the Senate; (2) that the election is void because ordered for the town of Liberty and not for Liberty school district; (3) that the election is void because it does not appear that the petition was signed by the requisite number of freeholders; (4) that the election was held in September, 1911, and defendants have lost the right to issue bonds, if it ever existed, by nonuser.

Hammer & Kelly, of Ashboro, for appellant. H. M. Robins, of Ashboro, for appellees.

ALLEN, J. There is, in our opinion, no valid objection to issuing the bonds in controversy.

[1] The act, as it passed the House, was not obligatory on any school district in the state, but simply gave the opportunity to all to hold an election as to issuing bonds, etc., and every provision now in the act was not only in it at that time, but it also applied to Liberty school district as one of the districts of the state, and the effect of the amendment adopted in the Senate was not to include Liberty school district, but to exclude other districts. As thus understood, the amendment falls within the principle declared in *Brown v. Stewart*, 134 N. C. 357, 46 S. E. 741; *Com'rs v. Stafford*, 138 N. C. 453, 50 S. E. 862; *Bank v. Lacy*, 151 N. C. 3, 65 S. E. 441. "It is equally well settled that, when the act has been passed in accordance with the provisions of article 2, section 14, of the Constitution, an amendment which does not increase the amount of the bonds or the tax to be levied, or otherwise materially change the original bill may be adopted by the concurrence of both houses of the General Assembly." *Commissioners v. Stafford*, 138 N. C. at page 455, 50 S. E. at page 863.

The second objection would require serious consideration if the fact was as contended by the plaintiff, but when the petition is read with the order of the county commissioners, it is clear that the election was ordered for the district, and that it was to be held at the usual place in the district, which was in the town of Liberty, and it does not appear that any citizen affected by the election was deprived of the right to vote.

[2] No evidence was offered in support of the allegation that the requisite number of freeholders did not sign the petition for the election; and, in addition to the presumption in favor of the legality and regularity of the acts of public officers, the act provides, after the requirement as to the petition, that "The ordering of such election by the board of county commissioners shall conclusively presume that all precedent conditions and provisions of this act have been complied with."

[3] There is nothing in the act which limits the time after the election within which the bonds may be issued, and, in the absence of evidence of abuse of power, the delay is no valid reason for restraining the defendants from doing so.

It may be that the defendants have had trouble in selling the bonds, and that they have taken steps to issue them as soon as a sale could be made.

Upon a review of the whole record, we find no error.

Affirmed.

(162 N. C. 471)

BALL-THRASH & CO. v. McCORMICK
et al.

(Supreme Court of North Carolina. May 28, 1913.)

1. APPEAL AND ERROR (§ 927*)—NONSUIT—EVIDENCE—REVIEW.

The court on appeal from a nonsuit must consider the evidence in the light most favorable to plaintiff and draw all reasonable inferences therefrom necessary to sustain his case, and will not consider adverse testimony.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2912, 2917, 3748, 3758, 4024; Dec. Dig. § 927.*]

2. EVIDENCE (§ 376*)—PRIVATE BOOKS—ADMISSIBILITY.

Where a clerk, who made entries in bank books, is accessible as a witness, he must testify as to the entries or they cannot be received as evidence.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 1628-1646; Dec. Dig. § 376.*]

3. PLEDGES (§ 30*)—ACTION ON NOTE PLEDGED—RIGHT OF PAYEE—"REAL PARTY IN INTEREST."

A payee of notes, who deposits them as collateral for his own debt due to a third person, may sue before paying the debt and recover thereon where he subsequently pays the debt and takes up the notes and produces them at the trial, without making the pledgee a party, for the payee is a real party in interest within Revised 1908, § 400, and has at least an equitable interest if not the legal title sufficient to form the basis of an action.

[Ed. Note.—For other cases, see Pledges, Cent. Dig. §§ 75-85; Dec. Dig. § 80.*]

For other definitions, see Words and Phrases, vol. 7, pp. 5938-5939; vol. 8, p. 7779.]

4. PLEDGES (§§ 1, 21*)—NATURE—RIGHT OF PLEDGEE.

A pledge is a deposit of personal effects not to be taken back but on payment of a certain sum, by express stipulation, and the pledgor retains a distinct interest in the property pledged, and he may sue for the protection thereof.

[Ed. Note.—For other cases, see Pledges, Cent. Dig. §§ 1, 4, 5; Dec. Dig. §§ 1, 21.*]

5. PLEDGES (§ 30*)—ACTION BY PLEDGEE—JUDGMENT.

Where a payee of notes, who pledged them as collateral for his own debt due to another, sues the maker, the court, to protect the debtor and the pledgee, may require that the pledgee shall be made a party, or provide in the judgment that the money collected on it shall first be applied to the discharge of the debt due the pledgee, or the payee may redeem before trial and judgment.

[Ed. Note.—For other cases, see Pledges, Cent. Dig. §§ 75-85; Dec. Dig. § 30.*]

6. PARTIES (§ 75*)—DEFECT OF PARTIES—OBJECTIONS—NONSUIT.

An objection based on a defect of parties cannot be taken by nonsuit, but only by demurrer or answer.

[Ed. Note.—For other cases, see Parties, Cent. Dig. §§ 115, 116, 167; Dec. Dig. § 75.* Pleading, Cent. Dig. § 494.]

7. PLEDGES (§ 34*)—PLEDGE OF CHOSE IN ACTION—ENFORCEMENT BY PLEDGEE.

A pledgor may sue for the property before paying the debt.

[Ed. Note.—For other cases, see Pledges, Cent. Dig. § 90; Dec. Dig. § 34.*]

8. PLEDGES (§ 21*)—OBLIGATION OF PLEDGEE.

A pledgee, if deemed the legal owner of the thing pledged, holds it in trust first for him-

self and then for the pledgor, and, where the debt for which the property is pledged is less than the value of the property, the pledgor has not only a technical, but a substantial, interest, and when he sues to preserve his interest the court may so frame its judgment as to protect all parties concerned.

[Ed. Note.—For other cases, see Pledges, Cent. Dig. § 45; Dec. Dig. § 21.*]

Appeal from Superior Court, Buncombe County; Bragaw, Judge.

Action by Ball-Thrash & Co. against A. H. McCormick and another. From a judgment of nonsuit, plaintiff appeals. Reversed, and nonsuit set aside and trial ordered.

Action upon promissory notes. The evidence tended to show that plaintiffs, at the request of defendants, installed a heating plant in their residence for the price of \$684. When the work was completed January 10, 1911, the defendant A. H. McCormick gave to plaintiffs his three promissory notes, each in the sum of \$228, and due respectively 30, 60, and 90 days after their date. Plaintiffs indorsed the notes for value to the American National Bank of Asheville, N. C., the bank discounting the same January 11, 1911, and afterwards the first note was paid and \$50 paid on the other two notes in December, 1911. The defendants, A. H. McCormick and wife, having refused to pay the other two notes, plaintiffs were notified by the bank that they would be expected to take care of them, and thereupon plaintiffs gave to the bank their notes for the full amount of the balance due, and the two notes of defendants to the McCormicks were deposited with the bank as collateral security. The evidence was conflicting as to when this was done, whether in 1911, before this action was commenced, or in February, 1912, after it was commenced; the summons having been issued and served on January 10, 1912. There was much evidence taken as to the quality of the heating plant, but, in the view we take of the case, it is not necessary that it should be stated here. The court, at the close of the evidence, having intimated that plaintiffs could not recover, they submitted to a nonsuit and appealed.

Lee & Ford, of Asheville, for appellant. Jas. H. Merrimon, of Asheville, for appellees.

WALKER, J. (after stating the facts as above). [1] As the evidence was conflicting upon the question whether the two unpaid notes were taken up by plaintiffs in 1911, or in February, 1912, after this suit was brought, we must assume, in favor of plaintiffs, that it was during the former year, as the evidence must be considered in the best light for them, drawing all reasonable inferences therefrom necessary to sustain their case, and rejecting the defendant's testimony, which is adverse to the plaintiffs.

Brittain v. Westhall, 135 N. C. 492, 47 S. E. 616; *Freeman v. Brown*, 151 N. C. 111, 65 S. E. 743; *Deppe v. Railroad*, 152 N. C. 79, 67 S. E. 262; *Boddie v. Bond*, 154 N. C. 359, 70 S. E. 824.

[2] We do not think the learned judge could have rested his opinion upon the testimony of the defendant's witness, as to the entries in the bank books, as he did not make the entries, and the clerk who did make them was then in the bank and perfectly accessible as a witness. Justice Reade said in *Sloan v. McDowell*, 75 N. C. 29: "The entries of a merchant's clerk are not evidence against third persons. It would be very dangerous if they were. They are not under oath and not subject to cross-examination. The clerk himself must be produced. If his memory be at fault, it may be that he can refresh it by his entries; that is all." But we need not pass upon the competency of this testimony, for the court, as we have seen, could not force a nonsuit of the plaintiffs upon the defendant's evidence, even if it was competent. *Boddie v. Bond*, *supra*.

[3] The question then is, and we presume this is the one the judge decided: Can the plaintiffs as pledgors of the notes to the bank, as collateral security, maintain this action without the presence of the bank as a party? We must premise that it appears from the evidence that the note of plaintiffs to the bank was paid and the collaterals taken up before the trial of this case; that is, in November, 1912, the trial having occurred at January term, 1913. It was not denied that plaintiffs had paid the notes and were the legal and equitable owners thereof at the time of the trial, and one of defendant's witnesses testified that they were paid in November, 1912. We need not consider the question as to the validity of the lien, as the plaintiffs were at least entitled to a judgment for the debt, if entitled to recover at all, and the nonsuit deprived them of this right. Two issues were submitted, one as to the debt and the other as to the lien, and plaintiffs must have failed in their proof as to both before we can hold that the opinion of the judge was correct and the nonsuit proper. The bald question, therefore, is: Can a pledgor, who has deposited notes with a bank as collateral, sue and recover upon the same, if he pays his debt, takes up the collateral notes, and produces them at the trial, so that they can be canceled for the protection of the debtor. We will answer this question in the affirmative, as we think it is in accordance with principle and authority.

[4] First, let us consider the nature of a pledge. It has been well defined in the leading case of *Doak v. Bank*, 28 N. C. 309, with reference to a transaction very much like the one presented in this case: "A mortgage of personal property in law differs from a pledge; the former is a conditional

transfer or conveyance of the property itself; and, if the condition is not duly performed, the whole title vests absolutely at law in the mortgagee, exactly as it does in a mortgage of lands; the latter, a pledge, only passes the possession, or at most is a special property in the pledge, with the right of retainer, until the debt is paid. A mortgage is a pledge and more, for it is an absolute pledge, to become an absolute interest, if not redeemed in a certain time. A pledge is a deposit of personal effects, not to be taken back, but on payment of a certain sum, by express stipulation, to be a lien upon it. *Jones v. Smith*, 2 Ves. Jun. 378; 4 Kent's Com. 138 (3d Ed.); 2 Story's Eq. 227. Generally speaking, a bill in equity to redeem will not lie, in behalf of a pledgor or his representatives, as his remedy is at law, upon a tender of the money. 2 Story's Eq. 298; 1 Ves. 298. We see that there is a very marked difference between a mortgage and a pledge of personal property." The pledgor, therefore, has a distinct interest in the thing he has pledged, and, having it, there is no reason why he should not have a remedy in the court for its protection, for when there is a right there is said to be always a remedy.

[5] It may be replied that, if he is allowed to sue and recover, the debtor may be subjected to a double payment, but not at all, for reason tells us and the cases show that the court will so shape the judgment as to both the debtor and the pledgee, and this can the more easily be done under our reformed procedure. There are three ways by which the debtor and the pledgee can be protected: First, by making the pledgee a party plaintiff, if he is willing, or, if not, then a party defendant; second, by providing in the judgment that the money collected under the process to enforce the judgment shall first be applied to the discharge of the debt due the pledgee; and, third, by the pledgor redeeming his pledge before the trial and judgment, as was done in this case.

[6] It will not do to answer that the pledgee was not made a party in this case, for that would be only an objection based upon a defect of parties, which cannot be taken by a nonsuit, but only by demurrer or answer, and, if the defect appears, the court will order the proper party to be brought in by process. This was expressly held to be the result of the reformed procedure in *Carpenter v. Miles*, 56 Ky. (17 B. Mon.) 593, a case resembling this one in its facts. There the court said: "A defect of parties, apparent upon the face of the petition, is cause for demurrer, and, when not thus apparent, is an objection to be taken in answer. Civil Code, § 123. An answer presenting such objection may be regarded as a dilatory plea, not, however, resulting, even when sustained by proof, in a dismissal or abatement of the action, but furnishing a ground for an order

of court requiring the additional parties to be made, on pain of dismissal without prejudice." It appears that the plaintiff had retained a valuable interest, as pledgor, in the collateral notes, and was a "real party in interest," within the meaning of *Revisal*, § 400, and had at least an equitable or beneficial interest, if not the legal title, and such an interest may form the basis of an action to recover the property in which it is claimed. *Murray v. Blackledge*, 71 N. C. 492; *Farmer v. Daniel*, 82 N. C. 152; *Condry v. Cheshire*, 88 N. C. 375; *Taylor v. Batman*, 92 N. C. 601; and other cases cited in *Pell's notes to Revisal*, § 400.

[7] But it has been expressly held that the pledgor may sue for the property before paying the debt. The plaintiff and pledgor, in *Wells v. Wells*, 53 Vt. 1, brought a suit against defendant, pledgee, for equitable relief. The bill was dismissed because there was an adequate remedy at law by action for the property pledged; the court saying: "And here it is to be remarked that the fact that the note and mortgage were held by the defendants as collateral did not stand in the way of the orators proceeding either by suit at law on the note or by foreclosure on the mortgage, if they deemed it for their interest to have the note or the mortgage, or both, enforced earlier than the defendants saw fit to proceed in that behalf. See *Am. Law Rev.* Oct. 1880, p. 693. The court would see to it that the rights and interests of the pledgee were protected in reference to the collateral at the same time that the pledgor was acting in regard to his own existing reversionary interest, in the pledge, by the proceeding to enforce it, as against the debtor in the pledge." The writer of the article in the *American Law Review*, referred to in that case, states the law to be that the pledgor has an interest in the thing deposited in pledge, and is not restricted to the remedy of tender or repayment, and the pledgee will be protected in his rights by an order that he shall be first paid out of the fund derived from the sale of the property pledged or its collection, if a note. So it was held in *Fisher v. Bradford*, 7 Me. (7 Greenl.) 28, that the pledgor of a note might recover against his debtor, the maker, when he had sued upon it and had paid his debt to the pledgee before the judgment was entered. The case is directly in point, and the syllabus, which fairly states the point decided, reads as follows: "The payee of a negotiable promissory note, having indorsed it in blank and delivered it in pledge to another as collateral security for his own debt, has still the right to negotiate it to a third person, who may maintain an action upon it in his own name as indorsee; the lien of the pledgee being discharged before judgment."

City Elec. Ry. Co. v. Bank, 65 Ark. 543, 47 S. W. 856, is a strong case against the action of the court in the case at bar, and there it

is said: "Counsel insist that the receiver of the bank should not be allowed to recover in this action on certain notes embraced in the decree, because these notes at the commencement of the suit were, as the receiver admits, in the hands of a St. Louis bank which claimed to hold them as collateral security for a debt due the latter bank. It seems that, after the suit was commenced, the St. Louis bank and the receiver reached an agreement by which the notes were returned to the receiver, and the latter filed them in court for cancellation when the decree herein was taken. This defense, it must be agreed, is extremely technical, so much so that counsel seem to concede that, if all the parties were solvent, this plea would hardly merit attention, but the apology offered for the interposition of this defense is that the insolvency of the corporation destroyed the right to make a transfer of claims to be used as a set-off. Since we have determined, however, that the street car company is entitled to no affirmative relief against the receiver, it has nothing to lose on this score." What should have been done here for the protection of all parties was to require the notes in the hands of the plaintiff to be deposited with the clerk of the court for cancellation, as is generally done in other actions upon such securities.

O'Kelly v. Ferguson, 49 La. Ann. 1230, 22 South. 783, gives us the rule of the civil law: "Until the debtor be divested from his property (if it is the case), he remains the proprietor of the pledge which is in the hands of the creditor only as a deposit to secure his privilege on it"—and thus applies it: "They [pledgors] maintain that, having placed the notes in the hands of the plaintiffs, they were themselves either powerless to take out remedial process against their lessors or that it was not their duty to do so. The fact that the defendants transferred the notes to the plaintiffs as collateral did not, in our opinion, withdraw from them the power of protecting their interests by proceedings against the makers of the notes. Notwithstanding the pledge, they were still owners of the notes. * * * We see no obstacle in the way of the lessor's (pledgor's) having recourse directly to conservatory proceedings to protect his interests. He could legally make all the allegations necessary to that end and procure the necessary proof on the trial. It would not be essentially necessary for the purpose that he should be in actual possession of the notes." We see that the rule of the civil law, in regard to the nature of a pledge and the interests of the respective parties, corresponds with our law as stated in *Doak v. Bank*, supra.

The same objection as we are now considering to plaintiff's right to sue and recover upon the pledged notes was raised upon similar facts in the recent case of *Gilman v. Heltman*, 137 Iowa, 336, 113 N. W. 932, but the court overruled it, and in doing so said

that the pledgor never ceased to be equitable owner of the note given in pledge, and that the pledgee held the legal title and right to possession merely as security for the payment of his own debt. It followed, said the court, that the pledgee and other lienholders would not be prejudiced by permitting the pledgor to sue and obtain judgment upon the note he had delivered to his creditor in pledge. The court then held that the pledgor could maintain the action upon the note and mortgage which secured it, notwithstanding they had been pledged to another as security for a debt, especially in the absence of any valid objection by the pledgee. Under such circumstances, said the court, the existence of the pledge is not a matter of which the appellee can avail himself to resist the enforcement of the lien against the mortgaged property (which had been pledged).

The court held in *Bank v. McKinster*, 11 Wend. (N. Y.) 473, that the pledgor of a note was still the general owner and the pledgee the special owner, and the former could maintain an action against a bank, with which the pledgee had deposited the note for collection, for a breach of its duty to collect, and that either the pledgor or pledgee might bring the suit. Other cases bearing more or less upon the question are *Greer v. Woolfolk*, 60 Ga. 623; *Hewitt v. Williams*, 47 La. Ann. 742, 746, 17 South. 269; *Insurance Co. v. Lozano*, 39 La. Ann. 321, 322, 1 South. 608; *Simon v. Wildt*, 84 Ky. 157; *Guest v. Rhine*, 16 Tex. 549.

[8] If we consider the pledgee as the legal owner of the collateral, he holds it in trust, first, for himself, and then for the pledgor. If the debt for which the property is pledged be less than the value of the latter, the pledgor has not only a technical interest as a beneficiary, but a substantial one, and he is also a beneficiary in the sense that he will be entitled to the thing pledged upon payment of his debt. When he sues to preserve and protect his interest in the pledge, the court may so proceed or so mold its judgment or decree as to protect all parties concerned. Our present system of pleading and practice is elastic enough for this purpose. Its liberal procedure, it has been said, would in some respects shock a lawyer bred in the old school, but it is convenient, sensible, and in every way worthy of universal adoption. The common-law objection that its procedure and judgments are impossible "is simply absurd; the thing is done, and is therefore possible." *Pomeroy's Rem. & Remedial Rights* (1876) p. 153, note 3, referring to the "divided" judgment in *Gradwohl v. Harris*, 29 Cal. 150.

The nonsuit having been taken in deference to an erroneous opinion as to the law of the case, is set aside and a new trial is ordered.

New trial.

(152 N. C. 355)

REID v. NORFOLK SOUTHERN R. CO. et al.

(Supreme Court of North Carolina. May 28, 1913.)

1. CORPORATIONS (§ 636*)—FOREIGN CORPORATIONS—CONTROL OF INTERNAL AFFAIRS—POWER OF COURT.

The court has no power to control or administer the internal affairs of a foreign corporation.

[Ed. Note.—For other cases, see *Corporations*, Cent. Dig. §§ 2505-2509, 2571; Dec. Dig. § 636.*]

2. RAILROADS (§ 141*)—CONSOLIDATION—PUBLIC POLICY.

The question whether a proposed merger of railroad corporations is contrary to public policy depends on the statute, and where a statute ratifies and validates the merger it is not contrary to public policy.

[Ed. Note.—For other cases, see *Railroads*, Cent. Dig. § 443; Dec. Dig. § 141.*]

3. RAILROADS (§ 141*)—MERGER—LEGISLATIVE AUTHORITY.

Under the rule that the Legislature may ratify and validate measures which it could have originally authorized when not interfering with vested rights, the Legislature may ratify and validate a merger of railroad corporations and acts done pursuant thereto.

[Ed. Note.—For other cases, see *Railroads*, Cent. Dig. § 443; Dec. Dig. § 141.*]

4. EVIDENCE (§ 30*)—JUDICIAL NOTICE—PRIVATE STATUTES.

The rule that a court will not take judicial notice of a private statute is, as recognized by *Revisal 1905*, § 500, a rule of pleading designed to prevent a litigant from being taken by surprise, and it will not prevail when a statute, which effectually settles the controversy, is, after due notice, formally brought to the attention of the court, and no issue is made as to its existence or terms.

[Ed. Note.—For other cases, see *Evidence*, Cent. Dig. § 38; Dec. Dig. § 30.*]

5. APPEAL AND ERROR (§ 19*)—QUESTIONS REVIEWABLE—MOOT QUESTIONS.

The Supreme Court will not entertain a cause to settle abstract propositions no longer at issue.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 63-80; Dec. Dig. § 19.*]

6. CONSTITUTIONAL LAW (§ 205*)—RAILROADS (§ 119*)—SPECIAL PRIVILEGES AND IMMUNITIES—STATUTES—VALIDITY.

Laws 1913, c. 516, ratifying and validating a merger of railroad corporations and acts done in pursuance thereto, is not in conflict with Const. art. 1, § 7, providing that no man or set of men are entitled to exclusive emoluments or privileges but on consideration of public services, especially in view of article 8, § 1, authorizing the formation of corporations by general laws and special acts which may be altered or repealed.

[Ed. Note.—For other cases, see *Constitutional Law*, Cent. Dig. §§ 591-624; Dec. Dig. § 205.* *Railroads*, Cent. Dig. § 376; Dec. Dig. § 119.*]

Appeal from Superior Court, Wake County; Garland Ferguson, Judge.

Action by Fergus Reid against the Norfolk Southern Railroad Company. From a judgment sustaining a demurrer to the complaint, plaintiff appealed, and defendant, by affidavit, brought to the attention of the Su-

preme Court a recent statute and moved for a dismissal of the case. Action dismissed.

The action was instituted by plaintiff as stockholder of the Norfolk Southern Railroad, alleged and for the purposes of this action admitted to be a corporation of the state of Virginia, and certain directors of said company, and also five North Carolina railroad corporations operating under charters of this state and having their properties here; the suit being to restrain said Norfolk Southern from incurring an indebtedness of \$5,456,000 and executing a mortgage to secure same on all the properties of said Norfolk Southern Railroad, including the properties formerly owned by the North Carolina companies and which the Norfolk Southern had acquired. Among other things and as a basis for relief in this jurisdiction, it was alleged that the Norfolk Southern, having purchased the capital stock of the North Carolina companies, had caused four of them to convey their properties to the fifth, the Raleigh, Charlotte & Southern Railroad, and that a certificate of merger had then been executed by the last-named company by which it was certified. "That the whole of the capital stock of said four railroads had been surrendered and transferred to it and its capital stock issued in exchange therefor as will appear by copy," etc., and that the indebtedness and mortgage referred to were for the purpose of obtaining the means to carry out said enterprise and to further extend and equip and operate the Raleigh, Charlotte & Southern Railroad, etc. It was further alleged that the Norfolk Southern was without power by charter or otherwise to engage in said business or incur an indebtedness therefor, and that the entire enterprise, in so far as it affected the railroads operating under such North Carolina charters, was contrary to our public policies and the express provisions of our statute law, etc. The defendants demurred, assigning for cause among others: (1) That the court has not and will not undertake to exercise jurisdiction and control over the "internal management of the affairs of a corporation of the state of Virginia or the action of its officers and directors." (2) That under and by virtue of the various charter provisions annexed as exhibits to the complaint, the companies had the power to carry out the proposed undertaking, and there was nothing in the plan that was in any way contrary to the policies of statutes of this state, etc. The demurrer having been sustained, plaintiff appealed to this court. Pending said appeal on notice duly issued, defendant by proper affidavit brought to attention of court and filed a duly certified copy of an act of the last General Assembly (chapter 516, Laws 1913), and which in express terms ratified and made valid the said merger and all acts done pursuant thereto, with certain restrictions and provisos not

relevant to the question as now presented, and on said statutes and by reason of the terms of same, moved the court to dismiss the case.

T. Lanier, of Oxford, and R. Randolph Hicks, of Norfolk, Va., for appellant. W. B. Rodman, of Washington, N. C., R. N. Simms, of Raleigh, and Chadbourn & Shores, of New York City, for appellee.

HOKE, J. (after stating the facts as above). [1] It is well understood that our courts have not the power nor will they undertake to administer or control the internal affairs of a foreign corporation (*Brenizer v. Royal Arcanum*, 141 N. C. 409, 53 S. E. 835, 8 L. R. A. [N. S.] 235); and, this being true, the only facts presented in this complaint which tend to establish a cause cognizable here are those which injuriously affect or threaten the chartered rights and privileges or holdings of these North Carolina companies.

[2, 3] As a basis for such jurisdiction, it is alleged that the proposed merger and incurring the indebtedness in aid thereof are contrary to our public policy and the express provisions of our state law. If this be conceded on the facts as set forth in the complaint, the objection, in our opinion, has been entirely removed by the statute which has been formally called to our attention. This public policy, which has been not inaptly termed the "manifested will of the state," is very largely a matter of legislative control, and it is a well-recognized principle that in so far as the public is concerned, and when not interfering with vested rights, a Legislature may ratify and make valid measures which it might have originally authorized. *Barrett v. Barnett & Davis*, 120 N. C. 127, 26 S. E. 691, 36 L. R. A. 226; *Anderson v. Township of Santa Anna*, 116 U. S. 356, 6 Sup. Ct. 413, 29 L. Ed. 633; *Schenck v. City of Jeffersonville*, 152 Ind. 214-217, 52 N. E. 212; *State of Illinois v. Ill. Central Railroad (C. C.)* 33 Fed. 730-771. The plaintiff, not challenging the enactment of the statute, contends that the defendant's motion should be denied: Chiefly because the court will not take judicial notice of a private act; (2) because the statute is in violation of article 1, § 7, of our Constitution, which provides "that no man or set of men are entitled to exclusive emoluments or privileges from the community but on consideration of public services."

[4] It is true as a general rule that a court does not take judicial notice of a private statute or its terms. This is a rule of pleading designed and intended primarily to prevent a litigant from being taken by surprise and has been directly recognized both in our decisions and statutes. *Corporation Commission v. Railroad*, 127 N. C. 283, 37 S. E. 266; *Revisal*, § 500. But the principle was never intended, nor should it be allowed,

to prevail when a statute, which effectually settles all matters in controversy of which the court has jurisdiction, has after due notice been formally brought to the attention of the court and no issue made or suggested as to its existence or its terms.

[5] It has been repeatedly held here that the court will not entertain or proceed with a cause merely to determine abstract propositions and when the questions in controversy are no longer at issue, and this is a case coming clearly within the principle. *Wallace v. Wilksboro*, 151 N. C. 614, 66 S. E. 657; *Wikel v. Commissioners*, 120 N. C. 451, 27 S. E. 117. In this last case judgment for a peremptory mandamus had been entered against commissioners requiring that body to build a bridge over the Tuskasegee river and to levy a tax therefor pursuant to a certain statute. Pending an appeal the Legislature repealed the act, held that the repeal abated the action, and the present Chief Justice delivering the opinion and in reference to this repeal said: "This destroyed the cause of action, and there only remains the judgment against the defendant for costs. It has been repeatedly held that, when pending an appeal the subject-matter of an action or the cause of action is destroyed in any manner whatever, this court will not go into a consideration of the abstract question which party should have rightly won merely in order to adjudicate the costs, but the judgment below as to the costs will stand."

[6] Nor will the second objection avail plaintiff that the act violates the section of the Constitution which prohibits the granting of special privileges and emoluments. The very section relied on by the appellant closes with the exception "But in consideration of public services," and under our decisions these franchises granted to public service corporations come directly within the words and meaning of the exception. In *re Spease v. Ferry*, 138 N. C. pp. 219-222, 50 S. E. 625. Our Constitution, art. 8, § 1, also contains provision as follows: "Corporations may be formed under general laws, but shall not be created by special act, except for municipal purposes and in cases where, in the judgment of the Legislature, the object of the corporations cannot be attained under general laws. All general laws and special acts, passed pursuant to this section, may be altered from time to time or repealed." The grantees of these quasi public charters and their stockholders take and hold them subject to both of these constitutional provisions as construed and interpreted, and the act ratifying this consolidation and merger is no more the conferring of special privileges nor the violation of vested rights than the statutes by which they were originally created.

On the facts as they now appear of record, we are of opinion that the action should be dismissed, and it is so ordered.

Action dismissed. Ordered, that the costs of this court be equally taxed against plaintiff and defendant.

(162 N. C. 667)

STATE v. DRAKEFORD.

(Supreme Court of North Carolina. May 28, 1913.)

1. INDICTMENT AND INFORMATION (§ 180*) — VARIANCE—NAME OF PROSECUTRIX.

That prosecutrix's name was alleged in the indictment for rape to be "Lila" H., when the evidence showed that it was "Liza" H., was at most an immaterial variance.

[Ed. Note.—For other cases, see Indictment and Information, Cent. Dig. §§ 551-556; Dec. Dig. § 180.*]

2. CRIMINAL LAW (§ 180*)—FORMER JEOPARDY.

That accused was discharged on a former trial at his own instance on the ground of variance between the name of prosecutrix as alleged and proved was not former jeopardy so as to bar a subsequent prosecution.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 316, 328; Dec. Dig. § 180.*]

3. JURY (§ 95*)—DISQUALIFICATION.

The fact that one of the jurors who tried accused was on the grand jury which found the first bill against him, on which he was discharged, was not ground for reversal of a judgment of conviction, where such juror stated on his voir dire, without contradiction, that he had not formed an opinion of accused's guilt or innocence.

[Ed. Note.—For other cases, see Jury; Cent. Dig. §§ 424-430; Dec. Dig. § 95.*]

4. CRIMINAL LAW (§ 911*)—VERDICT—VACATION.

A motion to set aside a verdict of conviction because one of the jurors was disqualified is addressed merely to the court's discretion.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 2134; Dec. Dig. § 911.*]

5. CRIMINAL LAW (§ 406*)—EVIDENCE—ADMISSIONS.

Statements made by accused to an officer are not rendered incompetent merely because accused was in jail at the time, unless made under duress or inducements held out to accused.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 785, 894-917, 920-927; Dec. Dig. § 406.*]

Appeal from Superior Court, Richmond County; Bragaw, Judge.

Moses Drakeford was convicted of rape, and appeals. Affirmed.

D. J. Cashwell, of Fayetteville, and J. R. McLendon, of Rockingham, for appellant. The Attorney General and T. H. Calvert, of Raleigh, for the State.

CLARK, C. J. The prisoner was indicted for rape upon "Lila" Hatcher. On the trial the evidence showed that it had been committed on "Liza" Hatcher. The prisoner's counsel, insisting that the names were not idem sonans, and that there was a fatal variance between the charge and the proof, granted the motion of the prisoner and instructed the jury to find the defendant not guilty of rape upon "Lila" Hatcher, but held

him to appear at the next term of court to answer the charge of committing rape upon "Liza" Hatcher. This bill was so found, and when the prisoner was put upon trial his counsel pleaded "former jeopardy."

[1] The court properly overruled the plea of former jeopardy. The names might well have been held *idem sonans*, or, at the most, an immaterial variance, and the former trial should have proceeded. *State v. Lane*, 80 N. C. 407; *State v. Collins*, 115 N. C. 716, 20 S. E. 452, and numerous instances there collected.

[2] But the prisoner, having been discharged on the former trial at his own instance, cannot now avail himself of this defense. In 12 Cyc. 266, it is said: "Where the accused has secured a decision that an indictment is void, or has procured its being quashed, or has been granted an instruction based on its defective character, directing the jury to acquit, he is estopped when subsequently indicted to assert that the former indictment was valid"—citing *U. S. v. Jones* (C. C.) 31 Fed. 725; *Joy v. State*, 14 Ind. 139; *State v. Meekins*, 41 La. Ann. 543, 6 South. 822. On same page (12 Cyc. 266) it is further said: "If the accused is acquitted by the direction of the court on the ground of material variance, he cannot plead the acquittal as a bar, for he has never been in jeopardy, and, when tried on a new indictment, the crime then alleged is not the same as in former indictment. And it has been held that if the accused on the prior trial maintained that the variance was material and the court directed a verdict of acquittal on that ground, he cannot subsequently on his plea of former acquittal allege or prove that it was not material"—citing very many cases which sustain this proposition, among them *State v. Birmingham*, 44 N. C. 120; *State v. Revels*, 44 N. C. 200; *State v. Sherrill*, 82 N. C. 694. "Where a verdict of acquittal is directed at the request of defendant upon the ground that the indictment is fatally defective, he cannot, on being again prosecuted, claim that the former indictment was in fact good, and that he has been in jeopardy under it." 17 A. & E. (2d Ed.) 615, and cases there cited. Clark, Criminal Law, § 174, says that a defendant may waive his right to plead former jeopardy, either expressly or impliedly, in many cases, citing instances, and among them specifies "where he procures a verdict or judgment to be set aside on his motion in arrest or for a new trial." In 2 Russell, Crimes, 61, the same is held as to this same offense, citing numerous authorities. In 1 Archbold, Pleading (8th Ed.) 344, are many decisions to the same effect. Among the cases there cited are *Com. v. Mortimer*, 4 Va. 325, which holds that, where a prisoner is acquitted of burning the barn of Josiah Thompson, he cannot plead this acquittal in bar of indictment for burning the barn of Josias Thompson, the real owner, when the acquittal was on the ground

that the name of the true owner was not set out properly on the first indictment.

While, as we have said, the court on the first trial should have held that the names were *idem sonans*, or certainly should have held that the variance was immaterial under *Revisal*, § 3254, yet as the defendant insisted upon the alleged defect in the bill and procured the judge to direct the verdict of not guilty upon the ground of that variance, upon all the authorities, as well as upon the reason of the thing, he cannot now insist that he was in jeopardy on the former trial. The judge having held, at his instance, that there was no evidence to connect him with an assault upon Lila Hatcher, he cannot now contend that he was in jeopardy on a trial for an assault upon Liza Hatcher. This would be trifling with the administration of justice. Of course, counsel are at liberty to ascertain how any proposition of law that is respectfully made and urged "will strike the court." But the court cannot be impressed with the suggestion that the prisoner was put in jeopardy on a former trial when the court held, at the instance of the prisoner himself, that he was not charged with the offense for which the judge bound him over to the succeeding term at which this indictment was signed and upon which he has now been convicted.

[3] The other exceptions do not require discussion except the seventh, which is that one of the jurors who tried the prisoner was on the grand jury which found the first bill, on which the defendant was acquitted. Aside from the fact that it was not this bill, it does not appear even if it were this bill that he voted in passing upon it. He may not have been present when the bill was found. On his *voir dire* the juror stated that he had not formed nor expressed an opinion as to the guilt or innocence of the prisoner. There is nothing to show to the contrary. Certainly we cannot presume that the juror answered untruly.

[4] It has always been held by us that a motion to set aside the verdict because of a defect as to one of the jurors comes too late after verdict and addresses itself only to the discretion of the court. Walker, J., in *State v. Lipscomb*, 134 N. C. 697, 47 S. E. 44. In that case it was shown that the juror was under 21 years of age. In *State v. Maultsby*, 130 N. C. 664, 41 S. E. 97, the same ruling was made where a relationship was discovered after verdict between the prosecuting witness and a juror, and the court there cited many other cases where a disqualification of a juror on divers grounds had been found after verdict, and in all which cases the court held that the matter rested in the discretion of the trial judge and that the refusal of the motion was not reviewable on appeal.

[5] We will merely mention, as to exception 5, that statements made to an officer are not incompetent simply because the de-

fendant was at the time in custody or jail, unless there was duress, threats, or inducements. *State v. Jones*, 145 N. C. 471, 59 S. E. 353; *State v. Bohanon*, 142 N. C. 695, 55 S. E. 797; *State v. Horner*, 139 N. C. 603, 52 S. E. 136, 4 Ann. Cas. 841; *State v. Exum*, 138 N. C. 600, 50 S. E. 283.

No error.

(162 N. C. 640)

STATE v. GREER et al.

(Supreme Court of North Carolina. May 22, 1913.)

1. HOMICIDE (§ 122*)—DEFENSE OF RELATIVE.

A defendant had no right to kill deceased to prevent him from killing or doing great bodily harm to such defendant's brother, where the brother was in the wrong in the difficulty between himself and deceased.

[Ed. Note.—For other cases, see *Homicide*, Cent. Dig. §§ 177-181; Dec. Dig. § 122.*]

2. HOMICIDE (§ 29*)—PARTICIPATION—COMMISSION BY ANOTHER.

Defendant W. and deceased having engaged in a voluntary fight, W. was being worsted, when his brother intervened, struck deceased with an axe, and killed him. There was no evidence of a conspiracy between W. and his brother, nor of any understanding or common purpose, nor any testimony from which the brother's act could be imputed to W. Held, that W. was not guilty of any degree of homicide.

[Ed. Note.—For other cases, see *Homicide*, Cent. Dig. § 47; Dec. Dig. § 29.*]

Brown and Walker, JJ., dissenting.

Appeal from Superior Court, Forsyth County; Allen, Judge.

Wallace Greer and Wattie Greer were convicted of manslaughter for the killing of Will Finney, and they appeal. Affirmed as to Wallace Greer and reversed as to Wattie Greer.

The first witness for the state, Della Causser, testified as follows: "I live on Bath street in Winston, and in the afternoon of the day when Will Finney was killed, I saw for the first time in my life Will Finney and Wattie Greer. They passed right up side of my house. They were coming up the street, both of them cursing each other. Will Finney was asking Wattie Greer what he had snatched. Wattie Greer refused, and said, 'I will give you a quarter,' and cursed him to his mother, and he cursed Wattie to his sister. Will Finney went right behind him, sorter to one side, and Wattie was ahead of him, but not in a direct route. Wattie got to his buggy, grabbed his whip, took it out of the socket to change ends, but, before he got it straight, Finney was too close on him to hit, and they went together. There was a little wash where it rained, and that made Wattie's feet slip, and that threw him some way and made his head fall near the horse, and the horse ran. They were down there scrambling, trying to get up. Will Finney had his left arm over Wattie. Wattie had his right over Will Fin-

ney. I saw this man, Wallace Greer, coming running up, and hit him somewhere with the axe. I had not seen Wallace Greer until he came up with the axe and struck Will Finney somewhere about his head. Will Finney dropped sorter on the side of Wattie, and, when he did, Wattie just whirled right there and began to mend him in the face with his fist. This was after he was struck with the axe. He also grabbed the whip and began to beat Will Finney in the face. I never saw Will Finney move any more after he was struck with the axe. Wattie hit him twice in the face with the butt end of the whip."

The husband of the above witness testified substantially to the same facts, but added that the deceased had a knife in his hand. It appears from the other testimony in the case that the dispute and quarrel between the deceased and Wattie Greer began shortly before and while they were at the house of one Arthur Green. It appears that the deceased asked Wattie Greer for 25 cents, which Wattie owed him; that Wattie then had 75 cents in his possession, but that he refused to pay the deceased the 25 cents. Both were angry and profane, and vulgar words passed between them, in the course of which, as testified to by the defendant Wallace Greer, the defendant Wattie Greer said to the deceased, "If I had a match, I would strike it on your face."

Wallace Greer testified as follows: "Q. You are charged with the killing of a man by the name of Finney; go on and tell his honor what took place that morning after you got in the neighborhood of where this thing happened, without any suggestion from me. A. Me and my brother went down there on Sunday evening between 4 and 5 o'clock. John Sheeks was with me, and John Allen was with my brother, and we goes in Kid Green's house; I believe that's his name. After we had been in there about five minutes, Finney come in. I went back in the back room, and when I come out Finney had on my brother's hat. Wattie says, 'Give me my hat,' and Finney says, 'I ain't going to do nothing of the kind,' and Wattie reached up and grabbed his hat off of Finney's head. Finney says, 'You owe me a quarter for going away for you, and I got to have it.' Wattie says, 'I ain't got but six bits, and you can't have them.' Finney says, 'I am broke, and I want it.' Wattie says, 'You can't get none of this.' Finney says, 'I am going to have it before the sun goes down or kill you, one.' Wattie says, 'If I had a match, I would strike it on your face,' and Finney says, 'No, you won't do nothing.' Q. Well, did they get to cursing each other? A. Yes, sir; and Kid Green asked them to get out of his house, and they went on the porch and stood out there and cursed, and the other gentleman in the other end told Finney to quit so much cursing there; he had some

children, and he didn't want the cursing there. I pushed my brother Watt and told him to go down off of the porch and quit fussing. He went on the ground, and Finney steps behind him, and kept cursing, and Finney cursed him to his mother and his sister, and I says: 'If you fuss with my brother Watt, you jest fuss; but you leave my mother out of it.' He cursed me and cursed Watt, and I pushed Watt this way and Finney that way (indicating). I says, 'Come on, now, and let's go to the pond.' Watt says, 'All right.' I turned around and Watt started towards his buggy, and I goes on to King's; in front of this house was my buggy, and Watt goes to his buggy. I told John Sheeks to turn the buggy around, and I got up in the buggy. They were still walking on, and I just got up in the buggy and set down like this, and went to pull my lines this way with the horse (illustrating). I just took my eyes off of my brother a minute when I went to get in my buggy, and just then I heard somebody holler, 'Don't let him kill Wattle,' and I turned around and jumped out of the buggy, and I didn't know where the axe was, but I started on, and the axe was about as far as to that man (indicating), and when I heard them say, 'Don't let him kill Wattle,' I jumped out and grabbed the axe and ran that way—just went on hard as I could and grabbed the axe (illustrating). Q. What was the position of Finney and Watt? A. My brother was laying back this way, and Finney had his hand this way, and I reckon his hand was going on down to cut him; Finney was on top of him, and had his hand up this way when I got there (illustrating). Finney was on top. Q. What did he have in his hand? A. Knife. Q. Is this the knife? Or do you know? A. That looked like the same knife; I didn't pay much attention to the knife. Q. At the time you struck him, you say Finney had his hand back this way, raised over Wattle? A. When I jumped out and ran and grabbed the axe, Finney was fixing to hit him, and I struck him, and Finney fell back this way (illustrating); my brother gets up, and he says, 'He cut me,' and I say, 'Let's see,' and he turned around, and I see where he cut him and where it got hung in the coat there, and I say, 'He got you there, didn't he?' and he showed me, and I say, 'Well, let's go home.' Q. Did you or your brother hit him outside of that one blow you gave him? A. Didn't hit but once; when I hit him and he fell over like that (indicating), Wattle he got up and showed me where he was cut; he say, 'I wonder where we can get something to put on it.' I says, 'Get in my buggy and let's go.' Q. You left there? A. Yes, sir. Q. Next morning did you surrender, or were you arrested? A. Yes, sir; next morning I surrendered."

Cross-examination: "I surrendered the next morning after the killing. I did not

hide that night, but come in the next morning and gave myself up. I do not know whether Arthur Green's house is a regular gambling place or not. I never gambled there. I had been there about five or ten times before the deceased come up. I went over in the buggy with John Sheeks. I might have met the deceased at the corner of King's house, but, if I did, I did not pay any attention to it. I did not see Finney and Wattle discussing the quarter. We all just went down to visit Kid Green. I have gambled and have been indicted for gambling, but I was not gambling that afternoon. I never saw my brother borrow three quarters from John Sheeks, as I was in the other room, where I went to get a drink of water. When I come out, Finney had my brother's hat, and my brother was asking for it. They started to cursing, and Kid Green asked them out of the house. They went out, and they cursed on the porch, and they cursed after they stepped on the ground. They both then started towards the buggy; I went off and got in my buggy. I heard the people screaming and looked around, and I jumped right out and grabbed the axe, as I was on my way to where they were fighting. I was sitting in my buggy when I heard somebody scream. I was running towards my brother, and I saw the axe and grabbed it up. I did not see the axe when I jumped out of my buggy. I did not see anything to hit the deceased with when I jumped out of the buggy. I hit him as quick as I could get there. Wattle did not hit the deceased in the head or face either with his fist or the whip. After it was over I told Wattle to get in the buggy and let's go. I stayed at my sister's house. The officers did not go to my house to look for me. I was not at home that night, but stayed with my sister. I am under indictment now for keeping a disorderly house, and I was also indicted for breaking into Brown-Roger's store and served a term on the roads. I went in there with a white man about 7 o'clock in the evening. There was a man in the store who caught me. I went in the front door of the store. I have been in jail here for gambling."

There was other evidence tending to corroborate the defendant.

At the close of the evidence the defendants requested the court to charge as follows:

"(1) That whenever there is a reasonable ground to believe that there is a design to destroy life, to rob, or commit felony, the killing of the offender to arrest such design is justifiable in law, and if you find from the evidence in this case that Will Finney had the defendant Wattle Greer on the ground, and had the knife which has been offered in evidence drawn and in a position to strike, that in order to prevent the destruction of life or the commission of a felony or the infliction of great bodily harm upon Wattle Greer, the defendant Wallace Greer rushed up with an axe and inflicted the wound,

which resulted in death, that such killing, under such circumstances, would be justifiable, and you should so find." The court refused to give this instruction, and the defendants excepted.

"(2) The court charges you that one not engaged in a fight may oppose another attempting the perpetration of a felony, if need be, to the taking of the felon's life, as in the case of person attacked by another intending to murder him, who thereupon kills his assailant; and if you find from the evidence in this case that the deceased and the defendant Wattie Greer were on the ground, with the defendant on the bottom, or even by the side of the deceased, unarmed, and that the deceased had already inflicted a wound on the defendant and had his knife drawn in a striking position, that under such circumstances, if you so find, the defendant's brother, Wallace Greer, had a right, if the danger of death or great bodily harm was about to be inflicted on his brother, the defendant Wattie Greer, to strike with the axe in order to prevent the commission of a felony or the infliction of great bodily harm, and the killing of Will Finney, under such circumstances, would be justifiable, and your verdict should be for the defendants." The court refused to give this instruction, and the defendants excepted.

"(3) You are instructed, if you find from the evidence that Wattie and Wallace Greer are brothers, and that Wattie Greer was down on the ground with the deceased on top of him, or by his side, and the deceased had his knife drawn and had stabbed Wattie Greer and was attempting to stab him again, that the relationship between the defendants, Wallace Greer and Wattie Greer, gave to the defendant Wallace Greer the right to interfere, and if it was reasonably apparent to Wallace Greer that his brother, Wattie Greer, was in imminent peril of death or great bodily harm, and that it was necessary for him to use the means or force which resulted in the death of Will Finney in order to prevent the same, such killing, under such circumstances, on the part of Wallace Greer, was justifiable, and it will be your duty to give a verdict of not guilty as to the defendants." The court refused to give this instruction, and the defendants excepted.

His honor charged the jury, among other things, as follows:

"Now the rule is that where one is attacked he may defend himself, even to the extent of killing his adversary, on the principle that what one may do for himself another may do for him, if this other believes life to be in immediate danger, and, if so, he may use such force as is apparently necessary to him to repel the attack of the aggressor, provided the party in whose defense he acts was not at fault; and so, if you find from the evidence in this case that the defendant Wattie Greer left Arthur Green's house, telling the deceased that he did not wish to have

any trouble with him, or words to that effect, and went over towards his buggy, intending thereby to avoid the difficulty, and while at his buggy the deceased ran up to him with a drawn knife and struck at him, and the defendant Wattie Greer and the deceased fell to the ground, and while they were on the ground the deceased was making an attempt to stab the defendant Wattie Greer with his knife, and had the knife uplifted in a position to stab, and the defendant's brother, Wallace Greer, had reasonable grounds to believe that his brother, Wattie Greer, was in danger of death or great bodily harm was about to be inflicted on him by the deceased, and he rushed up with an axe and struck the deceased the blow that caused his death, under such circumstances the defendant Wallace Greer had the right to use such force as was apparently necessary to prevent the commission of a felony or the infliction of great bodily harm, and a killing under such circumstances, if you so find the facts to be, would be justifiable, and your verdict would be, 'Not guilty.' Now, that involves the idea that Wattie Greer was not at fault; it is presenting that view of it if the jury should find that he left and told the deceased that he did not wish to have any trouble with him, or words of that character, and went over towards his buggy intending thereby to avoid a difficulty." And defendants excepted.

"So an important question for you to decide is as to whether Wattie Greer is guilty of willingly fighting or using language calculated to bring on a fight, and a fight did follow accordingly. Would Wattie Greer and Finney have been guilty of an affray, of fighting together, if no killing had occurred? Would they both have been guilty? If they would, and you are satisfied of that beyond a reasonable doubt, then, if Wallace killed to protect Wattie, they would both be guilty at least of manslaughter, and of murder in the second degree if it was a malicious killing—killing with malice as well as an unlawful killing. So that your verdict can be murder in the second degree, or manslaughter, or not guilty, according as you shall find from the evidence." And defendants excepted.

Louis M. Swink and Jones & Patterson, all of Winston-Salem, for appellants. Attorney General Bickett and T. H. Calvert, of Raleigh, for the State.

ALLEN, J. [1] It will be noted that while the abstract proposition as to the right to prevent the commission of a felony is stated in the instructions prayed for, when it is attempted to apply the law to the facts, several alternative propositions are stated, as "to prevent the destruction of life," or "the commission of a felony," or "the infliction of great bodily harm upon Wattie Greer."

The presiding judge is not required to dissect a prayer for instruction, but may con-

sider it as a whole (*Harris v. Railroad*, 132 N. C. 164; 43 S. E. 589), and neither of those requested could have been given unless Wallace Greer had the right to kill if it was reasonably necessary to do so to avoid great bodily harm to Wattie Greer, and under the authorities here and elsewhere he did not have this right if Wattie Greer was himself in the wrong.

This has been decided to be the law three times in this court: *State v. Johnson*, 75 N. C. 174; *State v. Brittain*, 89 N. C. 504; *State v. Cox*, 153 N. C. 645, 69 S. E. 419. In the *Johnson* Case, the court says: "The proposition is true that the wife has the right to fight in the necessary defense of the husband, the child in defense of his parent, the servant in defense of his master, and reciprocally; but the act of the assistant must have the same construction in such cases as the act of the assisted party should have had if it had been done by himself; for they are in a mutual relation one to another." And in the *Brittain* Case, in which father and son were indicted, after discussing the case of the father: "Our conclusions are equally applicable to the cause of J. W. Brittain as to that of his father, S. P. Brittain, for, although a son may fight in the necessary defense of his father, yet in such cases the act of the son must have the same construction as the act of the father should have had, if it had been done by himself; for they are in mutual relations to one another. *State v. Johnson*, 75 N. C. 174; 1 Hale, P. C. 484." And in *Cox's* Case: "In the oral argument here the prisoner's counsel earnestly contended that the prisoner had the right to enter the fight to protect his father, but he only had that right to the same extent and under the same circumstances under which the father himself could have used force. If the father entered the fight willingly, and had not afterwards withdrawn from the fight and retreated to the wall, or if he used excessive force, he would have been guilty if he had slain his assailant. The same principle would apply to the conduct of the son, fighting in defense of a father who had not retreated to the wall or if the prisoner used excessive force."

And the weight of authority elsewhere is in support of this principle.

In Hale's Pl. Cr. vol. 1, p. 484, the author says: "The like law had been for a master killing in the necessary defense of his servant, the husband in the defense of the wife, the wife of the husband, the child of the parent, or the parent of the child, for the act of the assistant shall have the same construction in such cases as the act of the party assisted should have had if it had been done by himself, for they are in a mutual relation one to another." And in *Whar. Hom.* § 521: "The general rule, as ordinarily stated, is that a brother or other relative assisting another in resisting a wrongful act directed against the latter, can use no more force than

the person he assists would be entitled to use, and that interference to protect a relative is not justified where the relative was the aggressor in the original difficulty. A person has a right to use violence in defense of another only when the imperilled person would have been justified in using it in his own defense. Both must have been free from fault in bringing on the difficulty."

In *Stanley v. Com.*, 86 Ky. 443, 6 S. W. 156, 9 Am. St. Rep. 306, the court, after discussing the right of one to defend himself, says: "Not only, however, may he do this, but another may do it for him. This other person, in such a case, steps into the place of the assailed; and there attaches to him not only the rights, but also the responsibilities, of the one whose cause he espouses. If the life of such person be in immediate danger, and its protection requires life for life, or if such danger and necessity be reasonably apparent, then the volunteer may defend against it, even to the extent of taking life, provided the party in whose defense he acts was not in fault."

In *Wood v. State*, 128 Ala. 30, 29 South. 568, 86 Am. St. Rep. 72: "One who intervenes in a pending difficulty in behalf of a brother and takes the life of the other original combatant stands in the shoes of the brother, in respect of fault in bringing on the difficulty, and he cannot defend upon the ground that his brother was in imminent and deadly peril and could not retreat, unless the latter could have defended upon that ground had he killed his assailant. Hence in such cases it is a material inquiry whether defendant's brother was at fault in bringing on the difficulty with the deceased."

In *State v. Giroux*, 26 La. Ann. 582: "The next exception was to the ruling of the judge refusing to charge the jury that if from the nature of the assault Giroux had reasonable grounds to believe that the life of his wife was in danger, or some felony was about to be committed upon the person of his wife, and was at the time of the killing being inflicted upon her person, then the killing was done in self-defense." This would have required the judge to assume the fact that the assault upon the wife was without provocation, for, if the wife was the aggressor, the killing would not be excusable in self-defense."

In *Surginer v. State*, 134 Ala. 125; 32 South. 278: "The right of one to use violence in defense of another is recognized by the law only where the imperilled person would have been legally justifiable in using like violence in his own defense, and in no case is a necessity for acting in self-defense regarded as ground for an acquittal unless the person seeking shelter thereunder was free from fault in bringing on the difficulty, or had required therefrom and was thereafter assailed."

In *State v. Cook*, 78 S. C. 255, 59 S. E. 862, 15 L. R. A. (N. S.) 1013, 125 Am. St.

Rep. 788, 13 Ann. Cas. 1051, the circuit judge charged the jury: "But if your brother or one near and dear to you provokes a difficulty, or puts himself in the wrong and brings it on, the law does not allow you to go there, take his place, and kill that man, and say you are guilty of neither murder nor manslaughter. * * * The law does not give the person who is near and dear to you the right to provoke a difficulty and then let you come in and kill some one, when he has brought it on himself, and get out of it by your saying he was near and dear to you, and you did the killing on that account. But if he was without fault in bringing on the difficulty and the law would justify him in defending himself, you have a right to go in and defend him. But if he brings on the difficulty and you take part, you do it at your own risk, and if he took life under similar circumstances, and would have been guilty of murder or manslaughter, and you go in, take his place, and take life under those circumstances, then you are guilty of murder or manslaughter." This charge was sustained by the Supreme Court, and the court says, after quoting from Hale and Wharton and citing other authorities in support of the principle: "We have endeavored to show the law as laid down by the circuit judge is firmly established. It is true the rule may in exceptional cases work hardship; but the opposite rule would allow the innocent man who had been forced to strike in self-defense to be killed with impunity merely because appearances happened to be against him at the moment a partisan of his antagonist reached the scene of conflict. The duty seems urgent to enforce rather than relax the rule which admits of no excuse for taking human life except necessity."

We are therefore of opinion that his honor properly refused the instructions of the defendant, and that there is no error as to Wallace Greer in the charge given. There are other exceptions, which we have considered and which require no discussion.

[2] As to Wattle Greer, the court was requested and refused to charge "that, if you believe the evidence in this case, the defendant Wattle Greer is not guilty of homicide, and you are instructed to return a verdict of not guilty as to Wattle Greer." This prayer should have been given.

There is evidence that Wattle and the deceased were engaged in a voluntary fight, but Wattle did not strike the fatal blow, and there is no evidence that he instigated it. The Attorney General says in his brief: "We have not found in the record that Wattle Greer had a deadly weapon; any evidence of a conspiracy between Wattle and Wallace, or an understanding or common purpose between them; or any testimony from which the act of Wallace could be imputed to Wattle."

Although one may have had some difficulty

with the deceased, he is not liable for a homicide committed at or about the same time by a third person who was acting independently, without any conspiracy or common design, even though the altercation brought on the fatal encounter, and the third person interfered to aid him. Title "Homicide," 21 Cyc. 692. See, also, Wharton on Homicide, §§ 50, 51; State v. Kendall, 143 N. C. 659, 57 S. E. 340; State v. Goode, 132 N. C. 982, 43 S. E. 502; State v. Finley, 118 N. C. 1161, 24 S. E. 495; State v. Howard, 112 N. C. 859, 17 S. E. 166; State v. Scates, 50 N. C. 420.

There is no error as to Wallace Greer, and a new trial is ordered as to Wattle Greer.

BROWN, J. (dissenting). There is evidence tending to prove that the defendant Wattle Greer and the deceased, Will Finney, engaged in an affray, and that both fought willingly, and that during the affray they clinched and fell, Finney on top, and that Finney drew his knife and stabbed Wattle and had his arm drawn back to stab him again, when defendant Wallace Greer rushed up and struck Finney on the head with an axe and killed him. Wattle was unarmed and at the time was flat on the ground with Finney on top of him. The evidence of defendant Wallace tended to prove that Wattle and Finney were having some words about a quarter of a dollar; that Wallace separated them and stopped the quarrel; that Wallace turned away and went to his buggy and started to drive off; that he heard some one exclaim, "Don't let Finney kill Wattle"; that he turned and saw that Finney was astride of Wattle and had stabbed him and had his arm drawn back to stab him again; that Wallace grabbed an axe and struck Finney on the head before Finney could stab Wattle again.

In his charge his honor made the guilt of Wallace depend exclusively upon the guilt of Wattle, saying: "His guilt or innocence would depend upon the question as to whether Wattle was at fault or not; that is, as to whether Wattle engaged in the fight willingly or used language calculated or intended to bring on a fight." This charge is sustained by our precedents in case the jury should find that Wallace entered into the fight for the purpose of aiding Wattle and defending him in the affray with Finney.

It is well settled that "though a son may fight in the necessary defense of his father, yet the act of the son must receive the same construction as the act of the father." State v. Brittain, 89 N. C. 482; State v. Johnson, 75 N. C. 175. This is upon the ground that these relatives stand in mutual relation one to the other, and, where one enters into the fight to assist in defending the other, he becomes his confederate, and his act must have the same construction as the act of the assisted party. 1 Hale

P. C. 484; 3 Blackstone, 3, and note; State v. Medlin, 126 N. C. 1127, 36 S. E. 344. Although this doctrine has been severely criticised by some courts, I am not disposed to abrogate or qualify it.

But there is a phase of this case which his honor did not present to the jury and which is not obnoxious to the authorities I have quoted. By several appropriate prayers for instruction the defendant Wallace Greer substantially requested the court to instruct the jury that if he (Wallace Greer) did not enter into the fight for the purpose of assisting and defending Wallace in his contest with Finney but struck the blow which killed Finney on a sudden emergency with the sole purpose of preventing Finney from committing a felonious homicide, and such blow was necessary for that purpose, then defendant Wallace was justified, and the jury, if they so find, should acquit. I think this view of the evidence should have been presented to the jury.

The evidence tends to prove that, had Finney succeeded in stabbing Wattle the second time and had killed him, he would have been guilty of a felonious homicide, and that the blow administered by Wallace prevented such result. Wharton on Homicide thus states the law: In section 533 it is said: "Bona fide belief by the defendant that a felony is in process of commission, which can only be averted by the death of the supposed felon, makes the killing excusable homicide, though, if such belief be negligently adopted by the defendant, then the killing is manslaughter. * * * If A. honestly and without negligence on his part believes that B. is in the process of committing a felony which can only be arrested by B.'s death, A. is excused in killing B." See, also, sections 537 and 539. "It is the duty of every man, whether an officer of justice or private citizen, who sees a felony attempted by violence, to prevent it if possible, and, in the performance of his duty, such person has the legal right to use all means which appear to him as a reasonable man to be necessary to make the resistance and interference effectual, and if the felony cannot be prevented by other means, he is justified in taking life." 21 Enc. of Law, 207. "A homicide is justifiable when committed by necessity and in good faith in order to prevent a felony attempted by force or surprise, such as murder. * * * To justify the killing, however, it must be done in good faith and under an honest and reasonable belief that such felony is about to be committed and that the killing is necessary in order to prevent its accomplishment, and must be done while the person is in the act of committing the offense, or after some act done by him showing an evident in-

tent to commit such an offense." 21 Cyc. 798, 799. These authorities show that, if it appears that a person is about to commit a felony upon another, a third party has the right to take the life of the one about to commit the felony, if he believes it is necessary, in order to prevent the felony, and a man of ordinary firmness and intelligence would have reached the same conclusion.

I think there is a well-marked distinction between the case where there is *only* an intention to prevent a felony, and that in which the third party, whether related or not, espouses the cause of one of the participants to defend him in the contest. In the latter case the parties, in law, become confederates, and their relation becomes mutual. In the former case a third party is excused, even in taking human life, if the sole motive which prompted him to interfere was to prevent the perpetration of a felonious homicide, and the jury should also be satisfied that the facts, as they appeared to him, were such as might reasonably have convinced a man of ordinary firmness and intelligence that such a felony was about to be committed.

The distinction is recognized by the Supreme Court of Michigan in *People v. Curtis*, 52 Mich. 617, 18 N. W. 385, in which it is held that a dangerous felony may be forcibly prevented by *any one* who is not himself in the wrong directly or by complicity.

Under the common law the right of mutual defense was given to nearly all the domestic relations, but there is no principle of the common law which denies to a relative the right to prevent the commission of a felonious homicide to the same extent and under the same circumstances as one not related may prevent it.

When one intervenes in a fight for the sole and only purpose to prevent the commission of a felonious homicide, and uses no more force than is reasonably necessary, he is not considered as fighting in defense of any one, but only to uphold the law of the land and to prevent the destruction of human life. The principle of justification in such case is broader than the mere idea of self-defense. It is founded upon duty to the state and not to an individual. Upon the same principle private citizens may arrest felons to prevent escapes without warrants. *State v. Bryant*, 65 N. C. 327. There can be no doubt that this defense would be open to the defendant Wallace Greer upon the evidence in this case, had he not been the brother of Wattle. The fact that he is his brother ought not to deprive him of the benefit of it.

WALKER, J., concurs in this dissent.

(162 N. C. 672)

STATE v. BLACKWELL.

(Supreme Court of North Carolina. May 28, 1913.)

1. HOMICIDE (§ 188*)—EVIDENCE—ADMISSIBILITY.

In a prosecution for homicide, evidence that the deceased was a violent and dangerous man when under the influence of liquor, and that he had been drinking just before he was killed, is inadmissible where it was not shown that accused knew of his character at the time of the killing, or that the killing was in self-defense, or that the manner of the slaying was doubtful.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. §§ 891-897; Dec. Dig. § 188.*]

2. CRIMINAL LAW (§ 782*)—TRIAL—INSTRUCTIONS.

The expression, "if the jury believe the evidence," preliminary to a direction as to how they should find upon such belief, is inexact, and should be eschewed by the judges, although not in itself ground for new trial; and consequently a requested instruction containing that expression may be properly refused when it tends to mislead the jury.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1847, 1849, 1851, 1852, 1877, 1878, 1880-1882, 1906, 1907, 1909-1911, 1960, 1966, 1967; Dec. Dig. § 782.*]

3. HOMICIDE (§ 116*)—SELF-DEFENSE—REASONABLE APPREHENSION.

Whether accused killed deceased under a reasonable apprehension that he was in danger of losing his life or of great bodily injury must be determined by the jury in view of the facts and circumstances as they appeared to accused, but the question of a reasonable apprehension cannot be determined by accused.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. §§ 158-163; Dec. Dig. § 116.*]

4. CRIMINAL LAW (§ 829*)—TRIAL—INSTRUCTIONS.

The refusal of instructions covered by the charge as given is not error.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 2011; Dec. Dig. § 829.*]

5. HOMICIDE (§ 340*)—APPEAL—HARMLESS ERROR.

Where accused was only convicted of manslaughter, the improper refusal of an instruction on murder in the second degree is harmless.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. §§ 715-717, 720; Dec. Dig. § 340.*]

6. CRIMINAL LAW (§ 847*)—TRIAL—INSTRUCTIONS—DUTY TO CALL ATTENTION TO MISTAKES.

If, by inadvertence, the court states any contention of counsel erroneously, it should be called to his attention so that the mistake can be corrected; for the court is not bound to adopt the language of accused's prayers for instructions, but may select his own words.

[Ed. Note.—For other cases, see Criminal Law, Dec. Dig. § 847.*]

7. HOMICIDE (§ 151*)—TRIAL—BURDEN OF PROOF.

Where the killing is with a deadly weapon, the burden is on accused to satisfy the jury of every matter or excuse for mitigation.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. §§ 276-278; Dec. Dig. § 151.*]

8. CRIMINAL LAW (§ 1159*)—APPEAL—VERDICTS.

If the jury return a verdict contrary to the truth of the matter the only remedy of an

accused is by motion in the court below; for the error cannot be reached on appeal.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 3074-3083; Dec. Dig. § 1159.*]

Appeal from Superior Court, Mecklenburg County.

Claud Blackwell was convicted of manslaughter, and he appeals. Affirmed.

The defendant was indicted in the court below for the murder of Dr. Fred Misenheimer, and was convicted of manslaughter. The evidence taken at the trial is very voluminous, covering nearly a hundred closely printed pages, and it will serve no useful purpose even to give a full synopsis of it.

The prisoner surely cannot complain if, for the purpose of passing upon his exceptions, we adopt his statement of the facts, as contained in the brief of his counsel. It is a fair and full statement for him; and, while it omits reference to some of the evidence, which strengthens the case for the state, it is sufficiently accurate to present the essential facts and the contentions of the respective parties. We may add, though that it did not appear that, if Dr. Misenheimer had earned a reputation for violence, when drinking, or under the influence of liquor, the prisoner knew of it, but the evidence tended to show the contrary, as his first acquaintance with him was on the night before the altercation in the room took place.

The statement of the facts by the prisoner's counsel is as follows: "The defendant together with W. L. Langley and C. B. Skipper, were, on the 25th of May, 1912, occupying a room in the Buford Hotel. Skipper, Porter, Beckman, and Langley had registered for the room. Porter and Beckman left before the trouble started, and were not witnesses to the fight. Skipper had been drinking hard for several days and was in a very weak condition. Blackwell came into the room on Friday afternoon about 5 o'clock. His room at the Buford Hotel had been assigned by the clerk to some one else, and upon the invitation of Skipper and Langley he went into their room about 6 o'clock that evening. Langley and Blackwell went to the Elks Club, where they met Dr. Misenheimer, who inquired as to the condition of Skipper, who was sick, and volunteered to walk back to the hotel with them. They all came back to the room which Skipper occupied, and went to bed about 10 o'clock that night. Langley waked up about 5 o'clock in the morning and waked Misenheimer and Skipper. Blackwell waked up and said he would have to go home, which was Lancaster, S. C., as had been planned the night before. Misenheimer and Skipper took another drink and went back to sleep. Langley stated that he hated to go away and leave Skipper in such a bad condition, and suggested that they wait until the afternoon train. Blackwell

agreed to this, and they went back to bed. About 9:30 or 10 o'clock on Saturday morning, Skipper and all of the remainder of the party woke up, and Langley ordered breakfast for all to be sent to the room. During breakfast, Misenheimer began to abuse Langley. He then asked Langley for \$2 to get a quart of whisky. Langley replied that he had no money of his own except a \$50 bill, and the remaining money he had belonged to Skipper. Whereupon Skipper directed Langley to give Misenheimer \$2, and Misenheimer wrote a prescription and Langley sent out for a quart of liquor. When the liquor came Misenheimer borrowed a knife from Blackwell to open the bottle with, took a drink, went into the bathroom and got a stick about 2 feet and 8 $\frac{1}{4}$ inches long and about 1 $\frac{1}{4}$ inches at one end and 1 inch at the other, weighing about 1 $\frac{1}{4}$ pounds. This stick is what is commonly known as a 'plumber's churn.' Misenheimer took this stick and began beating around the room, chasing Langley and hitting at Skipper. Then Misenheimer took the electric light cord and pulled it down and told Langley he was going to lynch him. He then began to pay attention to Blackwell. At first Blackwell did not at all reply to his attacks except to state, 'Quit that, Doc., it hurts.' Langley went into the bathroom then to stop his bleeding nose, which had resulted from the encounter with Misenheimer. He states that while he was there he heard three or four licks and heard an oath used. He looked around and Misenheimer was staggering, saying that he was stabbed. The doctor was sent for, and he was taken to the hospital. Blackwell testified that after Misenheimer had finished his attack on Skipper and Langley, and had beaten up the room pretty thoroughly with the stick, he came over to the bed where he lay and pulled it down, and then Blackwell arose and got his shirt, and Misenheimer asked him where he was going, using an oath. Blackwell said he was going to dress and get out of the room, and Misenheimer then locked the door and threw the key under the bed, and stated, with an oath, that he would knock the block off the first man that went out of the door. Blackwell then took up his shirt and got his knife off of the bed, where Misenheimer had thrown it after using it to open the bottle of whisky, and put it in his shirt pocket. Later he went after his slippers, which were under the bed. Misenheimer thought he was going to get the key, and said if he did get it he would kill him, and began beating him over the head. He continued to beat him over the head until Blackwell picked up the knife off the floor where it had fallen from his shirt pocket, and struck him with it. Misenheimer was taken to the hospital, and died after lingering several weeks. The defendant then went to Lancaster, under the belief that Misenheimer was not seriously hurt, but came back

voluntarily when requested by the police. The defendant offered abundant evidence as to his good character, and also showed that he was not the C. C. Blackwell upon whom the state endeavored to fix a bad character. The only eyewitnesses who testified as to the transaction were the defendant, Claud Blackwell, and the witness, W. L. Langley. The state offered evidence tending to show that the wound could not be caused by the knife introduced by the state. Upon this point experts disagreed, and there is positive evidence that the knife shown to the jury was the one used."

The following errors were assigned by the prisoner:

"(1) The court erred in refusing to admit evidence of the violent and dangerous character of the deceased while under the influence of whisky. The error in this is that there was evidence of self-defense; and violent and dangerous character in cases of homicide is admissible when there is evidence of self-defense.

"(2) The court refused the prayer of the defendant to instruct the jury as follows: 'If you believe the evidence, the deceased did beat the defendant with a stick and without provocation from him, and was about to strike him again when the defendant stabbed him. And the defendant had a right to resist the assault of the deceased upon him by force, and had a further right to use a weapon to repel the assault, and he was not required to confine himself to his natural force and strength not to retreat, and the only question before you is whether or not he reasonably thought such force was necessary to repel the assault, and if he so thought, you ought to acquit him.'

"(3) The court refused the prayer of the defendant to instruct the jury as follows: 'If you believe the evidence, the deceased struck the defendant severe blows several times with a stick, and was attempting to strike him again when defendant stabbed him, and the defendant had a right to stab the deceased at the time he reasonably thought such stabbing was necessary to prevent the deceased from killing him or inflicting severe bodily harm upon him; such stabbing would not be excessive force under these circumstances, and you should acquit the defendant.'

"(4) The court, in its charge, stated the contentions of the defendant erroneously, as follows: 'And the defendant says that he went to the bed to get his shirt, and while he was putting it on, the penknife fell to the floor, and while he was in the act of getting his knife and putting on the shirt, the deceased again struck him, and told him he was going to kill him.'

"(5) Among other requests, defendant asked the court to charge: 'If you believe the evidence, the defendant is not guilty of murder in the second degree, and you will so find.' The court refused this charge, and fully defined murder in the second degree to the ju-

ry, and left the question to the jury of the guilt or innocence of the defendant of the charge."

The court gave a very clear and elaborate charge to the jury, explaining fully and correctly the different degrees of homicide with reference to the particular facts of the case, and also the contentions of the state and the prisoner, and among other instructions were the following:

"(1) The inquiry in this case is whether the defendant is guilty of murder in the second degree or manslaughter or killed the deceased in self-defense, and therefore is not guilty. Although the law raises a presumption that the defendant is guilty of manslaughter, that presumption can be removed by evidence in the case. It is not necessary that the evidence should remove the presumption beyond a reasonable doubt, in order that you should acquit the defendant, but you must be satisfied only that the defendant struck the fatal blow in self-defense. In other words, such satisfaction need not be established beyond a reasonable doubt, nor by the greater weight of the evidence, but through and by means of any evidence in the case that causes such satisfaction.

"(2) The defendant contends that, at the time the fatal blow was given, he apprehended or believed that the deceased was about to take his life or do him great bodily harm. If that apprehension or belief was a reasonable one, and the defendant acted under the apprehension or belief that he was going to suffer death or great bodily harm, he was justified in killing the deceased, as it would be a case of self-defense, and you will acquit the defendant.

"(3) In passing upon the reasonableness of his belief or apprehension, it is not proper or just to the defendant that you should judge him by the circumstances, as you are now sitting and looking coolly back upon the transaction, in the light of the evidence, but you should put yourselves in the situation of the defendant, and surround yourselves with the same circumstances that surrounded him, and then determine whether or not his apprehension was reasonable, if you find that he had such apprehension.

"(4) The defendant contends that when he stabbed the deceased, the deceased had stricken him several times with the stick introduced in evidence. He contends that he had requested the deceased to stop beating or striking him, and had made an effort to leave the room in order to escape from the deceased; that he was sitting upon the bed putting on his shoes; that the deceased had locked the door and thrown the key under the bed, and threatened to kill any one who went out. Defendant contends that, while he was sitting on the bed, the deceased struck him several times with the stick, against his protest, and while he was in the act of striking him again, he picked up the knife from the floor and stabbed the deceased,

and at the time of such stabbing, he (the defendant) had reasonable grounds to believe, and did believe, had reasonable grounds to apprehend, and did apprehend, that the deceased was about to kill him or inflict great bodily injury upon him. The court charges you that, if you believe these contentions to be true, as heretofore it has charged you, the defendant was justified in stabbing the deceased, and you should render a verdict of not guilty.

"(5) So, gentlemen, coming back to the main proposition, What occurred at the time of the stabbing, and what was going on at that time? What was the character of the assault, if any, by the deceased upon the defendant, and what kind of weapon was he using? I repeat, if the defendant has satisfied you that, at the time the defendant struck this fatal blow, he had reasonable grounds to apprehend, and did apprehend, reasonable grounds to believe, and did believe—taking into consideration the character of the assault and the weapon used—that he was then in imminent danger of death or great bodily harm, and struck under those circumstances, it would be your duty to acquit him and find him, 'Not guilty.' If he has failed to so satisfy you, or if you find that he struck the deceased because he was irritated and mad at him; struck him at a time when he did not have reason to apprehend, and did not apprehend, nor reasonable grounds to believe, and did not believe that he was in imminent danger of death or great bodily harm, but struck him because, as I said, he was mad at him, because he wasn't going to take any more from him, struck him because he had been previously stricken with a stick by the deceased, and not because he was in imminent danger of suffering death or great bodily harm, then it would be your duty to find him guilty of manslaughter, and if he struck him with malice, it would be your duty to find him guilty of murder in the second degree."

The court gave these further instructions:

"(6) There must be a present impending peril to life, or great bodily harm, either real or so apparent as to create the honest belief in the mind of the defendant that there is an existing necessity to take the life of the person intended to be killed at the time that he attempts to take it.

"(7) As I have stated to you, the burden is upon the defendant, he having admitted that he slew the deceased, to satisfy you, not beyond a reasonable doubt, not by the greater weight of the evidence or the preponderance of the evidence, but to satisfy you that, at the time he struck this fatal blow that took the life of Dr. Misenheimer, he was excusable for doing so.

"(8) Now, gentlemen of the jury, give this matter your serious consideration. It is important to the state and to the defendant. Take the case and make up your verdict."

As already stated, the defendant was con-

victed of manslaughter, and after reserving his exceptions brought the case here by appeal.

Caudle & Delaney and Osborne, Cocke & Robinson, all of Charlotte, and Roach S. Stewart, of Lancaster, S. C., for appellant. Attorney General Bickett and T. H. Calvert, of Raleigh (Clarkson & Duls, of Charlotte, of counsel), for the State.

WALKER, J. (after stating the facts as above). [1] The plea in this case was self-defense. The prisoner offered evidence to show that the deceased was a violent and dangerous man when under the influence of liquor, and there was evidence tending to show that he had been drinking just before he was cut with the knife by the prisoner. For the purpose of testing the competency of the proposed evidence, we will therefore assume that he was under the influence of liquor at the time he assaulted the prisoner with the stick. There was no offer to show that the prisoner, at the time of the altercation, knew of the alleged character of deceased as a violent and dangerous man. Upon this question the law of this state is well settled by numerous decisions, however it may be in other jurisdictions, though we believe that the great weight of authority sustains the view of this court. The general rule prevailing in most of the jurisdictions is that such evidence is not admissible, and in this state such a general rule is well settled, but it is subject to exceptions depending upon the peculiar facts and circumstances of each case. It has been said that these exceptions are now so well defined and established by the current of the more recent decisions that they have assumed a specific formula, and have themselves become a general rule subordinate to the principal one. *State v. Turpin*, 77 N. C. 473, 24 Am. Rep. 455. As at present understood and formulated, the rule may be thus stated: As a general rule, evidence of the character of the deceased is not relevant to the issue in a trial for homicide, and consequently it is not permissible to show his general reputation as a dangerous or violent man, but when there is evidence showing, or tending to show, that the prisoner acted in self-defense, under a reasonable apprehension that his life was in danger, or that he was in danger of great bodily harm, evidence of the character of the deceased as a violent and dangerous man is admissible, provided the prisoner, at the time of the homicide, knew of such character, or the nature of the transaction is in doubt. 25 Am. & Eng. Enc. of Law (2d Ed.) p. 281, 5 Id. pp. 872, 873, where many cases are collected in the note which supports the text, and among them are cited *State v. Turpin*, supra, *State v. Hensley*, 94 N. C. 1022, and *State v. Rollins*, 113 N. C. 722, 18 S. E. 394.

The reason why it is necessary for the

prisoner to have known of the character of the deceased as a violent and dangerous man is well stated by Justice Bynum in *Turpin's Case*, supra, 77 N. C. at page 477, 24 Am. Rep. 455: "Where one is drawn into a combat of this nature by the very instinct and constitution of his being, he is obliged to estimate the danger in which he has been placed, and the kind and degree of resistance necessary to his defense. To do this he must consider, not only the size and strength of his foe, how he is armed, and his threats, but also his character as a violent and dangerous man. It is sound sense, and we think sound law, that before a jury shall be required to say whether the defendant did anything more than a reasonable man should have done under the circumstances, it should, as far as can be, be placed in the defendant's situation, surrounded with the same appearances of danger, with the same degree of knowledge of the deceased's probable purpose which the defendant possessed. If the prisoner was ignorant of the character of the deceased, then the proof of it would have been inadmissible, because his action could not have been influenced by the dangerous character of a man of which he had no knowledge."

In *Hensley's Case*, 94 N. C. at page 1032, the court said on this point: "If the prisoner did not have knowledge of such character of the deceased (for violence), then such evidence would not be competent, because it could not be inferred that he acted upon facts of which he was ignorant."

The present Chief Justice said in *Rollin's Case*: "The evidence of the homicide was not circumstantial; and, though the plea of self-defense was set up, it did not appear that the prisoner knew the character of deceased for violence. Evidence to show such character was therefore properly excluded." It is also competent to show the character of the deceased as a violent and dangerous man when the evidence is wholly circumstantial and the character of the encounter is in doubt.

The difference in the two kinds of cases is pointed out in *State v. Byrd*, 121 N. C. 684, 28 S. E. 353: "Evidence of the general character of the deceased as a violent and dangerous man is admissible where there is evidence tending to show that the killing may have been done from a principle of self-preservation and also where the evidence is wholly circumstantial, and the character of the transaction is in doubt." We think that threats made by the deceased against the prisoner come under the same rule. If the threats are not communicated to the prisoner, and the character of the deceased is unknown to him, such evidence is not admissible when offered only to show self-defense, because facts of which the prisoner had no knowledge could have no effect upon his mind. *State v. Turpin*, supra; *State v.*

Hensley, *supra*; State v. Rollins, *supra*. But, where the evidence is wholly circumstantial, testimony of the violent character and threats of the deceased, even if unknown to the prisoner, are admissible as tending to show the inherent probabilities of the transaction. State v. Tackett [8 N. C. 210]; State v. Hensley, *supra*. In the latter case the syllabus appears to differ from the opinion. While this principle has been doubted in some cases, we think it is correct, and its adoption the only way of reconciling apparently conflicting opinions." See, also, State v. Gooch, 94 N. C. 987; State v. Sumner, 130 N. C. 718, 41 S. E. 803; State v. Exum, 138 N. C. 600, 50 S. E. 283; State v. Baldwin, 155 N. C. 494, 71 S. E. 212, Ann. Cas. 1912C, 479; State v. Price, 158 N. C. 641, 74 S. E. 587. Our reference to State v. Byrd, and to the language quoted therefrom, must not be taken as an authoritative statement by us now of the rule where the evidence is circumstantial, for in this case the testimony is not of that character, as the details of the encounter were given in evidence by eyewitnesses, who testified substantially to the same facts. The present case has not been brought within either branch of the rule; for although there was evidence of self-defense, the character of the deceased for violence, if established, was not known to the prisoner, nor was the evidence circumstantial, nor was the nature of the transaction sufficiently in doubt. In no view, therefore, was it relevant to show the character of the deceased.

[2] The instructions requested by the defendant, and the subjects of his second and third assignments of error, were properly refused. We have said that the expression, "if the jury believe the evidence," preliminary to a direction as to how they should find upon such belief, is "inexact," and should be "eschewed" by the judges, though when used it is not ground for a new trial, unless clearly prejudicial. Sossaman v. Cruse, 133 N. C. 470, 45 S. E. 757; Merrell v. Dudley, 139 N. C. 57, 51 S. E. 777. But a judge should not be required to use that form of expression, especially if it will mislead the jury as to their province in passing upon the facts or restrict them in the exercise of their proper function as triers of the facts.

[3] The prayers were too strongly worded, and they are further objectionable as leaving the question of reasonable apprehension as to the prisoner's danger entirely too much to him, when it is one for the jury to decide, though in view of the facts, circumstances, and surroundings as they appeared to the prisoner at the time of the homicide. State v. Turpin, *supra*; State v. Barrett, 132 N. C. 1005, 43 S. E. 832.

We thus stated the principle in Barrett's Case: "The reasonableness of his apprehension must always be for the jury, and not the defendant, to pass upon, but the jury

must form their conclusion from the facts and circumstances as they appeared to the defendant at the time he committed the alleged criminal act. If his adversary does anything which is calculated to excite in his mind, while in the exercise of ordinary firmness, a reasonable apprehension that he is about to assail him and to take his life, or to inflict great bodily harm, it would seem that the law should permit him to act in obedience to the natural impulse of self-preservation, and to defend himself against what he supposes to be a threatened attack, even though it may turn out afterwards that he was mistaken, provided always as we have said, the jury find that his apprehension was a reasonable one, and that he acted with ordinary firmness." The prisoner must not only have thought that he was in danger of his life or of receiving great bodily harm, but his apprehension must be based on reasonable grounds, to be found by the jury in the manner we have stated, and not by the prisoner. State v. Cox, 153 N. C. 638, 69 S. E. 419; State v. Kimbrell, 151 N. C. 702, 66 S. E. 208, 614; State v. Dixon, 75 N. C. 275. The law is sufficiently lenient to him when it requires that he should be judged by the facts and circumstances as they reasonably appeared to him. State v. Nash, 88 N. C. 621; State v. Gray, 77 S. E. 833.

[4] But the principle of law attempted to be invoked in behalf of the prisoner was fully and correctly stated to the jury by the court in its charge.

[5] The prayer for instruction as to murder in the second degree, contained in the fifth assignment of error, is erroneous in itself, in view of the facts, but if it had been correct, the error in refusing it would have been harmless, as the jury did not convict of murder in the second degree, but of manslaughter. State v. Yates, 155 N. C. 450, 71 S. E. 817; State v. Watkins, 159 N. C. 480, 75 S. E. 22.

[6] The fourth assignment of error is without merit, as there is no substantial difference between the statement of counsel and the charge of the court in respect to the matter. If, by inadvertence, the judge states any contention of counsel erroneously, it should be called to his attention, so that the mistake can be corrected. Jeffress v. Railroad, 158 N. C. 223, 73 S. E. 1013; State v. Cox, *supra*.

[7] In this case, the judge charged the jury clearly and exhaustively upon every phase of the evidence. He was not bound to adopt the language of the defendant's prayers for instruction, if they had been correct, but could select his own words, provided they correctly expressed the legal principles applicable to the facts. He properly placed the burden upon the defendant to *satisfy* the jury of every matter of excuse or mitigation; the killing with a deadly weapon being admitted. State v. Quick, 150 N. C. 820, 64 S. E. 168; State v. Yates, *supra*; State v.

Rowe, 155 N. C. 436, 71 S. E. 332; State v. Simonds, 154 N. C. 197, 69 S. E. 790; State v. Bradley 76 S. E. 720.

[8] If the jury have returned a verdict contrary to the very truth of the matter, the only remedy was by motion in the court below to set it aside. We have no jurisdiction to reverse it, or to modify it, for that reason. The jury evidently found that the defendant did not act in self-defense, as explained by the court, when he struck the fatal blow, and therefore convicted him of manslaughter, upon the ground of legal provocation and the sudden heat of passion.

A careful review of the record and case on appeal has disclosed no error in the trial of the case.

No error.

HOKE, J. (concurring). I concur in the disposition made of this appeal on the ground that, all the eyewitnesses having been examined, there is substantial agreement as to the objective facts of the occurrence, and their evidence, to my mind, presents an instance where the character of the deceased was only relevant as bearing on the reasonableness of the prisoner's apprehension. In such case, evidence as to the character of the deceased as a violent, dangerous man, or threats of injury towards the prisoner, can only be received when such character is known or the threats have been communicated. But I do not assent to the proposition in so far as embodied in the principal opinion, and expressed in several of the authorities cited, that the testimony as to the character of the deceased or of previous threats towards the prisoner, when not made known to him, is only competent in cases which rest upon circumstantial evidence. On the contrary, I am clearly of the opinion that, when there is evidence which tends to make out a case of self-defense, though from the testimony of eyewitnesses the character of the transaction is in doubt, evidence of the character of the deceased as a violent, dangerous man or of threats by him, importing serious menace to the prisoner, are both competent when it may tend to throw light on the occurrence and reveal the same in its true nature. To illustrate: If A. and B. have an altercation, and A. kills B., and on the trial prisoner offers the evidence of eyewitnesses tending to show a homicide in his necessary self-defense, and that B. was in the act of committing a felonious assault with a deadly weapon and with intent to kill, evidence from eyewitnesses, on the part of the state, that no such assault was being made, nor any demonstration with a deadly weapon, is competent. In such case, testimony that the deceased was a desperado, one who was in the habit of using deadly weapons, or that a short time before he had threatened to kill A., would be evidence of

the first importance, tending to establish the facts of the occurrence.

Speaking to this question, in State v. Baldwin, 155 N. C. 496, 71 S. E. 213, Ann. Cas. 1912C, 479, the writer, in a per curiam opinion, said: "It was insisted further that his honor made an erroneous ruling in excluding evidence of certain uncommunicated threats of the deceased uttered shortly before the homicide, tending to show animosity towards the prisoner and a purpose to do him serious bodily harm. It is now generally recognized that in trials for homicide uncommunicated threats are admissible: (1) Where they tend to corroborate threats which have been communicated to the prisoner; (2) where they tend to throw light on the occurrence and aid the jury to a correct interpretation of the same, and there is testimony ultra sufficient to carry the case to the jury tending to show the killing may have been done from a principle of self-preservation, or the evidence is wholly circumstantial and the character of the transaction is in doubt. Turpin's Case, 77 N. C. 473 [24 Am. Rep. 455]; State v. McIver, 125 N. C. 645 [34 S. E. 439]; Hornigan & Thompson, Self-Defense, p. 927; Stokes' Case, 58 N. Y. 164 [18 Am. Rep. 492]; Holler v. State, 37 Ind. 57 [10 Am. Rep. 74]; Corneliuss v. Commonwealth, 54 Ky. [15 B. Mon.] 539. In the present case, while there was evidence on the part of the state tending to show that the prisoner fought wrongfully and killed without necessity, there is testimony on his part tending to show a homicide in his necessary self-defense, and the proposed evidence, tending as it did to throw light upon the occurrence, should have been received." I take this to be the correct and permissible deduction from Turpin's Case, supra, and the position, in my judgment, is supported by the great weight of authority, many of the decisions being cited in the well-prepared brief of the prisoner's counsel, notably Wiggins v. People, 93 U. S. 467, 23 L. Ed. 941; State v. Thompson, 49 Or. 46, 88 Pac. 563, 124 Am. St. Rep. 1015; State v. Feeley, 194 Mo. 800, 92 S. W. 663, 3 L. R. A. (N. S.) 351, 112 Am. St. Rep. 511; Keener v. State, 18 Ga. 194, 63 Am. Dec. 269; Williams v. State, 14 Tex. App. 102, 46 Am. Rep. 239.

(162 N. C. 369)

BURNS v. STEWART et al.

(Supreme Court of North Carolina. May 23, 1913.)

1. ADVERSE POSSESSION (§ 71*)—CHARACTER OF POSSESSION—"COLOR OF TITLE."

"Color of title" is any writing which on its face professes to pass a title but which fails to do so either from want of title in the person executing it or from the defective mode of conveyance employed, but it must not be so obviously defective as not to mislead a person of ordinary capacity but not skilled in the law; it is that which in appearance is title, but which in reality is not; it does not depend upon the

good faith of the person entering upon land, for even if he knew it belonged to another person than his grantor it would still be color of title, but is necessary not so much to show good faith as to fix the extent or boundaries of the land to which title may be acquired by continuous and adverse possession.

[Ed. Note.—For other cases, see Adverse Possession, Cent. Dig. §§ 415-429; Dec. Dig. § 71.*]

For other definitions, see Words and Phrases, vol. 2, pp. 1264-1273; vol. 8, p. 7606.]

2. ADVERSE POSSESSION (§ 74*)—COLOR OF TITLE—JUDGMENT.

A decree, in a suit involving title to land, effective to pass to plaintiff any title in the land which the other parties may have had, at least by estoppel, constituted color of title under which adverse possession for the requisite time might ripen into a good title.

[Ed. Note.—For other cases, see Adverse Possession, Cent. Dig. §§ 443-447; Dec. Dig. § 74.*]

Appeal from Superior Court, Macon County; Lane, Judge.

Action by Nora W. Burns, administratrix, against Henry Stewart, Macon County Land Company, and others. Judgment for Henry Stewart and others, and plaintiff and Macon County Land Company appeal. No error.

This action was brought to recover for a breach of a covenant of seisin, contained in a deed dated April 23, 1909, and executed by Henry Stewart, Sr., and wife, Cassie Stewart, and Henry Stewart, Jr., and wife, Lula Stewart, to J. M. Burns, intestate of the plaintiff.

The plaintiff's intestate had purchased the lands in question from the Stewarts, paying one-third of the purchase money in cash, and giving notes, payable in one and two years after date, respectively, and securing the payment of said notes by deed of trust to A. W. Horn, trustee. The one-year notes being about to mature, and the holders thereof threatening to foreclose, the plaintiff brought this action, partly to restrain the collection of the notes and the foreclosure of the deed of trust, and as a basis for her action alleged that there was a defect in the title to a portion of the lands her intestate had purchased of the Stewarts, to wit, that portion of the land which was covered by grant No. 3,625 to John Ingram, K. Elias, and T. J. Keener, bearing date February 19, 1883, containing about 500 acres, and that portion covered by grant 3,414 to G. R. Patton, assignee, dated September 17, 1875. The Macon County Land Company was made a party defendant for the reason that it claimed to be the owner of the disputed lands by virtue of mesne conveyances from the grantees named in grant No. 3,084, which was issued on May 21, 1869, to A. L. Herren, J. R. Ammons, G. C. Hinson, and John G. Eve, recorded in Macon county in Book M, p. 462. This grant, No. 3,084, was a large one, covering about 30,000 acres of land, and included the land embraced in grants Nos. 3,625 and 3,414, under which the Stewarts claimed title.

The question, therefore, involved in this action is whether or not the Stewarts were the true owners of said lands under their alleged title, acquired by grants Nos. 3,625 and 3,414, or whether the Macon County Land Company was the owner of the disputed land under said grant No. 3,084; it being admitted that grants 3,625 and 3,414 lay entirely within the boundaries of No. 3,084.

The plaintiff offered in evidence the deeds to her intestate from the defendants Henry Stewart and Cassie Stewart, Henry Stewart, Jr., and Lula Stewart, conveying the lands in dispute, and containing the covenant of seisin, and further offered in evidence the notes of the intestate to the Stewarts, and the deed of trust securing the same, and for the purpose of showing a breach of said covenant, and for that purpose only, offered in evidence grants Nos. 3,625 and 3,414, and the mesne conveyances to the Stewarts from the grantees named in said grants, and also offered in evidence grant No. 3,084 to A. L. Herren et al., and the mesne conveyances from the grantees therein to the Macon County Land Company. It was also shown that grant No. 3,084 entirely overlapped grants Nos. 3,625 and 3,414, and, being senior in date, passed the title; nothing else appearing. The plaintiff also, for the purpose of showing a breach of the covenant of seisin, and for the purpose of showing an estoppel against the Stewarts to claim title under grant 3,625, offered in evidence the record of a certain suit, including the judgment therein, entitled Harvey P. Wyman et al. v. Henry Stewart et al., heretofore pending in the District Court of the United States for the Western District of North Carolina, at Asheville; the judgment therein having been rendered on November 9, 1891, and after Henry Stewart had acquired title under grant No. 3,625 from the grantees therein, by the terms of which judgment the plaintiffs in said suit, Harvey P. Wyman et al., were decreed to be the owners of the lands covered by grant No. 3,084, except as hereinafter stated.

At the time this judgment was rendered, Henry Stewart, Sr., under whom the defendants Henry Stewart, Jr., and Cassie Stewart, claim, had already attempted to acquire title to the lands covered by grant 3,625 by deed from Ingram, Elias, and Keener, dated March 4, 1889. The judgment so rendered in the District Court of the United States adjudged that H. P. Wyman et al. were the owners in fee simple of all the lands covered by grant No. 3,084, except such portion thereof as is covered by grants which were based upon entries dated prior to July 16, 1867. Grant 3,625 did not come within the exception as it was based upon an entry made January 10, 1882, but grant 3,414 was within the exception, as it was based on an entry of a date prior to 1867; that is, September 23, 1859. The defendant Macon County Land Com-

pany afterwards became the owner of the lands covered by grant No. 3,084 by virtue of deeds from H. P. Wyman et al., the plaintiffs in said action in the federal court.

Defendant Henry Stewart introduced the record in the case of Henry Stewart, Sr., under whom he claimed, against A. J. Calloway, James Evitt et al., showing a judgment at Spring term, 1899, of Macon superior court, in which it was declared and adjudged, upon issues answered by a jury, that the plaintiff in that case was the owner and entitled to the possession of the land covered by grant No. 3,625, lying on Brush and Skittie's creeks in said county, giving its metes and bounds. The following agreement was made in the case: As the court was beginning its charge to the jury in order to simplify the issue before them, it was agreed between all the parties in court that if his honor should be of the opinion that the grant to Ingram, Keener, and Elias, or the conveyances thereunder, or that the decree in the superior court in the case of Henry Stewart, Sr., v. A. J. Calloway, James Evitt et al., heirs at law of D. M. Evitt, or either of them, constituted color of title, then that the possession of Henry Stewart, Sr., and the defendants Cassie and Henry Stewart was adverse and sufficient to ripen title, and that the court should so charge the jury, and the first issue should be answered, "Yes," but that if the court should be of the opinion that said records, nor either of them, did constitute color of title, he should so charge the jury, and thereupon the court, being of the opinion that said records nor either of them did constitute color of title, charged the jury that the said defendants Henry Stewart and Cassie Stewart had offered a paper writing covering the lands in dispute which the court holds constitutes color of title, and had offered evidence showing possession sufficient to ripen the title, and that if they believed the evidence they should answer the first issue "Yes."

The jury returned the following verdict:

"(1) Did the defendants Henry Stewart and Cassie Stewart convey a good title to plaintiff's intestate under the deeds set up in this action? Answer: Yes.

"(2) If not, what sum is the plaintiff entitled to recover from the defendants Henry Stewart and Cassie Stewart? No answer."

Judgment was entered upon the verdict, and plaintiff and the Macon County Lumber Company appealed.

Bourne, Parker & Morrison and Z. V. Weaver, all of Asheville, and Johnston & Horn, of Franklin, for appellants. J. F. Ray, R. D. Sisk, G. L. Jones, and Robinson & Benbow, all of Franklin, for appellee Stewart.

WALKER, J. The agreement of the parties, which is copied in the statement, greatly simplifies the case. It appears from the

charge that the court held, and so instructed the jury, that the judgment or decree in the case of Stewart v. Calloway, Evitt, and others was color of title, and, as the appellants had admitted the adverse possession necessary to ripen this color into a good title, they would, if they believed the evidence, answer the first issue "Yes." So the decision of the case turns mainly upon the correctness of this ruling as to color of title, and this is necessarily so, because the parties have, by their solemn agreement, declared that it shall be so. In the brief of appellant's counsel, it is also admitted to be so by this statement: "The Stewarts claimed this judgment was color of title as against appellants, and, as they had shown possession for more than seven years after the judgment, they had matured title; and the court so held, and charged the jury to that effect." Counsel for appellants contend that there is no evidence as to what lands were in controversy between the parties in that case, and that the judgment did not pass any title to Stewart, and therefore it is not sufficient color of title. But we think otherwise. It clearly appears that the title to several tracts of land was litigated in the suit, and that it was finally adjudged that Stewart was the owner of the land covered by grant No. 3,625, and the decree, by its terms, had the force and effect in law either of confirming or of vesting the title to that tract, as between the parties to the action, in Stewart, who was plaintiff in the action. If the defendants had any title or interest in that tract, they lost it by the decree, and it became vested in their adversary, Henry Stewart, Sr., and was transferred to him by force of the judgment, and they were forever afterwards estopped from claiming any interest in the land as against him.

[1] Color of title has been variously defined by the courts of this country. It was early held to be any writing which on its face professes to pass a title, but which it fails to do, either from want of title in the person making it, or from the defective mode of conveyance employed; but it must not be so obviously defective as not to mislead a person of ordinary capacity but not skilled in the law. *McConnell v. McConnell*, 64 N. C. 342; *Tate v. Southard*, 10 N. C. 119, 14 Am. Dec. 578; *Dobson v. Murphy*, 18 N. C. 586. The courts have generally concurred in defining it to be that which in appearance is title, but which in reality is not. *Wright v. Mattison*, 18 How. (U. S.) 56, 15 L. Ed. 280; *Jackson v. Frost*, 5 Cow. (N. Y.) 346; *Baker v. Swan*, 32 Md. 355; *La Frombois v. Jackson*, 8 Cow. (N. Y.) 589, 18 Am. Dec. 463; *Hall v. Law*, 102 U. S. 466, 26 L. Ed. 217. The doctrine is said to have originated in the necessity for showing good faith in entering upon the land, the law not permitting a person to be ousted who had settled upon land in good faith, believing it to be

his, and after holding it adversely for seven years (*Grant v. Winborne*, 3 N. C. [2 Hayw.] 56); but it was subsequently held that whether the writing was good color of title did not depend upon his good faith, for, even if he knew the land belonged to another person than his grantor, it would still be color. *Reddick v. Leggat*, 7 N. C. 539; *Rogers v. Mabe*, 15 N. C. 180; *McConnell v. McConnell*, supra. Finally the definition we have first given was adopted, and an unconstitutional act of the General Assembly was held to be within the meaning of the definition and to confer a good title where the necessary adverse possession had been held under it for the requisite time. *Doe v. Newbern Academy*, 9 N. C. 233. Color of title is necessary, not so much to show good faith, as to fix the extent or boundaries of the land to which title may be acquired by the continuous and adverse possession. *Thurston v. University*, 4 Lea (Tenn.) 520; *Goodwin v. McCabe*, 75 Cal. 584, 17 Pac. 705; *Greenleaf v. Bartlett*, 146 N. C. 495, 60 S. E. 419, 14 L. R. A. (N. S.) 660. The case last cited shows the liberal tendency of the courts upon this question, and we think follows the more reasonable principle. The subject is fully discussed in *Sedgwick & Wait on Trial of Title to Land*, § 761 et seq. Judgment or decrees may be color of title. 1 *Oyc.* 1100; *Wardlaw v. McNeill*, 106 Ga. 29, 31 S. E. 785; *Patton v. Dixon*, 105 Tenn. 97, 58 S. W. 300; *Kimball v. Lohmas*, 31 Cal. 157; *Thurston v. University*, supra; *Wood v. Conrad*, 2 S. D. 341, 50 N. W. 95; *Reedy v. Camfield*, 159 Ill. 254, 42 N. E. 833; 7 *Enc. of U. S. Sup. Ct. Rep.* p. 955; *Defferback v. Hawke*, 115 U. S. 407, 6 Sup. Ct. 95, 29 L. Ed. 423.

We have held that a judgment in a proceeding for partition is color of title, although it does not divest or vest any title. The court said in *Bynum v. Thompson*, 25 N. C. at page 584, that: "Partition does not indeed constitute a title, except as against the parties to it. But it is * * * color of title as much as any of the defective instruments which have been thus deemed." And this case has been followed ever since. *Smith v. Tew*, 127 N. C. 299, 37 S. E. 330; *Lindsay v. Beaman*, 128 N. C. 189, 38 S. E. 811; *Hill v. Lane*, 149 N. C. 267, 62 S. E. 1074. To the same effect are *Johnson v. Britt's Heirs*, 56 Tenn. (9 Heisk.) 756; *Brind v. Gregory*, 120 Cal. 640, 53 Pac. 25; *Duncan v. Gibbs*, 9 Tenn. (1 Yerg.) 256. The court said in *Lindsay v. Beaman*, supra, that title passes by deed from owner to purchaser, and to constitute color of title the deed must be registered (*Austin v. Staten*, 126 N. C. 783, 36 S. E. 338), while in partition proceedings between tenants in common no title passes; and in *Johnson v. Britt's Heirs*, supra, it was said that in such a proceeding there is no divestiture of title, but the decree merely

defined the claim of the parties to their respective shares.

[2] In this case the judgment in the suit of Stewart against Calloway and others vested the title in Stewart as much so as if the other parties had been required to execute deeds to him for the land. It is a solemn adjudication after trial and investigation that the true title is in him, and it would be singular if we should hold that such a judgment is not color of title, when the deed of one having not even the pretense of a title would be. The judgment not only declares the title to be in Stewart, but also the right of possession. An adverse possession taken and continued for seven years under such a solemn determination should be as much protected as one under a void deed or a deed ineffectual to pass title. To rule otherwise would be to sacrifice the substance of the thing to the mere form or shadow. It appears that the judgment clearly adjudges Stewart's right and title, defines the extent of it with perfect accuracy, and declares him to be entitled to the possession of the land. It comes, therefore, within every reason or principle upon which the doctrine in respect to color of title is founded. The effect of the judgment was to pass any title in the land which the other parties may have had to Stewart, at least by estoppel. The case of *Keener v. Goodson*, 89 N. C. 273, does not militate against this view. There no question of title was involved; the allotment of the homestead having, as said by the court, "no other effect than simply to attach to his (homesteader's) existing estate a quality of exemption from sale under execution." We do not pass upon the merits of that decision, for the facts and the reasoning have no application to our case.

Holding, as we do, that the judgment in the Calloway suit was color of title, it follows, under the terms of the stipulation made by counsel, that the ruling of the court was correct.

No error.

(94 S. C. 453)

STATE v. WATSON.

(Supreme Court of South Carolina. May 14, 1913.)

1. WITNESSES (§ 405*)—IMPEACHMENT—COLLATERAL MATTER.

A witness may not be discredited as to a collateral question.

[Ed. Note.—For other cases, see *Witnesses*, Cent. Dig. §§ 1273, 1275; Dec. Dig. § 405.*]

2. CRIMINAL LAW (§ 1147*)—DISCRETION—ABUSE.

A discretionary ruling will not be disturbed unless there is an abuse of discretion.

[Ed. Note.—For other cases, see *Criminal Law*, Cent. Dig. §§ 3038, 3072, 3073; Dec. Dig. § 1147.*]

3. HOMICIDE (§ 300*)—INSTRUCTIONS—SELF-DEFENSE.

In a prosecution for homicide, a charge, that if accused fired the first shot then he cannot open his mouth and plead self-defense, is erroneous.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. §§ 614, 616-620, 622-630; Dec. Dig. § 300.*]

4. HOMICIDE (§ 116*)—SELF-DEFENSE.

To make out a case of self-defense it is necessary to show that the accused actually believed that he was in such immediate danger of losing his life or sustaining serious bodily harm that it was necessary to take the life of his assailant, and that the circumstances in which accused was placed were such as would justify such a belief in the mind of an ordinary person.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. §§ 158-163; Dec. Dig. § 116.]

Appeal from Common Pleas Circuit Court of Kershaw County; G. W. Gage, Judge.

O. H. Watson was convicted of homicide, and he appeals. Reversed, and cause remanded for new trial.

The defendant's exceptions are as follows:

"The defendant excepts to the ruling of his honor, George W. Gage, trial judge, and to his charge to the jury, upon the following grounds, to wit:

"(1) Because his honor erred in refusing to allow the witness Bowers to testify as to the intimate sexual relations existing between the witnesses Ella Peach and Loma Peach, and the deceased, T. E. Gregory, and his brothers; such testimony having been offered to show interest or bias on the part of the said Ella Peach and Loma Peach.

"(2) Because his honor erred in allowing the solicitor, in his argument to the jury, over the protest of defendant's counsel, to comment upon the fact that the witnesses as to the good reputation of the defendant were from a distance and that none had been produced from the near vicinity of his home, whereas, his honor had refused to allow the defendant to put other witnesses on the stand to testify as to his good reputation, although he had them present and ready from the near vicinity of his home; such facts having been called to his honor's attention at the time the protest was made; and notwithstanding that witness J. E. Baker was a close neighbor to defendant.

"(3) Because his honor erred in charging the jury that the question of 'self-defense' might be summed up in the language of the school boy as 'who hit the first lick'; whereas, he should have charged the jury that the question of 'self-defense' depended upon who brought on the difficulty.

"(4) Because his honor erred in charging the jury, without clear qualification, that the question of 'self-defense' depended upon 'who fired the first shot,' and in charging said jury that, 'If Watson fired the first shot, then he cannot open his mouth and plead self-defense'; whereas, he should have charged the jury that the defendant, Watson,

could plead 'self-defense,' even though he fired the first shot, if said shot was fired because of a reasonable belief by defendant that he was in imminent danger of death or great bodily harm at the hands of deceased.

"(5) Because his honor erred in charging the jury, without clear qualification, as follows, 'If the other man fired the first shot, if the peril was there imminent and the controversy was on, Watson had the right to shoot to save himself'; the reasonable inference from said charge being, in the absence of clear qualification, or explanation, that the defendant had no right to shoot unless the other man fired the first shot.

"(6) Because his honor erred in charging that 'self-defense' is a matter of 'who hit the first lick,' or 'who fired the first shot'; said charge being an abstract proposition, without qualification, explanation, or illustration, and therefore incomplete and misleading.

"(7) Because the whole charge of his honor on the question of 'self-defense' was incomplete, erroneous, inadequate, and misleading to the jury."

Williams & Williams, of Lancaster, for appellant. Solicitor Cobb, of Columbia, M. L. Smith, of Camden, and J. C. Massey, of Kershaw, for the State.

GARY, C. J. The defendant, O. H. Watson, was indicted for the murder of T. E. Gregory, and upon his trial the jury rendered a verdict of guilty with a recommendation to mercy, whereupon he was sentenced to imprisonment for a period of four years, and thereafter appealed upon exceptions which will be reported.

[1] The case of *State v. Hasty*, '76 S. C. 105, 56 S. E. 669, shows that the first exception cannot be sustained. In that case the court, having under consideration a similar question, used the following language: "The presiding judge ruled that the testimony therein mentioned was irrelevant, and that it was not competent for the purpose of contradiction, as it related to a collateral question. This court is satisfied that the testimony was not only irrelevant, but that it was not admissible for the purpose of discrediting the witnesses for the state therein mentioned."

[2] The second exception must be overruled, for the reason that it has not been made to appear that there was an abuse of discretion on the part of his honor the circuit judge.

[3] The other exceptions assigning error, on the part of his honor the presiding judge, in regard to the law of self-defense, must be sustained. The presiding judge charged the jury that, if Watson fired the first shot, then he cannot open his mouth and plead self-defense.

The testimony as to whether the defendant

or the deceased provoked the difficulty was conflicting.

[4] The rule in regard to self-defense is thus stated in the case of *State v. McGreer*, 13 S. C. 464: "To make out a case of self-defense, two things are necessary: (1) The evidence should satisfy the jury that the accused actually believed that he was in such immediate danger of losing his life, or sustaining serious bodily harm, that it was necessary, for his own protection, to take the life of his assailant. (2) That the circumstances in which the accused was placed were such as would, in the opinion of the jury, justify such a belief in the mind of a person, possessed of ordinary firmness and reason. It is not a question which depends solely upon the belief which the accused may have entertained; but the question is what was his belief, and whether, under all the circumstances, * * * the jury think he ought to have formed such belief." The charge of the presiding judge was not in harmony with the foregoing definition.

It is the judgment of this court that the judgment of the circuit court be reversed, and that the case be remanded for a new trial.

WOODS, HYDRICK, WATTS, and FRASER, JJ., concur.

(94 S. C. 473)

GEER v. EARLE et al.

(Supreme Court of South Carolina. May 19, 1913.)

MUNICIPAL CORPORATIONS (§ 181*)—OFFICERS—VACANCY—TERM.

Under Act Feb. 20, 1907 (25 St. at Large, p. 813), amending Act March 2, 1899 (23 St. at Large, p. 183), providing that, on the happening of a vacancy in office of police commissioners, who were elected for four years, the city council would appoint an incumbent "until the succeeding regular election," where a police commissioner resigned before two years had expired, and before a general election, which occurred at the two-year period, and the vacancy was filled by the council, the appointee held only until the next succeeding election, and not for the unexpired term of four years.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. §§ 458-465; Dec. Dig. § 181.*]

"To be officially reported."

Petition in the Supreme Court by John M. Geer, Police Commissioner of the City of Greenville, against Wilton H. Earle and others constituting the City Executive Committee. Petition dismissed.

McCullough, Martin & Blythe, of Greenville, for plaintiff. Wilton H. Earle, of Greenville, for respondents.

GARY, C. J. This is an application to the court, in the exercise of its original jurisdiction, for a writ of certiorari, upon an

agreed statement which contains the following facts:

1. "By an act of the Legislature approved the 2d of March, 1899, it is provided 'that on or after the first Tuesday in April, 1899, there shall be established a board of police commissioners in the city of Greenville, consisting of five upright and intelligent citizens.'"

2. "By an amendment to said act approved February 20, 1907, the above-mentioned act of 1899 was amended, by striking out sections 2 and 5 thereof, and inserting in lieu thereof the following two provisions:

"At the next regular election, for the purpose of electing a mayor and alderman for the city of Greenville, there shall be elected by the qualified electors thereof, five members of the board of police commissioners, two of whom shall be elected for two years, or until their successors shall be elected and qualified; at each subsequent regular city election, successors to the members of said board of police commissioners, whose terms have expired shall be elected for a term of four years.

"All vacancies in said board caused by death, resignation, or otherwise, shall be filled by election by the city council of Greenville, until the succeeding regular election."

3. "Under the aforesaid act of 1907 five members of the board of police commissioners were elected, at the regular election in September, 1907, two of them for two years and three of them for four years, in accordance with the statute. At the next election in September, 1909, two members of said board, L. O. Cauble and W. L. Mauldin, were elected for a term of four years, in accordance with the statute, and their terms will expire during the present year, their successors having to be selected at the regular election September, 1913. At the election following the 1909 election, to wit, that election occurring in September, 1911, Frank Hammond, A. McBee, and J. D. Gilreath were elected members of the said board for a term of four years in accordance with the statute. Some time after his election, the said J. D. Gilreath resigned from the said board of police commissioners, and the said resignation was duly accepted and became effective, the vacancy being filled by the said city council of Greenville by the election of T. O. Lawton. That during the year 1913 the said T. O. Lawton, after serving some months, moved out of the city of Greenville, S. C., and resigned from the said board of police commissioners, his resignation being accepted and becoming duly effective, and the vacancy was filled by the said city council, by the election by the city council of Jno. M. Geer, plaintiff herein."

4. "The defendants, Wilton H. Earle, W. C. Beachman, H. J. Haynesworth, J. I. Westervelt, G. R. Busbee, B. M. Shuman, J. W. Goddard, R. F. Watson, A. K. Park, J. I. West, M. B. Leach, and J. A. McDaniel, are

the members of and constitute, the City Democratic Executive Committee, under the laws of the state of South Carolina, governing primary elections, and under the constitution and rules of the Democratic party are charged with the duties of providing and arranging for city elections in the said city, of declaring what officers shall be voted for, and of providing ballots and arranging details for the election of such officers, including members of said board of police commissioners. And under our political system in the state of South Carolina, nomination at the Democratic primary election for such officers are practically equivalent to election."

5. "That the defendants as constituting the committee, as aforesaid, have ordered a Democratic primary election to be held for nominees of the Democratic party, for the general election for the city of Greenville, which will be held in September, 1913, of two members of the said board of police commissioners instead of three, two to succeed Messrs. Cauble and Mauldin, whose terms properly expire during the present year, and one to succeed plaintiff, who alleges that his term does not properly expire until the year 1915, and that the decision and determination of the said committee are in derogation of his right to the peaceful possession of his office, as a member of the said board of police commissioners, and contrary to the provisions of the law made and provided in such case. The members of the committee, admitting their doubt as to the proper construction of the law covering this point, have deemed it better to order this election of a successor to the said Jno. M. Geer, and have agreed that the matter be submitted without controversy to this court, to determine whether the said Jno. M. Geer is correct in his contention, and the said Geer herein claims the right to review the action of said committee by way of certiorari, and prays that said committee be enjoined from ordering, arranging, and providing for the election of his successor until the regular election for the year 1915."

The only question in the case is whether the successor of Gilreath is to be elected at the next general election for city officers (which is to be held in September, 1913), or at the subsequent election, when his successor would have been elected if he had remained in office until that time. In other words, whether "succeeding regular election" has reference to the next regular election for the particular office in question.

The contention of the defendants' attorney, is thus stated in his argument: "The scheme of the General Assembly with reference to police commissioner undoubtedly is that three should be elected by the people at one time for four years, and two years later two should be elected by the people for four years, and this probably because the desire

of the lawmakers is that this office should be as continuous as possible. The contention of defendants recognizes this scheme, the view being that upon the resignation of Gilreath, Lawton was elected only until the next general city election, and, he having resigned before this time, plaintiff was elected by the council only until the next general city election, and that in September, 1913, successors to the two commissioners who were elected in 1909 will be elected for a term of four years, and that the successor to plaintiff will have to be elected in September, 1913, for a term of two years. In other words, the successor to plaintiff to be elected by the people this year will be for the unexpired term of Gilreath, who was elected in 1911 for a term of four years. The matter of electing in 1913 two commissioners for four years and one for two years will merely be following the method adopted in 1907 under the amendatory act of 1907, when three were elected for four years and two for two years."

The scheme of the statute was that the members of the board should be so classified as to produce rotation in office, and that the members should be elected by the people as far as possible; hence the provision that all vacancies caused by death, resignation, or otherwise should be filled by the city council, not for the unexpired term, but until the succeeding general election.

In order that this scheme should be carried into effect, all minor provisions must be construed to be subordinate and subservient to the leading design. In the language of Mr. Justice Hudson in the case of *Simpson v. Willard*, 14 S. C. 191: "The supplying of vacancies in unexpired terms, is incidental to the preservation of an existing term of office, and hence must be so conducted and carried out as not to derange, but to preserve this fundamental and leading design of succession and regular rotation." By this construction alone, can full force and effect be given to the scheme contemplated by the statute.

It is the judgment of this court that the plaintiff is not entitled to the relief for which he prays, and that the petition be dismissed.

WOODS, HYDRICK, WATTS, and FRASER, JJ., concur.

(94 S. C. 439)

STATE v. McINTOSH et al.

(Supreme Court of South Carolina. May 12, 1913.)

1. CRIMINAL LAW (§ 398*)—COMPELLING ACCUSED TO BE A WITNESS AGAINST HIMSELF—SHOE TRACKS.

To compel an accused to give up his shoes for the purpose of comparison with tracks made near the scene of the murder and the admission of the result of the comparison do not violate Const. art. 1, § 17, providing that

no person shall be compelled in a criminal case to be a witness against himself.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 871-874; Dec. Dig. § 393.*]

2. WITNESSES (§ 389*) — CONTRADICTION OF STATE'S OWN WITNESS—INCONSISTENT STATEMENTS.

Where, in a prosecution for murder, a witness for the state on cross-examination denies the truth of a statement made by him to the sheriff before trial, claiming that it was procured by duress, the sheriff may not prove the statement to contradict the witness.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. §§ 1243-1245; Dec. Dig. § 389.*]

3. CRIMINAL LAW (§ 418*)—EVIDENCE—STATEMENTS IN PRESENCE OF ACCUSED.

Statements made by a person in the presence of accused are not admissible where accused denies their truth.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1120, 1121; Dec. Dig. § 418.*]

4. CRIMINAL LAW (§ 696*)—EVIDENCE—CREDIBILITY.

Where, in a prosecution for murder, a witness for the state implicates the accused, but on cross-examination says that he made the statement to save himself, it is not error to refuse to strike the testimony, as it affected his credibility only.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1639-1644; Dec. Dig. § 696.*]

Appeal from General Sessions Circuit Court of Florence County; S. W. G. Shipp, Judge.

"To be officially reported."

Harry McIntosh and John Williams were convicted of murder, and they appeal. Reversed.

McNeill & Oliver, Willcox & Willcox, and Henry E. Davis, all of Florence, for appellants. Walter H. Wells, of Florence, and J. Monroe Spears, of Darlington, for the State.

HYDRICK, J. On March 6, 1912, Andrew Jackson, a little boy eight or ten years old, of the city of Florence, disappeared. On the second day thereafter his dead body was found in an empty box car on the repair tracks of the railroad company. The circumstances indicated that he had been murdered. The shoe tracks of a man were found leading to and from the car. They showed certain peculiar characteristics by which it was thought the shoe that made them might be identified. A few days after the discovery of the body, four colored boys, William Foxworth and Freddie McIntosh, and the defendants, Harry McIntosh and John Williams, were arrested and detained in the city jail on suspicion of being guilty of the murder. While they were in jail, the chief of police ordered the defendant Harry McIntosh to take off his shoe and give it to him, and he did so. The shoe was com-

pared with the tracks found near the car, and it was put on the foot of another person, who made a track beside one of them for the purpose of comparison. The shoe and testimony of the similarity of the track made by it to those going to and from the car was admitted in evidence against the objection of the defendant McIntosh.

After the four boys had been transferred to the county jail, William Foxworth and Freddie McIntosh made statements to the sheriff implicating the defendants. These statements were reduced to writing by the sheriff and signed by William and Freddie. The sheriff then took these boys into the presence of the defendants and read the statements over in their presence and hearing and asked William and Freddie if they were correct and true, and both said they were, but the defendants both said that they were false, and that the other boys had made them to exculpate and save themselves. At the trial the state put up William and Freddie as its witnesses. William's testimony was, with slight variation, according to his statement. He admitted, however, on cross-examination, that when he was first put in jail and asked if he knew anything about the murder he had denied any knowledge of it, and said his reason for doing so was that he was afraid he would get himself into it. He said also that the sheriff told him that, if he knew anything about it, it would be better for him to tell it, and that if he did not tell it and get himself out he (the sheriff) would get all four of them. Freddie denied the truth of his statement in every material particular, and swore that it had been extorted from him by fear and cruel treatment. The sheriff denied that the statements had been obtained by duress, and said that they were voluntary; but he admitted that, when he read them over in the presence of the defendants, both defendants said they were not true, and that the boys had made them to get out of it themselves. After William and Freddie had testified at the trial, the sheriff was allowed to prove their statements to him, and they were admitted in evidence, against the objection of defendants.

[1] The first exception assigns error in admitting in evidence Harry McIntosh's shoe and the testimony tending to show that the tracks at the car were made by it, on the ground that it violated the inhibition of the Constitution (section 17, art. 1) that no person "shall be compelled in any criminal case to be a witness against himself." The admission of the evidence did not violate the constitutional right of the defendant. In *State v. Atkinson*, 40 S. C. 363, 18 S. E. 1021, 42 Am. St. Rep. 877, certain pieces of newspaper taken from the room of the defendant, John Atkinson, which the witness had entered without authority of law, were

admitted in evidence for the purpose of showing that they corresponded with pieces of paper picked up at the scene of the homicide, which were supposed to have been the wadding of the gun with which the fatal shot was fired. Their admission was sustained. The court quoted with approval the following from 1 Cr. Ev. § 254a: "It may be mentioned in this place that though papers and other subjects of evidence may have been illegally taken from the possession of the party against whom they are offered, or otherwise unlawfully obtained, this is no valid objection to their admissibility, if they are pertinent to the issue. The court will not take notice how they were obtained, whether lawfully or unlawfully, nor will it form an issue to determine that question." See, also, *Adams v. New York*, 192 U. S. 585, 24 Sup. Ct. 372, 48 L. Ed. 575; *State v. Garrett*, 71 N. C. 85, 17 Am. Rep. 1; 30 A. & E. Enc. L. (2d Ed.) 1159.

[2, 3] The court erred in admitting the statements made to the sheriff by William Foxworth and Freddie McIntosh. They were not admissible to contradict the witness (*State v. McKay*, 89 S. C. 234, 71 S. E. 859), nor to corroborate them (*State v. Thomas*, 3 Strob. 269; *State v. Scott*, 15 S. C. 434; *State v. Gilliam*, 66 S. C. 419, 45 S. E. 6; *State v. McDaniel*, 68 S. C. 304, 47 S. E. 384, 102 Am. St. Rep. 661), nor as independent evidence, on the ground that they were made in the presence of the accused. Statements made in the presence of a party are generally admissible, if he remains silent, when they are made, and the circumstances are such that he can speak and naturally would or ought to respond to them. In such circumstances, his silence may afford ground for inferring that he acquiesces in the truth of the statements. But, where the situation is such that it would be improper for him to respond, statements made to him or in his presence are inadmissible. *State v. Senn*, 32 S. C. 392, 11 S. E. 292. So, also, if he positively and unequivocally denies the truth of such statements, as was done in this case, they are inadmissible. *Chanc. Mod. Ev. § 1421*; 12 Cyc. 423. The admission of such testimony would violate the rule against hearsay and permit proof of an issue by fabricated testimony.

[4] There was no error in refusing to strike out the testimony of William Foxworth given at the trial. The fact that he testified, on cross-examination, that he made the statement, which was introduced in evidence, to save himself went only to the credibility of his testimony, not to its admissibility.

As there must be a new trial, it would not be proper to discuss the testimony. It is enough to say there was no error in refusing to direct a verdict of acquittal as to the defendant John Williams. The assignments of

error in the charge are unsubstantial and cannot be sustained.

Reversed.

GARY, C. J., and WOODS, WATTS, and FRASER, JJ., concur.

(34 S. C. 478)

SEABOARD AIR LINE RY. CO. v. HEWLETT et al.

(Supreme Court of South Carolina. May 20, 1913.)

1. REPLEVIN (§ 119*) — BOND — CONDITION — "FOR PROSECUTION OF ACTION" — BREACH.

The condition of the bond, given by plaintiff in an action of claim and delivery, "for the prosecution of the action," is breached on the action being dismissed, though on motion of defendant therein, for lack of jurisdiction.

[Ed. Note.—For other cases, see *Replevin*, Cent. Dig. §§ 470-478; Dec. Dig. § 119.*]

2. REPLEVIN (§ 133*) — BOND — ACTION FOR BREACH — COMPLAINT.

The complaint, in an action on the bond given by the plaintiff in an action of claim and delivery, alleging the institution of the action of claim and delivery, the giving of the bond (a copy being attached to and made a part of the complaint, and showing the condition to prosecute the action), the taking of the property from the defendant in such action, and its delivery to the plaintiff therein, in consideration of the giving of the bond, and the dismissal of such action, is sufficient to entitle plaintiff, in the action on the bond, to rely on the failure to prosecute the action of claim and delivery as a breach of the bond, though the chief reliance of the complaint seems to be failure to return the property in accordance with an alleged judgment therefor, which in fact was never rendered, and could not have been rendered because the dismissal was for want of jurisdiction.

[Ed. Note.—For other cases, see *Replevin*, Cent. Dig. §§ 520-526; Dec. Dig. § 133.*]

3. APPEAL AND ERROR (§ 232*) — REVIEW — MATTER NOT URGED BELOW.

The complaint and proof, in an action on a bond given by the plaintiff in an action of claim and delivery, entitling plaintiff to recover for breach of the condition "for prosecution of the action," granting defendant's motion to direct a verdict because plaintiff had proved no judgment for return of the property, was affirmative error, which will avail plaintiff on appeal, though in the trial court he merely resisted the motion on the ground on which it was made, and did not there urge that the verdict could not be directed because there was allegation and proof of breach of the condition to prosecute.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 1351, 1368, 1426, 1430, 1481; Dec. Dig. § 232.*]

4. REPLEVIN (§ 124*) — BOND — BREACH — DAMAGES.

For breach of the bond given by plaintiff in an action of claim and delivery, recovery can have been only for such damages as defendant sustained by the taking of the property from its possession; so where it was merely holding the property for demurrage charges, it can recover only such amount as is found was due it for demurrage.

[Ed. Note.—For other cases, see *Replevin*, Cent. Dig. §§ 487-497; Dec. Dig. § 124.*]

Gary, C. J., and Fraser, J., dissenting.

Appeal from Common Pleas Circuit Court of Barnwell County; S. F. Rice, Judge.

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

Action by the Seaboard Air Line Railway Company against J. H. Hewlett and another. From a judgment on a verdict directed for defendants, plaintiff appeals. Reversed.

Harley & Best, of Barnwell, and E. L. Craig and Lyles & Lyles, all of Columbia, for appellant. J. M. Patterson, of Allendale, for respondents.

HYDRICK, J. The defendant Hewlett brought an action of claim and delivery in the court of a magistrate against the plaintiff, Seaboard Air Line Railway Company, to recover possession of a car of cotton seed, which the company claimed the right to hold for demurrage charges, amounting to \$21. Hewlett gave bond, as required by statute, conditioned, among other things, for the prosecution of said action, and the seed was taken from the company and delivered to him. Upon the call of the case for trial it was dismissed, on motion of the Railway Company, on the ground that the magistrate had no jurisdiction; the particular ground being that the day of trial was fixed in the summons 21 days after the day of service, instead of on a day *within* 20 days thereafter, as required by the statute. The Railway Company then brought this action on the bond. The circuit court held that no breach of the condition of the bond had been proved, and directed a verdict for the defendants.

[1] While, in some respects, the case of *Elder v. Greene*, 34 S. C. 154, 13 S. E. 323, is like the present case, there is at least one important difference. It appears, from the report of that case, that the condition of the bond there sued on was "for the return to the defendants of the said property, or so much thereof as shall be taken by virtue of the said affidavit and requisition thereupon indorsed, if a return thereof shall be adjudged." It will be observed that the bond in that case was not conditioned for the prosecution of the action. Therefore the court held that, as the condition of the bond was "for the return to the defendants of the said property, * * * if a return thereof shall be adjudged," and as the trial justice had no jurisdiction to order the return of the property, his order to that effect was a nullity, and, no return thereof having been legally adjudged, there had been no breach of the condition of the bond. Nevertheless, in order that the parties might not be denied the opportunity of trying their right and title to the property in dispute, and that injustice might not be done, the court remanded the case, with leave to the plaintiffs to apply for an amendment of their complaint so as to make the action one for trespass for the illegal seizure of the property rather than an action on the bond, which it was held to be.

In this case, however, one of the conditions of the bond was "for the prosecution of the action," so that the question here is

whether the dismissal of the action of claim and delivery for lack of jurisdiction, even though it was done on motion of the defendant in that action (plaintiff here), was a breach of the condition of the bond. That question has been conclusively answered in the affirmative by this court in *Alderman v. Roesel*, 52 S. C. 162, 29 S. E. 385, where an order of discontinuance of an action of claim and delivery was taken by the plaintiff, who had given bond to prosecute the action. The court said: "Is such discontinuance of an action a breach of the condition of the bond to prosecute? To prosecute an action, so far as concerns the matter in hand, is to carry it on to final effect, and so the bond in question is conditioned to carry on the action to effect. Where a plaintiff abandons his action, fails to prosecute it, discontinues it on his motion, or where it is dismissed for want of prosecution, there is a breach of the condition to prosecute." In 34 Cyc. 1578, it is said: "A dismissal of such a suit is held to constitute a breach of the bond, entitling the obligee to an action for the return of the property or its value, *although such dismissal was ordered on his own motion for defect in the writ, for want of jurisdiction, or for failure of plaintiff to prosecute*" (italics added). To the same effect is 24 A. & E. Enc. L. (2d Ed.) 539.

From the foregoing statement of the law, which is well supported by the authorities, it appears that it makes no difference that the action of claim and delivery was dismissed on motion of the defendant, and there is no reason why that fact should prejudice the defendant's right of action on the bond. If the plaintiff in claim and delivery should fail to prove his right to the possession of the property, and for that reason be nonsuited, on motion of defendant, should defendant, on that account, be denied the protection of the bond which the statute required the plaintiff to give as a prerequisite of his being allowed to take the property from his possession? The bond is required upon the supposition that the plaintiff might have no case, or, having one, might fail to prove it. Or, suppose the plaintiff brings his action in a court which has no jurisdiction, gives bond, and takes possession of defendant's property, must defendant submit to the trial of the case in a court whose judgment would be a nullity and could not be pleaded in bar of another action at the peril of being told, if he moves to dismiss the action for want of jurisdiction, that, because he has done so, he has no right of action on the bond? Such a holding would enable a plaintiff to take advantage of his own wrong, and get possession of a defendant's property without giving him that protection which the law requires.

[2, 3] It is said, however, that the breach of the condition to prosecute the action should not be allowed to avail appellant, because no such breach was alleged, or proved, or relied

upon in the court below. It is true that the failure to prosecute the action was not stressed either in the allegations of the complaint, in evidence, or in the contentions of the plaintiff in the circuit court. The gravamen of plaintiff's complaint seems to have been the failure of defendant to return the property in accordance with an alleged judgment for the return thereof. Upon this ground, the plaintiff utterly failed to make out a case, because the uncontradicted evidence was that there was no judgment for the return of the property. Indeed, there could not have been any such judgment, because the magistrate held that he had no jurisdiction, and there was no appeal from his ruling. *Elder v. Greene*, supra.

The allegations of the complaint, however, were quite sufficient to entitle plaintiff to rely upon the failure to prosecute the action as a breach of the bond. The complaint alleges the institution of the action of claim and delivery in the magistrate's court, the giving of the bond in accordance with the provision of the statute (and a copy of the bond is attached to the complaint, as an exhibit, and made a part of the complaint, and in it there appears the condition to prosecute the action), the taking of the property from defendant, and the delivery thereof to plaintiff, in consideration of the giving of the bond, and the dismissal of the action. To hold that these allegations are not sufficient to entitle plaintiff to rely upon the failure to prosecute the action as a breach of the bond would commit this court to a strict and technical construction of a pleading, contrary to the spirit and mandate of the Code of Procedure, as well as the previous decisions of the court.

It must not be forgotten, also, that the defendants herein, and not the plaintiff, selected the battle ground in the circuit court; for the defendants moved for the direction of the verdict on the ground that plaintiff had failed to prove a judgment for the return of the property, and it was upon that ground that the motion was granted. It is true that plaintiff did not take the position on circuit that the verdict could not be directed, because there was allegation and proof of a breach of the condition to prosecute, but merely resisted the motion of defendants on the ground upon which it was made. But this cannot avail respondent, because the error here complained of was one of commission and not one of mere omission; and the rule that errors of omission will not ordinarily be allowed to avail a party in this court, unless the matter complained of was relied upon or brought to the attention of the judge in the circuit court, does not apply. This is more like the case of a demurrer to a complaint for insufficiency on a particular ground, which may be well taken as to that ground, yet if the complaint states any cause of action, this court has frequently held that it is error to

dismiss it for insufficiency, though it may not state facts sufficient to constitute the particular cause of action which the complaint shows that the plaintiff intended to set up. So it has been held that when the facts alleged and proved show that plaintiff is entitled to *any* relief, it is error to grant a nonsuit or direct a verdict for defendant. In such cases, it is the duty of the court to grant the relief which under the allegations and proof the plaintiff is entitled to according to law.

[4] It appears from the record that the plaintiff contended on circuit that it was entitled to recover the penalty of the bond. In an action like this the plaintiff would be entitled to recover only such damages as it sustained by reason of the taking of the property from its possession; for instance, in this case plaintiff is entitled to recover only such an amount, if any, as may be found to be due to it by the defendant Hewlett for demurrage charges on the car load of seed in question, for the collection of which it was holding the seed. *Alderman v. Roesel*, supra; 24 A. & E. Enc. L. (2d Ed.) 540.

For these reasons I think the judgment should be reversed.

WOODS and WATTS, JJ., concur.

FRASER, J. I dissent. This is an action commenced in the court of common pleas, on a bond given in claim and delivery proceedings in a magistrate's court, in which the respondent Hewlett was plaintiff, the respondent Harter was constable, and the appellant company was defendant.

The defendant moved to dismiss the proceedings in the magistrate's court, on the ground of want of jurisdiction, as the summons was returnable within 21 days instead of 20 days. There is some confusion in the record, but the magistrate sustained the motion and dismissed the proceedings for want of jurisdiction, and there was no appeal. The bond was for \$200, and the appellant brought suit on the bond in the court of common pleas. The following is the bond:

"Undertaking of Plaintiff's Sureties on Claim of Delivery of Personal Property.

"Whereas the plaintiff in this action has made an affidavit that the defendant therein wrongfully detains certain personal property in the said affidavit mentioned, of the value of one hundred and no dollars, and the plaintiff claims the immediate delivery of such property, as provided by law: Now, therefore, and in consideration of the taking of said property, or any part thereof by W. J. Harter, special constable of the county of Barnwell, by virtue of the said affidavit, and the requisition thereupon indorsed, we, the undersigned, A. J. Harter, J. H. Hewlett, do hereby undertake to be bound to the defendant in the sum of two hundred and no

dollars for the prosecution of the action of the plaintiff in the case of *J. H. Hewlett v. Seaboard Air Line Ry. Co.* against the defendant for wrongfully detaining the said property, for the return to the defendant of said property, or so much thereof as shall be taken, by virtue of the said affidavit, and requisition thereupon indorsed, if a return thereof shall be adjudged, and for the payment to Seaboard Air Line Ry. Co. of such sum as may, for any cause, be recovered in this action against plaintiff.

"Dated December 10, A. D. 1902.

"J. H. Hewlett, [L. S.]

"A. J. Harter, M. D. [L. S.]"

The complaint set out the bond, and alleged: "(5) That on or about the 31st day of December, 1900, said cause was called for a hearing before said magistrate and was dismissed, and it was adjudged that the said property was wrongfully and unlawfully taken out of the possession of said Seaboard Air Line Railway, and it was adjudged that the same should be returned forthwith to it, the plaintiff herein."

The case shows that the magistrate dismissed the proceedings, but did not order a return of the property. The circuit judge directed a verdict for the defendants (respondents) on the ground that no breach of the bond had been shown, and the plaintiff appealed upon four exceptions, which will be considered as made.

Exception 1: "(1) That his honor erred in directing a verdict for the defendants when there was evidence that the condition of the bond, set forth in the complaint and introduced in evidence, had been breached, in that the property taken under the claim and delivery proceedings, by virtue of the affidavit in such proceedings, had not been returned to the Seaboard Air Line Railway as provided in said bond." This exception cannot be sustained. The bond was "for a return to the defendant of said property * * * if a return thereof shall be adjudged." There was no adjudication for the return; and, under the case of *Elder v. Greene*, 34 S. C. 154, 13 S. E. 323, there could not have been. In this respect there has been no breach of the bond, and this exception is overruled.

Exception 2: "(2) That his honor erred in directing a verdict for the defendants when the evidence tended to show that there had been a breach of the bond given in the claim and delivery proceedings, whereby J. H. Hewlett undertook to prosecute the action against the Seaboard Air Line Railway Company for wrongfully detaining the property taken in said claim and delivery proceedings." This exception cannot be sustained. *Alderman v. Roesel*, 52 S. C. 162, 29 S. E. 385, is not applicable here. That case says, at page 164, of 52 S. C., at page 386 of 29 S. E.: "Where a plaintiff abandoned his action, fails to prosecute it, discontinues it

on his own motion, or where it is dismissed for want of prosecution, there is a breach of the condition to prosecute. * * * A voluntary discontinuance by him is no defense in such case." This case shows that the case was dismissed on appellant's motion. What action Respondent Hewlett could have brought is not apparent. He certainly could not have brought a possessory proceeding for property already in his possession. Besides the breach alleged is "failure to return the property, and not failure to prosecute." There is not only no allegation of a failure to prosecute, but there is no evidence of such failure. The question was not made in the circuit court, and cannot prevail here.

Exception 3: "(3) That his honor erred in directing a verdict for the defendants because the complaint contained sufficient allegations to sustain an action for trespass for the wrongful and unlawful seizure of the cotton seed under the proceedings before the magistrate, and there was evidence tending to sustain this action, and therefore the case should have been submitted to the jury." This exception cannot be sustained. The appellant stood squarely on the bond. There was no motion to amend. The appellant claimed the right to possession, and based his right on an order that was not, and could not, in law have been made. The right to treat this as an action for trespass was not claimed in the circuit court, and cannot be raised here. Appellant is still relying on the bond. The change to an action for trespass would be such an entire change of the whole case that this court does not feel warranted in allowing it.

The fourth exception, not being considered in argument, is deemed abandoned. The suggestion of respondent that this court give judgment absolute for the four or five dollars admitted to be due cannot be accepted, as the admission is only by respondent. The case shows that appellant claims more than that sum.

The judgment of this court is that the judgment of the circuit court be affirmed.

GARY, C. J., concurs in the dissent.

(140 Ga. 79)

CULLEN v. TYLER.

(Supreme Court of Georgia. May 16, 1913.)

(Syllabus by the Court.)

APPEAL AND ERROR (§ 977*)—FIRST GRANT OF NEW TRIAL—DISCRETION OF COURT.

There was no abuse of discretion in granting a first new trial in this case. Civ. Code 1910, § 6204.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3860-3865; Dec. Dig. § 977.*]

Error from Superior Court, Burke County; H. C. Hammond, Judge.

Action between W. B. Cullen and O. M.

Tyler. From the judgment, Cullen brings error. Affirmed.

Wm. H. Davis and C. B. Garlick, both of Waynesboro, for plaintiff in error. E. L. Brinson and H. J. Fullbright, both of Waynesboro, for defendant in error.

HILL, J. Judgment affirmed. All the Justices concur.

(140 Ga. 75)

CEMENT STONE & TILE CO. v. McALLA.
(Supreme Court of Georgia. May 16, 1913.)

(Syllabus by the Court.)

REFUSAL OF NEW TRIAL.

The petition stated a cause of action, the evidence authorized the verdict, and the court did not abuse its discretion in refusing a new trial.

Error from Superior Court, Fulton County; W. D. Ellis, Judge.

Action between the Cement Stone & Tile Company and John McCalla. From an adverse judgment, the company brings error. Affirmed.

Edgar Latham, of Atlanta, for plaintiff in error. Scott & Davis, of Atlanta, for defendant in error.

EVANS, P. J. Judgment affirmed. All the Justices concur.

(140 Ga. 82)

OSWALD et al. v. JOHNSON et al.
(Supreme Court of Georgia. May 15, 1913.)

(Syllabus by the Court.)

1. PARTITION (§ 106*) — CONFIRMATION OF SALE—NECESSITY—SEASONABLE OBJECTIONS—RESALE.

In the partition of land under Civ. Code 1910, § 5358 et seq., where the land cannot be divided into parcels, and it is sold pursuant to an order of the court, such sale is subject to confirmation by the court. Any party in interest may file objections to the confirmation of the sale, at the term of the court to which the commissioners conducting the sale make their report, if done before confirmation. If the matter urged in the objections be such as to show the sale to have been unfair or inequitable to the parties, the court will refuse to confirm it and order a resale.

(a) The court erred in dismissing the objections to the sale on the ground that they were presented too late, and that the sale could not be attacked in the partition proceedings under the above Code sections.

[Ed. Note.—For other cases, see Partition, Cent. Dig. §§ 853-361; Dec. Dig. § 106.*]

(Additional Syllabus by Editorial Staff.)

2. JUDICIAL SALES (§ 39*)—VALIDITY—INADEQUACY IN PRICE.

Inadequacy of price is not per se sufficient ground for setting aside a judicial sale under an interlocutory decree, unless so gross as, when combined with other circumstances, to amount to fraud; but if it be great it is of itself a strong circumstance to evidence fraud.

[Ed. Note.—For other cases, see Judicial Sales, Cent. Dig. § 77; Dec. Dig. § 39.*]

Error from Superior Court, Screven County; B. T. Rawlings, Judge.

Action by Mrs. L. A. Johnson and others against J. L. Oswald, guardian, and others. Decree for plaintiffs, and defendants bring error. Reversed.

Mrs. L. A. Johnson applied for a partition of a tract of land owned in common by herself and others. It was represented to the court that it was impossible to have partition by metes and bounds, and the court ordered a sale of the land by three commissioners. The commissioners made a report of the sale, and the plaintiffs in error offered to file objections against its confirmation. The court sustained an oral demurrer to the objections made to the fairness of the sale and to the motion against its confirmation. A final decree was rendered, apportioning the net proceeds of the sale, and exception is taken to such final judgment and certain interlocutory rulings.

White & Lovett, of Sylvania, for plaintiffs in error. E. K. Overstreet, of Sylvania, for defendants in error.

EVANS, P. J. (after stating the facts as above). [1] The controlling point arises out of the exceptions to the rulings of the court refusing to consider objections to the fairness and validity of the sale of the property sought to be partitioned, and to its confirmation by the court. When the exceptors offered their written objections to the validity of the sale, an oral demurrer thereto was sustained, on the ground that the objection to the sale and the motion to withhold confirmation was presented too late, and that the sale could not be set aside in this proceeding. This brings up the question whether it is permissible, under the statute for the partition of land, to contest in that proceeding the validity of the sale made under the order of the court, or must a dissatisfied cotenant go into equity for that purpose.

The Code provides that where land is held in common one or more of the co-owners, upon giving notice of their intention, may apply to the superior court for the appointment of partitioners, who shall divide the land according to the interest of the respective owners therein. Whenever application is made and either of the parties in interest shall make it satisfactorily appear to the court that a fair and equitable division of the land cannot be made by metes and bounds, the court shall order a sale of the land, and shall appoint three persons to conduct it under such regulations and upon such just and equitable terms as the court may prescribe, which sale shall take place on the first Tuesday of the month, at the place of public sales of the county in which the land is situated, after an advertisement of such sale in some public gazette of this state, once a week for four weeks. After

the sale of the land, the commissioners conducting it shall return their proceedings to the court, and the court shall order the proceeds of the sale to be divided among the several claimants ratably in proportion to their respective interests, after deducting the expenses of the proceedings. Upon the sale of the land, the parties in interest shall execute a title to the purchaser, and if any fail or refuse to do so, the commissioners, or a majority of them, shall execute the deed of conveyance, which deed will be as valid and binding in law and equity as if made by the parties themselves. In any extraordinary case, not covered by the Code sections, the court may frame its proceeding and order so as to meet the exigency of the case, without forcing the parties into equity. At the term of the court at which the application is made, or at the term next after the partitioners have made their return, any of the interested parties may file objections to the right of the applicant to have partition, or to the return of the partitioners, and may by way of defense show any good matter in bar of the partition, or may show that the demandant has not title to so much as is allowed and awarded to him by the partitioners, or to any part of the land, and an issue made by such objection shall be tried by a jury. Civil Code, §§ 5358-5368.

The statute evinces a legislative purpose to afford an effective mode for the partition of land, without forcing the parties into equity. Power is reserved to the court in ordering a sale of the land to prescribe reasonable regulations and equitable and just terms in the conduct of the sale. These features of the statute, as well as the general power of the court over sales, which are to be the basis of further action in the same proceeding, indicate not only the power, but the propriety and necessity, of the court's confirmation of the sale before dividing out the proceeds amongst the interested parties.

It is argued that it is only where the decree authorizing a sale is interlocutory that confirmation is necessary, and that the order directing a sale of the property for division of the proceeds is final in its nature. It is true that it has been decided that where an application is made to the superior court for the partition of land by sale, and the judge, after hearing the evidence, appoints commissioners, and orders them to sell the land, such judgment is so far final as to authorize the objecting party to bring the case to the Supreme Court for review of that judgment. *Lochrane v. Equitable Loan & Security Co.*, 122 Ga. 433, 50 S. E. 372. But that holding was put upon the peculiar provisions of the statute as affording a remedy for exception to such judgment, and not as dispensing with the necessity of confirmation of the sale. The power of the court to impose regulatory terms in the conduct of the sale, and the statutory requirement of a report of the persons conduct-

ing the sale as a precedent step to the division of the proceeds, sufficiently make it appear that the legislative intent was to require a confirmation of the sale. Indeed, in this case the court expressly confirmed the sale in his order dividing the proceeds.

The objection urged against the sale was its unfairness and the gross inadequacy of the price at which it was sold by the commissioners. The plaintiffs in error are minors, who have a guardian, and owned a three-fortieth interest in the land. The purchaser at the sale and his wife owned $\frac{22}{120}$ of the land. It is alleged that the guardian was inadvertently misled by a conversation he had with the presiding judge into believing that he would be given notice when the sale would take place; that the land was worth \$8,000, and the purchaser at the commissioners' sale had offered to buy the interest of plaintiffs in error on the basis that the land was worth \$5,000; that the purchaser bid it off for the sum of \$2,000, which was the only bid made for the land; that the guardian of the plaintiffs in error is a man of means and is their uncle, and he would have bid on the land if he had been informed of the sale; that, although the plaintiffs in error had a guardian, the court appointed as their guardian ad litem a total stranger, who, notwithstanding he accepted the trust, did nothing to notify the plaintiffs in error or their guardian of the order for the sale of the land or the time it would be sold.

[2] Inadequacy of price is not per se sufficient to set aside a sale, unless it is so gross as, when combined with other circumstances, to amount to fraud; but if it be great it is of itself a strong circumstance to evidence fraud, and this is true where it is attended by any other fact showing the transaction to be unfair, or unjust, or against good conscience. *Parker v. Glenn*, 72 Ga. 637. This is the rule laid down by this court with respect to an execution sale, which does not require confirmation. How much greater, then, is the force of the rule when applied to a sale under an interlocutory decree? On demurrer we have to assume the truth of the averments of fact contained in the objections. According to these averments, the land is sold at one-fourth of its market value; the purchaser was a cotenant owning more than two-thirds of the land; the plaintiffs in error were inadvertently misled into believing that they would receive notice of the sale; and their guardian ad litem, the officer of the court appointed to look after their interests, wholly failed to inform them of the order directing the sale or the time it would occur. These facts are such as should appeal to the court to refuse to confirm a sale which works injustice to the plaintiffs in error, and which does not deprive the purchaser of any equity or right he has in the land. Under the circumstances, we think

the court erred in dismissing the objections to the confirmation of the sale.

Judgment reversed. All the Justices concur.

(140 Ga. 65)

SANDY CROSS GIN CO. v. DOVE.

(Supreme Court of Georgia. May 15, 1913.)

(Syllabus by the Court.)

APPEAL AND ERROR (§ 1015*)—REVIEW—QUESTIONS OF FACT—MOTION FOR NEW TRIAL.

No complaint that any error of law was committed upon the trial. There was evidence to authorize the verdict, and the court did not err in refusing a new trial.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3860-3876; Dec. Dig. § 1015.*]

Error from Superior Court, Franklin County; D. W. Meadow, Judge.

Action by John Dove, by his next friend, against the Sandy Cross Gin Company. Judgment for plaintiff, and defendant brings error. Affirmed.

Geo. L. Goode, of Carnesville, for plaintiff in error. J. C. Little and W. R. Little, both of Carnesville, for defendant in error.

FISH, C. J. Judgment affirmed. All the Justices concur.

(140 Ga. 46)

MIZELL & BRO. v. SATILLA TURPENTINE CO.

(Supreme Court of Georgia. May 15, 1913.)

(Syllabus by the Court.)

TRIAL (§ 159*)—NONSUIT—INSUFFICIENCY OF EVIDENCE.

The evidence submitted in behalf of the plaintiff failing to make out a prima facie case, a nonsuit was properly granted.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 341, 359-367; Dec. Dig. § 159.*]

Error from Superior Court, Charlton County; T. A. Parker, Judge.

Action by Mizell & Bro. against the Satilla Turpentine Company. Judgment of nonsuit, and plaintiffs bring error. Affirmed.

J. L. Sweat, of Waycross, and W. M. Oiliff, of Folkston, for plaintiffs in error. Wilson, Bennett & Lambdin, of Waycross, for defendant in error.

HILL, J. Judgment affirmed. All the Justices concur.

(140 Ga. 45)

TAYLOR v. BANK OF TIFTON.

(Supreme Court of Georgia. May 15, 1913.)

(Syllabus by the Court.)

CLAIMS ON EXECUTION.

This is a companion case to that of Taylor v. Brown & Co., 77 S. E. 1062, decided April 18, 1913, in which the facts and assignments of error are the same, and the rulings made in that case are controlling in this.

Error from Superior Court, Tift County; W. E. Thomas, Judge.

Action by the Bank of Tifton against C. L. Taylor. Judgment for plaintiff, and on levy of execution S. A. Taylor interposed a claim on property found subject, and claimant brings error. Affirmed.

J. H. Price, R. Eve, J. S. Ridgill, and C. C. Hall, all of Tifton, for plaintiff in error. R. D. Smith, of Tifton, for defendant in error.

HILL, J. Judgment affirmed. All the Justices concur.

(140 Ga. 42)

MADDOX v. GILES.

(Supreme Court of Georgia. May 15, 1913.)

(Syllabus by the Court.)

FOUNDATIONS OF NEW TRIAL.

The grounds of the motion for new trial are not meritorious. There was evidence to authorize the verdict, and the court did not err in refusing a new trial.

Error from Superior Court, Butts County; R. T. Daniel, Judge.

Action between J. P. Maddox, administrator, and S. J. Giles. From the judgment, the administrator brings error. Affirmed.

J. F. Carmichael, of Jackson, and A. W. Lane, of Macon, for plaintiff in error. C. L. Redman and J. T. Moore, both of Jackson, and O. M. Duke, of Flovilla, for defendant in error.

FISH, C. J. Judgment affirmed. All the Justices concur.

(140 Ga. 16)

WILEY v. WOOTEN et al.

(Supreme Court of Georgia. May 14, 1913.)

(Syllabus by the Court.)

WILLS (§ 634*)—CONSTRUCTION—DISTRIBUTION OF REMAINDER INTEREST.

A testatrix devised certain realty to her son for and during his natural life, and at his death to go to his wife, if she survived him, for and during her natural life, and at the death of the survivor, either himself or wife, having no children or issue of children, "the said property at the period last aforementioned to be equally divided among my other children, according to the scheme mentioned in the second and third items of my said will." The second item of the will provided that certain lands be sold as soon after the death of testatrix as practicable, and the entire proceeds of the land, and the proceeds of the notes, accounts, and other personal property of the testatrix, be equally divided, share and share alike, between certain named children of testatrix. The third item of the will provided that "the above bequest to my children respectively shall be paid to their respective children in the event either one of my children shall die before I do; that is to say, each family of my grandchildren shall receive the legacy to which their parent would have been entitled, had he or she been in life at the time of my death." Mrs. A., a daughter of testatrix and one of the

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

devises under item 2 of the will, died before the testatrix, and before the life tenant or his wife. Mrs. A. had two children, who survived her. One of these, Florence, died after the testatrix, and after the wife of the life tenant, but before his death. Florence died testate, making several specific bequests, and gave the residue of her estate to her two named nieces, the children of her deceased brother, who are parties to this case. The life tenants under the will died without children. The property devised to them was then sold under authority, and the proceeds held by the administrator *de bonis non cum testamento annexo* undisposed of. The administrator filed his petition, asking direction of the court as to whether the two nieces of Florence were entitled to participate in the distribution of the funds in his hands arising as above stated. To the judgment of the court that they were so entitled exception was taken. *Held*, that under the will the granddaughter of the testatrix, Florence, took a remainder interest in the property devised to the life tenants named, contingent upon the event of their death without children, or issue of children.

(a) This interest was devisable, and, the life tenants having died without leaving children or issue of children, the nieces of Florence, as her devisees, are entitled to participate in the distribution of her remainder interest.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 1488-1510; Dec. Dig. § 634.*]

Error from Superior Court, Putnam County; J. B. Park, Judge.

Action by O. M. Wiley, administrator, against J. G. Wooten and others. Judgment for defendants, and plaintiff brings error. Affirmed.

Hall & Hall, of Macon, for plaintiff in error. W. B. Wingfield, of Eatonton, for defendants in error.

HILL, J. Judgment affirmed. All the Justices concur.

(130 Ga. 335)

INDEPENDENT ORDER OF GOOD SAMARITANS AND DAUGHTERS OF SAMARIA et al. v. MACK et al.

(Supreme Court of Georgia. May 13, 1913.)

(Syllabus by the Court.)

CORPORATIONS (§ 49*)—NAME—BENEFICIARY ASSOCIATIONS—BURDEN OF PROOF—NECESSARY PARTIES.

Where under the Act of 1909 (Civ. Code 1910, §§ 1993, 1994), an equitable petition was filed by two benevolent organizations, operating under charters, against another organization of like character, seeking to enjoin the latter from obtaining a charter from the superior court and from the use of a name which is colorable and of an imitative character of the distinctive and principal words in the name of the plaintiffs' organization and charters, and on the trial of the interlocutory hearing there was evidence tending to show that the charter of one of the plaintiffs had expired by lapse of time, and the other was antedated by the charters of at least two other similar organizations not parties to the suit, but which were chartered and operating in this state also under the distinctive words as a part of their name, as used by the plaintiffs, at the time of the filing of the petition for injunction, the judge did not err in refusing to grant the interlocutory injunction prayed for.

(a) In such a case, the burden is upon the

plaintiffs' organization asserting the right to the exclusive use of the distinctive name or words in question to show that such is the case. And it is not necessary that the organization actually entitled to the exclusive use of the name in question shall be a party litigant.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. § 137; Dec. Dig. § 49.*]

Error from Superior Court, Clarke County; O. H. Brand, Judge.

Action by Independent Order of Good Samaritans and Daughters of Samaria and others against James Mack and others. Judgment for defendants, and plaintiffs bring error. Affirmed.

The "State Grand Lodge No. 7 Independent Order of Good Samaritans and Daughters of Samaria," and the "Independent Order of Good Samaritans and Daughters of Samaria, United States of America," filed their joint equitable petition for injunction, etc., against the "Benevolent Order of Good Samaritans," and made substantially the following case: One of the plaintiffs, the Independent Order of Good Samaritans and Daughters of Samaria, United States of America, was incorporated under and by virtue of a general act of Congress of May 5, 1870 (16 Stat. 98, c. 80), filing their articles of incorporation on April 24, 1872, in the District of Columbia, and was duly organized as provided by law, and has since been using the above name continuously. The chief aim and object of this incorporation, as stated in its articles, being "to receive and carry forward the cause of temperance and benevolence in such a complete and effectual manner, that all may receive and enjoy its healing influences; to provide for the sick and distressed, the widow and the orphan in their affliction, to elevate the living and bury the dead of the society, and generally, by love seeking, may spread the principles of love, purity, truth and humanity throughout the globe." This plaintiff was rechartered on the 24th day of April, 1892. The other plaintiff, the State Grand Lodge No. 7 Independent Order of Good Samaritans and Daughters of Samaria, was chartered and incorporated under the laws of Georgia in the fall of 1908 by the superior court of Clarke county, and under and by authority of the Supreme Grand Lodge, having applied for and obtained its charter by permission and under the authority of the Supreme Grand Lodge. Prior to obtaining the last-named incorporation, it had been operating under the jurisdiction and dispensation of the State Grand Lodge of South Carolina. The objects of this lodge are the same as that of the parent lodge organized in the District of Columbia. The membership of these organizations is composed entirely of colored people, both men and women. The organization is generally known and called the "Good Samaritans." There are 10,000

members in the state of Georgia, and some 100,000 or more in the United States. It is a fraternal and benevolent order, with a ritualistic form of procedure, and is very famously known by the colored people, etc.

James Mack and the other defendants against whom the injunction was prayed applied to Clarke superior court for a charter, under the name of "Benevolent Order of Good Samaritans." It is averred that the defendants have combined and conspired among themselves to form another association under the above name, and that the name is colorable and imitative of the character of the name that "controls and the uses made" of the name by the plaintiffs, and is an infringement upon the corporate and trade-name of the plaintiffs' association, and would create great confusion and injury to plaintiffs' order, which is composed exclusively of colored people, many of whom are ignorant and illiterate and who will not readily be able to distinguish the technical differences between names, and more particularly in view of the fact that plaintiffs' association is generally known among its members and by the public as "Good Samaritans." If defendants' association is allowed to be chartered and carry on its business as advertised, it will be known, as intended to be known, as "Good Samaritans," the words "Goods Samaritans" being the principal and distinctive words in the title, little attention being paid to the prefixes and suffixes. That with this and in view some of the defendants, who are largely dissatisfied members of plaintiffs' subordinate lodges, are already seeking to dissatisfy not only the members of plaintiffs' association, but whole lodges, and are trying to induce them to attempt to withdraw from the plaintiffs' association, and to secede and join defendants in their illegal and fraudulent scheme to disrupt and injure plaintiffs. Plaintiffs further show that under their articles of incorporation the principal and distinctive words are "Good Samaritans," by the judicious, just, and fair administration of the affairs of the association very considerable property, real and personal, has been acquired, of the value of thousands of dollars, and, if defendants are allowed to proceed, it would greatly injure and have a tendency to mislead and deceive the public and the members of plaintiffs' association, etc.

The prayer of the petition was that the defendants be restrained and enjoined from proceeding further with the application for charter under the name of "Benevolent Order of Good Samaritans," or under any similar name and style which would be imitative or colorable of the name of plaintiffs' association; and from attempting to organize under said name, or any similar name, whether under the charter applied for or not; or from attempting to dissatisfy or interfere with plaintiffs' subordinate lodges or

the members thereof, or with the business of plaintiffs' association.

The defendants, in their answer, admit seeking incorporation, but deny the other material allegations in the petition, and, answering specially, in substance say that the plaintiffs have acquired no "exclusive right" to the use of any name or title containing the words "Good Samaritans." It is averred that at least four other associations and corporations have acquired a prior right to use a name and style containing the words "Order of Good Samaritans," and that plaintiffs themselves are infringers upon the rights of other associations and corporations which had adopted, before any of the plaintiffs had done so, a name practically identical with the names of the two plaintiffs, who claim to be corporations in this action. Defendants aver that the following named associations and corporations have used and appropriated names practically identical with the name of plaintiffs in this case, namely: (1) An association known as the "National Grand Lodge, Independent Order of Good Samaritans and Daughters of Samaria," organized in New York City in 1847, and has been operated under that name continuously since in the United States and the state of Georgia, and in other states of the Union, and its purposes are practically the same as those declared and professed by plaintiff. (2) On the 3d day of February, 1908, the "National Grand Lodge of the Independent Order of Good Samaritans and Daughters of Samaria of North America," was incorporated under the laws of the District of Columbia, and has continuously since been operating its business, which is practically the same as plaintiffs', under that name. (3) On the 14th day of October, 1891, Smith W. Easley, Jr., and his associates, were by the General Assembly of Georgia incorporated under the name and style of the "Grand Lodge of the Independent Order of Good Samaritans and Daughters of Samaria of Georgia," and have continuously since that time been operating and conducting their business under said name, and the purposes of which are practically the same as those declared and professed by plaintiffs. (4) On the 15th day of April, 1898, John M. Pace and his associates, were incorporated by the superior court of Clarke county under the name and style of "Mt. Zion Lodge No. 19 of the Independent Order of Good Samaritans and Daughters of Samaria of the United States of America," and have since said date continuously conducted their business under said name and style, and the purposes of the corporation are practically the same as those declared by the plaintiffs.

It is further averred that so far as one of the plaintiffs, the "Independent Order of Good Samaritans and Daughters of Samaria of the United States of America," is concerned, which claimed that it took out articles

of incorporation under a general act of Congress by filing its articles of incorporation on April 24, 1872, if such articles were filed on the last-mentioned date, so as to make that particular petitioner a corporation, that its charter expired by limitation on the 24th day of April, 1892, under the terms of the act of Congress referred to, and that this plaintiff, if ever a corporation, is no longer one. The plaintiff "State Grand Lodge No. 7, Independent Order of Good Samaritans and Daughters of Samaria," is antedated as a corporation by the three other corporations named above, which have been using the names and styles continuously since the date of their respective incorporation. The plaintiff last above named was not incorporated until December 18, 1908, and the corporation next before the last named was chartered in the District of Columbia at least six months before the plaintiff, and that, while that was a foreign corporation, it had been doing business in the state of Georgia for many years before the "State Grand Lodge No. 7, Independent Order of Good Samaritans and Daughters of Samaria," claims to have been incorporated, and the corporation chartered by the Georgia Legislature and the corporation chartered by the superior court of Clarke county in the year 1908 were domestic corporations carrying on their business at the time that the "State Grand Lodge No. 7, Independent Order of Good Samaritans and Daughters of Samaria," claims to have been incorporated. The defendants aver that by reason of the facts above set forth that the plaintiffs, nor either of them, have any property rights in any name or style containing the words "Order of Good Samaritans" by which they have a legal and equitable or equitable right to prevent defendants from being incorporated by the superior court of Clarke county under the name of "Benevolent Order of Good Samaritans."

The judge made an order to the effect that the charter granted by the District of Columbia on April 24, 1872, to the Supreme Lodge of the Independent Order of Good Samaritans and Daughters of Samaria in America, and subsequently rechartered under the name of Supreme Grand Lodge of the Independent Order of Good Samaritans and Daughters of Samaria of the United States of America on April 25, 1892, expired by limitation on April 25, 1912, and as the corporate existence of the same was not extended as provided by the act of Congress, the charter lapsed and the corporation became extinct on the last-named date. It was further adjudged that neither of the plaintiffs had such vested or exclusive right to the name "Good Samaritan" as to authorize the granting of an injunction even though the corporate name asked for by the defendants be substantially similar to that used by the plaintiffs. The plaintiffs excepted to the order of the judge refusing to grant the injunction prayed for.

Holden & Shackelford and E. K. Lumpkin, all of Athens, for plaintiffs in error. Cobb & Erwin, of Athens, for defendants in error.

HILL, J. (after stating the facts as above). This case turns upon the question of whether the plaintiffs, or either of them, have the right to the exclusive use of the distinctive name "Good Samaritan" as a part of their chartered name. The Act of 1909, p. 139 (Civil Code, § 1993), is as follows: "No person or organization shall assume, use, or adopt, or become incorporated under, or continue to use the name and style or emblems of any benevolent, fraternal, social, humane, or charitable organization previously existing in this state, and which has been incorporated under the laws of this or any other state, or of the United States, or a name and style or emblem so nearly resembling the name and style of such incorporated organization as to be a colorable imitation thereof. In all cases where two or more of such societies, associations, or corporations claim the right to the same name, or to names substantially similar as above provided, the organization which was first organized and used the name, and first became incorporated under the laws of the United States or of any state of the Union, whether incorporated in this state or not, shall be entitled in this state to the prior and exclusive use of such name and the rights of such societies, associations, or corporations, and of their individual members shall be fixed and determined, accordingly." And section 1994 declares: "Whenever there shall be an actual or threatened violation of the provisions of the preceding section of this chapter, the organization entitled to the exclusive use of the name in question, under the terms of said section, shall have the right to apply to the proper courts for an injunction to restrain the infringement of its name and the use of its emblems; and if it shall be made to appear to the court that the defendants are in fact infringing or about to infringe the name and style of a previously existing benevolent, fraternal, social, humane, or charitable organization in the manner prohibited in said section, or that the defendant or defendants are wearing or using the badge, insignia, or emblems of said organization, without the authority thereof and in violation of said section, an injunction may be issued by the court under the principles of equity without requiring proof that any person has been in fact misled or deceived by the infringement of such name, or the use of such emblem."

No question is raised by either party to this case as to the validity of the act of 1909, supra, but each apparently concedes its validity and bases its case upon it. Nor is any question raised by the record as to the organizations which were chartered prior to the plaintiffs' being estopped on account

of *laches*. Counsel for plaintiffs in error in their argument before this court contend that "the question of discretion on the conflicting evidence is *not involved* in this case, but it is a question of law." The question turns largely upon the construction of the act of 1909. The first section of that act provides that: "In all cases where two or more of such societies, associations, or corporations claim the right to the same name, or to names substantially similar as above provided, the organization which was first organized and used the name, and first became incorporated under the laws of the United States, or of any state of the Union, whether incorporated in this state or not, shall be entitled in this state to the prior and exclusive use of such name." From this it appears that the only organizations entitled to the exclusive use of the name in question are those which have been "incorporated." See the two sections quoted above. It becomes material, therefore, to ascertain whether the plaintiffs or any of the organizations considered in this case were or were not incorporated at the commencement of this suit. Prior to the act of 1909, organizations of the kind under consideration, whether *chartered* or not chartered, were entitled to injunctive relief where there was an infringement upon the use of a trade-name. *Whitley Grocery Co. v. McCaw Mfg. Co.*, 105 Ga. 839, 32 S. E. 113; *Creswell v. Grand Lodge, etc.*, 133 Ga. 837, 67 S. E. 188, 134 Am. St. Rep. 231, 18 Ann. Cas. 453; *Supreme Lodge, etc., v. Improved Order Knights of Pythias*, 113 Mich. 133, 71 N. W. 470, 38 L. R. A. 658; 38 Cyc. 694-696.

This case is based wholly on the act of 1909, and nothing herein said is to be understood as in any way affecting the rights arising under the general law independent of that act. It will be seen from reading section 1994 of the Code, above quoted, that, before one organization can prevent another from becoming incorporated under a certain name and style, it must have the right to the *exclusive* use of the name in question. It is provided by that section that, "when-ever there shall be an actual or threatened violation of the provisions of the preceding section of this chapter, the organization entitled to the *exclusive* use of the name in question, under the terms of said section, shall have the right to apply to the proper courts for an injunction to restrain the infringement of its name," etc. It is insisted by the plaintiffs in error that this language has application to the relative rights of the parties *litigant*, and not to those organizations collaterally referred to by the defendants. But there is nothing in the act of 1909, as codified above, to so indicate. It would seem to place the burden upon the organization seeking the injunction to show that it has the right to the exclusive use

of the name in question over all other incorporated organizations or persons. Unless, therefore, the plaintiffs in error have established that they are entitled to the exclusive use of the name or words "Good Samaritans," they are not entitled to the equitable relief sought. To show that they have obtained a charter, or have organized and are using that name, is not sufficient. They must not only show that they have the right to use the name in question, but that they have the *exclusive* right to so use it.

According to the statement of facts set out above, it appears that both of the plaintiffs use the distinctive name or words "Good Samaritans," and the defendant likewise, in its proposed charter, uses the same words. Have the plaintiffs, therefore, the exclusive right to use the name of "Good Samaritans." The plaintiffs in error rely upon a charter granted to "State Grand Lodge No. 7 of the Independent Order of Good Samaritans and Daughters of Samaria" by Clarke superior court in December, 1908. They also rely upon a charter granted to the "Independent Order of Good Samaritans and Daughters of Samaria of the United States of America" under the act of Congress of 1870, and the acts amendatory thereof. The plaintiffs also offered in evidence and rely upon certificates of incorporation granted in the District of Columbia in the years 1872, 1879, and 1892, incorporating the "Independent Order of Good Samaritans and Daughters of Samaria of the United States of America," for a period of 20 years. A certificate of reincorporation was granted in April, 1892. The general act of Congress passed May 5, 1870 (see U. S. Stat. at Large, vol. 16, pp. 101, 102), authorized the incorporation of benevolent associations, etc., within the District of Columbia, for a period of 20 years. This act was later amended, April 23, 1884 (U. S. Stat. at Large, vol. 23, p. 13, c. 28), and the words "not exceeding twenty years" were stricken from the act.

It is argued that by the very act of amendment the charter of one of the plaintiffs had perpetual existence, unless divested by direct proceedings for that purpose. But to this contention we cannot agree. This plaintiff asked to be incorporated for a term of 20 years from April 25, 1892. It is probable that if it had named a term of 50 or 100 years, or any indefinite period, the life of the charter would have been for the term named; but the plaintiff did not do that, but, instead, named a term of 20 years from the date of the renewal in 1892, and there was no renewal at the expiration of 20 years from that time, so far as the record discloses. The amendment to the original act offered the *opportunity* for a "perpetual charter," or at least for a longer term than 20 years; but the plaintiff did not avail itself of this opportunity and renew its

charter at or before the time it expired on April 25, 1912. And we do not think that the act amendatory of the act of Congress of 1870, by merely striking out the words "not exceeding twenty years," operated of itself, without more, to give the plaintiff here dealt with a perpetual charter. There was something for the incorporators to do. They could have the charter renewed for an indefinite term, if it took the proper steps as provided for the renewal of charters, but without such an effort on its part, and the renewing of the charter, we think it expired on April 25, 1912, and was legally dead at the time the application for injunction in this case was made. Another thing, the amending act provides how charters for benevolent corporations may be obtained, and one prerequisite is that a certificate in writing shall be filed by those who desire incorporation, in which it shall be stated, among other things, "the term for which it is organized." U. S. Stat. at Large, vol. 23, p. 13. Later this seems to have been enlarged so as to read, "the term for which it is organized, which may be perpetual." U. S. Stat. at Large, vol. 31, p. 1283, c. 854. But this plaintiff in 1892, when its charter was about to expire, had it renewed for a definite term of 20 years from April 25, 1892. It might have named a longer "term," for the 20-year limitation had been repealed. It might have named a "perpetual" term, and thus obtained a perpetual charter, as insisted by plaintiffs in error. But it did not name a term longer than 20 years, and there was no renewal of the charter at the expiration of the second 20 years. We do not think that the mere repeal of the 20-year limitation to the life of a charter, or the right to have a perpetual charter if the proper steps were taken to secure it, is self-executing, so as to extend the life of the charter beyond the term which is named in it. For these reasons we think the charter lapsed on April 25, 1912.

The defendants in error introduced evidence tending to show that there was organized in 1847 a voluntary association under the name of "National Grand Lodge Independent Order of Good Samaritans and Daughters of Samaria," which has been doing business under that name since the above date. And on October 14, 1891, the General Assembly of the state of Georgia passed an act granting a charter to "Grand Lodge of the Independent Order of Good Samaritans and Daughters of Samaria of Georgia" for a term of 30 years. Acts 1890-91, vol. 1, p. 504. This order has been doing business under this last name continuously since the charter was granted. On January 31, 1908, the "National Grand Lodge of the Independent Order of Good Samaritans and Daughters of Samaria of North America" was incorporated under the laws of the District of Columbia, and has since been in operation

continuously under that name. These three associations and corporations seem to be distinct and separate from the plaintiff in error, and yet each has the distinctive words or name "Good Samaritans" identical with the distinctive words "Good Samaritans" as contained in the charters of the plaintiffs in error. The plaintiff in error which was chartered by the superior court of Clarke county in December, 1908, namely, "State Grand Lodge No. 7 of the Independent Order of Good Samaritans and Daughters of Samaria," is, under the ruling above made, the only one which remains to be dealt with, and its charter was antedated by the two other charters and organizations above referred to, namely, the "Grand Lodge of the Independent Order of Good Samaritans and Daughters of Samaria of Georgia," which was incorporated, as above set forth, by the General Assembly of Georgia in 1891; and the other organization chartered under the laws of the District of Columbia on January 31, 1908, namely, "National Grand Lodge of the Independent Order of Good Samaritans and Daughters of Samaria of North America."

In view of the entire record in this case, to which we have given very careful consideration, we hold that the plaintiffs, nor either of them, have the right to the exclusive use of the name "Good Samaritans." The evidence tends to show that at least two of the organizations above specified were chartered, organized, and are using the words "Good Samaritans," and it cannot be held, in view of these facts, that the plaintiffs have the right to the exclusive use of the name in question. They do not come within the terms of the act of 1909. The case of *Lane v. Evening Star Society*, 120 Ga. 355, 47 S. E. 951, and the other cases cited by the plaintiffs in error, were decided before the approval of the act of 1909.

Judgment affirmed. All the Justices concur.

(140 Ga. 1)

AMBURSEN HYDRAULIC CONST. CO. v.
NORTHERN CONTRACTING CO. et al.

(Supreme Court of Georgia. May 13, 1913.)

(Syllabus by the Court.)

1. ABATEMENT AND REVIVAL (§ 13*)—ANOTHER ACTION PENDING—ACTION IN OTHER STATE.

The pendency of a suit in one state between the same parties and for the same cause of action furnishes no cause to stay or abate a new suit brought in a court of another state.

[Ed. Note.—For other cases, see Abatement and Revival, Cent. Dig. §§ 92-98, 100; Dec. Dig. § 13.*]

2. ABATEMENT AND REVIVAL (§ 13*)—ANOTHER ACTION PENDING—ACTION IN OTHER STATE.

This rule applies as well where the second suit is instituted by the defendant in the first

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

suit as where the plaintiff in both actions is the same person.

[Ed. Note.—For other cases, see Abatement and Revival, Cent. Dig. §§ 92-98, 100; Dec. Dig. § 13.*]

3. INJUNCTION (§ 33*)—SUBJECTS—ACTION IN OTHER STATE.

The rule in equity is analogous to that at law, and the pendency in equity of the same cause of action between the same parties will not authorize an injunction against a subsequent action at law in another state by the defendant against the plaintiff, unless it appears that the prosecution of the second suit would be inequitable and unjust.

[Ed. Note.—For other cases, see Injunction, Cent. Dig. §§ 70, 71; Dec. Dig. § 33.*]

4. INJUNCTION (§ 33*)—SUBJECTS—ACTION IN OTHER STATE.

The facts of this case examined, and it is held, that the court should not have enjoined the prosecution of the common-law action for damages for a breach of contract brought by the defendant against the plaintiff in the first suit in the state of New York where the plaintiff had its corporate existence.

[Ed. Note.—For other cases, see Injunction, Cent. Dig. §§ 70, 71; Dec. Dig. § 33.*]

Error from Superior Court, Rabun County; J. B. Jones, Judge.

Action by the Northern Contracting Company and others against the Ambursen Hydraulic Construction Company. Judgment for plaintiffs, and defendant brings error. Reversed.

The Northern Contracting Company, a corporation of the state of New York, contracted with the Ambursen Hydraulic Construction Company, a corporation of the state of New Jersey, for the construction of a dam across the Tallulah river in Rabun county, Ga. The contract was entered into on June 27, 1912, and contained a provision that "the work herein embraced shall be wholly completed at a date not later than March 1, 1913, time being of the essence hereof." It was further covenanted that, if at any time during the work it should appear by report of the chief engineer of the Northern Contracting Company that the forces employed, the quantity or quality of tools, appliances, or workmen provided, or the progress of the work, are not such as to insure the completion of the work within the stipulated time or according to specifications, the Northern Contracting Company may serve a written notice on the Ambursen Company to supply at once such increase of forces, appliances, or tools, and to cause such improvement in the character of the work so as to conform to specifications, and if on the expiration of ten days after the service of such notice the Ambursen Company shall have failed to furnish the Northern Contracting Company's engineer satisfactory evidence of the Ambursen Company's intention, efforts, and ability to immediately furnish the requisite material and workmen, and remedy the specified deficiencies, or if it shall appear that the Ambursen Company is insolvent or bankrupt,

the Northern Contracting Company was empowered to "enter and take possession of the said work, or any part thereof, with the tools, materials, plant, appliances, houses, machinery and other appurtenances and supplies thereon or used in connection with the work, and hold the same for security for any and all damage or liability that may arise by reason of the nonfulfillment of this contract within the time herein specified, and furthermore may employ the said tools, materials, plants, machinery and other appurtenances and such other means as the company or its engineer may deem proper to complete the work, at the expense of the contractor, and may deduct the cost of the same from any payments then due or thereafter becoming due to the constructor, and the constructor shall pay the cost thereof to the company; or may declare such contract forfeited as it may elect."

On December 26, 1912, the Northern Contracting Company filed in the superior court of Rabun county its petition against the Ambursen Hydraulic Construction Company, its superintendent and agent in charge of the work of building the dam, who were temporarily residing in Rabun county, alleging that the Ambursen Company in pursuance of its contract proceeded to erect a dam across the Tallulah river, when without excuse or justification it abandoned its contract and ceased work on December 19, 1912. It was further alleged: That in view of the provisions of the contract that the work was to be completed within a specified time, and, on the happening of the contingencies authorizing them so to do, that the Northern Contracting Company entered upon and took possession of the work, together with the tools, materials, plant, appliances, houses, machinery, and other supplies thereon, and that it purposes holding the same as security as provided in the contract and to employ the same, together with such other appurtenances and other means as it and its engineer may deem proper, to complete the work according to the contract. That the Ambursen Company not only had its superintendent and agent, but also more than 100 employés, upon the work, and that the Ambursen Company had notified petitioner that they will not permit it or its employés to use their tools, materials, etc., and that petitioner has a force of laborers of its own engaged upon a part of the work, and that unless the Ambursen Company was restrained from interfering with petitioner in the use of the tools, materials, etc., there would be not only danger of violence, but that the tools, materials, etc., would be injured or destroyed. The damage claimed to accrue to petitioner from the defendant's violation and abandonment of its contract was alleged. The prayers of the petition were for judgment for breach of contract; for a decree ascertaining what are

the tools, materials, etc., described in the contract, and which petitioner holds as security for damages arising from the defendant's breach of contract; that petitioner be decreed to have a lien in the nature of a mortgage thereon to secure such sums as they may have for its damages; and that the tools, materials, etc., be sold in satisfaction of any judgment which it may recover; for injunction against interference with the premises or with the tools, materials, etc.; for general relief and process. The defendants were served on December 26, 1912, with a copy of the suit, process, and order of court temporarily restraining the defendants as prayed.

On December 31, 1912, the Ambursen Hydraulic Construction Company and Burton Thompson filed in the Supreme Court of New York, in the county of Nassau, a suit against the Northern Contracting Company and the Georgia Railway & Power Company. In this suit the contract between it and the defendant company was set out, and it was alleged that the defendant had failed to comply with the contract in many particulars, by reason whereof the plaintiff was unable to carry out and perform the terms of the contract on its part. It was further alleged that the dam was being constructed on the property of the Georgia Railway & Power Company, and that this company guaranteed to the plaintiff the punctual performance of all things to be done by, and the payment of all moneys to be paid by, the Northern Contracting Company to it, but that the power company had failed to comply with its guaranty. The seizure of the personal property on the work belonging to the Ambursen Company was alleged, and also that this company had sold to Burton Thompson an undivided one-half interest in it. Wherefore plaintiffs demanded judgment that the defendants be required forthwith to deliver the personal property seized by the Northern Contracting Company to the plaintiffs; that it be decreed that the plaintiffs had violated their contract and had no right to hold this property; that the defendants be restrained from proceeding with the construction of the dam according to the plans prepared by the Ambursen Company and by the use of the plaintiffs' personal property; that an account be taken for damages caused by the detention of the personal property by the defendants; and that plaintiffs have judgment therefor.

On January 11, 1913, the Northern Contracting Company amended its petition against the Ambursen Hydraulic Construction Company. In the amendment it was alleged that subsequent to the service of their original suit the foregoing suit in the state of New York was filed in violation of the restraining order previously granted, and that its purpose was to defeat the jurisdiction of the superior court of Rabun county

and to take the custody of the property to the state of New York. A copy of the indemnity contract and bond executed by the Georgia Railway & Power Company was alleged. The prayer was for an injunction against the Ambursen Company from prosecuting its suit in New York.

The Ambursen Hydraulic Construction Company and Burton Thompson also on December 31, 1912, brought a suit in the Supreme Court of New York, in the county of Nassau, against the Northern Contracting Company to recover damages for breach of the contract between it and the Ambursen Company, alleging that before the commencement of the action the Ambursen Company had transferred to Burton Thompson an undivided one-half interest in the right of action. Thereafter, on January 16, 1913, the Northern Contracting Company again amended its petition pending in Rabun superior court, alleging the pendency of the action for breach of contract in the Supreme Court of New York, and that the matters therein involved relate to the same contract and transactions in its original suit; that the maintenance of the suit in the state of New York is a great hardship to the Northern Contracting Company, and subjects it to double litigation relating to the same cause of action, and has the effect of interfering with the jurisdiction of the superior court of Rabun county to fully adjudicate all matters contained in its original petition; that the Northern Contracting Company has no property in the state of New York, so that there is no reason for a judgment against it in that state. The prayer of the amendment was to enjoin the Ambursen Company from prosecuting in the state of New York its action to recover damages for breach of contract. The Ambursen Company filed its answer, and an interlocutory hearing was had on the prayer for a pendente lite injunction.

After hearing the evidence, the court rendered a judgment, decreeing: "(1) That the Georgia Railway & Power Company be made party plaintiff in this suit with the Northern Contracting Company. (2) That the plaintiff make a good and solvent bond in the sum of \$100,000 conditioned to pay the defendant, the Ambursen Hydraulic Construction Company, any and all damages it may recover of plaintiff in this suit. (3) It is ordered that on said bond being made the restraining order heretofore granted on defendant's motion preserving the status of the property and restraining the plaintiff from using the same be and is vacated. (4) It is also ordered and adjudged that the defendant, its employes, agents, and servants, are restrained and enjoined from doing any of the acts or things complained of in the original petition until the further order of this court. (5) It is further ordered and adjudged that on said party plaintiff being made and bond made as herein required, and until the further order of this court, the defendant, Am-

bursen Construction Company, its officers, agents, attorneys, and servants, are restrained and enjoined from further proceeding with or prosecuting either of the two suits brought in New York, and complained of in the amended pleading of the plaintiff." Exception is taken to so much of this judgment as restrains the Ambursen Hydraulic Construction Company from prosecuting its common-law action pending in the Supreme Court of New York.

W. A. Charters, of Gainesville, and Robt. C. & Philip H. Alston, of Atlanta, for plaintiff in error. King, Spalding & Underwood, of Atlanta, and H. H. Dean, of Gainesville, for defendants in error.

EVANS, P. J. (after stating the facts as above). [1, 2] The general rule is well settled that the pendency of a suit in one state between the same parties and for the same cause of action furnishes no cause to stay or abate a new suit brought in a court of another state. *Tarver v. Rankin*, 3 Ga. 210; *Chattanooga, etc., R. Co. v. Jackson*, 86 Ga. 676, 13 S. E. 109. The more common instance of the application of this rule is where the plaintiff in the first suit is also the plaintiff in the second action. The rule, however, is not limited to cases where the plaintiff in both suits is the same person. If each of the parties to a contract claims that the other has breached it, each would be entitled to sue for the breach. The defendant in the first suit could recoup his damages of the plaintiff in that suit; but this right would not forbid his going into another state, where his adversary resides, and there bringing a suit to recover damages for a breach of the contract. If the defendant in such a case can place his claim for damages in a more favorable condition to obtain redress; if his remedy in the state of his adversary party is more comprehensive—no sound reason appears to us why he may not go into the state of the other party to the contract alleged to have been breached and sue him there. It would be, indeed, anomalous for a resident of one state, claiming an action for breach of contract, to leave his own jurisdiction to sue for its breach, and set up such prior suit in abatement of an action brought by the defendant against him in his own state to recover damages for a breach of the same contract. To grant such a privilege would be to allow a citizen of a state to evade its laws of remedial procedure, by instituting a suit in a foreign jurisdiction. Hence we conclude that the rule that the pendency of a prior suit in one state cannot be pleaded in abatement of a suit between the same parties for the same cause of action in a court of another state applies as well where the second suit is instituted by the defendant in the first suit as where the plaintiff in both actions is the same person.

[3] The circumstance that one of the suits may be pending in a court of equity and the

other in a court of law does not alter the principle. Upon authority, both English and American, the Supreme Court of the United States has held that the plea of a former suit pending in equity for the same cause in a foreign jurisdiction will not abate an action at law in a domestic tribunal or authorize an injunction against prosecuting such action. *Insurance Co. v. Brune's Assignee*, 96 U. S. 588, 24 L. Ed. 737.

We do not contend that, after a bill in equity has been filed, in a proper case the court may not enjoin the parties from litigating the whole or a part of the cause of action in a foreign court; but we do contend that the bare fact that a bill in equity is pending in this state, in the absence of equitable considerations, furnishes no ground to enjoin a defendant from suing his claim in a foreign court, although the cause of action may arise out of the contract involved in the litigation in the equity court. Before the prosecution of the defendant's suit will be enjoined, the propriety and necessity of confining the litigation to the tribunal in which it is first instituted must appear. The power of a court of equity to restrain persons within its jurisdiction from prosecuting suits in a foreign court rests upon the basis that the person sought to be enjoined is within the jurisdiction of the court, and he can be prevented from doing an inequitable thing. 22 Cyc. 813. The case of *Engel v. Scheuerman*, 40 Ga. 206, 2 Am. Rep. 573, is illustrative of the principle. In that case a Georgia creditor sued out an attachment against his nonresident debtor in this state. He also sued his debtor on the identical demand in the state of New York. His attachment suit was prosecuted to judgment and satisfied by payment. After paying the attachment judgment, the creditor assured the debtor that he would not further press the New York suit; but in violation of such assurance he prosecuted the New York suit to judgment. Thereupon the debtor filed a bill against the Georgia creditor in the county of his residence to enjoin the enforcement of the New York judgment, and this court held that the creditor, a citizen of this state, having voluntarily sued his claim to judgment in the courts of this state, and accepted payment of the judgment, will be enjoined from collecting the claim for the second time in a foreign court.

[4] In the case at bar the Northern Contracting Company contracted with the Ambursen Hydraulic Construction Company to construct a dam across the Tallulah river in Georgia. The former is a corporation of the state of New York, and the latter a corporation of the state of New Jersey. In the progress of the work differences arose between the contracting parties; each charging the other with a breach of the contract. Work was suspended. In order to complete the dam within the stipulated time, the Northern Contracting Company entered up

on the work and took possession of the tools, materials, etc., of the Ambursen Company. The contract gave them a right to do this under certain contingencies, and when this right was exercised they were to hold this property as security for any damages sustained by a breach of the contract on the part of the Ambursen Company. In this situation the Northern Contracting Company brought a suit in Rabun county to recover damages for breach of contract, praying that the covenant granting to it the right to retain the personal property as security be treated as a mortgage and foreclosed as such, and for injunction against interference with their work of construction and the use of defendant's tools, materials, etc. The temporary restraining order was no broader than the prayer for injunction. Afterwards the Ambursen Company, with another, alleged to be an assignee of a half interest in the subject-matter of the litigation, brought two actions in the Supreme Court of New York in the county of Nassau. The first concerned the personal property which was alleged to have been taken by the Northern Contracting Company, and the latter was a plain action at law for a breach of the contract. No point is made upon the injunction against prosecuting a suit in New York for the recovery of the personal property, but exception is taken to the injunction against prosecuting the action for breach of contract.

Now let us see whether the case presented shows a necessity for confining the litigation for a breach of the contract to the superior court of Rabun county. The fact that the maintenance of the two suits will cause double litigation, inasmuch as they involve the same subject-matter, is insufficient cause for an injunction against prosecuting the common-law action in New York, for the reasons advanced in the first part of this opinion. The suit in New York is for a breach of contract, and in no way interferes with the possession by the Northern Contracting Company of the personal property of the Ambursen Company, alleged to have been taken into possession by the Northern Contracting Company pursuant to the contract. In other words, the prosecution of the breach of contract action in New York does not affect the res in possession of the Georgia court. The restraining order did not forbid the institution of the action. It only remains to determine whether it is unfair and against conscience for the Ambursen Company to sue the Northern Contracting Company, at the latter's home, for an alleged breach of contract, instead of submitting to the tribunal of a state selected by the other party.

It is urged as reasons for confining the

litigation to the action filed in Rabun county that that suit was first filed; that the court in which it pends is vested with full jurisdiction over the subject-matter; that the contract was to be performed in Georgia; and that the witnesses by whom the breach of contract and other relevant issues may be established are more accessible to the Georgia court. It is also urged that the Ambursen Company procured the Georgia Railway & Power Company to be made a party and asked for and obtained from the court a protective bond. For all of which reasons it is claimed that it would be unfair and inequitable not to confine all of the litigation to the action first instituted by it. On the other hand, the Ambursen Company replies that it has the legal right to sue the plaintiff in the venue of the latter's domicile; that the matters set up by the Northern Contracting Company against prosecuting an action against it in the state where it was incorporated relate solely to its own convenience; and that equity will not take away from the Ambursen Company its plain legal rights and require it to litigate in this state for the convenience of the other party, who prefers to submit the controversy to a foreign court rather than try the issues in a court of its legal residence. The Ambursen Company joined the Georgia Railway & Power Company with the Northern Contracting Company in its suit in New York concerning the personal property, but it does not appear from the record that the Georgia Railway & Power Company was made a party to this litigation at the instance of the Ambursen Company, or that it asked that the Northern Contracting Company be required to give bond to indemnify against a recovery of damages. But even if it did, we do not see how its effort to protect its property involved in the litigation should deprive it of its legal right to sue for damages for breach of contract in another state.

The joinder of Burton Thompson as a co-plaintiff with the Ambursen Company in the New York suit is no ground for an injunction against the further prosecution of the action, even if the assignment be invalid. If both assignor and assignee are before the court as parties, the defendant is secure of all its right, and further than they are involved is not concerned with the question of title. *Gilmore v. Bangs*, 55 Ga. 405.

On the whole case, we think that the interlocutory judgment should be so modified as to relieve the Ambursen Hydraulic Construction Company from the injunction against prosecuting its common-law action for breach of contract in the state of New York.

Judgment reversed. All the Justices concur.

(140 Ga. 26)

ALMAND v. HATHCOCK.

(Supreme Court of Georgia. May 14, 1913.)

*(Syllabus by the Court.)***1. JUDGMENT (§ 628*)—RES JUDICATA—JOINT OBLIGORS.**

The general rule is that, where a joint contract is the subject of a suit, a recovery against one of the joint obligors merges the entire cause of action, and bars any subsequent suit on the same contract against any of the other debtors.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. § 1144; Dec. Dig. § 628.*]

2. JUDGMENT (§ 628*)—PROCESS (§ 59*)—RES JUDICATA—JOINT OBLIGORS.

But under section 5591 of the Civil Code of 1910, when two or more joint contractors are sued in the same action, and service is perfected on one or more of such joint contractors, and the officer serving the writ shall return that the rest are not to be found, the plaintiff may proceed to judgment and execution against the defendants who are served in the same manner as if they were the sole defendants.

(a) Where suit is brought against two joint obligors on a promissory note, both within the jurisdiction of the court, and no return of non est inventus as to either is made by the officer serving the writ, and it does not otherwise appear that either of the joint contractors is without the jurisdiction of the court, or is dead, but on the contrary it appears that both joint contractors are within the jurisdiction of the court, and one only has been served with process and judgment is had against him, and later the other is sued on the same joint contract, the judgment against the first merges the entire cause of action, and bars a recovery in the subsequent suit on the same contract against the other joint obligor.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. § 1144; Dec. Dig. § 628;* Process, Cent. Dig. §§ 49, 68; Dec. Dig. § 59.*]

Error from Superior Court, Fulton County; Geo. L. Bell, Judge.

Action by J. L. Almand against M. L. Hathcock. Judgment for defendant, and plaintiff brings error. Affirmed.

Horton Bros. & Burress, of Atlanta, for plaintiff in error. J. F. Gollightly and J. Howell Green, both of Atlanta, for defendant in error.

HILL, J. Almand brought suit against Redwine and Hathcock on a certain promissory note returnable to the May term, 1910, of the superior court of Fulton county. This case was dismissed for want of prosecution and was reinstated by consent of counsel. Hathcock denied the authority of his attorney to reinstate the case as to him, and the court held that it was not reinstated as to Hathcock. Plaintiff then took judgment against Redwine. Thereafter Almand brought suit on the same note against Hathcock. The note was a joint, and not a joint and several, note. On the trial the plaintiff introduced the note and the agreement to reinstate the case of Almand against Redwine and Hathcock. The defendant Hath-

cock introduced the declaration in the case of Almand v. Redwine and Hathcock. The court, after hearing the evidence of Hathcock sustaining his plea, directed a verdict for the defendant, ruling that the note had merged into the first judgment and that no cause of action existed in the present suit as to Hathcock. To this ruling of the court the plaintiff excepted.

[1] 1. The one question to be determined is whether the plaintiff, who had sued and recovered on a joint, and not a joint and several, note, against Redwine alone, while Hathcock, the other joint obligor, was within the jurisdiction of the court, could subsequently sue Hathcock and recover on the same note. The answer to the question depends on whether the former recovery against one of the joint contractors merges the entire cause of action and bars any subsequent suit on the same note against the other joint debtor.

At common law, where a joint contract is the subject of an action, a recovery against one of the joint obligors merges the entire cause of action, and bars any subsequent suit on the same obligation against any of the other debtors, or against all jointly. 23 Cyc. 1208; Howell v. Shands, 35 Ga. 72; 2 Black on Judg. (2d Ed.) § 770. And see Robinson v. Snyder, 97 Ind. 56, holding that the burden of proof is on the one who claims to be released by the former judgment. In the case of Lauer v. Bandow, 48 Wis. 638, 4 N. W. 774, it is said: "It is perfectly well settled that if the holder of a joint debt or obligation sues one of the joint debtors and obtains judgment thereon against him, and then sues another of the joint debtors for the same debt or obligation, the latter may plead such judgment against his codebtor and bar the action. This is so because the joint debt is merged in the judgment against the debtor first sued, and, being indivisible, it cannot be merged or canceled as to one, and existing and operative as to another joint debtor." And in the case of Kennard v. Carter, 64 Ind. 31, it was said: "A separate judgment taken against one of several joint makers of a note, in a suit to which the others are not parties, or in which steps are not taken to preserve the right to a subsequent judgment against such others, may be pleaded as a bar to a subsequent suit against those not included in the first suit or judgment." The leading English case on this subject is that of King v. Hoare, 18 Meeson & Welsby, 494. In that case, Parke, B., said: "The cause of action is changed into matter of record, which is of higher nature, and the inferior remedy merged in the higher. This appears to be equally true where there is but one cause of action, whether it be against a single person or many. The judgment of a court of record changes the nature of that cause of action and prevents its being the subject of another suit, and the cause of ac-

tion, being single, cannot afterwards be divided into two. * * * The distinction between the case of joint and several contract is very clear. It is argued that each party to a joint contract is severally liable, and so he is in one sense, that if sued severally, and does not plead in abatement, he is liable to pay the entire debt; but he is not severally liable in the same sense as he is on a joint and several bond, which instrument, though on one piece of parchment or paper, in effect comprises the joint bond of all, and the several bonds of each of the obligors, and gives different remedies to the obligee." In other jurisdictions one state only (South Carolina) seems to adhere to the opinion that a former judgment against one of the joint obligors to a contract or obligation does not merge the cause of action against the other obligor. 2 Black on Judg. (2d Ed.) § 770. The last-named authority says: "But this stands as an exception to the universal consensus of opinion in England and America, and the rule is now established, by nothing less than a multitude of authorities, that where the contract or obligation sued on is joint, a recovery against one of the joint contractors merges the entire cause of action and bars any subsequent judgment on the same cause of action against the other debtors or any of them." Id. § 770.

[2] But it is insisted by the plaintiff in error that the note sued on in the present case did not merge into the first judgment, and he cites the cases of *Merritt v. Bagwell*, 70 Ga. 578, and *Ells v. Bone*, 71 Ga. 466, as controlling. In the first-named case nothing contained therein militates against the general rule. It was there decided that, "if one of two defendants to a suit * * * against them as makers, tacitly permits judgment * * * to be rendered" by default "against his codefendant, when the note is afterwards offered in evidence against him, he cannot object to it on the ground that judgment had previously been rendered against his codefendant. He had consented, by his silence, to a severance." This language is sufficient to distinguish it from the present case. In delivering the opinion in the case of *Ells v. Bone*, supra, Mr. Justice Hall said that, "while agreeing with the learned counsel for plaintiff in error that at common law the weight of authority would merge this liability in the first judgment, * * * yet we think, under our legislation, no such effect could be given to the first judgment." He then cites the act of 1820 (Cobb's Dig. p. 485) and sections 3350 and 3351 of the Code (now Civil Code of 1910, §§ 5591, 5592), which provide that where two or more joint, or joint and several contractors, or copartners, are sued in the same action, and service shall be perfected upon one or more of the joint contractors or copartners, and the officer serving the writ shall return that

the rest are not to be found, the plaintiff may proceed to judgment and execution against such as were served, in the same manner as if they were the sole or only defendants. In that case the plaintiff was the owner of a draft due, drawn by *Ells & Laney* upon *W. A. Cheney*. The plaintiff brought suit upon this paper. *Cheney* and *Laney* were alone served. *Ells* was absent from the state, and was not served. There was no return of service whatever as to *Ells*, but in the agreed statement of facts it appeared that he was a nonresident of the state at the date of the suit and judgment. Judgment was rendered by the court against *Cheney*, as acceptor, and *Laney*, as drawer, for principal, interest, and costs. *Ells* later returned to Georgia, and plaintiff brought suit against him on the draft. The question was whether in that case *Ells'* liability on the draft existed after the judgment against *Cheney* and *Laney*, or whether it was merged in the first judgment. It was held that *Ells* was liable and that under the express terms of the statute *Ells* was no party to the judgment against his copartner, *Laney*, and the acceptor, *Cheney*. The instant case differs from that of *Ells v. Bone*. There *Ells* was not a party to the first suit. He was absent from the state. In the agreed statement of facts, it was admitted that *Ells* was without the state, which admission was equivalent to a return of non est inventus provided for by the statute. In the *Ells* Case the court placed its decision upon the statute and upon the case of *Printup Bros. & Co. v. Turner* and *Turner v. Printup Bros. & Co.*, 65 Ga. 71 and 78, which held that "when a suit is brought against copartners, or against the survivors of a partnership, it is not necessary to declare against and pray process as to all the members thereof, and have a return of non est inventus as to those not served, in order to bind their interest in the partnership effects; in either case, the judgment binds the partners sued and served as to their individual property and all the property of the partnership."

As is evident from the ruling just quoted, the decision was one in which the relationship of partners was involved. A partnership debt is not one solely of joint liability. Civil Code, § 8156, declares that in the case of partners, as to third persons all are liable, not only to the extent of their interest in the partnership property, but also to the extent of their separate property. Furthermore, in cases of partnership service of one partner, with return of non est inventus as to the others, authorizes a judgment against the firm binding all the firm assets. Civil Code, § 3167. As to the *Ells* Case, supra, not only was it one involving the relation of partnership, but also, as previously stated, one in which it appears that the defendant against whom the second suit was brought was, when the former action was commenced,

a nonresident of the state. As hereinbefore pointed out, this placed the case on the same footing as though the defendant had been shown by a return of non est inventus to be beyond the reach of process. While the decision seems to be planted mainly upon the statute, it must be assumed that in rendering the decision Justice Hall had in mind the fact of nonresidence appearing in the agreed statement of facts.

It will be noticed that this case is in line with the great weight of authority, which holds, independent of statutory enactment, that the fact of nonresidence, making it impossible to acquire jurisdiction over one or more joint obligors, is *ex necessitate rei* cause for a relaxation of the general rule; and accordingly in such cases it is held that the bringing of suit against the joint obligors subject to the jurisdiction does not operate to merge as to nonresidents the cause of action. See 2 Black on Judg. § 771. On its facts, the decision in the Ellis Case is in line with these authorities. We know of no case decided by this court in which there was no relation other than that of a mere joint liability, in which it has been held that, after judgment against one joint obligor, the same cause of action can afterwards be prosecuted to judgment in a second suit against the other; both being all the while within the jurisdiction of the court. Whatever may be said as to the correctness of the ruling in the Printup Case, supra, we are not inclined to extend it further. To hold, independent of the statute, that in the absence of a return of non est inventus, or other showing that the joint obligor not sued in the first action was not at the time of its commencement within the jurisdiction of the court, the plaintiff might nevertheless elect to proceed severally against the obligors on a strictly joint promise, would be running counter to the common-law rule as adhered to by practically all the courts. To construe section 5591 of the Civil Code as changing the common-law rule to this extent would be an unwarranted enlargement of its terms. It may well be conceived that the very object of the Legislature in requiring a return of non est inventus to be made was to restrict actions of this character against less than all the joint obligors to cases where it was shown that when the action was commenced jurisdiction could not attach to one or more of the defendants, and to leave otherwise unchanged the common-law rule.

In the present case, it affirmatively appearing that Hathcock was within reach of process all the while the first suit was in progress, we hold that the cause of action sued on was merged in the judgment rendered against Redwine alone in that suit.

Judgment affirmed. All the Justices concur.

(12 Ga. App. 399)

MCINTYRE BROS. & CO. v. SOUTH ATLANTIC STEAMSHIP LINE.

(No. 4,189.)

(Court of Appeals of Georgia. Feb. 24, 1913.)

(Syllabus by the Court.)

1. SHIPPING (§ 106*)—CARRIAGE OF GOODS—BILL OF LADING—EFFECT.

When it affirmatively appears that the cargo specified in a bill of lading was never delivered to the carrier or received by it, the original consignee in the bill of lading cannot hold the carrier liable for the loss of the cargo, unless it appears that the bill of lading was issued with an intent to defraud.

[Ed. Note.—For other cases, see Shipping, Cent. Dig. §§ 225, 226, 414-419; Dec. Dig. § 106.*]

2. SHIPPING (§ 62*)—CARRIAGE OF GOODS—CHARTER PARTY—CONSTRUCTION.

It is the duty of the master of a vessel, who is a servant of the ship owner, to ascertain whether articles receipted for by him in a bill of lading have been actually received for shipment, and if, by reason of his neglect to perform his duty in this respect, loss is incurred by the shipowner, the latter cannot recover therefor from a charterer of the ship, although the charter party stipulates that the captain shall sign the bills of lading "as and when presented by the charterer," when this stipulation is so qualified as to restrict the general authority of the captain to the matter of freight rates, and no specific authority is given him to warrant the correctness of the bills of lading in other respects. Generally, an agent of a shipowner has no authority to sign bills of lading for cargo which has not been delivered to the ship for transportation.

[Ed. Note.—For other cases, see Shipping, Cent. Dig. §§ 257-269, 313-315, 317; Dec. Dig. § 62.*]

3. MONEY PAID (§ 1*)—GROUND FOR RECOVERY—NECESSITY FOR REQUEST.

The payment of the debt of another, without his request or authority, does not entitle the payer to recover from the debtor the sum thus advanced.

[Ed. Note.—For other cases, see Money Paid, Cent. Dig. §§ 1-6; Dec. Dig. § 1.*]

4. PLEADING (§ 248*)—AMENDMENT—PETITION.

A petition which, in substance, alleges that the plaintiff has a right of action over against the defendant for moneys which the plaintiff was legally required to pay, on account of the misrepresentations of the defendant, cannot be amended by setting up a cause of action dependent upon a specific breach of a contract between the parties which would have entitled the plaintiff to recover damages for the breach.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 686-709; Dec. Dig. § 248.*]

Error from City Court of Savannah; Davis Freeman, Judge.

Action by McIntyre Bros. & Co. against the South Atlantic Steamship Line. Judgment for defendant, and plaintiffs bring error. Affirmed.

The plaintiffs, as shipowners, entered into a charter party with the defendant as a charterer by the terms of which the plaintiffs' steamship *Reliance* was to be loaded by the defendant with a cargo to be provided by it at Savannah, Ga., and carried

by said steamship to Havre and Hamburg. The contract provided that the captain "shall sign bills of lading as and when presented" without prejudice to the contract. In pursuance of that contract, the defendant, the charterer, presented to the captain of said steamship, for his signature, certain bills of lading calling for 36 bales of cotton of specified marks set forth in the bills of lading, and consigned to the respective parties named in the petition as amended, also bills of lading for six pieces of wood consigned and described in the bill of lading as set out in the petition as amended, and also for three barrels of rosin as described in the petition as amended. These bills of lading were signed by the master as required by the contract or charter party and it is alleged that they were signed upon a representation of the defendant, upon which representation the captain of said steamship relied, that the cargo specified in them had been loaded on said steamship by the defendant as required by the contract.

Upon arrival of the steamship at Havre, the cotton so marked and consigned was found not to have been loaded on it by the defendant at Savannah, and the owners of the ship paid the consignees for the missing cotton. Upon the arrival of the ship at Hamburg, it was found that four pieces of oak thus described and consigned had not been loaded at Savannah by the defendant, and the shipowners paid the consignees their value. Upon the arrival of the ship at Hamburg, it was found that three barrels of rosin thus specified and consigned had not been loaded by the defendant at Savannah, and the consignees of this rosin required the shipowners to pay the value thereof. Certain other cargo was found on board said steamship, put there at Savannah by defendant, bearing no marks, and marks for which there were no consignees. Plaintiffs endeavored to get the consignees of the missing cotton to accept the no-mark and wrong-marked bales of cotton in lieu of the cotton marked as consigned to them, but this the consignees refused to do. Petitioners thereupon sold the no-mark and wrong-marked cotton, and obtained the best price obtainable therefor, and gave credit to defendant for the amount received, less the necessary costs and expenses incident to the transaction. This suit was brought to recover the difference in money claimed to be due in consequence. The court below, on demurrer, held that neither the original petition nor the petition as amended presented a cause of action, and dismissed the suit.

Anderson, Cann & Cann, of Savannah, for plaintiff in error. Adams & Adams, of Savannah, for defendant in error.

RUSSELL, J. (after stating the facts as above). Stripped of the many collateral questions which have been presented in the

exhaustive briefs of the very learned counsel for both parties, the solution of the question as to whether the defendant is liable to the plaintiffs depends at last upon the construction of the contract by which they are bound, and which we think the lower court properly construed. The case is not affected by rulings, almost without number, which we have examined, where the charter party differed from the one involved in this case. A charter party, after all, is nothing more than a contract of affreightment, and though the contract be unusual, or even unnaturally favorable to one of the contracting parties rather than to the other, this affords no reason why the contract as written should not be enforced.

Briefly stated, and putting the case most favorably for the plaintiffs, they seek to recover money which they paid in Europe to consignees for a portion of the cargo which they were unable to deliver, because, upon the ship's arrival, that portion of the cargo could not be found in the ship. The defendant contends that it is not liable, and that the plaintiffs have no right of action over against it because the plaintiffs were not compelled to pay the consignees, and also because, if they were liable to the consignees in Europe, this liability was due to some other cause than a breach of the defendant's contract as embodied in the charter party; in other words, that, even if the plaintiffs were liable to pay the consignees, it was not due to any fault of the defendant.

The merit of these respective contentions is to be determined by the nature of the agreement between the parties and the relations they sustained to each other. It does not matter that under the provisions of a "time charter" such as is dealt with in the *Santona Case* (O. C.) 152 Fed. 516, or in *Golcar Steamship Co. v. Tweedy* (D. C.) 146 Fed. 563, or in the case of the *S. S. Hackney* (which is appended as a note to the *Santona Case*), it was held that the captain was the servant of the charterer. These were cases in which the contract was treated as a demise of the ship, and, as Judge Hough says in the *Santona Case*: "The rule of law separating the letting of a ship from a contract for her services has been too often laid down to admit of doubt." Nor does it matter that courts of highest authority (as in *Elder, Dempster & Co. v. Dunn & Co.*, decided by the House of Lords) have held that under a particular contract therein involved the carrier could recover from the charterer the damages he had to pay for short delivery. We are only concerned with the contract entered into between the plaintiffs and the defendant. As we construe that contract, the charterers were to furnish the cargo alongside the ship and pay for loading it on board the ship, and McIntyre Bros. & Co. were to transport it to destination and deliver it to the charterers' agents. It is alleged in the

petition that a certain portion of the cargo, the value of which the plaintiffs paid the consignees, and which it was the defendant's duty to place alongside the ship, was not placed alongside the ship, and that, in consequence of its not being aboard when the ship reached its destination, the plaintiffs had to pay the consignees for it. If nothing more was stated, this would seem to give the plaintiffs a clear right of action, but it appears from the petition that the only reason why the plaintiffs had to pay the consignees for the shortage in the cargo was that the consignees had bills of lading which included the missing cotton, lumber, and rosin. And this raises the inquiry as to the plaintiffs' original liability to the consignees upon their bills of lading.

[1] Could the plaintiffs have refused to pay the consignees for the portion of the cargo they failed to deliver? And, if not, would they have a right over against the defendant to recover the amount that they were compelled to pay? We think the first question must be answered in the affirmative, and the second in the negative. It is not necessary to determine the question of the plaintiffs' liability if the bills of lading had been assigned and had passed into the hands of innocent purchasers without notice, because there is no allegation that they were assigned, and consequently such rulings as that in *Van Santen v. S. O. Co.*, 81 N. Y. 171, are not in point. Construing the petition most strongly against the pleader, it must be assumed that the bills of lading had not been assigned, but were presented by the original consignees. Still, even if the plaintiffs were liable upon their bills of lading, the defendant, whose duty in reference to the cargo was to place it alongside the ship, would not be liable upon the bills of lading, because they were issued by the captain, who must be held to be the agent of the plaintiffs themselves, and no responsibility would attach to the defendant for an act of the captain as an agent of the plaintiffs. This contract expressly limits the liability of the defendant to the period of time necessary to put the cargo on board. It contains the stipulation that: "Owners are to be responsible for all cargo after it is delivered alongside, and signed for by mate or other person authorized to receive same." And paragraph 11 of the charter party provides that: "All liability whatever of the charterers hereunder is to cease when the cargo is shipped, the owners, master, or his agents having an absolute lien on it for freight, dead freight and demurrage." These provisions may seem unreasonable, but they speak the agreement of the parties. Consequently it does not appear that the portion of the cargo which was missing, even if not loaded by the stevedores, was not stolen or misplaced after it was placed alongside the ship by the charterers. The petition, therefore,

does not show that the failure of the charterers to place alongside or load all of the cargo imposed liability upon the charterers.

The plaintiffs rely upon the proposition that McIntyre Bros. & Co. were liable to the consignees because they could not dispute the statement of the bills of lading in the hands of the consignees that they had received the shipment, including the portion which they (the owners of the vessel) were unable to deliver. There is no stipulation that the bills of lading are to be binding upon master and owners as proof of quantity delivered to the ship (as there was in the *Tongoy Case* [D. C.] 55 Fed. 329); and so we need not consider whether the plaintiffs would have been estopped to deny the acknowledgments of their bills of lading, if the present contract had contained such a stipulation. The question turns upon whether the master had the authority to sign bills of lading for a shipment which he had not in fact received. The plaintiffs' petition states that the missing articles were not loaded. Therefore, of course, if the master acknowledged the receipt of these articles, the statement that he had received them was untrue. The plaintiffs attempt to meet this point by an allegation that the charterers procured the signature of the master to the bills of lading by false representations. This might give the plaintiffs a right of action for deceit, if by such false representations the plaintiffs had finally been compelled to pay the consignees. The fact that the bills of lading were induced by misrepresentation, however, would not necessarily have made the plaintiffs liable to pay the consignees for the shortage in the cargo. At the time that the plaintiffs paid the claim of the consignees, they were not estopped from asserting that the master had no authority to sign in their behalf bills of lading for a shipment, which, in fact, had never been received by them.

[2] In *Sears v. Wingate*, 3 Allen (Mass.) 103, Judge Hoar, delivering the opinion of the court, held it to be a general principle, amply supported by authority (which he cites), "It is not within the scope of the master's authority from the owners to sign bills of lading for any property but such as is put on board." Counsel for the plaintiffs concede the general principle, but insist that in the present case, under the provision of the contract that "the captain shall sign bills of lading as and when presented on press receipts or railroad guarantees, as customary," the captain not only had the authority to sign the bills of lading, but it was his duty to do so without question. This view is supported with marked ability in the learned and ingenious argument of counsel, and many authorities are cited. We think, however, counsel loses sight of the fact that the provision in reference to the captain signing the bills of lading "as and when presented" is qualified by the stip-

ulation that they must be signed "without prejudice to this charter party," and also that the entire authority of the captain in signing the bills of lading is restricted to the matter of freight rates.

Since the charterers were responsible only for the cargo in placing it alongside the ship and in loading what there might be to load, and their responsibility ceased (under the eleventh paragraph) when the cargo was shipped (or loaded), authority of the captain to acknowledge receipt of cargo, which in fact he did not receive, cannot be implied from the contract. And it has been expressly held that the terms in a charter party authorizing the captain to sign bills of lading "as and when presented, without prejudice to the charter party," "but any difference between the amount of freight as per bills of lading and this charter party to be settled at port of loading," etc., were not inconsistent with the general rule that an agent cannot give bills of lading for shipments not received, but confined the authority of the captain, in relation to the bills of lading, to the mere matter of freight charges. 36 Cyc. 65, 66; *The Tongoy* (D. C.) 55 Fed. 330; *The Kirkhill*, 99 Fed. 576, 39 C. C. A. 658.

The declaration in the case at bar is based upon the alleged violation of the charter party: "Petitioners attach hereto an itemized statement marked Exhibit B., which is made a part hereof, showing that said defendant is indebted to them in the sum of £196, 9s, 11d., for which amount in terms of money of the United States of America, to wit, the sum of \$951.11, petitioners, who are the owners of said ship *Reliance*, and who have paid out the sums heretofore set forth, because of defendant's breaches of contract as aforesaid, ask judgment." But in the allegations there is nothing to show that the charter party was violated in any respect, nor is there any reference to a particular part of it which has been violated. The case proceeds upon the theory that the master signed, the bills of lading upon the defendant's representation that the cargo described in the bills of lading had been loaded, when, as a matter of fact, it had not been loaded, but there is no allegation of any fraud on the part of the defendant. It is not stated that the defendant knew at the time the bills of lading were presented for signature that the missing cotton and other articles had not been loaded, nor is it alleged that there was any fraudulent collusion between the defendant and the master with intent to defraud the plaintiffs. It is to be noted, too, that, while the charterers were to pay the stevedores for loading the cargo, the loading was to be under the captain's direction. He was to say in what portion of the ship the various articles of freight were to be stowed, and there is no reason given why he could not, or did not, check the articles as delivered upon and stowed in the

ship, except the fact that the charterers loaded the ship in great haste in order to make the despatch money. This statement itself would contradict the idea that the defendant was intending to defraud the plaintiffs, and raise the inference that, if the defendant omitted to place alongside or load any portion of the cargo, it was due to haste and negligence rather than to design.

[3] Counsel for the plaintiffs strenuously insist that the ruling in *Elder-Dempster & Co. v. Dunn & Co.*, *Law Times*, Dec. 18, 1909, 11 Asp. Mar. Cas. (N. S.) 337, is conclusive upon the point that *McIntyre Bros. & Co.* could not dispute the statements of the bills of lading, and therefore were liable to the consignees. As we have previously said, we see no reason why *McIntyre Brothers & Co.* could be held to be estopped from denying the authority of the captain to sign the bills of lading for cargo not received, but even if they could not, and if the liability for payment of the consignees properly rested upon the *South Atlantic Steamship Co.*, *McIntyre Bros. & Co.* would not have a right to recover for the payment made by them in behalf of the *South Atlantic Steamship Company*, unless they had been requested by the steamship company to pay its debt. The fact that I, without Smith's request, pay Smith's debt, does not authorize me to recover from Smith the amount which I paid in behalf of Smith without his procurement or knowledge. Smith may justly owe the debt, non constat that he is ready and willing to pay it. It may be it would have been tedious and expensive to the plaintiffs to have resisted a libel if the consignees had proceeded against the ship; but if the plaintiffs were not liable, and these expenses had been caused by the defendant, they could have recovered from the defendant the damages which their breach of the contract had occasioned.

It appears that the provisions of the charter party in the *Elder-Dempster Case* are so dissimilar to the charter here involved that the ruling is not in point. The remarks of *Scrutton, K. C.*, show that the charter in the *Elder-Dempster Case* was what is called the "net form" under which the charterer and his servants put the goods right on board, whereas in the charter before us the shipper gave the goods to the ship "alongside," the owners were responsible for them while they remained there, and, though the charterers furnished the stevedores and paid for the loading, the loading was done under the supervision of the captain.

We think that when the parties inserted in the present contract the stipulation that the owners were to be responsible for the cargo after it was delivered alongside, and signed for by the mate or other person authorized to receive it, the shipowners either clearly overlooked the fact that a part of the cargo might be stolen, burned, or removed from alongside the ship before it was

loaded, or else they clearly intended to assume the risk in case of either of these contingencies, and, in the absence of any evidence that the charter in the Elder-Dempster Case contained a similar stipulation, we would not be authorized to treat the ruling in that case as controlling authority. The liability of the defendant, if any, depends upon the authority of the captain to issue bills of lading for a cargo which he did not receive. It must be conceded that he has generally no such authority, and there is nothing stated in the petition which would have given the consignee the right to assume that he did have such authority. Consequently the consignees took the bills of lading with knowledge of the fact that the captain had no such authority, and they could not have held McIntyre Bros. & Co. liable for the portion of the cargo which was missing without first proving that McIntyre Bros. & Co., did, in fact, receive the entire cargo. As McIntyre Bros. & Co. would not have been responsible in the first instance, they were not authorized to pay the consignees' claim against the South Atlantic Steamship Company, and, having paid it without direction or request on the part of the South Atlantic Steamship Company, they cannot recover. It may be that the bills of lading themselves would show that the South Atlantic Steamship Company was liable. But we cannot assume this. We would have preferred that the bills of lading had been in the record. Counsel for the defendant demurred upon the ground that they should be set forth, but does not except to the judgment overruling this demurrer, and, so far as this case is concerned, it must be held that the court ruled correctly in overruling the demurrer. We incline to the opinion that the ruling was right, and that there was no ground to except; but certainly the plaintiffs cannot complain of the ruling, and from their failure to amend by setting out the bills of lading (although they were not required to do so) it may be presumed that there is nothing in the bills of lading which would disclose anything to their benefit or take the case out of the general rule.

It may be that the bills of lading did not disclose that the 36 bales of cotton were actually included therein, and the same may be said as to the rosin and lumber. From this it may be inferred that business considerations may have influenced McIntyre Bros. & Co. to accede to a claim which in fact was not justified by the bills of lading. The description of the marks of some portion of the cotton may have been illegible on the bills of lading, and the plaintiffs may have conceded the claim of the consignees too readily, simply to avoid litigation. Be this as it may, since the plaintiffs elected to base their action upon the charter party, their case must stand or fall upon its provisions.

[4] The fact that it is alleged in an amend-

ment, which the plaintiffs proposed to make the seventh count of their petition, but which the trial judge refused to allow as an amendment, that the defendant failed to place the portion of the cargo for which the plaintiffs had to pay alongside the ship, as it was bound to do by the provisions of the charter party, has been the subject of our most serious consideration, and the question presented has not been determined without great difficulty. We were at first of the opinion that this raised such an issue of fact as to a very apparent breach of one of the conditions of the contract that it should have been submitted to the jury, and that the trial judge erred in sustaining the objection to the amendment and in refusing to allow it. However, after an exhaustive examination of the authorities, we are compelled to the conclusion that this breach of the contract cannot afford a basis for the plaintiffs' recovery of the sum of money which they allege they paid to the consignees upon their bills of lading, procured, as the plaintiffs allege, by false representations of the defendant to the captain that the goods had been placed alongside the ship. Even though the plaintiffs might be entitled to recover in a direct action brought upon the breach of the contract in this particular, and without regard to the bills of lading or the representations by which their issuance was induced, if the rule is as we think it is, and as stated by Justice Hoar in the case of *Sears v. Wingate*, supra, that the master never has authority to acknowledge receipt of goods which he does not actually receive, and if it is further true, as held in *Swift v. Tatner*, 89 Ga. 660, 15 S. E. 842, 32 Am. St. Rep. 101, that the master, under this charter party, was the servant of the owner rather than the charterer, then the shortage in the cargo was the fault of the plaintiffs' own agent, and, of course, the plaintiffs could not recover from the defendant for a loss which had been occasioned the plaintiffs by the negligence of their own agent in not ascertaining that the goods specified in his bills of lading had not in fact been delivered alongside. If, as a matter of fact, the goods were not delivered alongside by the defendant charterer, the plaintiffs may maintain an action for this breach of the contract, and the measure of their damages would not only include the market value at Savannah of such articles as were not put alongside, but might also include all other costs and damages to which the plaintiffs were subjected by reason of the defendant's breach of the contract evidenced by the charter party. But this right of action would be one entirely different and distinct from the plaintiffs' original cause of action, which depends upon the procurement of bills of lading from the plaintiffs' captain by false representation to the effect that defendant had placed alongside ship articles which had not in fact been delivered by the charterers.

Of course, if, as a matter of law, the captain was the agent of the charterers, instead of the agent of the owners of the ship, the plaintiffs would not have been compelled to pay the consignees for the shortage in the cargo. We think, therefore, that under the allegations of the petition, as well as of the amendments proposed thereto, the plaintiffs could not recover of the defendant in this action.

Even if it is not clear that the plaintiffs could have avoided paying the consignees in Europe, it is perfectly plain, in the absence of any allegation of fraud or collusion between the captain and the defendant charterers, that the failure of the captain (the plaintiffs' agent) to ascertain for himself, and for the protection of his masters, that the articles receipted for in the bills of lading had been actually delivered by the charterers, was the real cause of the shortage for which the plaintiffs had to pay, and that the plaintiffs cannot recover of the defendant for the negligence of their own agent.

Judgment affirmed.

(12 Ga. App. 722)

BROWN v. STATE. (No. 4,761.)

(Court of Appeals of Georgia. May '20, 1913.)

(*Syllabus by the Court.*)

1. INFANTS (§ 68*)—CRIMINAL LAW (§ 778*)—COMPETENCY TO COMMIT CRIME—BURDEN OF PROOF—INSTRUCTIONS.

Under the statute of this state, a person between the ages of 10 and 14 years cannot be legally convicted of a crime, unless it appears from the evidence that he was *capax deli*; and the burden of proving that he was so rests upon the state. Penal Code 1910, § 83; *Ford v. State*, 100 Ga. 63, 25 S. E. 845. The court should have charged the jury to this effect, in accordance with a written request, timely made. An instruction to the effect that, in determining the question as to the mental responsibility of the accused for his conduct, the jury should consider any evidence showing what he did, how he acted, what he said, in fact the whole case in all of its aspects, to determine whether he knew good from evil, and that if the jury had a reasonable doubt on this question they should acquit, was not equivalent to the instruction requested.

[Ed. Note.—For other cases, see *Infants*, Cent. Dig. § 172; Dec. Dig. § 66;* *Criminal Law*, Cent. Dig. §§ 1846-1852, 1854-1857, 1960, 1967; Dec. Dig. § 778.*]

2. HOMICIDE (§ 300*)—INSTRUCTIONS—JUSTIFICATION.

Since the decision of the Supreme Court in the case of *Cumming v. State*, 99 Ga. 662, 27 S. E. 177, it has been uniformly held by that court and by this court that a charge to the jury that "provocation by words, threats, menaces, or contemptuous gestures shall in no case be sufficient to free the person killing from the guilt and crime of murder" (Penal Code 1910, § 65) should not be given without qualification, where there is a theory of the evidence, or of the statement of the accused made to the jury, on which the jury might find that the person killing acted in self-defense, on account of a reasonable fear aroused in his mind by menaces, etc., considered in connection with the other facts in the case. In the

present case the theory of the defense, based upon the statement of the accused, was to the effect that the accused, in killing the decedent, did so under the fears of a reasonable man that the decedent was endeavoring to take his life or to commit a felony on his person; these reasonable fears being aroused by menaces, accompanied by the act of drawing a knife on the accused by the decedent.

[Ed. Note.—For other cases, see *Homicide*, Cent. Dig. §§ 614, 616-620, 622-630; Dec. Dig. § 300.*]

3. NO OTHER ERROR.

Except as above decided, no substantial error of law appears.

Error from Superior Court, Bibb County; H. A. Mathews, Judge.

Gus Brown was convicted of crime, and he brings error. Reversed.

John R. Cooper, of Macon, for plaintiff in error. John P. Ross, Sol. Gen., of Macon, for the State.

HILL, C. J. Judgment reversed.

(12 Ga. App. 729)

CENTRAL OF GEORGIA RY. CO. v. BORLAND. (No. 4,350.)

(Court of Appeals of Georgia. May 6, 1913. Rehearing Denied June 10, 1913.)

(*Syllabus by the Court.*)

1. TRIAL (§ 257*)—INSTRUCTIONS—REQUEST—NECESSITY.

In the absence of an appropriate and timely request to that effect, the trial judge (after having fully and fairly stated the contentions of the parties as set out in the pleadings) is not required to direct the attention of the jury to specific contentions of either party, arising, for the first time, upon the argument of the case and not specifically mentioned in the pleadings; the contention being wholly dependent upon inferences from the testimony.

[Ed. Note.—For other cases, see *Trial*, Cent. Dig. §§ 642-645; Dec. Dig. § 257.*]

2. TRIAL (§ 141*)—INSTRUCTIONS—CONCEDED LIABILITY.

Counsel for the defendant, in open court, admitting its liability to the plaintiff for such damages as were due to a slight wound in the plaintiff's head, but at the same time denying the existence of all other injuries from which the plaintiff claimed to have suffered, it was not error for the judge, in reply to this statement of counsel, and in proceeding with his charge, to use the following language: "Counsel having conceded the liability of the defendant, you should carefully consider the case and arrive at the proper amount after giving due weight to all of the testimony in the case, and the form of your verdict should be, 'We, the jury, find for the plaintiff' so many dollars, stating the amount."

[Ed. Note.—For other cases, see *Trial*, Cent. Dig. § 336; Dec. Dig. § 141.*]

3. VERDICT SUSTAINED.

The verdict is fully supported by the evidence.

Error from City Court of Sandersville; E. W. Jordan, Judge.

Action by J. D. Borland against the Central of Georgia Railway Company. Judge

ment for plaintiff, and defendant brings error. Affirmed, with damages.

F. H. Saffold, of Swainsboro, J. J. Harris, of Sandersville, and Lawton & Cunningham, of Savannah, for plaintiff in error. Hardwick & Wright, of Sandersville, and Smith & Hastings, of Atlanta, for defendant in error.

RUSSELL, J. The plaintiff in the lower court brought an action for damages against the railway company, and the jury returned a verdict in his favor for \$5,000. It is not insisted by counsel for plaintiff in error that the plaintiff was not entitled to recover damages in some amount. It is admitted that the railway company is liable for whatever injury the plaintiff really suffered, due to a head-end collision of two of the defendants' trains. The jury, therefore, had but two questions before it: (1) What injuries did the plaintiff receive in the collision? (2) What was the amount of damages dependent upon these ascertained injuries? There are two special grounds of the motion for new trial.

[1] 1. In the fourth ground of the amendment to the motion it is insisted that the court erred in stating the contentions of the defendant in that the court withdrew from the consideration of the jury one of the defendant's real and important defenses, "Because one of the defendant's main contentions was the apparent condition of the plaintiff, as it appeared before the jury, was not his real condition; that the plaintiff was feigning; that his back was not injured at all; and, if so, not as it appeared." It is very apparent that this assignment of error is hypercritical. The contentions of the parties are generally to be drawn from the pleadings, and to have presented to the jury a special defense, which is merely a matter of argument and deduction from the evidence, would certainly require the timely presentation of an appropriate request in writing. The charge of the court was a remarkably full and fair presentation of all of the issues involved in the case, as set out in the pleadings of both parties. The question whether or not the plaintiff was feigning a physical condition which did not, in fact, exist was one which necessarily depended wholly on the credibility of the plaintiff on the stand and when not upon the stand. No judge can undertake to call the special attention of the jury to the credibility of a witness without error, and he is likely to commit error whenever he undertakes to state to the jury that either party insists that testimony damaging to his case is unreliable or untrustworthy. We are inclined to the opinion that the trial judge would have erred to have instructed the jury as counsel for plaintiff in error now insists he should have done. But, not being required at this time to rule upon this point, we have no hesitation in holding that he cer-

tainly did not err, in the absence of a request to give the instruction the omission of which is assigned as error.

[2] 2. As the judge was about to state, toward the conclusion of his charge, the form of the verdict in case the jury found for the defendant, he was interrupted by one of counsel for the plaintiff with the statement: "If your honor please, I understand the defendant concedes its liability." The court said: "It is denied in the pleadings." Thereupon defendant's counsel said: "Your honor, we admit we are liable to the plaintiff in some amount for damages for the wound received in his head. We, of course, however, deny the other injuries the plaintiff claims." Whereupon the court, as the concluding sentence in his charge, said: "Well, gentlemen of the jury, counsel having conceded liability of the defendant, you should carefully consider the case and arrive at the proper amount, after giving due weight to all of the testimony in the case, and the form of your verdict should be, 'We, the jury, find for the plaintiff' so many dollars, stating the amount." We cannot concur in the insistence of the plaintiff in error that this mere statement of the court as to the form of the jury's verdict placed the defendant in the position of admitting liability as set out and claimed by the plaintiff, for there is nothing in the language as used, nor in anything which transpired in connection therewith, to have created any such impression in the minds of a jury of ordinary intelligence.

[3] 3. The verdict is fully supported by the evidence, and the special assignments of error in our opinion are without merit.

Judgment affirmed.

(12 Ga. App. 732)

FARMER v. PHILLIPS. (No. 4658.)

(Court of Appeals of Georgia, May 6, 1912.
Rehearing Denied June 10, 1912.)

(Syllabus by the Court.)

1. **DOMICILE (§ 2*)—"RESIDENCE."**

The term "residence" has been judicially defined as "an abode or dwelling place, as distinguished from a mere temporary locality of existence" (citing 7 Words & Phrases, p. 6155).

[Ed. Note.—For other cases, see Domicile, Cent. Dig. § 2; Dec. Dig. § 2.*]

2. **CHATTEL MORTGAGES (§§ 87, 188*)—PLACE OF RECORD—"RESIDENCE" OF MORTGAGOR—PRIORITIES.**

A resident of Tift county moved his family over into Worth county, intending to remain there until a house in which he expected to reside, located in Tift county, was completed, and made ready for his family residence, when he intended to return to Tift county and resume his residence with his family therein. While temporarily sojourning in Worth county, he executed a mortgage on personal property, and this mortgage was recorded in Worth county. *Held*, (1) that the mortgagor's residence was in Tift county and the mortgage should have been recorded in that county; (2) that a second mortgage executed by him, covering the

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

same property as that in the first mortgage and duly recorded in Tift county (the holder of the second mortgage having no actual notice of the existence of the first mortgage), was prior in dignity to the first mortgage, and the proceeds arising from the sale of the mortgaged property were properly awarded to the *fi. fa.* issued on the foreclosure of the second mortgage.

[Ed. Note.—For other cases, see *Chattel Mortgages*, Cent. Dig. §§ 162-165, 228-236; Dec. Dig. §§ 87, 138.*]

Error from City Court of Tifton; R. Eve, Judge.

Action between J. L. Farmer and J. J. L. Phillips to determine conflicting claims to money arising from the sale of a horse levied on. Judgment in favor of Phillips, and Farmer brings error. Affirmed.

Perry, Foy & Monk, of Sylvester, for plaintiff in error.

HILL, C. J. The question in this case arose on a rule to distribute money, and was decided by the judge of the court below, by consent, without the intervention of a jury, upon the following stipulation as to the facts: In the early part of January, 1912, J. L. Farmer sold to one B. H. Holt a horse, and took a mortgage from Holt for the purchase money. This mortgage was properly executed, and was recorded at once in Worth county. Subsequently Holt executed a second mortgage covering this horse to one Phillips. This mortgage was properly executed, and was recorded in Tift county. It was foreclosed by Phillips, and the horse was levied upon and sold by virtue of a mortgage *fi. fa.* Farmer also foreclosed his mortgage on the horse, and had an execution issued thereon. This execution was placed in the hands of a levying officer before the sale of the horse, with instructions to the officer to hold up the money arising from the sale of the horse, awaiting the order of the court directing its proper distribution as between the two mortgage executions. When the first mortgage given by Holt to Farmer was executed, Holt lived in Tift county on a place known as the "Parks place" during the year 1910, and when he moved from that place about Christmas, 1911, he contemplated moving to another place in Tift county, with the intention of residing there during the year 1912. The place at which he expected to reside during 1912 is immediately across the line in Tift county, on the east side of a road which is the line between Worth and Tift counties. Upon arriving with his household effects, that being the only property he owned (he being a tenant), the house in which he expected to reside in during the year 1912 was incomplete, not having been finished in its building, and was unfit for occupation; and thereupon he made arrangements to move his household goods and his family to a house just across the road in Worth county, where he remained for a few weeks until his house was

ready. While he was stopping at the house in Worth county, he bought the horse in question from Farmer, executing to Farmer a mortgage note. At the time of selling Holt the horse, and at the time of the execution of the mortgage, Farmer inquired of Holt where he lived, whether in Worth or Tift county, and was told by Holt that he lived in Worth county. Farmer did not know at the time of taking said mortgage note, or at the time of having same recorded, or even until after its foreclosure, that Holt at the time of the execution of his note and mortgage contemplated moving into Tift county. The mortgage executed by Holt to Phillips was properly recorded in Tift county. The judge awarded the money arising from the sale of the horse to the *fi. fa.* in favor of Phillips, and Farmer excepted to this judgment.

[2] The only question to be decided by this court is as to the record of the mortgage executed by Holt to Farmer. It is conceded that this mortgage was for the purchase money of the horse sold by Farmer to Holt, and it is not contended that Phillips, who took the second mortgage, had any actual knowledge of the existence of the first mortgage. If Farmer's mortgage was properly recorded, of course, it constituted constructive notice to Phillips, and Farmer was entitled to the proceeds of the horse. Civil Code 1910, § 3259, provides that a mortgage on personalty must be recorded in the county where the mortgagor resides at the time of its execution, and it is insisted by the plaintiff in error that the word "residence" in this section means actual residence of the mortgagor as contradistinguished from his domicile or political residence. In determining whether a mortgagor is a resident of a particular county, the question as to his domicile may not be involved, for he may have a residence which is not in law his domicile. Domicile includes residence with intention to remain, while no length of residence without intention of remaining constitutes domicile. Drake on Attachments, § 58. In construing the statute requiring that a mortgage on personalty must be recorded in the county of the mortgagor's residence at the time of the execution of the mortgage, the question of residence and not domicile is involved, and, as said by the Supreme Court of Minnesota in *Keller v. Orr*, 40 Minn. 428, 42 N. W. 292, and approved by the Supreme Court of this state in *Stickney v. Chapman*, 115 Ga. 759, 761, 42 S. E. 68, the fact of actual residence is to be determined by the ordinary and obvious indicia of residence.

[1] In both of the cases just cited the question under discussion was as to the issue of nonresidence under attachment laws; and in the decision in the *Keller* Case it was held that a mere temporary or casual absence of a debtor from the state on business or pleasure will not render him a nonresi-

dent. The words "resident" and "residence" import more than a temporary stay in a place for the performance of a single piece or job of work, especially where the workman at the same time has a home and permanent place of abode in another place, and the term "residence" has been judicially defined as "an abode or dwelling place, as distinguished from a mere temporary locality of existence." 7 Words & Phrases, 6155. Under these definitions of the term applied to the facts of this case, we must conclude that the mortgagor, Holt, did not reside in Worth county, when he executed the mortgage note to Farmer, but at that time he was simply temporarily sojourning in Worth county until his permanent residence was ready for his reception in the county of Tift; in other words, that he had not abandoned his residence in Tift county by a temporary dwelling in Worth county for a short time, until he could carry out his intention of resuming his residence in Tift county. While it seems that Farmer exercised due diligence in making inquiry as to the place of residence of Holt when he executed the mortgage to him, and was not informed as to the facts by Holt, we are not at liberty to add to the mandatory statute of the Legislature which declares that a mortgage on personal property must be recorded in the county of the residence of the mortgagor, in order to constitute constructive notice of its existence. Entertaining this view of the law, it follows that the judgment of the lower court, awarding the money to the holder of the second mortgage who had neither constructive nor actual notice of the first mortgage, should be affirmed.

Judgment affirmed.

(72 W. Va. 364)

McLAUGHLIN v. SAYERS.

(Supreme Court of Appeals of West Virginia.
April 29, 1913.)

(*Syllabus by the Court.*)

EQUITY (§ 420*) — DEFAULT — HEARING — CONTINUANCE.

A defendant in default by a bill taken for confessed against him at rules, though at the first term he unsuccessfully demurs and then files his answer, cannot as of right demand a continuance to enable him to take proof. The plaintiff is entitled to have the cause heard at that term unless the defendant shows good cause for a continuance by affidavit filed.

[Ed. Note.—For other cases, see Equity, Cent. Dig. § 970; Dec. Dig. § 420.*]

Appeal from Circuit Court, Pocahontas County.

Bill in equity by A. M. McLaughlin against D. W. Sayers to enforce a vendor's lien. From a decree for plaintiff, defendant appeals. Affirmed.

W. A. Bratton, of Marlinton, for appellant. Henry Gilmer, of Lewisburg, for appellee.

ROBINSON, J. By the bill in this cause plaintiff sought the enforcement of a vendor's lien which he had retained on land conveyed by him to defendant. From a decree for the unpaid purchase money, ordering a sale of the land to satisfy the same, defendant has appealed.

Though duly summoned, defendant allowed the bill to be taken for confessed at rules. At the first term thereafter he appeared and entered a demurrer to the bill, which was promptly, but most properly, overruled. The bill was assuredly sufficient. Plainly the demurrer was a dilatory one. Upon the overruling of the demurrer, defendant tendered an answer, to which plaintiff filed exceptions. The exceptions were sustained. That this answer afforded no defense is clear. The bill was fully supported by documentary evidence. Plaintiff insisted on a hearing. A decree of sale for the enforcement of plaintiff's lien was directed. Before such a decree was entered, defendant tendered an amended answer which presented a sufficient defense to the bill. Plaintiff replied generally. The amended answer set up that which, if supported by proof, would have entitled defendant to an abatement of the purchase money or a rescission of the conveyance. That the general replication was in place is sustained by *Depue v. Sergeant*, 21 W. Va. 326, syl. 2. It put defendant to proof. With the tendering of the amended answer, defendant moved a continuance of the cause, but filed no affidavit in support of his motion. A continuance was refused and the decree complained of was entered.

Was it error to deny defendant a continuance of the cause? Indeed the statute answers the question: "At any time before final decree, a defendant may file his answer, but a cause shall not be sent to the rules or continued, because an answer is filed in it, unless good cause be shown by affidavit, filed with the papers therefor." Code 1906, ch. 125, sec. 53. Since the motion for continuance was not supported by an affidavit as required by this statute, it was proper to overrule the same. True, upon the overruling of the demurrer, defendant was entitled to answer the bill. He was permitted to do so. The question we have is not as to the right to answer; it is as to the right to a continuance. The statute plainly gives a defendant the right to answer; but it quite as plainly denies him a continuance on the strength of the answer alone.

True also, defendant tendered his answer at the first term after the cause was matured and set for hearing; but when he tendered it he was in default. The bill had been taken for confessed as to him. That fact convicted him of dilatoriness. He might have appeared at rules and aided the progress of the cause, or might have taken such steps at rules as would have prevented the default

of a bill taken for confessed. It was to provide against delay by reason of any such dilatoriness on the part of a defendant that the statute we have quoted was enacted. That statute virtually says that a defendant by affidavit filed in the papers must purge himself of all apparent neglect before he can continue the cause on the filing of an answer in term. And that statute applies as well to the first term of court as to any other. It does not except the first term. If, as in this case, the bill is one that does not require the taking of depositions to prove it, a defendant when summoned to answer it must take notice that a decree may be insisted upon at the first term, and must use all reasonable diligence in the making of his defense. Otherwise he may not be able to acquit himself and show good cause for a continuance if he needs more time when the first term comes on. Of course in the majority of instances, an answer filed in term puts the plaintiff to proof and brings on a continuance to which plaintiff is then himself entitled. Thus chancery causes usually go over the first term for the taking of proof. And it is this that has caused an impression with some that in all cases a defendant summoned to rules may wait until the term to put in his defense and rather as of right carry the case over. But if the plaintiff is in position to ask a decree at the first term, let the defendant beware. If the defendant is in default, he can not get further time without the affidavit required by the statute.

Mr. Hogg says: "When the plaintiff has regularly filed his bill at rules and matured the cause for a hearing, and the defendant afterwards files his answer in term time, and the plaintiff desires time to reply to the answer and take proof and prepare his case for hearing, he is entitled to a continuance of the cause as a matter of right, upon a motion made for that purpose." Then on the other hand he says: "While a defendant may file his answer at any time before final decree, as we have seen, he cannot, upon the filing of his answer, have the case continued, except for good cause, to be shown by affidavit filed in the papers for that purpose. A defendant who has time and opportunity to take his evidence after the filing of the bill, before the case is called for hearing in court, or before the coming on of the term of the court at which the case is heard, cannot file his answer at the hearing or at the term at which the cause may be heard, and then continue or delay the case to procure evidence in support of his answer." *Equity Procedure*, secs. 460, 461.

In *Gardner v. Landcraft*, 6 W. Va. 36, it is held: "When a bill has been regularly taken for confessed at rules, and the cause set for hearing, and docketed, and the defendant appears in court and by leave of court, files his answer to which plaintiff files a general replication, the plaintiff is entitled

to have the cause heard at the same term, unless, the defendant shows good cause for a continuance." In that case Judge Haymond says: "At the commencement of the court at which the decree was rendered the plaintiffs were entitled to have the cause heard, upon the bill taken for confessed at rules. At this term of the court the defendants appeared before the decree was rendered and obtained leave to file their answers, and did then file them, to which the plaintiffs filed general replications. Up to the filing of the answers the defendants were in default, and it was the right of the plaintiffs to have the cause then heard, upon the bill, exhibits, answers, and replication thereto, unless the defendants by proper affidavits showed good cause to the court for a continuance."

In *Reynolds v. Bank*, 6 Grat. 188, the court, in relation to proceedings at the first term, says: "In this case the defendant being in default, the law attached to his pleading, demurring, or answering, the condition that his doing so should not delay the cause; and this condition was expressed in the order of the court receiving his demurrer. If the defendant had answered instead of demurring, the plaintiff would have been entitled to a trial without delay, and equally so though a demurrer was filed instead of an answer. The overruling of the demurrer placed him in no better condition than he was before; he had still a right to answer, but subject to the same condition. If the mere filing of a demurrer is to entitle a defendant, in default, to the allowance of two months to answer, it will enable him in every case, without any reason whatever, to obtain a continuance beyond the term; which is directly in the teeth of the plain words of the statute, and against its true spirit and meaning."

In *Bronson v. Vaughn*, 44 W. Va. 410, 29 S. E. 1023, the very question that we have under consideration arose and was passed upon. There, just as in this case, at the first term a demurrer to the bill was overruled, the defendants answered, the plaintiff replied generally, and the court denied the defendants a continuance. This court, through Judge English, said: "Was the motion for continuance properly overruled by the court? In order to reach a proper conclusion upon this question, we must consider that this bill was filed at rules on the 9th of October, 1895, and the answer was not tendered until January 11, 1896, in term time; and after the answer was filed, and the plaintiff replied generally thereto, the defendants asked a continuance of the cause, to give them an opportunity to prove the allegations of their answer, which motion was overruled. The defendants offered no affidavit in support of their motion, or in any manner showed to the court that they had any proof to take or any good cause why such contin-

uance should be granted, when section 53 of chapter 125 of the Code expressly provides that 'at any time before final decree a defendant may file his answer, but a cause shall not be sent to rules or continued, because an answer is filed in it unless good cause be shown by affidavit filed with the papers therefor.' Under this section, then, and in the circumstance of the case, I think the motion for continuance was properly overruled."

In *Ash v. Lynch*, 78 S. E. 365, decided this term, recognition is given to the necessity of an affidavit showing good cause to warrant a continuance on the coming in of an answer, though, as in that case, it is tendered at the first term. Therein Judge Poffenbarger says: "With this answer in, no decree should have been entered, because the bill was not sustained by any proof. If its allegations had been supported by proof, the denial of the answer, had it been filed, would not have prevented a decree, in the absence of good cause shown for a continuance. Upon the bill, answer and general replication, without any evidence, there could not have been a decree for the defendants. The plaintiff could have prevented this by taking a continuance, but the defendants could not have had a continuance, without disclosing good cause therefor, if the plaintiffs had been ready to submit the cause." And in *Moore v. Moore*, 78 S. E. 99, also decided at this term, we gave further recognition to the necessity of an affidavit as the basis of a continuance on the tendering of an answer at the first term, by holding that the affidavit offered at such term in that case showed good cause and warranted a continuance as was asked.

Defendant says that his answer, which is sworn to, is an affidavit which entitled him to a continuance of the cause. But we find no facts stated therein which show good cause why the hearing should have been delayed to enable defendant to take proof.

It may be that, in the short period of a little more than a month between the filing of the bill and the coming on of the term defendant if he had been ever so diligent could not have made out his case for that term or speeded the cause by earlier appearance on his part. If such was the fact, defendant, by the terms of the statute, was required to show the same to the court below by affidavit, in order to justify that court in even entertaining his motion for a continuance. The statute does not say that the court shall judge from anything but an affidavit as to whether a continuance shall be granted a defendant when he files an answer in a cause ready for hearing. The court is not left to exercise its judgment on verbal statements, general appearances, or the ordinary papers of the suit. It can only adjudge whether there shall be a continuance by ref-

erence to an affidavit. Where no affidavit is filed, it must proceed to hear the cause if the plaintiff so insists.

The enforcement of this plain statute which requires the filing of an affidavit showing good cause before any chancery suit ready for hearing on the part of the plaintiff can be carried over any term merely by the defendant filing an answer therein, will not be amiss in this day of complaint against the sluggishness of judicial procedure. Without its enforcement many a just cause may be delayed over a long period between two terms by a defendant simply filing an answer which he never expects to prove, and which is put in only to prevent a decree for a time and thereby give him longer possession or use of the subject of the litigation.

The decree will be affirmed.

(72 W. Va. 270)

ROBERTS v. BALTIMORE & O. R. CO.
(Supreme Court of Appeals of West Virginia.
April 29, 1913.)

(Syllabus by the Court.)

1. JUSTICES OF THE PEACE (§ 167*)—APPEAL — CONTINUANCE.

An amended complaint filed in the circuit court after the jury has been selected and sworn in an appeal from a judgment of a justice, setting forth more particularly and formally the claims or demands described in the complaint filed in the justice's court, and introducing no new cause of action, does not of itself show cause for a continuance.

[Ed. Note.—For other cases, see Justices of the Peace, Cent. Dig. §§ 647-651, 654; Dec. Dig. § 167.*]

2. NEGLIGENCE (§§ 72, 136*)—CONTRIBUTORY NEGLIGENCE — EMERGENCIES — QUESTION FOR JURY.

In cases of sudden and unexpected danger, necessitating quick determination and choice of means of safety or escape, the law makes allowance for errors in judgment, exacting only good faith and abstention from voluntary risk on the part of the person so exposed, and the inquiry as to whether injury resulting to him from mischoice of means was due to his contributory negligence is generally one for jury determination.

[Ed. Note.—For other cases, see Negligence, Cent. Dig. §§ 99, 100, 277-353; Dec. Dig. §§ 72, 136.*]

3. RAILROADS (§ 350*)—CROSSING ACCIDENT — CONTRIBUTORY NEGLIGENCE — QUESTION FOR JURY.

In the absence of proof of knowledge on the part of a driver of a vehicle of the character and extent of a defect in a highway crossing on a railroad, by means of which a vehicle, while being driven across the track in the nighttime, caught and became fastened upon a rail of the track, and could not be detached and removed in time to prevent it from being struck by an engine, it is for the jury to say whether the driver was guilty of contributory negligence in attempting to effect a crossing, in view of the character of the vehicle and the defect in the crossing.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 1152-1192; Dec. Dig. § 350.*]

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

4. TRIAL (§ 295*)—CROSSING ACCIDENT—INSTRUCTION.

An instruction in such a case, authorizing the jury to find for the plaintiff, if they believe from the evidence that the crossing was out of repair and in an unsafe condition, and the defect therein was the proximate cause of the injury, aided by other instructions given for the defendant, propounding an inquiry as to the existence of contributory negligence and clearly stating what is meant by proximate cause, may properly be given in an action for damages for injury sustained in such manner.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 703-717; Dec. Dig. § 295.*]

5. RAILROADS (§ 351*)—CROSSING ACCIDENT—INSTRUCTION.

An instruction in such case authorizing a verdict for the plaintiff, if the jury believe the servants of the defendant in charge of its engine, by the exercise of ordinary care, could have discovered the vehicle and avoided injury thereto, is proper, although binding and the evidence upon which it is based circumstantial, consisting of the facts and circumstances attendant upon the injury. As the act of negligence to which such an instruction relates, if established, is necessarily the last one of the transaction and therefore the proximate cause of the injury, the instruction need not cover other phases of the case.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 1193-1211, 1213-1215; Dec. Dig. § 351.*]

· Error to Circuit Court, Wetzel County.

Action by John Roberts against the Baltimore & Ohio Railroad Company, a corporation. Judgment for plaintiff, and defendant brings error. Affirmed.

Thomas P. Jacobs and F. V. Iams, both of New Martinsville, for plaintiff in error. John F. Thockmorton, of Hundred, and E. L. Robinson, of New Martinsville, for defendant in error.

POFFENBARGER, P. On appeal from a judgment of a justice the plaintiff recovered a verdict and judgment for damages for the alleged negligent destruction of his hay baler and injury to other property on a highway crossing over the defendant's railroad. The crossing being out of repair, the baler caught on one of the rails of the track, as it was being driven across the same, and before it could be detached one of the defendant's engines struck it and destroyed it together with some other property connected with or attached to it, and injured and damaged the plaintiff's horses and harness.

[1] The filing of an amended declaration after the jury had been impaneled and sworn was the occasion of a motion for a continuance, the overruling of which is the ground of one of the assignments of error. A complaint, called a declaration, setting forth the nature of the plaintiff's claim and an account, containing an itemization thereof, were filed with the justice. The amended declaration or complaint amounts to nothing more than a restatement, with more particularity and formality, of the claim filed with the justice. It introduced no new ground

of action. The declaration or complaint filed with the justice called the machine a hay press and the amended declaration designates it a hay baler, but this difference in name is not suggestive of a new subject-matter; "hay press" and "hay baler" obviously meaning the same thing. An amendment to a pleading made at the bar does not of itself confer right to a continuance. The cause therefor must appear from the nature of the amendment or be shown in some other way. *Koen v. Brewing Co.*, 69 W. Va. 94, 70 S. E. 1098; *Bank v. Hamilton*, 43 W. Va. 75, 27 S. E. 296; *Anderson v. Coal Co.*, 12 W. Va. 526. The baler was a portable machine, carried on two trucks or axles, connected by a reach or coupling pole. The wheels were much lower than those of an ordinary wagon. In the reach or coupling pole were two pins or bolts, extending slightly below it, and distant from the front axle, respectively, about two feet and ten inches and four feet and five inches. The plaintiff's agent or servant attempted to cross the track from north to south. From the south rail of the track there was a considerable drop, by reason of the earth having been worn away or the track having been built above the surface of the roadbed, or both. As to the depth of this depression, there is some conflict in the evidence, but none as to its existence. At the crossing there is a switch or side track as well as the main track, and the evidence tends to show a depression between the tracks. As to whether there was a board or plank on the ends of the ties outside of the south rail of the main track there is some conflict, but there is evidence tending to prove there was none. When the front wheels of the baler went over the south rail of the main track into the depression, the first bolt or pin in the reach caught on the rail. By means of a jack it was detached, and then the other one caught, and pending the efforts of the teamster and the boy who was with him to detach it the engine came upon them and struck the baler. The collision occurred in the evening a little after dark. The crossing is either in a curve or very close to it. The headlight of the engine would not, for this reason, reveal the baler's presence at a distance of more than 15 or 20 feet, and the engine was running at a rather high rate of speed, 20 or 25 miles an hour. The engine crew and another witness say the crossing signals were given. There was no light on the baler, nor did the teamster or boy endeavor to give any signal to the approaching engine or in any way disclose their presence upon the track. When the teamster came to the track, train No. 4, going east, was just about due, and he waited until it passed. Train No. 53, going west, was due at the crossing only a few minutes later. All this he knew, but started to cross in this short interval of time, assuming his ability

to do so without mishap. The baler was struck by a loose engine, a helper, going west ahead of train No. 55. It was an extra not scheduled, and for all that appears the baler might have been detached before the arrival of train No. 55.

[2, 3] As railroad companies in making and maintaining public crossings over their tracks assume and discharge, in obedience to the statute, the duty ordinarily imposed by law upon county courts respecting highways, and provide and maintain them for the same purposes for which county courts construct and maintain highways, the due performance of that duty is tested by the rules and principles applicable to county courts, respecting performance of their duties relating to highways; and the duty of a traveler over such a crossing is the same as that pertaining to his use of other portions of a highway. Hence, what would amount to contributory negligence on the part of a traveler on any other portion of the highway would constitute contributory negligence in his use of a crossing, and, if injury in either case is caused by such negligence, there is no right of recovery. This defense is relied upon here in resistance of the rulings of the trial court upon instructions and also upon the motion to set aside the verdict. Hence, the inquiry is a very material and important one. If the plaintiff's agent, knowing the character and extent of the defect and danger, deliberately assumed the risk or hazard incident to the attempt to cross, his act was binding upon his employer. Under principles declared in *Shriver v. County Court*, 66 W. Va. 685, 66 S. E. 1062, 26 L. R. A. (N. S.) 377, *Phillips v. County Court*, 31 W. Va. 477, 7 S. E. 427, *Moore v. Huntington*, 31 W. Va. 842, 8 S. E. 512, *Hesser v. Grafton*, 33 W. Va. 548, 11 S. E. 211, *Campbell v. Elkins*, 58 W. Va. 308, 52 S. E. 220, 2 L. R. A. (N. S.) 159, and *Slaughter v. Huntington*, 64 W. Va. 237, 61 S. E. 155, 16 L. R. A. (N. S.) 459, there can be no recovery, if the danger was obvious and the risk assumed. It was not negligence in the plaintiff to send the vehicle upon the public road because of its peculiar character or construction, but, in attempting to use defective portions of the road, he was bound to take into consideration the character of the vehicle. He selected it for such use and knew its character. If the depression was known to the driver to be as deep as some of the witnesses say it was, he must have known the attempt to pass over it with the baler was hazardous, but his knowledge of the exact depth and character of the depression is not shown, and, owing to the lateness of the hour and darkness, he may not have observed its depth. Knowing nothing to the contrary, he could presume the crossing was reasonably safe. *Daniels v. County Court*, 69 W. Va. 676, 72 S. E. 782, 37 L. R. A. (N. S.) 1158. It was manifestly not negligence in the driver to attempt to pass over the track immediately

after a train had gone by, in the absence of proof of the obvious approach of another or a signal indicating its approach. With his vehicle thus fastened on the track and unable to go forward, there was a duty upon the driver, if practicable, to protect himself from approaching trains by keeping a lookout and warning them of his presence, unless he had reason to believe his detention would not be of sufficient duration to prevent him from getting off the track after hearing train signals for the crossing. In this connection he was entitled to take into consideration the implements he had for effecting a detachment of the machine from the rail. He had a jack suitable and convenient for such purpose. By its use he relieved himself from the first impediment, and was endeavoring to get relief from the second by the same means when the collision occurred. These circumstances indicate lack of reason for belief that he would be detained for any considerable length of time. His embarrassment, according to his own testimony, occurred unexpectedly, and he had little time in which to determine his course of procedure. It was dark, and he had no light with which to give a signal. He may have thought the danger would have been increased rather than minimized by the consumption of time requisite to the procurement of a light with which to give signals. Under these circumstances, the question of contributory negligence was one for jury determination. In cases of sudden emergency the law makes allowance for errors in judgment. The test is good faith and abstention from voluntary risk. *Mannon v. Railway Co.*, 56 W. Va. 554, 49 S. E. 450. Hence the verdict cannot be disturbed, unless the court erred in some of its rulings in the course of the trial.

At the instance of the defendant, the jury were fully instructed as to the duty of travelers upon highways to exercise care for their own safety, the effect of contributory negligence as a bar to recovery, and the duty of the plaintiff's servant, when he found himself detained on the track, to use diligence, if practicable, to give such notice to approaching trains of his presence there by signal or otherwise as ordinary prudence required under the circumstances. An instruction upon the law of concurrent negligence and another upon the duty of the plaintiff's agent to give notice of his presence upon the track by signals to approaching trains were refused. As the defense of contributory negligence had been clearly brought to the attention of the jury, the subject-matter of the instruction on concurrent negligence was sufficiently covered by those given. The jury were told the plaintiff could not recover if his negligence in any degree contributed to the injury. Defendant's other proposed instruction, refused by the court, omitted the element of judgment as to the necessity of giving signals under the circumstances. This omission justified refusal thereof. It was a

binding instruction, omitting any reference to one of the issues fairly presented by the evidence.

[4] Plaintiff's instruction No. 1 merely asserted the duty of the defendant to keep the crossings over its tracks in repair and in a reasonably safe condition for wagons and other vehicles. His instruction No. 2 authorized the jury to find for the plaintiff, if they believed the defendant had failed and neglected to keep the crossing in question in repair and reasonably safe, and its failure to do so was the proximate cause of the injury. It is said these instructions wrongfully impose duty to keep the approaches to the crossing in repair, though beyond the right of way of the defendant. There is no evidence that the depression in question was beyond the right of way of the defendant. Though instruction No. 2, binding as it is, says nothing about the issue of contributory negligence in terms, it requires the jury to find the negligence of the defendant was the proximate cause of the injury. The meaning of proximate cause is clearly shown in instruction No. 3, given at the instance of the defendant, though not formally defined. Had it not been thus disclosed, plaintiff's instruction No. 2 might have been misleading because of its generality. It inserts two conditions, telling the jury they must find the defendant was negligent, and that its negligence proximately caused the injury, before they could find for the plaintiff. In other words, instruction No. 2 is sound and complete, covering the whole case in general terms, some of which are defined in other instructions. Thus read, it does not ignore contributory negligence as a defense.

[6] Plaintiff's instruction No. 3, likewise binding, authorized a verdict for the plaintiff, if the jury should believe the defendant's servants, by the exercise of ordinary care, could have discovered the baler on the track and avoided injury thereof. There was no direct or positive evidence that the engine crew could have discovered the obstruction on the track, if they had been keeping a lookout for it, in time to prevent the injury, but the circumstances may be regarded as evidence proper for jury consideration upon that question. It was early in the evening, just after dark, and the engine, pulling no train, could have been stopped in a much shorter distance than if it had been drawing one, and the curve in the road at that point is not definitely given. Of course, it is error to give an instruction for which there is no basis in the evidence at all, but slight evidence only is required for such purpose. This instruction propounded an inquiry as to an act of negligence which, if established, was necessarily the last one in the transaction, and therefore the proximate cause of the injury. For this reason it could properly be made binding, though it

did not cover all the issues in the case. Considered as a whole, the instructions fairly presented to the jury all the issues developed by the evidence.

These conclusions result in affirmance of the judgment.

(72 W. Va. 349)

REYNOLDS v. REYNOLDS.

(Supreme Court of Appeals of West Virginia.
April 29, 1913.)

(Syllabus by the Court.)

1. DIVORCE (§ 287*)—APPEAL—SUBSEQUENT PROCEEDINGS BELOW—ALLOWANCE OF ALIMONY.

On an appeal by the husband from a decree granting the wife a divorce a mensa et thoro, and decreeing a conveyance to the wife of the husband's real estate as permanent alimony, the decree as to separation was affirmed, but, in respect to taking lands for alimony, was reversed, and the cause remanded, with direction to the lower court to enter a "reasonable money decree" for alimony. *Held*, that the chancellor has discretion to allow alimony from the date of the decree of divorce.

[Ed. Note.—For other cases, see Divorce, Cent. Dig. § 771; Dec. Dig. § 287.*]

2. DIVORCE (§§ 240, 286*)—APPEAL AND ERROR—AMOUNT OF ALIMONY—DISCRETION.

The amount of alimony proper to be allowed depends upon the wife's needs and station in life and upon the husband's means and ability to earn money; and the chancellor is vested with a wide judicial discretion in determining what is a proper amount, and his finding will not be disturbed unless it clearly appears that he has abused his discretion.

[Ed. Note.—For other cases, see Divorce, Cent. Dig. §§ 675-678, 680, 769, 770; Dec. Dig. §§ 240, 286; * Appeal and Error, Cent. Dig. § 598.]

Appeal from Circuit Court, Wood County.

Suit by Emma F. Reynolds against William O. Reynolds. From a decree for plaintiff, defendant appeals. Affirmed.

John F. Laird, of Parkersburg, for appellant. Thomas Coleman, of Parkersburg, for appellee.

WILLIAMS, J. This is the second appeal in this divorce suit, both taken by the husband. The decision on the former appeal is reported in 68 W. Va. 15, 69 S. E. 381, Ann. Cas. 1912A, 889, and contains a statement of the facts. The two decrees first appealed from were rendered on the 20th of December, 1907, and the 30th of December, 1908, respectively. The former granted the wife a decree of divorce a mensa and decreed a conveyance to her of certain real estate in Parkersburg, owned by her husband, as permanent alimony, and the latter, rendered after the filing of an answer and cross-bill by the husband, who had theretofore been proceeded against by order of publication, simply confirmed the former and decreed costs against the husband and his surety on his bond. This court reversed the first decree in respect to the taking of real estate for

alimony, and the second in respect to costs, and affirmed them in all other respects, and remanded the cause, with direction to the lower court to render a "reasonable money decree" for alimony. Thereupon, on the 8th of February, 1911, the lower court determined that \$12 per month, payable in quarterly installments of \$36, during the joint lives of husband and wife, or until their reconciliation, was a reasonable alimony, and decreed that it be paid from the 20th of December, 1907, the date of the decree appealed from. It ascertained that \$444 was due as of the 20th of January, 1911, and credited that sum with \$224.55, the costs of the appeal which it was decreed the wife should pay, thus leaving a balance of \$219.45 for the husband to pay on account of back alimony; and out of that sum the court decreed \$177 to the wife's counsel, of which \$150 was for his fees for services rendered in her behalf in the lower court and in this court, and \$27 on account of costs paid for her. From that decree the present appeal was taken.

[1] It is insisted that the lower court did not follow the mandate in that it did not enter a decree for appellant's costs incurred in the prosecution of his appeal, and allowed an unreasonable alimony. This court decreed costs of the appeal against the wife, and it was therefore not necessary for the lower court to do more than enter the mandate upon its record, so far as it related to the matter of costs. The mandate, by virtue of the statute, became the decree of that court. Section 29, c. 185, Code 1906. Execution for costs was not necessary, because the decree now appealed from gave credit for the costs on the accrued alimony. That amounted to an actual payment of the costs.

The wife was entitled to alimony from the date of the decree of separation, and the court had so decreed; but it erred in taking the husband's real estate in satisfaction thereof, and for that reason, that part of the decree was reversed, and the cause was remanded, with direction to ascertain a reasonable alimony payable in money, but the decree divorcing the parties from bed and board was affirmed. The mandate fixed no time from which alimony should begin to run. That point was not adjudicated by this court. It was therefore left to the discretion of the chancellor. He had the right to make the alimony relate back to the time of that decree. "The time of allowance (of alimony) like the question of amount is in the discretion of the court, and may, according to some authorities, be made to relate back to the commencement of the suit." 3 Enc. L. & P. 136; 14 Cyc. 788. The Supreme Court of Georgia held that it was proper and usual to make it relate back to the commencement of suit. *Swearingen v. Swearingen*, 19 Ga.

266. See, also, *Gay v. Gay*, 146 Cal. 237, 79 Pac. 885. But it is only necessary for us to decide that it was proper to make the allowance begin at the date of the decree of divorce, and that is all we now decide.

[2] The court allowed \$12 per month, payable in quarterly installments of \$36 each. This was certainly not unreasonable. The wife was given the care and custody of an infant daughter; the only other child was of age. The husband owned one-fourth interest in a vacant lot in Parkersburg, valued at \$1,000, and worked as a common laborer, earning about \$20 to \$25 and his board per month. The wife lived in a rented room for which she paid \$3 per month and did such house work as she could find to do, thereby earning small sums of money to aid in supporting herself and daughter. The amount of alimony proper to be allowed depends upon the wife's needs and her station in life, and upon the husband's means and ability to earn money. It is a matter within the sound discretion of the chancellor, and this court will not disturb his finding, unless it clearly appears that he has abused it. *Henrie v. Henrie*, 76 S. E. 887. There has been no abuse of discretion in the present case.

The allowance of fees to appellee's counsel out of the wife's alimony is not a matter of which appellant can complain. Those fees were not decreed against him or paid out of suit money furnished by him, but out of the wife's allowance for alimony therefore accruing.

The court did not allow costs to appellee, and that is cross-assigned as error. By the decree first appealed from, it had allowed her costs against her husband and his surety on his bond. But this court reversed that decree in respect thereto and reserved no right to again deal with that matter. The question of costs has therefore been finally adjudicated. For the lower court to have rendered a decree for costs against the husband, after it had once done so and this court had reversed its decree, would have been a violation of the mandate. The effect is that each party must pay his own costs in the court below.

The decree will be affirmed, with costs to appellee.

(72 W. Va. 475)

CHAMP v. NICHOLAS COUNTY COURT
et al.

(Supreme Court of Appeals of West Virginia.
May 6, 1913.)

(Syllabus by the Court.)

1. EMINENT DOMAIN (§ 276*)—INJUNCTION—
ROAD ESTABLISHED BY ACQUIESCENCE —
RIGHT TO USE—ESTOPPEL.

Where a landowner, with full knowledge and without protest, permits a county court, under bona fide claim of right or an agreement

evincing intent to dedicate a way for a public highway, to expend money and labor in fitting it for such use, he cannot, after establishment, maintenance, and public use thereof continuously for three years, prevent by injunction further use of the land for the purpose so intended.

[Ed. Note.—For other cases, see Eminent Domain, Cent. Dig. § 774; Dec. Dig. § 276.*]

2. ESTOPPEL (§ 90*) — GROUNDS — ACQUIESCENCE.

When a party, with full knowledge of his right and all material circumstances, freely and advisedly does anything which amounts to recognition of a transaction, or acts for a considerable length of time in a manner inconsistent with its repudiation, there is acquiescence; and the transaction, although originally impeachable, becomes unimpeachable in equity.

[Ed. Note.—For other cases, see Estoppel, Cent. Dig. §§ 242-244, 248-256; Dec. Dig. § 90.*]

3. ESTOPPEL (§ 93*) — GROUNDS — ACQUIESCENCE—TIME.

Acquiescence may bar relief in a very short period. Where one stands by without objection, and sees others dealing with property in a manner inconsistent with his right, and by his silence permits or encourages them to part with their money or property, he cannot complain. His silence is acquiescence, and estops him.

[Ed. Note.—For other cases, see Estoppel, Cent. Dig. §§ 204-275; Dec. Dig. § 93.*]

4. DEDICATION (§ 38*)—IMPLIED DEDICATION—ACCEPTANCE—RIGHT TO RECALL.

If the acts of the landowner are such as would fairly and reasonably lead an ordinarily prudent man to infer an intent to dedicate a way for a public highway, and they are received and acted upon by the public, the owner cannot, after acceptance by the public, recall the appropriation.

[Ed. Note.—For other cases, see Dedication, Cent. Dig. §§ 77, 78; Dec. Dig. § 38.*]

5. DEDICATION (§ 16*)—IMPLIED DEDICATION—ESTOPPEL—SECRET INTENT.

Regard is to be had to the character and effect of the open and known acts, not to any latent or hidden purpose. If they are such as to induce the belief that the owner intended to dedicate the way, and the public and individuals act upon such conduct as if in fact there had been a dedication, and acquire rights which would be lost if the owner were allowed to reclaim the land, the law will not permit him to assert that there was no dedication, no matter what may have been his secret intent.

[Ed. Note.—For other cases, see Dedication, Cent. Dig. §§ 15-49; Dec. Dig. § 16.*]

Appeal from Circuit Court, Nicholas County.

Action by E. T. Champ against the County Court of Nicholas County and others. From decree for plaintiff, defendant named appeals. Decree reversed, injunction dissolved, and bill dismissed.

S. R. King, of Summersville, and Mollohan, McClintic & Mathews, of Charleston, for appellant. Brown & Eddy, of Richwood, and T. C. Townsend, of Charleston, for appellee.

LYNCH, J. From a final decree perpetuating an injunction restraining defendant from removing certain obstructions placed by

the plaintiff in the public highway, the legal establishment of which through his lands is controverted, the defendant appeals.

In June, 1905, the county court of Nicholas county appointed viewers to locate a way for a public road "leading from a point on the public road near J. W. Bragg's residence * * * and extending to the mouth of Anglins creek," with direction to report at the next regular term. The report, made pursuant thereto, shows that plaintiff's lands lay directly between the terminal points designated in the order, and that the road as projected passes through his lands. It affirmatively appears, and virtually is not denied, that plaintiff joined with others in promoting the establishment of the road over lands owned by him and others along the route, although he did not sign the petition to the county court therefor, because of his temporary absence from the community at the time the petition was prepared, signed, and presented. It likewise also appears that he was present, with other landowners, at the time of the preliminary survey, when a discussion arose as to claims for damages to the several landowners, all of whom, except plaintiff, then agreed not to assert claim therefor if all joined therein, to which plaintiff at first refused his consent. But the proof shows, and plaintiff substantially admits, that he then stated that he would give the land for the road provided it was located and opened along his outside farm line; the reason assigned by him therefor being that thereby he would avoid the necessity and expense incident to the construction and maintenance of lane fences. The viewers thereupon changed the route, complying with his suggestion, and later reported to defendant, the county court, the way viewed by them through the lands of plaintiff and others whose lands were thereby affected. But defendant did not, as required by section 36, c. 43, Code 1906, "appoint a day for hearing the parties interested, and cause notice thereof to be given to the proprietors and tenants of the property, which would have to be taken or injured, to show cause against the same"; but, by an order entered of record December 13, 1905, the court "located and established a public road upon the location as shown in the said report," and thereby directed the surveyor of the proper road precinct to expend thereon "the \$40 donated by G. A. Burr, Marshall McClung, and Jacob Bays in opening said road on said location from John W. Bragg's to the land of Jacob Bays," the plaintiff's land intervening between the two.

Plaintiff urges, as grounds for relief, defendant's omission to comply with the statutory provisions cited, and its failure to compensate him in damages for his lands which it thus attempted to appropriate to public use. He also denies that defendant in fact established and opened the road as a public

highway, or that the public used the same as such since its order of December, 1905. He therefore insists that defendant is without warrant of authority to remove the obstructions placed thereon by him, and from removing which he seeks to maintain the injunction awarded and by the circuit court made perpetual.

While defendant did not, as stated, strictly comply with the formalities usual, in fact required by statute, its failure in that respect may, with propriety, be traceable to plaintiff's conduct. Acting upon the good faith of his promise—and, in effect, what he said is the equivalent of a promise—not to claim damages provided the road was located as suggested by him, the viewers reported, and the county court, as it might under the circumstances, accepted as true the report, that "neither of the landowners claim damages." On cross-examination, to the question, "When you reached the lands of Mrs. Burr, did you in talking to the viewers, G. A. McClung and J. H. McClung, and to G. A. Burr, Jacob Bays, R. C. Skaggs, and possibly others, state to them that, if the road went outside of your field through your lands, you would not claim any damages on account of said road going through your land, or in substance that?" he replied: "Not in them words. They was George Burr brought up a conversation to this effect—says, 'If any of us claims damage there won't be any road.' I replied, and said that so far as I was concerned there was all the road I wanted, and if the road went through my place that I had filed an account for damages for \$55; and George Burr says, 'If you claim damage, we will claim damage,' and I told him I didn't care who claimed damage, that he could claim all the damage he pleased, and in the conversation I remarked something like this: That if I didn't have to build the line [lane] fence through my place that I wouldn't care so much, but if I had to make a lane fence plumb through my place there was going to be a big thing on me. He contended that they had lanes through their place, that I had just as well built lanes as them, and I told him as well as I mind that they was done built, or something to that effect; but I said in the talk that if it would go along the outside of my land that I would give the land along the outside of my line, so I wouldn't have to build a lane fence." While, in his answer, he uses the words "outside of my land," he evidently intended, and by the purport thereof assuredly did intend, to say and mean, on his land along the outside line. The answer, taken as a whole, is susceptible of no other reasonable construction. He could not give, and presumably made no offer to give, lands not owned or controlled by him.

His claim that he filed with defendant or its clerk a claim for damages is without satisfactory proof in its support, and is clearly refuted by proof deemed sufficient for that

purpose. Besides, not calling as a witness the attorney or agent by whom the claim therefor was prepared or presented, according to his testimony, justifies the presumption that, if produced, such witness would not only not support him in that respect, but would testify to the contrary. *Cooper v. Upton*, 60 W. Va. 649, 654, 64 S. E. 523, and cases cited.

[1] The testimony quoted, tending as it does, although apparently evasive, to show plaintiff's consent to the establishment of the road through his land, without damages or claim therefor, accords with the positive statements of defendant's witnesses that he did so agree. But he now asserts and insists that the agreement is not legally conclusive against a subsequent right to withdraw therefrom and require payment for such damage, and that, until such payment is made or the road otherwise legally established by the county court, he may obstruct it, and by injunction prevent the defendant from removing the obstruction and reopening the highway to public use. The authorities do not, under similar circumstances, warrant any such pretensions. The rule announced by them is to the contrary, as the following cases, those cited therein and in 18 Cyc. 768, clearly show: *Railway Co. v. Perdue*, 40 W. Va. 443, 21 S. E. 755; *Railway Co. v. Railway Co.*, 70 W. Va. 227, 73 S. E. 726; *Mylius v. Koontz*, 69 W. Va. 621, 73 S. E. 319; 1 *Elliott on Roads and Streets*, §§ 139, 146, 147; 2 *Elliott on Roads and Streets*, §§ 733-737; 1 *Lewis on Eminent Domain*, §§ 494, 495. As stated in *Railway Co. v. Railway Co.*, 70 W. Va. 227, 73 S. E. 726, the principle applicable to the facts of this case, and that generally stated, is to the effect that if an owner of land, with full knowledge and without protest, permits another, under a bona fide claim of right or agreement therefor, to expend money in fitting it, or any part thereof, for public use, or for a use public in its nature and purposes, his remedy is limited to an action at law to recover compensation for the land so taken and used, in the absence of an agreement not to claim such compensation, and he cannot, by the injunctive process of the court, prevent the use of the land for the purpose so intended. Under such circumstances, the constitutional provision inhibiting the taking or damaging of private property for public use, without compensation paid or secured, has no application. The entry and improvement on the lands, under an agreement waiving the amount and not fixing any basis for compensation, or in case of dedication, or with the knowledge and acquiescence of the owner, operate as a waiver of the benefit of that provision. Its benefit is intended for those only who desire to retain title and possession thereunder until compensation is fixed and paid or secured as therein and otherwise provided, and not for those who otherwise agree. "If a landowner sees fit to

permit an entry upon his lands by a railway company or an adjoining landowner, under some sort of an oral agreement, and large expenditures upon the faith of such agreement or permission, carrying an assurance of a conveyance of the title to the land or an easement therein, his situation is similar to that of a vendor by verbal contract, when the vendee has entered into possession and made substantial improvements." 70 W. Va. 231, 73 S. E. 728. Nor is the amount or character of the work material, if it is done on a public highway under the direction of the county court or its proper representatives, and inures to the benefit of the general public. *Campbell v. Elkins*, 58 W. Va. 309, 52 S. E. 220, 2 L. R. A. (N. S.) 159.

But plaintiff denies both permission to enter and acquiescence on his part to an entry on his land, or any part of it, by defendant's agents for the purposes of preparing it for public use. But the evidence tends to prove, and does sufficiently prove, not only that he assisted in promoting the establishment of the road, and suggested changes in the location thereof on his lands, which were then made as so suggested, but also that he knew the road was in fact opened and used by the public whenever necessary or convenient, and that work thereon was continued from time to time under the order and direction of the proper officers and agents of the county court from the spring of 1906 until obstructed by him in 1909, during which time it does not appear that he objected thereto. Although he says, and by proof seeks to show, that he was absent from the county when the work began, and that he first observed the work on his return home in February, 1906, he admits that he was present while the bridge across Laurel creek, on lands claimed by him and a part of the road so used, was in course of construction, in fact almost completed, and subsequently when it was being repaired, both construction and repairs being, as he also then knew, by and under the authority and direction of the defendant's road surveyor having charge of the precinct wherein the road is located. The evidence tends to show his presence near and within the unobstructed view of the road, while other and later repairs thereon through his lands were in process by defendant's agents acting under its authority, although he says he did not see the men engaged therein—a statement seemingly somewhat improbable.

[2, 3] Thus it will be observed that from time to time from the spring of 1906 until 1909, without any notice or dissatisfaction on his part, or without any protest from him, the county court not only opened the road by the expenditure of the amount donated by other landowners affected and the additional county funds necessary for that purpose, and did work thereon, and that the public was using the same during that time

in the manner and for the purposes for which it was intended. The question then presented for determination is whether, under these circumstances and after this delay, plaintiff may restrain and prevent the county court from removing the obstructions placed on the road by the plaintiff. The following cases, with those already cited, answer that question in the negative: *Hast v. Railroad Co.*, 52 W. Va. 396, 44 S. E. 155. *Mann v. Peck*, 45 W. Va. 18, 30 S. E. 206, wherein it is said: "When a party, with full knowledge, or at least with sufficient notice or means of knowledge, of his rights and of all material circumstances of the case, freely and advisedly does anything which amounts to the recognition of a transaction, or acts in a manner inconsistent with its repudiation, or freely and advisedly abstains for a considerable length of time from impeaching it, there is acquiescence, and the transaction, although originally impeachable, becomes unimpeachable in equity." *Pence v. Bryant*, 54 W. Va. 263, 46 S. E. 275, which holds that when land has been dedicated for a public street, and accepted by long use by the general public as a street, so that retraction would be hurtful to the public, the dedication cannot be retracted, though no municipal order or action has accepted the dedication, and it is a valid street as between the dedicant and his alienees and the public. *Despard v. Despard*, 53 W. Va. 443, 44 S. E. 448, wherein it is held that "acquiescence in a transaction may bar a party of relief in a very short period. Where one has knowledge of an act, or it is done with his full approbation, he cannot undo what has been done; and if he stands by and sees another dealing with property in a manner inconsistent with his right, and makes no objection, he cannot afterwards have relief. Where his silence permitted or encouraged others to part with their money or property, he cannot complain that his interests are affected. His silence is acquiescence, and estops him."

[4, 5] 1 Elliott on Roads and Streets, § 124, says: "The public, as well as individuals, have a right to rely on the conduct of the owner as indicative of his intent. If the acts are such as would fairly and reasonably lead an ordinarily prudent man to infer an intent to dedicate, and they are received and acted upon by the public, the owner cannot, after acceptance by the public, recall the appropriation. Regard is to be had to the character and effect of the open and known acts, and not to any latent and hidden purpose. If the open and known acts are of such a character as to induce the belief that the owner intended to dedicate the way to public use, and the public and individuals act upon such conduct, proceed as if in fact there had been a dedication, and acquire rights which would be lost if the owner were allowed to reclaim the land, then the law will not permit him to assert that there was

no intent to dedicate, no matter what may have been his secret intent."

The conclusion is to reverse the decree of October 25, 1909, dissolve the injunction awarded June 18, 1909, and dismiss the bill, with costs and damages as required by law.

(72 W. Va. 238)

ASH et al. v. LYNCH et al.

(Supreme Court of Appeals of West Virginia.
March 18, 1913. Rehearing Denied
May 29, 1913.)

(Syllabus by the Court.)

**1. EQUITY (§ 181*)—ANSWER—TIME OF FILING
—"FINAL DECREE."**

A decree appealable as one adjudicating the principles of a cause is final, within the meaning of section 53 of chapter 125 of the Code.

[Ed. Note.—For other cases, see Equity, Cent. Dig. § 417; Dec. Dig. § 181.*]

For other definitions, see Words and Phrases, vol. 3, pp. 2774-2798; vol. 8, p. 7663.]

2. EQUITY (§ 181*)—ANSWER—TIME OF FILING.

Although a decree has been pronounced, signed, and directed to be entered, an answer may be filed in the cause, if it has not been actually entered in the order book.

[Ed. Note.—For other cases, see Equity, Cent. Dig. § 417; Dec. Dig. § 181.*]

**3. EQUITY (§ 181*)—ANSWER—TIME OF FILING
—"FINAL DECREE."**

That, in such case, the defendant prevented entry of the decree by taking it and the papers in the cause from the clerk's office of the court, does not justify rejection of the answer or denial of leave to file it.

[Ed. Note.—For other cases, see Equity, Cent. Dig. § 417; Dec. Dig. § 181.*]

4. EQUITY (§ 184*)—ANSWER—SUFFICIENCY.

An answer denying the contract alleged by the bill, not in affirmative or negative terms, but by statement of the same contract with conditions or limitations not mentioned in the bill, is defensive and sufficient, if the truth of its averments would preclude relief sought by the bill.

[Ed. Note.—For other cases, see Equity, Cent. Dig. §§ 422-425; Dec. Dig. § 184.*]

5. EQUITY (§ 186*)—ANSWER—SUFFICIENCY.

Such an answer cannot be rejected for mere omission of admission or denial of other portions of the bill not conclusive of the case.

[Ed. Note.—For other cases, see Equity, Cent. Dig. §§ 426, 427; Dec. Dig. § 186.*]

(Additional Syllabus by Editorial Staff.)

**6. APPEAL AND ERROR (§ 184*)—OBJECTION
BELOW—NECESSITY—INFORMALITY IN ANSWER.**

Objections to mere informalities in an answer will not be reviewed, when not presented below.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1241-1246; Dec. Dig. § 194.*]

Appeal from Circuit Court, Harrison County.

Action by Luther C. Ash and others against V. S. Lynch and others. From judgment for plaintiffs, defendants Lynch and Broadwater appeal. Reversed and remanded.

Chas. E. Hogg, of Morgantown, F. O. Sutton, of Clarksburg, and Howard A. Bingaman, for appellants. George M. Hoffheimer, of Clarksburg, for appellees.

POFFENBARGER, P. Rejecting the answer tendered by the defendants and refusing to permit them to file it, on account of delay in the tender thereof and insufficiency in form and substance, the court entered a decree against them, requiring the assignment to the plaintiffs of an undivided one-eighth interest in a certain leasehold estate and a gas well thereon, together with the casing, tubing, pipes, and fittings thereof, and further requiring the defendants to pay to the plaintiffs the sum of \$2,086.58, which was adjudged to be a lien upon the residue of the leasehold estate, gas well, casing, pipes, and fitting, under the mechanic's lien statute, and ordering a sale of that interest to satisfy the lien in case of default in payment.

Process in the cause had been made returnable to June rules, 1911. On the 26th day of August, 1911, the plaintiffs executed and delivered to the defendants a written proposal of settlement on the basis of payment of \$2,100 and the conveyance of the one-eighth interest in the leasehold estate, within 30 days from the date thereof. On the expiration of that time, September 27, 1911, payment not having been made nor the assignment executed, the plaintiffs prepared a decree which the court approved, signed, and directed to be entered. On the same day the defendants withdrew from the clerk's office all the papers in the cause, including the draft of the decree, and retained the same in their possession until the 8d day of October, 1911, at which time they tendered and asked leave to file their joint and separate answer to the bill, and supported their motion by the affidavit of one of the defendants, setting forth, by way of excuse for delay, the pendency of negotiations for a compromise of the matters in difference. The plaintiffs objected to the filing of the answer and moved the court to reject it, on the ground of its having been tendered too late, and as being insufficient. They also filed an affidavit denying the statements contained in the one filed on behalf of the defendants. On this issue of fact, the court found for the plaintiffs, rejected the answer, and entered the decree.

[1] As the decree is undoubtedly one settling the principles of the cause, it is final within the meaning of the terms of section 53 of chapter 125 of the Code, permitting the defendant to file his answer at any time before final decree. This conclusion is the logical result of principles declared in *Barbour, Stedman & Herod v. Tompkins*, 58 W. Va. 572, 52 S. E. 707, 3 L. R. A. (N. S.) 715.

[2, 3] As the decree, though pronounced, signed, and directed by the court to be en-

tered upon the record, had not actually been entered thereon, when the answer was tendered, the case is governed, in this respect, by the decision in *Bean et al. v. Simmons*, 9 Grat. 389, unless the conduct of the defendants, in taking the papers and decree from the clerk's office and thereby preventing the entry thereof, constitutes ground for an exception from the rule declared therein. It does not, for the reason that the answer might have been tendered on the very day on which the court pronounced the decree, if the other method of prevention of entry had not been adopted. If the answer was insufficient in substance, showing no defense, the court was justified in rejecting it, although tendered before the entry of the decree.

[8] Most of the grounds of objection set forth in the argument here go to the form rather than the substance of the answer, and presumptively were not brought to the attention of the court below; for no exceptions are indorsed on it, nor does the decree show any specification of defects as grounds of objection. The course of procedure in such cases, approved in *Rogers v. Verlander*, 30 W. Va. 619, 5 S. E. 847, was not observed. Hence objections as to matters of form were waived.

[4, 5] The claim of the plaintiffs asserted by the bill was for compensation for the drilling of a gas well at the price of \$1.15 a foot, on account of which they were to take, in part payment, an assignment of a one-eighth interest in the leasehold. To compel this assignment, and enforce an alleged mechanic's lien upon the leasehold for the residue of the demand, the suit was brought. There was an additional item of \$549.50, the value of 785 feet of tubing at 70 cents a foot, which the bill alleges the defendants agreed to pay, in case it should be necessary to leave the tubing in the well, and such necessity is alleged in the bill. The depth of the well is alleged to be 2,406 feet, and the contract provided for the drilling of a well at least 2,500 feet deep, unless oil or gas should be discovered in paying quantities at a lesser depth. Neither denying nor admitting in express terms the entire statement of the bill as to the contract respecting the depth, the answer says the well was to be drilled into the oil and gas sands, or until oil or gas should be discovered in paying quantities, but avers the inability of the respondents to ascertain definitely the depth of the well, and calls for full proof as to it. It is argued that, although the answer may contain in other portions thereof matter of defense sufficiently averred, the court could reject it for want of an express admission or denial as to the depth of the well, and the amount of compensation due. Granting, for the purposes of argument, the right of plaintiffs to an express admission or denial as to the depth of the well, the extensive

consequences claimed in the brief do not follow. None of the authorities relied upon for the proposition go so far. They say such failure as is charged subjects the answer to right of exception; but the exception would not wholly destroy it, if it contains matter of defense sufficiently averred. Such an admission, if unavoidable, would dispense with necessity of proof of the allegation, and the plaintiffs are entitled to be so relieved; but failure to deny the allegation relieves from necessity of proof, and thus fully effectuates the plaintiffs' right in that respect.

Admitting an agreement to assign an eighth interest in the leasehold in part payment of the contract price for drilling the well, the answer sets forth as part of the contract a condition or limitation not mentioned in the bill. The bill says the interest in the leasehold was to be taken upon a valuation of \$1,000. The answer says it was to be taken at a valuation of \$1,100, if the well should turn out to have a productive capacity of 4,000,000 feet per day or more, and then avers that it has such capacity, and that the plaintiffs have declined to receive an assignment at a valuation of \$1,100. The sufficiency of this averment is challenged, because it does not show when the agreement was made, nor that the defendants were willing to assign at a valuation of \$1,100, and says disagreement as to this was one reason for not having made the assignment. Fairly read, the averment makes the condition a part of the original contract, and substantially states the controversy as to the capacity of the well prevented the assignment. An agreement not to assert a mechanic's lien is set up by the answer, and also an agreement to allow the defendants a reasonable time in which to sell a portion of the leasehold for sufficient money to pay what should remain due after the application of the value of the one-eighth interest. There is also a denial of liability for the casing, accompanied by admission of liability for the use of it at 10 cents per lineal foot. As to the claim for casing, the answer admits the portion of the contract, as stated in the bill, but varies from it as to the residue. No affirmative relief is asked. All the matter of the answer is purely defensive, and we have no doubt whatever of its sufficiency, though it may be subject to exceptions for formal defects.

With this answer in, no decree should have been entered, because the bill was not sustained by any proof. If its allegations had been supported by proof, the denial of the answer, had it been filed, would not have prevented a decree, in the absence of good cause shown for a continuance. Upon the bill, answer, and general replication, without any evidence, there could not have been a decree for the defendants. The plaintiffs could have prevented this by taking a continuance; but the defendants could not have

had a continuance, without disclosing good cause therefor, if the plaintiffs had been ready to submit the cause.

For the reasons stated, the decree complained of will be reversed, and the cause remanded, with leave to the defendants to file their answer.

(72 W. Va. 430)

DANSER v. DORR.

(Supreme Court of Appeals of West Virginia.
May 6, 1913.)

(Syllabus by the Court.)

1. CORPORATIONS (§ 306*)—OFFICERS—PERSONAL LIABILITY.

The president and general manager of a corporation, who, without authority from his company to do so, directs a servant, employed to perform certain work for the company, to order such material as is needed for the work, is personally liable to the seller for the price of goods ordered by such servant in the individual name of the president, notwithstanding they are used in the work of the company.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 1457, 1458; Dec. Dig. § 306.*]

2. VENUE (§ 16*)—PROCESS (§ 61*)—RIGHT TO ELECT—SERVICE.

If a cause of action arises in one county, and the sole defendant resides in another, plaintiff may sue in either. But if he sues where the cause of action arose, defendant must be served with process in that county.

[Ed. Note.—For other cases, see Venue, Cent. Dig. §§ 23, 25-27; Dec. Dig. § 16; * Process, Cent. Dig. § 69; Dec. Dig. § 61.*]

3. SALES (§ 80*)—VENUE (§ 16*)—PLACE OF PAYMENT—ACTION FOR PRICE.

If goods are sold and shipped upon order which states no place of payment, it is the duty of the purchaser to pay at the seller's place of business, if in the state. The failure to pay gives the seller a right of action, which he may assert either in the county where the sale was made or where the purchaser resides.

[Ed. Note.—For other cases, see Sales, Cent. Dig. § 228; Dec. Dig. § 80; Venue, Cent. Dig. §§ 23, 25-27; Dec. Dig. § 16.*]

4. APPEAL AND ERROR (§§ 1026, 1039*)—HARMLESS ERROR—PLEA TO THE JURISDICTION—REVERSAL.

If the jurisdiction of the trial court sufficiently appear from any part of the record, this court will not reverse a final judgment rendered upon the merits, on account of error committed in the trial of an issue on a plea to the jurisdiction.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4029, 4030, 4075-4088; Dec. Dig. §§ 1026, 1039.*]

5. TRIAL (§ 417*)—MOTION TO EXCLUDE EVIDENCE—WAIVER.

Defendant waives the benefit of his motion to exclude plaintiff's evidence by thereafter introducing his own.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 980; Dec. Dig. § 417.*]

Error to Circuit Court, Lewis County.

Action by W. C. Danser against C. P. Dorr. Judgment for plaintiff, and defendant brings error. Affirmed.

Brannon & Stathers, of Weston, for plaintiff in error. E. A. Brannon and Chas. P. Swint, both of Weston, for defendant in error.

WILLIAMS, J. Action of assumpsit for the price of goods alleged to have been sold and delivered by plaintiff to defendant. Judgment in favor of plaintiff for \$577.92, and defendant obtained this writ of error.

Suit was brought in Lewis county and process served on defendant in that county. Defendant pleaded want of jurisdiction. Issue was joined, and at the March term, 1909, a trial by jury resulted in a verdict upholding the jurisdiction. Defendant then pleaded the general issue. At the November term, 1909, a trial was had upon the merits, and a verdict returned in favor of plaintiff.

[4] Counsel for defendant admit that there is but one question in the case, viz.: Did defendant purchase, or authorize the purchase of, the goods from plaintiff, for the price of which the action is brought? This question arises both upon the plea in abatement and upon the trial upon the merits. Therefore it is only necessary to consider the evidence in relation to the question upon the merits, for the character of the case is such that, if plaintiff is entitled to recover in any event, his action is maintainable in Lewis county; and, if any error was committed in the trial of the issue on the plea in abatement, it would be harmless, unless there is also error in the trial upon the merits. This court will not reverse for harmless error. *Nichols v. Camden Interstate Ry. Co.*, 62 W. Va. 409, 59 S. E. 968; *State v. Davis*, 68 W. Va. 142, 69 S. E. 639, 82 L. R. A. (N. S.) 501, Ann. Cas. 1912A, 996.

[1, 2] The plea in abatement avers that defendant resided in the county of Webster, and was served with process in Lewis county, and that the alleged cause of action did not arise in the latter county. Jurisdiction depends upon whether the cause of action, or any part of it, arose in Lewis county. If it did, the creditor could elect to sue in that county, or in the county of Webster, the place of defendant's residence. Section 2, c. 123, Code (1906). That the goods were shipped by plaintiff, consigned to defendant at Webster Springs, and were received by one H. J. Bragg, who claimed to be acting for defendant, is not denied. There is also evidence tending to prove that the goods were shipped upon a written order given therefor, signed "C. P. Dorr, by H. J. Bragg." Hence both the jurisdiction of the court and the merits of the case depend upon the agency of Bragg. There is conflict in the testimony of witnesses on this point; and, unless there is a great preponderance of evidence against the verdict, the court would not be justified in setting it aside. The goods consisted of plumbing material, and were used in a wa-

terworks plant at Webster Springs, which at one time appears to have been owned by defendant, and later by the Webster Springs Water & Electric Light Company, a corporation, of which defendant was president and general manager. The goods were shipped in the fall of 1904, and defendant testifies that the plant was then owned by the corporation, and that he did not order the goods or authorize any one else to order them. He moreover testifies that he "had no authority to authorize any one to buy." But he is contradicted by two witnesses, H. J. Bragg and J. G. Cricher, both of whom did work on the plant. Bragg testifies that defendant told him to order whatever material was needed for the work, and Cricher says he was present and heard defendant give that direction. He also says that he did not know that the plant was owned by a corporation, and that defendant practically gave orders for all work." Bragg says he knew that the plant was owned by a company, but did not know any stockholders or officers other than defendant. The jury were the judges of the disputed fact concerning Bragg's agency. There is no evidence tending to prove whether defendant told Bragg to order the goods in defendant's name, or in the name of his company. But, in view of defendant's testimony that he had no authority from his company, it is not material in whose name, or whether in any particular name, he was directed to make the order. Because the legal effect is the same as if he had authorized Bragg expressly to order the goods in his (defendant's) name. For, if he gave direction to Bragg on behalf of his company, without its authority, it would

present the case of an agent acting in excess of his authority, in which event the law holds him personally liable. In view of the conflict in the testimony, the court did not err in overruling the motion of plaintiff to set aside the verdict.

[5] Defendant waived his motion to exclude plaintiff's evidence, made when plaintiff rested his case, by thereafter introducing his own evidence. This question has been so frequently decided that we deem it unnecessary to elaborate on it. *Core v. Railroad Co.*, 88 W. Va. 456, 18 S. E. 596; *Poling v. Ohio River R. R. Co.*, 88 W. Va. 646, 18 S. E. 782, 24 L. R. A. 215; *Trump v. Tidewater Coal & Coke Co.*, 46 W. Va. 238, 32 S. E. 1035; *Ewart v. New River Fuel Co.*, 68 W. Va. 10, 69 S. E. 300.

[3] Plaintiff's place of business is in Weston, Lewis county; and if the goods were purchased by order, and no place of payment agreed upon, it was the duty of the purchaser to make payment at the place of purchase. The failure to pay would constitute a breach of the implied contract, and would give cause of action, where the breach of duty occurred, which was in Lewis county. *Harvey v. Parkersburg Insurance Co.*, 87 W. Va. 272, 16 S. E. 580. "A debtor must seek his creditor to pay him, unless the creditor be out of the state." *Galloway v. Standard Fire Ins. Co.*, 45 W. Va. 237, 31 S. E. 969; 3 *Elliott on Evidence*, § 2579; 30 *Cyc.* 1185.

The rulings of the court upon instructions are consistent with the law as herein expressed. Finding no error, we affirm the judgment.

LYNCH, J., absent.

(71 W. Va. 701)

MELTON, Sheriff, v. CHESAPEAKE & O. RY. CO.(Supreme Court of Appeals of West Virginia.
Feb. 4, 1913. Rehearing Denied
May 29, 1913.)*(Syllabus by the Court.)***1. RAILROADS (§ 300*)—ACCIDENT AT CROSSING.**

A partial but substantial equipment by a railroad company of a portion of its track through a city, town, or village in the manner usually adopted at public crossings, and as a convenient means of access to and from a nearby public highway, operates as an implied invitation to the public to so use such crossing; and if so generally used by it that the company, through its employes, must be cognizant thereof the company is thereby charged with the duty of exercising the same degree of care as the law imposes at a public crossing.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. § 955; Dec. Dig. § 300.*]

2. RAILROADS (§ 310*)—ACCIDENT AT CROSSING.

Propelling a train of cars by an engine in mid-train over such frequented crossing on a dark night, without signal or warning, or light on or about the forward car, is negligence, and if injury results the operating company is liable therefor in damages to the person so injured, in the absence of negligence on his part contributory thereto.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 982-987; Dec. Dig. § 310.*]

3. NEGLIGENCE (§ 122*)—CONTRIBUTORY NEGLIGENCE—BURDEN OF PROOF.

Where plaintiff has shown negligence on the part of defendant, if the latter relies on contributory negligence of plaintiff to defeat recovery, the burden is on defendant to prove such negligence, unless it is disclosed by plaintiff's evidence, or may be fairly inferred from all the circumstances; and in the absence of such proof or inference the person injured must be presumed to be without fault.

[Ed. Note.—For other cases, see Negligence, Cent. Dig. §§ 221-223, 229-234; Dec. Dig. § 122.*]

4. RAILROADS (§ 299*)—ACCIDENT AT CROSSING—NEGLIGENCE.

A case holding the railroad crossing at which the injury occurred to be of such public character as requires the operating company to exercise reasonable care to prevent injury, and the company liable in damages for injury caused by its negligence in that respect.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 954, 958; Dec. Dig. § 299.*]

Error to Circuit Court, Kanawha County.

Action by J. J. Melton, Sheriff, against the Chesapeake & Ohio Railway Company. Judgment for plaintiff; defendant brings error. Affirmed.

Kinslow, Fitzpatrick, Alderson & Baker, of Huntington, for plaintiff in error. A. M. Belcher, of Charleston, for defendant in error.

LYNCH, J. This action was brought to recover damages for the negligent killing of Samuel Canterbury, plaintiff's intestate. A verdict and judgment in favor of the plaintiff were obtained in the circuit court. The case is now before us on writ of error.

Three grounds of error are relied on in the defendant's brief: First, that improper testimony was allowed to go to the jury; second, that the jury was improperly instructed; third, "that upon the merits there should have been a verdict for the defendant."

Canterbury was killed in Marmet, a village of 800 inhabitants. His mangled body was found on defendant's track, 10 feet from a crossing, a short time after one of its freight trains had passed. Competent proof sufficiently attributes the cause of his death to a collision with defendant's train. This fact the defendant only formally denies.

The evidence of which the defendant complains relates to the character of the crossing. It is true no highway, established under the forms prescribed by law, crossed the right of way at that point. But the proof shows a long-continued use of the place where the accident occurred as a crossing. The railroad runs through and divides the town. The residents of the village used the crossing from 15 to 20 years in all respects as if it were in fact a public crossing. True a fence was maintained by the defendant along its track; but it also constructed and maintained a gateway through the fence to the crossing. A driveway extended from different parts of the village direct to the gateway. For years prior to and at the time of the accident, it had been and was adopted by the public and in constant use as a ready means of access to and from the county road. The defendant placed heavy planks on each side of the outside rails, filled up with ballast the space between the ties, and kept the crossing in repair. Canterbury was killed some time about 7 o'clock in the evening. He left his brother at Wells' store, located 200 feet east of the crossing, about an hour before his death, and was last seen, immediately after he left the store, approaching the crossing, where he had arranged to meet his brother, after going to the post office. The night was dark. No one saw the accident. The engine was mid-train. It carried a headlight, but other cars preceding the engine obstructed the light. His body was found between 7 and 8 o'clock. His toes, fragments of clothing, and bloodstains were found on the crossing. The proof is abundant to show that his death was caused by the defendant's train; and it is liable for the injury, provided the public character of the crossing was such as to require ordinary diligence and care by its agents, in order to avoid injury to persons and property using it as a public crossing.

[1, 4] We think the evidence is affirmatively sufficient to support the finding of the jury, as virtually it did find, that the place of injury was to the extent public that it became and was the duty of the defendant, in the operation of its trains, to exercise a reasonable degree of care and diligence for

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

the safety of the persons using it as a crossing, and that it was negligence on the part of the defendant to approach the crossing in the manner we have stated, in darkness and without signal or warning of any kind. In *Bowles v. Railway Co.*, 61 W. Va. 272, 57 S. E. 131, it is said: "The precaution must suit the circumstances, and be adequate under the circumstances." Bowles was killed at a public crossing; but the defendant sought to avoid liability because he had approached the crossing by walking thereto on the track. This, it urged, was negligence on his part; but the court decided otherwise.

In *Ray v. Railway Co.*, 57 W. Va. 333, 338, 50 S. E. 413, 415, Judge Brannon, quoting from *Elliott on Railroads*, says: "In order to impose upon the company the duty to treat a place as a public crossing, those who use the place as a crossing must either have a legal right to so use it, or must use it at the invitation of the company; and 'neither sufferance nor permission nor passive acquiescence is equivalent to an invitation.' If, however, the traveler uses a place as a crossing by invitation of the company, it must use ordinary care to prevent injury to him, as where the company constructs a grade crossing and holds it out to the public as a suitable place to cross. Where, by fencing off a footway over its tracks, it induces the public to so use it, by building to the track plank bridges for foot passengers, or by constructing gates in the railroad fence for the use of pedestrians who habitually cross the track, it thereby holds out the place as proper for them to use. Such invitation as imposes on the company the duty of ordinary care is implied, where by some act or designation of the company persons are led to believe that a way was intended to be used by travelers or others having lawful occasion to go that way, and the company is under obligation to use ordinary care to keep it free from danger."

In *Railroad Co. v. Carper*, 88 Va. 557, 14 S. E. 328, it is held that if "the tracks where plaintiff's intestate was killed had long been used by the public with defendant's knowledge and acquiescence, then deceased was not on the track as a trespasser, but as a licensee." The same case is authority, if such be necessary, that a railroad company running its trains through a town must use greater care and diligence to prevent injury to persons and property than is required in less frequented localities or populous districts; and "the fact that pedestrians were accustomed to travel on the track at a particular place, in the knowledge of the company, made it its duty to use greater care in operating its road at that place." The opinion states that "the track of the railroad lies through the town, and from lots fronting on the railroad the company had constructed plank bridges for foot passengers, leading from the lot to the track, over and across

the usual ditch found there, as in other railroads; and there were three tracks—main, south and north—along in that part of the line; and between the two first named a good, wide walkway had been constructed, upon which persons might safely walk between moving trains. If these things are true, was not the public invited to walk there? And if so invited, were they trespassers? Clearly not." So in *Railroad Co. v. Burge*, 84 Va. 63, 4 S. E. 21, it is said that a company running its trains on city streets must use greater care than in less frequented localities; and "it is required of them to resort to special precautions, depending upon the particular locality and the circumstances, to avoid accidents, and any neglect of such precautions as are proper, under the peculiar surroundings and circumstances of the locality, constitutes negligence."

Greater care and prudence is required of a railroad company in the operation of its road at places where pedestrians are accustomed to travel on or across its railroad at any particular place than is required at places where the tracks are not so used. A difference exists between the degree of care due from a railroad company under ordinary circumstances to a trespasser and licensee; yet if the company, through its agents, knows that its right of way at a certain point is constantly in use as a footway in a village, town, or city, and that people pass over it daily and at all hours, the railroad company cannot without fault, proceed in a manner which must necessarily be dangerous to such persons, whether trespassers or licensees. 11 *Encyc. Dig.* 582, and cases cited.

The doctrine laid down in *Huff v. Railway Co.*, 48 W. Va. 45, 35 S. E. 866, does not militate against the views above expressed and the authorities cited. In that case the accident occurred in defendant's yards and upon its switch tracks—a place to which persons resort at their peril; the company being liable to them only for reckless and wanton injury.

[2] We think the character of this crossing was such as to require the defendant to use a higher degree of care than it did use on the night of the accident. No signals or warnings statutory or otherwise, were given of the approach of the train. There was no light at or near the front car, nor proof of any, except the statement of the brakeman that he was walking on the ground with a lantern; but he did not see the deceased. None of the trainmen saw him; nor did they know he had been struck and killed until after the discovery of his body. We are of the opinion, therefore that the evidence of which the defendant complains was proper, and that no error was committed in permitting it to go to the jury.

Nor do we think the jury was improperly instructed. The first instruction on the plaintiff's behalf is sufficiently disposed of by

the discussion of the evidence relating to the character of the crossing. It was not limited to statutory warnings. It employed the word "warnings" in a general sense; and we think it was the duty of the defendant, not only to exercise care and caution, but to exercise the further precaution of having a light at the front of the advancing car, and to give some warning of its approach. In the language of the instruction, "the failure to give such signals or warnings was," in our view, "the proximate cause of the death" of decedent.

[3] The giving of the second instruction for plaintiff was also free from error. "Where the plaintiff has shown negligence on the part of the defendant, if the defendant relies on contributory negligence of the plaintiff, the burden is on the defendant to prove it, unless it is disclosed by the plaintiff's evidence, or may be fairly inferred from all the circumstances; and in the absence of such proof the person injured must be presumed to be without fault." *Railway Co. v. Bryant*, 95 Va. 212, 28 S. E. 183; *Kimball v. Friend*, 95 Va. 125, 27 S. E. 901; *Railroad Co. v. Gilman*, 88 Va. 239, 13 S. E. 475; *Beyel v. Railroad Co.*, 34 W. Va. 538, 545, 12 S. W. 532. The language of these cases is practically identical with that of the instruction itself.

Plaintiff's third instruction is supported by the case of *McVey v. Railroad Co.*, 46 W. Va. 111, 32 S. E. 1012. Its propriety is also supported by *Beach on Contributory Negligence*, 3182, where it is said that "where there is no evidence that the party injured stopped and listened the court will not presume he did not stop and adjudge him guilty of negligence, but will leave the question to the jury." Also *McBride v. Railroad Co.*, 19 Or. 64, 23 Pac. 814, holds that, in the absence of evidence, the presumption is that the traveler looked and listened. To the same effect are *Railroad Co. v. Weber*, 76 Pa. 157, 18 Am. Rep. 407, cited in *Young v. Railroad Co.*, 44 W. Va. 218, 28 S. E. 932; *Railway Co. v. Bryant*, supra; *Same v. Hansbrough*, 107 Va. 733, 60 S. E. 58; *Railroad Co. v. Griffith*, 159 U. S. 603, 611, 16 Sup. Ct. 105, 40 L. Ed. 274; *Roberts v. Managers of Canal*, 177 Pa. 183, 35 Atl. 723. The proof in this case does not disclose any circumstance upon which this court can impute to Canterbury any negligence, or, in other words, say that he did not look and listen for an approaching train before going upon the crossing where the injury occurred. There is also absence of any evidence tending to show that he could have seen or heard the train if he had looked or listened. True Wells says there were lights burning in his store, about 200 feet east of the crossing in the direction of the moving train, and the brakeman that he was walking beside the train with lantern in hand; but the jury have virtually passed upon the

question whether Canterbury could see the train by means of the light from the store or lantern. One witness for the plaintiff says that while standing on the platform at the depot only a few feet from the track the train partially passed him before he observed it.

Defendant's instructions refused are either not warranted by the proof, or incorrectly state the law. The first instruction was mandatory, and was properly refused, because there was sufficient evidence to carry the case to the jury. The impropriety of the fourth and fifth instructions sufficiently appears from previous discussion. The ninth was defective in its conclusion: "The railroad company would not be liable for his death, unless the jury find that the agents for defendant *did discover* him on track in time to have avoided accident." It should have contained the qualification, "or by the exercise of reasonable diligence could have discovered him on the track in time to have avoided injury." The authorities are in accord in holding this qualification essential to the validity of such instruction.

We are unable to find error in the record, and therefore affirm the judgment.

(72 W. Va. 1)

MORRIS v. BAIRD et al.

(Supreme Court of Appeals of West Virginia.
Feb. 11, 1913. Rehearing Denied
May 29, 1913.)

(Syllabus by the Court.)

1. CREDITORS' SUIT (§ 51*)—RENT OF LAND—COAL IN PLACE.

The general rule requiring that a judgment debtor's lands be rented, if the same will rent for sufficient in five years to pay his debts, is inapplicable to coal in place owned by him, and having no rental value.

[Ed. Note.—For other cases, see *Creditors' Suit*, Cent. Dig. §§ 191-209; Dec. Dig. § 51.*]

2. INTEREST (§ 35*)—RATE—EFFECT OF CONTRACT.

It is error to decree interest at six per cent. when the notes or other contracts evidencing the debts bear a less rate of interest.

[Ed. Note.—For other cases, see *Interest*, Cent. Dig. § 75; Dec. Dig. § 35.*]

3. DEEDS (§ 114*)—CONSTRUCTION—INTEREST CONVEYED.

A deed which purports to convey part of a larger tract, but which does not attempt to locate the part conveyed, should be construed as conveying an undivided interest in the larger tract. Such deed is not void for uncertainty.

[Ed. Note.—For other cases, see *Deeds*, Cent. Dig. §§ 316-322, 326-329, 388; Dec. Dig. § 114.*]

4. VENDOR AND PURCHASER (§ 285*)—PROPERTY SUBJECT TO EXECUTION—UNDIVIDED INTEREST—MODE OF SALE.

Where undivided interests in a larger tract, composed of numerous tracts each subject to a prior vendor's lien, are so conveyed, and it is impracticable in selling the larger tract, or the several tracts composing it, for the purchase money liens thereon, to respect such undivided interests, it is not error to order the tract or

tracts sold as an entirety to satisfy such vendor's liens, though not subject to the judgment liens decreed against other lands of the debtor, and leave the subsequent alienees to take their interests out of the proceeds remaining after payment of such vendor's liens.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. §§ 800-807; Dec. Dig. § 285.*]

5. VENDOR AND PURCHASER (§ 287*)—PROPERTY SUBJECT TO EXECUTION — UNDIVIDED INTEREST—MODE OF SALE.

And where such undivided interests in a larger tract, composed of numerous tracts, so conveyed, are subject to such prior vendor's liens and to the liens of prior judgments and attachments, and it is impracticable to sell the land or interests therein in the inverse order of alienation, or to sell first the interests of the debtor therein without detriment to all other interests, it is not error to decree a sale of the entire tract, leaving such alienees to take their interests out of the surplus funds, if any.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. §§ 810-814; Dec. Dig. § 287.*]

Appeal from Circuit Court, Doddridge County.

Bill in equity by Tusca Morris against William F. Baird and others. From a decree for plaintiff, certain defendants appeal. Remanded for corrections, and affirmed.

Millard F. Snider and Homer Strosnider, both of Clarksburg, for appellants. Neely & Lively, of Fairmont, for appellee Morris. J. Ramsey, of West Union, for appellees Parr and others.

MILLER, J. [1] In a judgment creditors' suit to subject the coal owned by the debtor in fee, the first point of error in the decree below which we are called upon to consider is that, as the judgment debtor in his answer, filed on the eve of pronouncing the final decree, disclosed, for the first, that he was the owner when suit was brought of 800 acres of coal in Tyler County, in addition to the 6400 acres in Doddridge County reported by the commissioner, and adjoining it, the court should have required plaintiff to amend his bill, so as to bring in that coal, and then, as a condition precedent to decreeing a sale of the coal in Doddridge County, have ascertained whether all the coal would rent for sufficient in five years to pay the debts, and if so, to decree that the same be rented and not sold.

We see no merit in this point. The main portion of the indebtedness decreed is for purchase money on the very coal decreed to be sold, and on which vendor's liens were retained. Section 7, of chapter 139, Code 1906, relating to the enforcement of judgment liens is inapplicable to the enforcement of vendor's liens. But treating this as strictly a suit to enforce judgment liens, the point is still without merit. The rule relied on, laid down in *Newlon v. Wade*, 43 W. Va. 283, 27 S. E. 244, *Kane v. Mann*, 93 Va. 239, 24 S. E. 938, and enunciated in *Hogg's Eq. Pr.* § 458, is clearly inapplicable to a

suit to subject to sale coal in place to pay judgment liens. That rule, as a reading of the authorities relied on and a history of the statute referred to on which it is based will show, is applicable only to land which has a rental value, as for farming, grazing, or other occupancy, and not to coal, or oil, or gas in place, which we judicially know can have no rental value. No one would rent these minerals in place, on any terms, that did not involve the taking of the very substance of the inheritance. Such a renting would amount to a sale of the land (coal) itself, which would be wholly incongruous with the purposes of the statute. This incongruity is so apparent that we think no further elaboration of the question, or citation of authority is required.

[2] The next assignment of error deserving consideration is that six per cent. interest is decreed on certain debts, when by the note or contracts they bear only five per cent. These creditors, and appellees, at once concede this error, and the following authorities cited seem to fully support the proposition. *Pickens v. McCoy*, 24 W. Va. 344; *Brooke v. Roane*, 1 Call (Va.) 205; *Bent v. Patten*, 1 Rand. (Va.) 25; *Shipman v. Bailey*, 20 W. Va. 140; *Cecil v. Hicks*, 29 Grat. (Va.) 1, 26 Am. Rep. 391; *Bank of Marietta v. Pindall*, 2 Rand. (Va.) 465. But appellees contend that these errors, not having been called to the attention of the court below by exceptions to the commissioner's report, or otherwise, do not constitute reversible error, but error which may and should be corrected here by section 6, chapter 134, Code 1906, and if no other error be found therein, the decree should be affirmed. We think this a proper construction of the statute. But as we have found no other error in the decree prejudicial to appellants, and to make the corrections here would require many calculations of interest, with which the time of the court ought not to be consumed, we are disposed to order the error corrected in the lower court and when the decree is so amended there, that it stand affirmed. Appellants need not have come to this court to correct this error in the first instance.

[3] The next point of error which we will notice is that the court erroneously decreed the sale of the alleged interests of Lydia M. Oaks, and Oliver P. Markle and Isadore Frank, in 2447.951 acres known as the "Salem Syndicate" coal, when the judgments and attachments decreed were subsequent in date to the deeds conveying those interests, and which were not subject to said liens. As already noted, the debts decreed are in the main for purchase money. But this fact may not be important. A pertinent inquiry is, what is the nature or character of the estates or interests which these appellants took by their deeds from Baird? The deed to Lydia M. Oaks, purports to "grant, with general warranty, unto the said party of the

second part, her heirs and assigns, all the undivided thirty (30) acres of the Pittsburg vein or stratum of coal with the mining rights, privileges and other rights, etc., situate in Doddridge County, West Virginia, * * * in a field of coal known as tract No. 2 of the Salem Syndicate as was conveyed to W. F. Baird by the following recited deeds," some sixteen in number. A later clause, further descriptive of the coal, says: "The tract herein conveyed is an undivided interest in tract No. 2 of the Salem Syndicate, containing 30 acres, which is a part of the same tract of land which has been conveyed to the said W. F. Baird by deeds aforesaid." The deed from Baird to Markle and Frank purports to grant "all the undivided two hundred (200) acres of the Pittsburg vein or stratum of coal" in the same "Salem Syndicate," conveyed to Baird by the deeds recited in the deed to Lydia M. Oaks. A later clause is as follows: "The tract of coal herein conveyed is an undivided 200 acres, being a part of the same tract of coal which has been conveyed to the said W. F. Baird by deeds aforesaid." The deed from Baird to L. Louisa and Margaret F. Hamilton, purports to convey "all the undivided seventy five (75) acres" of said coal by substantially the same language as the deed to Markle and Frank.

The decree appealed from, as we interpret it, adjudges that Lydia M. Oaks by her deed took a 30/2447.951 undivided interest; L. Louisa and Margaret F. Hamilton a 75/2447.951 undivided interest; and Markle and Frank by their deed a 200/2447.951 undivided interest in said Salem Syndicate, comprising sixteen several tracts or parcels of land, and that Baird held the remaining undivided interest therein.

Appellees contend that these deeds are void for uncertainty, and rely on 4 Am. & Eng. Ency. Law, 802, and Shackleford v. Bailey, 35 Ill. 387. We think the court properly interpreted these deeds, however, for reasons to be given. The authorities seem almost unanimous in holding that a deed which conveys part of a larger tract, but which does not locate the part conveyed should be construed as conveying an undivided interest in the larger tract, distinguishing deeds of that class from those which attempt to describe a specific portion, designating the number of acres, and as a part of the larger tract, but the calls of which do not describe the tract intended to be conveyed, and held void for uncertainty. Some cases distinguish deeds of the former class also from deeds which by other descriptions the grantees are held to take the interests conveyed as tenants in common. 2 Devlin on Deeds, § 1019; 13 Cyc. 655, citing among many other cases, Buchanan v. King, 22 Grat. (Va.) 414, Anno. Ed. 154; 1 Jones on Real Prop. § 404, and numerous cases cited in notes. All our cases, so far as we have observed fall within the distinguished class

above referred to. See Smith v. Peterson, 76 S. E. 804; Reger v. McAllister, 70 W. Va. 52, 73 S. E. 48; Harding v. Jennings, 68 W. Va. 354, 70 S. E. 1; Oil Co. v. McCormick, 68 W. Va. 605, 70 S. E. 371, and Crawford v. Workman, 64 W. Va. 10, 63 S. E. 319, and cases cited.

[4] Such being the interests of these appellants what rule should govern in ordering a sale, particularly with respect to the undivided interests of Oaks, and Markle and Frank, not subject to the liens of the judgments and attachments decreed? The whole of Baird's original interests in the several tracts comprising the Salem Syndicate No. 2, are subject to purchase money liens aggregating amounts exceeding the prices likely to be obtained at a judicial sale thereof. An attempt to sell Baird's undivided interests would likely affect injuriously those interests, for they would not likely sell to as good advantage when sold separately as if sold as a whole. True the interests of these alienees are not subject to the liens of the judgments and attachments recovered subsequently, but they are subject to the purchase money liens, and, if necessary to satisfy those liens, the whole of the coal, subject thereto, will necessarily have to be sold to satisfy the same. As noted, sixteen different tracts are involved, subject to distinct purchase money liens on each. How would it be practicable to respect the undivided interests of appellants in a sale of these tracts separately, as they have been decreed and must be sold? It may be said that the interests of Baird in each tract might be first sold or offered for sale, and if necessary, then to sell the whole. This is the only possible way we can conceive in which it might be done. But would this manner of sale likely result satisfactorily? Some of the tracts are small, and if the interests of Baird should sell for enough to pay a particular lien on the several tract very insignificant portions would be partible among appellees. Related as these interests are we think the only practicable way to partition them is to sell the whole, and if more than sufficient is realized to pay the prior liens let these alienees take their shares in the proceeds of sale. The point of error should be overruled.

[5] Lastly, it is said that even if the interests of the Markle, Frank, Oaks, and the Hamiltons could be sold, as decreed, it was error not to have decreed that Baird's interests be first sold, and then if they should not sell for sufficient to pay the prior debts to sell the interests of the subsequent alienees. Section 8, of chapter 139, Code 1906, and Handy v. Sydenstricker, 4 W. Va. 605, and McClaskey v. O'Brien, 16 W. Va. 791, are cited and relied on in support of this proposition. Much of what has been said in disposing of the last preceding assignment of error is applicable here. The section of the statute referred to, relating to the en-

forcement of judgment liens, as does a corresponding statute of Virginia, provides that "Where the real estate liable to the lien of a judgment is more than sufficient to satisfy the same, and it, or any part of it, has been aliened, as between the alienees for value, that which was aliened last shall, in equity, be first liable, and so on with other successive alienations until the whole judgment is satisfied. And as between alienees who are volunteers under such judgment debtor, the same rule as to the order of liability shall prevail. But any part of such real estate retained by the debtor himself shall be first liable to the satisfaction of the judgment." This statute is little more, if anything, than declaratory of an old and well settled rule of equity, applied not only in the enforcement of judgment liens, but also in suits to enforce mortgages and deeds of trust. *Clark v. Timber Co.*, 70 W. Va. 312, 315, 73 S. E. 919, and cases cited. In Virginia a recent case construing the statute holds that if an alienee intends to rely on this rule he should allege in his answer, or establish by proof, that the real estate liable to the liens is more than sufficient to satisfy the same. *Bank v. Preston*, 97 Va. 222, 226, 33 S. E. 546. The fact is alleged in the answers of the several alienees in this case; but to each of these answers there is a general replication, and there is no proof of the fact. But we doubt the construction of the Virginia court. We are disposed to hold that the statute as well as the old rule in equity confers a substantial property right, and that in all cases, where it has practical application, the rule ought to be adhered to. But where, as in this case, it cannot be applied so as to do equity as between all the parties, and where undivided interests have been conveyed in numerous tracts, and those interests are so small as to render it practically impossible of execution the rule should not be applied. Such an exception to the general rule finds support, we think, in 2 *Jones on Mort.* § 1582, and cases cited.

A point of error, plainly a clerical error, in drafting the decree is made upon behalf of Sheridan R. Griffin and Michael A. Brast. The commissioner reported due each of them, \$16,902.67, purchase money, for which a vendor's lien was retained on coal conveyed to Baird. There was no exception to the commissioner's report on this finding. In drafting the decree appealed from they were decreed jointly, instead of each, the sum of \$16,902.67. We are of opinion the decree should be corrected in this respect, also making it read that said Griffin and Brast each recover the sum of \$16,902.67, with interest as recited in said decree. And as thus corrected and after it has also been corrected in other particulars herein directed, that the decree stand affirmed.

(72 W. Va. 161)

BENT v. BARNES et al.

(Supreme Court of Appeals of West Virginia.
March 11, 1913. Rehearing Denied
May 29, 1913.)

*(Syllabus by the Court.)***1. EQUITY (§ 219*)—JURISDICTION—GROUNDS.**

In consideration that J. B. would build a good road across a triangular piece of C. B.'s land, C. B. agreed in writing to grant to him the small triangle cut off by the road, which, as stipulated in the agreement, was to be located seven rods from the apex of the triangle, thus forming a small triangle, estimated to contain about 17 square rods. J. B., without the knowledge of C. B., built the road at a place much farther than seven rods from the apex of the triangle, and thereby cut off a triangle containing more than 60 square rods. After the road had been built, but without knowledge of its location, C. B. conveyed to T. the entire tract of land, describing it by metes and bounds, and, by express reference to the agreement, excepted from the operation of the grant the part that he was bound to grant to J. B. The agreement between C. B. and J. B. was not recorded, and, at the time of his purchase, T. had not seen it, but knew where the road had been built by J. B. Being thereafter advised that the road had not been built in the place agreed upon, T. closed up the road; whereupon J. B. sued him, and obtained an injunction, perpetually enjoining T. from closing up the road, and commanding him to remove the obstructions which he had placed in it. C. B. was not a party to that suit. Continuing to claim title to all of the triangle cut off by the road, but not included in the aforesaid agreement, T. took possession of the same, and J. B. then brought this suit against both C. B. and T., to compel C. B. to convey to him the legal title to all the triangle of land cut off by the road, and to enjoin T. from prosecuting a threatened action of ejectment, and from committing numerous, continuous, and petty alleged acts of trespass on the land. *Held:*

That the bill was good on demurrer.

[Ed. Note.—For other cases, see Equity, Cent. Dig. §§ 496, 498-500; Dec. Dig. § 219.*]

2. JUDGMENT (§ 736*) — CONCLUSIVENESS — MATTERS CONCLUDED.

That the former adjudication does not estop T. from claiming title to a part of the triangular piece of land.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 1264, 1265; Dec. Dig. § 736.*]

3. VENDOR AND PURCHASER (§ 65*) — CONSTRUCTION OF CONTRACT — LOCATION OF BOUNDARY.

That the written agreement, and not the actual location of the road, must determine what is the dividing line between the land conveyed by C. B. to T., and what he had previously agreed to convey to J. B.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. §§ 93-96; Dec. Dig. § 65.*]

4. VENDOR AND PURCHASER (§ 65*) — CONSTRUCTION OF CONTRACT — LOCATION OF BOUNDARY.

That C. B. is bound to convey to J. B. only so much land as is included in the written agreement.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. §§ 93-96; Dec. Dig. § 65.*]

5. INJUNCTION (§ 48*)—SUBJECTS OF RELIEF—TRESPASS.

That, as a general rule, equity will not enjoin a mere naked trespass to realty; yet,

if the acts are repeated and continuous, and so trifling in character that the damages recoverable at law for each act would be small when compared with the expense of prosecuting separate actions, equity will enjoin their threatened commission, owing to the inadequacy of legal remedy.

[Ed. Note.—For other cases, see Injunction, Cent. Dig. § 101; Dec. Dig. § 48.*]

Appeal from Circuit Court, Randolph County.

Bill in equity by James A. Bent against P. Clarence Barnes and another. From a decree for defendants, plaintiff appeals. Affirmed.

Harding & Harding, of Elkins, for appellant. W. E. Baker, of Elkins, for appellees.

WILLIAMS, J. James A. Bent was the owner of two tracts of land, rectangular in form, which touched at their respective northwest and southwest angles. P. Clarence Barnes was the owner of an adjoining tract, which terminated in a sharp triangle having its apex at the corner common to the two Bent tracts. One of Bent's tracts bordered on a public highway called the Seneca Road, and the other was separated from it, and also from the road, by the above-described triangle, across which a way was necessary for Bent to reach one of his tracts from the Seneca Road. In view of this situation, Bent procured from Barnes the following writing, viz.: "It is agreed by and between P. Clarence Barnes, of Allegheny county, Maryland, and James A. Bent, of Elkins, West Virginia, that in consideration of the said James A. Bent making a good substantial public road between his land and the Seneca Road, through the lands of the said P. Clarence Barnes near the stream, that the said P. Clarence Barnes hereby agrees to convey to the said Bent the triangular piece of land lying on the west end of his land, seven rods long and five rods wide where it adjoins said road to be constructed; the same containing about seventeen square rods. The said James A. Bent agreeing that the said road shall be constructed within one month from the date hereof, and that it shall at all times be open to the said P. Clarence Barnes and the public generally. Witness our hands and seals this 26th day of March, 1903. P. Clarence Barnes. [Seal.] James A. Bent. [Seal.]"

Within the time specified, Bent constructed a road across the triangle, but located it at a much greater distance from the apex of the triangle than seven rods. The triangle cut off by the road contained 60, or more, square rods, instead of 17 as in the contract stipulated. Barnes never saw the land after the road was made. The contract was executed at Cumberland, Md., the place of Barnes' residence. On June 22, 1903, Barnes and his wife conveyed his tract of

land to the defendant Vincenzo Trimboli, describing it by metes and bounds, but made the following exception, viz.: "Save and excepting therefrom a narrow strip triangle in form on the western end of said land which by agreement between James A. Bent and the grantors hereof executed in March, 1903, was granted for a public road to be at all times open to the proprietor of this land and the public generally." It appears that Trimboli knew where the road was, at the time he bought; but the contract between Bent and Barnes had never been recorded, and he had not seen it before he bought and paid for the land. Later, however, he seems to have been advised that the Bent road cut off more of the apex of the triangle of his land than the agreement authorized; and he then asserted claim to all of the triangle except the part described in the written agreement, and closed up the road. Bent then brought a suit to enjoin Trimboli from interfering with the road and to compel him to remove the obstructions which he had placed in it. A temporary injunction was awarded, but later dissolved by the circuit court of Randolph county, and his bill dismissed. Bent then appealed, and obtained a reversal of that decree, and a decree by this court perpetually enjoining Trimboli from interfering in any manner with his use of the road, and requiring Trimboli to remove all obstructions which he had placed in it. 61 W. Va. 509, 56 S. E. 881. Barnes was not a party to that suit. Notwithstanding the result of that suit, Trimboli, still claiming the greater part of the triangle cut off by the road, continued to make use of so much of it as lay between the road and a line parallel to it, seven rods from the apex of the triangle; and Bent brought the present suit to compel Trimboli to remove structures and material from the land, which he had placed upon it, and to enjoin him from prosecuting a threatened action of ejectment against plaintiff, and from committing other threatened and petty acts of alleged trespass. The bill alleges that plaintiff was in possession of the land, and that Trimboli, "violently and wrongfully, and secretly in the nighttime, attempted to take, and did take, possession of said land, and then and there tore down the plaintiff's said fence, bars, and gates, on said land"; and further alleges that Trimboli is threatening to institute an action of ejectment against plaintiff, and is now building houses and shanties on the land. Barnes is made a party, and the bill prays that he be compelled to convey to plaintiff all of the triangular piece of land west of the road. Trimboli and Barnes both answered, and general replications thereto were made, and depositions were taken and filed by Bent and Trimboli. The bill also exhibits

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

the record, in the former suit. The cause was finally heard on the 26th of February, 1910, and a final decree made, whereby Barnes was required to execute to Bent a deed for 17 square rods at the apex of the triangle, describing it; dissolving the preliminary injunction restraining Trimball from trespassing upon the land, which had been granted in the meantime; and dismissing the bill, so far as it sought relief against Trimball. Bent has appealed from that decree.

[1, 5] It is urged that the demurrer to the bill should have been sustained. The court did not directly pass upon it, but it was, in effect, overruled by the final decree. *Dimmack v. Wheeling Traction Co.*, 58 W. Va. 226, 52 S. E. 101; *McGraw v. Bank*, 64 W. Va. 509, 63 S. E. 398. The bill is good on demurrer. Bent's only relief was in equity. He claimed the land by virtue of his agreement with Barnes, which gave him only an equity in the land; and he could neither successfully prosecute nor defend an action of ejectment on his equitable claim. His suit was to get in the legal title from Barnes, and Trimball was a necessary party, because he claimed the same land by deed from Barnes, and was alleged to be in possession of it. Having jurisdiction of the cause and the parties, equity could administer full and complete relief. It could prevent, by injunction, the commission of such acts of trespass upon the land for which the law does not afford an adequate remedy. And while it is true, as a general rule, that equity will not enjoin a mere naked trespass to realty, yet if the acts are repeated and continuous and are so trifling in character that the damages recoverable at law for each act would be small when compared with the expense of prosecuting separate actions therefor, equity will grant relief by injunction, owing to the inadequacy of the legal remedy. 1 *High on Injunction* (4th Ed.) §§ 697, 702a; *Miller v. Wills*, 95 Va. 837, 28 S. E. 337; *Callaway v. Webster*, 98 Va. 790, 37 S. E. 276; *Lembeck v. Nye*, 47 Ohio St. 336, 24 S. E. 686, 8 L. R. A. 578, 21 Am. St. Rep. 828; *Edwards v. Haeger*, 180 Ill. 99, 54 N. E. 176; *Mills v. New Orleans S. Co.*, 65 Miss. 391, 4 South. 298, 7 Am. St. Rep. 671; *New York, N. H. & H. R. Co. v. Scovill*, 71 Conn. 136, 41 Atl. 246, 42 L. R. A. 157, 71 Am. St. Rep. 159; *Boston & Maine R. v. Sullivan*, 177 Mass. 230, 58 N. E. 689, 83 Am. St. Rep. 275; *Pohlman v. Evangelical Lutheran Trinity Church*, 60 Neb. 364, 83 N. W. 201; and *McClellan v. Taylor*, 54 S. C. 430, 32 S. E. 527.

[2-4] The principal question is: Is Bent entitled to a conveyance from Barnes for all the land west of his road, or is he entitled to only 17 rods at the apex of the triangle? If he is entitled to all west of the road, it follows that the decree is not only erroneous in that it fails to compel Barnes to make him a deed for that much, but it is erroneous in that it dissolved the preliminary injunction against Trimball to prevent his repeated acts

of trespass upon it. But if he is entitled to only so much as the court below found him entitled to, then the decree is right in all respects, and must be affirmed.

It is evident that Barnes conveyed all of his land to Trimball except what he had previously agreed to convey to Bent. It therefore follows that Barnes has legal title to only so much as Bent has equitable title to, by virtue of his contract with Barnes. Barnes has parted with all his interest in the land, either to Trimball or to Bent. And it is insisted by appellant that the decree in the former suit is an adjudication of the questions in the present suit. But we do not think so. Looking to the bill in the former suit, we find that the title to the land was not involved. Only the right to the free and unobstructed use of the road, where Bent had constructed it, was there litigated. Barnes was not made a party, and no relief against him was sought. Therefore the decree in that suit is, in no sense, an adjudication against Barnes. But, having parted with all beneficial interest in the land, it is now immaterial to him where the road is in fact located; but, in no view of the case, can he be compelled to do more than he agreed to do. At the time he conveyed the land to Trimball, he did not know where Bent had built the road, but he was careful to except from the operation of the deed the small piece that he had previously agreed to convey to Bent for a public road. Having now no interest in the land, Barnes can have no interest in the location of the road, further than it may serve as matter of description, to determine the line by which he should convey to Bent. There is no effort by defendants in this suit to have the road relocated, nor could it be done if they desired it. It is now only an evidentiary matter. But Barnes stands upon the written agreement, and Bent could not change its effect, without his consent, by building his road in the wrong place. He could not thus compel Barnes to grant him more land than he had agreed to grant him. So that, notwithstanding the location of the road is res judicata, it still does not define the eastern boundary line of the triangle which Barnes should convey to Bent, unless located according to the agreement. Barnes can only be compelled to comply with his written agreement; it must control. By it he bound himself to convey to Bent the "triangular piece of land lying on the west end of his land, seven rods long and five rods wide where it joins said road to be constructed; the same containing about seventeen square rods." As between Bent and Barnes, this contract must determine where the road should be; and, when that is ascertained, it necessarily becomes the property line between Bent and Trimball; for Barnes conveyed to Trimball the land up to that line, and not the land up to the road located at any place Bent may have seen fit to locate it. It is proven that Bent built

the road very much farther from the apex of the triangle than 7 rods, and thereby cut off more than 60 square rods, instead of about 17, as provided in the contract. There is much conflicting evidence, and it would be a useless task to review it in this opinion. It suffices to say that we have carefully read and considered it, and we think it is fully proven that the road was not located where it should have been. Two important facts are clearly proven, and not denied. One is that when Trimboli bought from Barnes he knew of an agreement between Bent and Barnes, and knew where Bent had built the road, but he had not seen the agreement, and therefore did not then know whether Bent had violated it or not. The other is that, at that time, Barnes did not know that the road had been built. Hence he referred to the agreement with Bent, instead of the road, to define the boundary of the land which he excepted from his grant to Trimboli. So that, even if Trimboli then actually believed he was getting the land only up to the road, he is not thereby estopped from claiming title to all his deed actually gives him. That is a matter between Trimboli and his grantor, and not a matter of which Bent can claim any advantage, for he has right to only so much land as his contract with Barnes gives him.

Finding no error in the decree, it will be affirmed.

(72 W. Va. 424)

STEVENS v. JOHNSON et al.

(Supreme Court of Appeals of West Virginia.
May 6, 1913.)

(Syllabus by the Court.)

1. REFORMATION OF INSTRUMENTS (§ 45*) — MISTAKE—RELIEF—PROOF.

Equity will relieve against a mutual mistake in the execution of a deed only where the mistake is clearly established, by proof that leaves no reasonable doubt that the writing does not correctly embody the real intention of the parties.

[Ed. Note.—For other cases, see Reformation of Instruments, Cent. Dig. §§ 157-193; Dec. Dig. § 45.*]

2. APPEAL AND ERROR (§ 1009*)—FINDING—CONFLICTING EVIDENCE—EQUITY.

A finding in equity from conflicting evidence, not contrary to a plain preponderance, will not be disturbed on appeal.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3970-3978; Dec. Dig. § 1009.*]

Appeal from Circuit Court, Greenbrier County.

Bill in equity by Joseph W. Stevens against L. E. Johnson and others. From decree for defendants, plaintiff appeals. Affirmed.

J. S. McWhorter, of Lewisburg, for appellant. Henry Glimmer, of Lewisburg, and T. N. Read, of Hinton, for appellees.

ROBINSON, J. Stevens conveyed to Ely a tract of land. No vendor's lien was retained in the deed, for deferred purchase money to be paid in one year. Johnson, a banker, furnished the cash payment, and Ely immediately conveyed a one-half interest in the land to him. Later, Ely, who had become involved financially within the year, conveyed the remaining one-half interest to Johnson. So it was that Johnson protected himself as to Ely's indebtedness to his bank, for which indebtedness Johnson, as an officer of the bank, had become liable by reason of permitting Ely to overdraw. But Stevens was left wholly unprotected as to the purchase money due him. Thereupon he brought this suit, seeking to set up and establish that the omission of a vendor's lien in his deed to Ely was a mutual mistake of the parties, and that Johnson took conveyances of the land with knowledge of the mistake. In the alternative, Stevens also alleged that the conveyance to Johnson of the latter one-half interest was wholly voluntary and fraudulent. If the deed could not be corrected as to the alleged mistake, Stevens sought to have the last conveyance to Johnson set aside as for naught, so that the property conveyed thereby might be impressed with the purchase money debt. Upon a hearing, the court dismissed the bill.

[1] The evidence does not establish that by a mutual mistake the retaining of a vendor's lien was omitted from the deed of Stevens to Ely. Such a mistake in a written instrument as plaintiff asserts can only be corrected in equity by clear and satisfactory evidence. Justice Story says: "If the proofs are doubtful and unsatisfactory, and the mistake is not made entirely plain, equity will withhold relief, upon the ground that the written paper ought to be treated as a full and correct expression of the intent until the contrary is established beyond reasonable controversy." Eq. Jur. sec. 152. We have cases announcing this almost elementary rule. *Jarrell v. Jarrell*, 27 W. Va. 743; *Koen v. Kerns*, 47 W. Va. 575, 85 S. E. 902; *Robinson v. Braiden*, 44 W. Va. 183, 28 S. E. 798, and others. Equity will relieve against a mutual mistake in the execution of a deed only where the mistake is clearly established, by proof that leaves no reasonable doubt that the writing does not correctly embody the real intention of the parties. It suffices to say that the evidence in the record before us does not plainly show that, at the time the deed was executed, both parties thereto intended it to contain reservation of a vendor's lien. And even if a mutual mistake in this particular were shown, the evidence is not sufficient to charge Johnson with notice, when he took conveyances for the land, that the parties had been mutually mistaken in not writing a vendor's lien in the deed of Stevens to Ely.

[2] Nor is the charge of voluntariness and fraud in the last conveyance of Ely to Johnson sustained. Johnson proves that he took the conveyance for that which is a consideration deemed valuable in law. True, some admissions of Johnson to the contrary are shown, but on this conflict we can not by any means say that the chancellor was manifestly wrong. A finding in equity from conflicting evidence, not contrary to a plain preponderance, will not be disturbed on appeal. *Bradshaw v. Farnsworth*, 65 W. Va. 28, 63 S. E. 755.

It is submitted on cross assignment that defendant's demurrer to the bill should have been sustained, on the ground of inconsistency in the alternative features thereof. But our conclusion that the bill was properly dismissed at the hearing precludes necessity for a consideration of the sufficiency of the bill.

An affirmance of the decree will be ordered.

(71 W. Va. 639)

SMITH v. WHITE et al.

(Supreme Court of Appeals of West Virginia.
Jan. 21, 1913. Rehearing Denied
May 29, 1913.)

(Syllabus by the Court.)

1. VENDOR AND PURCHASER (§ 174*)—ABATEMENT OF PRICE—BREACH OF COVENANT.

In a suit to enforce a vendor's lien, equity has jurisdiction to award relief to the grantee by abating from the purchase price any damage resulting from a breach of his grantor's covenants; and the damage may be ascertained either by directing an issue quantum damnicatus to be tried by a jury, or by reference to a commissioner.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. §§ 353, 359; Dec. Dig. § 174.*]

2. COVENANTS (§ 96*) — PERFORMANCE OR BREACH—COVENANT AGAINST INCUMBRANCES.

A covenant against incumbrances is one in present; and, if broken at all, is broken the instant it is made.

[Ed. Note.—For other cases, see Covenants, Cent. Dig. §§ 111-129; Dec. Dig. § 96.*]

3. COVENANTS (§ 96*) — PERFORMANCE OR BREACH—COVENANT AGAINST INCUMBRANCES.

Such a covenant is broken by the existence, at the time of executing the deed, of a continuing right of way over the land granted, in favor of a third person; and if such easement materially affects the value of the land, it entitles the covenantee, at once, to substantial damages, whether the easement be in actual use, or be only potential.

[Ed. Note.—For other cases, see Covenants, Cent. Dig. §§ 111-129; Dec. Dig. § 96.*]

4. COVENANTS (§ 127*) — PERFORMANCE OR BREACH—COVENANT AGAINST INCUMBRANCES.

The true measure of damages, in such case, is the difference between the market value of the land subject to the easement, and its market value if the easement did not exist.

[Ed. Note.—For other cases, see Covenants, Cent. Dig. §§ 233-242, 258; Dec. Dig. § 127.*]

5. VENDOR AND PURCHASER (§ 175*)—BREACH OF COVENANT—ABATEMENT OF PRICE.

A covenant of general warranty is so far broken by the failure of plaintiff's title to a portion of the land granted, even though the grantee's possession has not been actually disturbed, as to authorize a court of equity to relieve the grantee against the payment of the purchase price pro tanto.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. §§ 360-363; Dec. Dig. § 175.*]

6. VENDOR AND PURCHASER (§ 175*)—RIGHTS OF PARTIES—ABATEMENT OF PRICE.

In case of the failure of plaintiff's title to a particular portion of the land granted, the amount to be abated on account thereof is not ascertained by the average price per acre for the whole tract, but is the relative value of the land lost.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. §§ 360-363; Dec. Dig. § 175.*]

(Additional Syllabus by Editorial Staff.)

7. EQUITY (§ 39*)—JURISDICTION—RETENTION FOR COMPLETE RELIEF.

Where a court of equity has jurisdiction of the subject-matter and the parties, it will administer complete relief; and, where the defendant's cross-bill avers facts entitling it to relief though there may be an adequate remedy at law, the cross-bill should not be dismissed.

[Ed. Note.—For other cases, see Equity, Cent. Dig. §§ 104-114; Dec. Dig. § 39.*]

Appeal from Circuit Court, Mingo County.

Suit in equity by Will M. Smith against M. Z. White and others. From a decree for plaintiff, defendants appeal. Reversed and remanded.

Edward O. Lyon, of New York City, Brown, Jackson & Knight, of Charleston, and Shepard, Goodykoontz & Scherr, of Williamson, for appellants. Stokes & Bronson, of Williamson, for appellee.

WILLIAMS, J. This suit is brought by Will M. Smith against M. Z. White and the United Thacker Coal Company, a corporation, to enforce a vendor's lien reserved in a deed for 688.5 acres of land. The deed was executed by Smith to White August 7, 1907, and contained the following covenants, viz.: "The parties of the first part covenant to and with the party of the second part that they will warrant generally the said lands and property hereby conveyed, and that said lands is free from all incumbrances." The consideration was \$42,000, and the suit is to enforce the last deferred payment, being \$14,000 with interest from date. The suit was brought originally against M. Z. White alone. White answered that the land was purchased by him for the United Thacker Coal Company and that it furnished the money with which to make the cash payment and to pay the first deferred purchase-money note, and averred that, immediately upon receipt of the deed to him, he had executed to said

company a written declaration of trust. Thereupon plaintiff amended his bill bringing in the coal company. It answered the bill and amended bill, setting up the defenses that plaintiff's covenants were broken, in that his title to 50 acres, a part of the land conveyed, was fatally bad, and that there existed upon the land, at the time of the conveyance, a right of way in favor of the Logan Coal & Timber Association created by deed executed by Jacob Smith, plaintiff's devisor, in the year 1900. That deed granted to certain named trustees for the Logan Coal & Timber Association, a right of way along Mate creek, over the 688 acres of land "for the construction and use of roads, roadways, tramways, railways, and bridges, for the purpose of transporting coal, gases, salt-water, oil and minerals, *logs* and lumber and every description to, from and over a certain tract of parcel of land lying on Mate creek in Mingo county, West Virginia, and adjoining a tract conveyed by the said trustees to the said Jacob Smith upon certain trusts, etc., by said above-mentioned deed, together with full mining privileges and the right to erect tipples, and other buildings or structures necessary for mining and marketing said minerals and lumber." The defendant company in its answer alleges that said trustees are asserting the rights conferred by said deed of November 1, 1900, and are threatening and fully intending to use all of the rights conferred by that deed, and that said rights materially affect the value of respondent's land which was purchased on account of its coal; that the valley of Mate creek is narrow and the mountain sides steep, and that the only practicable way of developing respondent's coal is by means of a railroad and coal tipples, along Mate creek, which may be wholly occupied by the claimants of the aforesaid easement; and averred that it had suffered damages by reason of the existence of said easement to the amount of \$20,000.

The court sustained a demurrer to the allegations of defendant's cross-bill answer relating to the breach of covenants and claim for damages, and gave a personal decree against the defendant M. Z. White for \$16,807, and, in default of its payment, decreed a sale of the land. From that decree defendants have appealed.

[7] It is a settled principle of equity that, having jurisdiction of the subject-matter and the parties, it will administer complete relief to all parties. If defendant's cross-bill avers a state of facts which entitles it to relief, even though it may have an adequate remedy on account thereof in a court of law, its cross-bill answer should not have been dismissed. The chancellor evidently dismissed it because he thought equity had no jurisdiction to administer relief, for he did so without prejudice to the right of defendant to institute another suit. But it has long

been the settled rule of practice, both in Virginia and in this state, that a court of equity, when once it has acquired jurisdiction of the cause of action and the parties, will determine all questions involved, and settle the rights of all the parties, even though it should necessitate the ascertainment of unliquidated damages. *W. Va., etc., Land Co. v. Vinal*, 14 W. Va. 637; *Mason v. Bridge Co.*, 17 W. Va. 396; *Forsyth v. City of Wheeling*, 19 W. Va. 318; *Bettman v. Harness*, 42 W. Va. 433, 26 S. E. 271, 36 L. R. A. 566; *Hotchkiss v. Plaster Co.*, 41 W. Va. 357, 23 S. E. 576. "Equity having acquired jurisdiction of a cause for one purpose, although the relief sought be finally denied, any relief, legal or equitable, justified by the pleadings and tending to end litigation between the parties, will be granted." *Evans v. Kelley*, 49 W. Va. 181, 38 S. E. 497 (Syl. pt. 3); *Grubb v. Starkey*, 90 Va. 831, 20 S. E. 784; *Miller v. Wills*, 95 Va. 337, 28 S. E. 337.

In *Mason v. Bridge Co.*, *supra*, plaintiff was owner of an interest in a ferry franchise on the Shenandoah river, and the defendant was about to erect a toll bridge across the river in close proximity to the ferry landing; he sued in equity to enjoin the erection of the bridge; he also alleged that stone had been taken from his land, by defendant, for the abutments of the bridge, and prayed for an accounting for the value of the stone so taken, and for damages done to his land, as well as for an injunction. On the hearing the circuit court dissolved the injunction which had been awarded by the county court, and at a later day dismissed plaintiff's bill. On appeal this court reversed the decree of the circuit court in part, and continued the injunction in force, so far as it restrained the bridge company from constructing and using its bridge until compensation was paid or secured to be paid plaintiff on account of the damages to his ferry franchise, and remanded the cause to the circuit court for the ascertainment of damages by directing an issue quantum damnificatus.

In *Forsyth v. Wheeling*, *supra*, Mrs. Forsyth brought a suit to enjoin the city from opening and using a street across her lot without her consent, and without any proceedings to ascertain what would be a just compensation to her for the land to be taken therefor. She also claimed damages for the trespass already committed before suit brought. The circuit court perpetually enjoined the city from opening the street, but failed to give damages for the trespass. On an appeal taken by the city, plaintiff cross-assigned as error the failure of the court to award her damages for the trespass. This court sustained the point, and reversed so much of the decree as failed to provide for ascertaining plaintiff's damages, and remanded the cause with instructions to refer it to a commissioner to ascertain the damages.

As further illustrating equity jurisdiction in such matters, this court has held that, where there has been a conveyance of land with covenants of general warranty, which is a covenant real running with the land and is never considered as broken until an ouster, equity has power, nevertheless, to enjoin the collection of the purchase money before actual ouster, if it be clearly shown that the grantor's title is defective. *Harvey v. Ryan*, 59 W. Va. 134, 53 S. E. 7, 7 L. R. A. (N. S.) 445, 115 Am. St. Rep. 897.

[1] The purpose of the present suit being to enforce a vendor's lien, it is clear that the vendee has the right to set up, as a matter of defense thereto, the breach of any covenant contained in the deed, which would entitle him to damages in an action at law therefor. It would be inequitable to require the vendee to pay the purchase money when he has a present right of action against his covenantor for breach of covenant, and take the risk of his insolvency if he should thereafter sue at law. The covenantor is in default and has no right to demand the purchase price until he makes good his covenant, either by removing the incumbrance or responding in damages.

[2] A covenant against incumbrances is a personal, not a real covenant; it is a covenant in present and is broken the instant the deed is executed, if the incumbrance exists. And it is a general rule of law subject to few, if any, exceptions, that a broken covenant is not technically assignable; that is, it does not pass by grant of the land. Another rule, universally recognized by the courts, is that a breach of covenant affords immediate right of action. Consequently, there is no question that defendant, in this case, could have sued on the broken covenant the instant the deed was delivered.

[3] The only questions in the case which have given us any serious trouble are: (1) Has defendant suffered substantial damages, since it appears that the claimant of the easement has not yet actually occupied its land; and (2) if entitled to substantial damages, what is the proper rule for ascertaining them? On these points there is some conflict in the decisions of the various courts of the country; some of them taking the view that, until the covenantee has either been put to the expense of removing the incumbrance, or has been disturbed in his possession by an actual adverse occupation, his damage is only nominal. On the other hand, a number of courts hold that, if the easement is a continuing and irremovable one, the covenantee is entitled to substantial damages regardless of whether his possession has been actually disturbed; and it appears to us that the latter is much the more equitable rule, and is more in harmony with other well-established principles of law. Using the present case as an illustration, the statute of limitations unquestionably began

to run against the covenantee from the execution of the deed, and if it be not entitled to substantial damage until the railroad and tipples are actually built on its land, and if this should not be done within ten years, and should be done thereafter, it would be remediless. But it alleges in its answer, which is in its nature a cross-bill, that it purchased the land on account of the coal it contained, and for the purpose of opening and operating coal mines upon it; that the valley of Mate creek is so narrow and the mountain sides so steep that it is not practicable to build more than one railroad in said valley; that it is the only place furnishing access to its property for developing it and marketing the coal; and that the occupation of the creek by the existing right of way in favor of the Logan Coal & Timber Association virtually destroys the value of defendant's property. In view of these facts and circumstances, which defendant was not permitted to prove, but which upon the demurrer must be taken as true, is it not apparent that defendant has suffered substantial damages, even before the right of way has been actually made use of? There can be no doubt that the mere existence of such an easement does materially diminish the market value of the servient estate. Is not the *jus disponendi* essential to the complete enjoyment of land, and is it not a matter of material interest to the owner to have it cleared of any incumbrance that substantially diminishes its value in the market? How can an owner of land be said to have full and complete enjoyment of it, if he is not able to sell it for a fair and reasonable price because of the existence of an incumbrance on it? Again, suppose defendant should desire to develop its land, by building a railroad, opening coal mines, and erecting tipples; could it safely erect a single tippie, or build a yard of railroad, without risk of disturbance in the enjoyment thereof, by the owner of the superior right? So that, whether defendant desired to sell or to develop its coal land, it would be materially embarrassed. It is therefore inequitable to deny defendant substantial relief; its injury is material, and its relief should be substantial and complete.

[4] In case of a permanent, irremovable easement, the rule for measuring the damages suffered by the owner of the servient estate is the difference between the market value of the land with the easement upon it, and its market value if the easement did not exist. And this difference in value would seem to be just as easy of ascertainment, whether the easement is actually used, or is only potential.

[5, 6] This court has frequently held that equity has jurisdiction to abate from the purchase price of land sold by the acre, because of a shortage. *Butcher v. Peterson*, 26 W. Va. 447, 53 Am. Rep. 89; *Crislip, Guardian, v. Cain*, 19 W. Va. 438; *Koger v. Kane*,

5 Leigh (Va.) 606; *Smith v. Ward*, 66 W. Va. 190, 66 S. E. 234, 33 L. R. A. (N. S.) 1030. And the general rule for determining the amount to be abated is the average price per acre multiplied by the number of acres wanting. But this rule is subject to the exception that, if the abatement is on account of the loss of a particular part of the land which has been conveyed, because of the failure of grantor's title thereto, the amount to be abated is not then the average price per acre, but is the relative value of the particular land lost. *Butcher v. Peterson*, supra; *Smith v. Ward*, 66 W. Va. 190, 66 S. E. 234, 33 L. R. A. (N. S.) 1030. Such an abatement is no more certain of ascertainment than are the damages in the present case.

Kellogg v. Malin, 62 Mo. 429, was an action at law for breach of a covenant against incumbrances; but it serves well to illustrate the rule for the ascertainment of damages in the case of a continuing and irremovable incumbrance. In that case the incumbrance was a railroad right of way, only part of which was actually occupied by the railroad track; the unoccupied part on each side of the track being occupied and cultivated by the covenantee under permission from the railroad. The trial court, by its instructions, authorized the jury, in estimating the damages, to consider not only the land actually occupied by the railroad, but also to take into consideration the perpetual right of the railroad company to occupy a strip 50 feet in width on either side of the center of its track; and those instructions were held by the Supreme Court to state the law correctly.

The opinion in *Funk v. Vonelda*, decided by the Supreme Court of Pennsylvania in 1824 and reported in 11 Serg. & R. 109, is instructive, because of the able discussion of the question which we are now considering. *Funk* had sued *Vonelda* and another, as executors of *Wm. Bechtoll*, deceased, for breach of covenant against incumbrances. Prior to the conveyance to *Funk* in 1814, *Bechtoll* had executed a mortgage upon the land, payable in installments, the last of which was to become due in April, 1830. Plaintiff had failed to allege any special damage, and the court below instructed the jury that he was not entitled to recover anything. But the Supreme Court reversed the judgment, and held that he was entitled to recover at least nominal damages. And, notwithstanding the opinion in that case is purely obiter, so far as it relates to what plaintiff should have recovered, if his declaration had contained the proper averment as to damages, it is nevertheless worthy of consideration because of the force of its logic. On pages 114 and 115 of 11 Serg. & R., *Duncan, J.*, says: "On the whole of this case, my opinion is that the charge of the court was erroneous, as the plaintiff had a cause of action, without proof of actual damage, on the breach which in-

stantly arose, at least, for nominal damages. And although the ground is untrampled, it is the opinion of my brother *Gibson*, as well as myself, the Chief Justice giving no opinion, not having been present at the argument, that the plaintiff, by assigning specially the consequential damages arising from the breach of covenant, according to the evidence offered by him, stating that the land was of less value, by reason of the incumbrance, and that he was prevented from selling it as advantageously as he might have done, and that in fact it was sold by process of law for so much less, would be entitled to recover the full value of the mortgage. Whether a grantee could not, by calling on the grantor to remove the incumbrance, recover this value, where there had been no sale, no eviction, and even before the mortgage money became due, is another question, which it is not necessary now to decide. But in tracing this doctrine, both in courts of law and equity, it is by no means clear that in our mixed administration of law and equity, he ought not. It would be very inconvenient if he should not. Transfers of land are so very frequent; lands are so continually changing owners; the policy of our laws is so much in favor of removing every impediment in the way of alienation; and the hardship is so great on the grantee, who is entitled to the full benefit of his covenant—that I would feel a strong desire to relieve him, if by analogy to any principle of the common law, or any rule of equity, it could be done. For the grantee to wait until he is evicted, locks up all property; suspends all improvements; for who would be willing to make improvements, and wait till he is evicted; and when he, viz., the grantor, may be unable to make any compensation. The arguments ab inconvenienti are unanswerable. And why should he not be obliged, immediately, to perform his covenants?"

Mitchell v. Stanley, 44 Conn. 312, was an action for damages for breach of covenant against incumbrances. The incumbrance there was a right of way along and over plaintiff's land, within ten feet of a canal, for the purpose of cleaning and repairing the canal, upon paying the owner of the land reasonable damages. In the action it was found that the actual damage for the exercise of the right, up to the time of bringing the suit, was \$10, but that the land was worth \$750 less because of the existence of the incumbrance. The court below rendered judgment for \$10 only. But on appeal the judgment was reversed; the Supreme Court holding that plaintiff was entitled to recover \$750.

The rule is thus stated by *Washburn*, in his work on Real Property (6th Ed., vol. 3, § 2411): "If the incumbrance be of a permanent character, such as a right of way or other easement which impairs the value of the premises and cannot be removed by the purchaser, as a matter of right the damages

will be measured by the diminished value of the premises thereby occasioned, to be determined by a jury." To the same effect is the text in 18 A. & E. E. L. (2d Ed.) 179. See, also, *Lamb v. Danforth*, 59 Me. 322, 8 Am. Rep. 426; *Fagan v. Cadmus*, 46 N. J. Law, 441.

Harlow v. Thomas, 15 Pick. (Mass.) 66, was an action for breach of covenant against incumbrances. The breach there consisted in the existence of a right of way over plaintiff's land, in favor of a third person. The court held that he was entitled to recover substantial damages.

The fact that the deed, granting the right of way in question, was recorded, or that defendant's agent, White, may have had knowledge of it, cannot affect its right of recovery for breach of the covenant. Such evidence is not admissible to vary or contradict the express covenant that no incumbrance existed. *Harlow v. Thomas*, supra.

Defendant is also entitled to an abatement from the purchase price to the extent of the value of the 50 acres, part of the 688.5 acres provided it can prove the allegation in its answer in respect to plaintiff's defective title thereto. *Butcher v. Peterson*, 26 W. Va. 447, 53 Am. Rep. 89; *Harvey v. Ryan*, 59 W. Va. 134, 53 S. E. 7, 7 L. R. A. (N. S.) 445, 115 Am. St. Rep. 897.

It was plaintiff's duty to remove the incumbrance, and to perfect his title to said 50 acres, if defective, or answer to defendant in substantial damages therefor. And, in case of the easement, such damage is the difference in value of the land, subject to the easement and its value if the easement did not exist. The circuit court erred in failing to ascertain the damage and in not giving defendant an opportunity to prove the allegation concerning the defect in plaintiff's title to the 50 acres. The decree appealed from will be reversed, and the cause remanded to the circuit court of Mingo county for further proceedings therein to be had according to the principles herein announced.

Reversed and remanded.

(73 W. Va. 444)

STATE v. MASSIE.

(Supreme Court of Appeals of West Virginia.
May 6, 1913.)

(Syllabus by the Court.)

1. HIGHWAYS (§ 164*)—OBSTRUCTION—CRIMINAL PROSECUTION—INDICTMENT.

An indictment, under section 1515a80, Code Supp. 1909, for obstructing a public road, which charges that defendant "did knowingly, wilfully and unlawfully obstruct a certain road and pass way, to-wit, the road and pass way leading from the land of S. A. Parker, in Jumping Branch District, adjoining the said W. J. Massie, over the lands of said Massie, where he now resides, in said district, to the public county road, leading from Jumping Branch to Flat Top, by then and there unlawfully locking a gate over and across said road and pass way and

continuing the same from said time hitherto, in consequence of said unlawfully locking of said gate by the defendant, W. J. Massie, said road and pass way was rendered impassable for all the time aforesaid, said road and pass way being lawfully owned by and used by said A. S. Parker, at the time aforesaid, against the peace and dignity of the State," omitting the words, "and to which road the public has the right of or is not denied the use," employed in section 1515a1, defining a public road, is bad on demurrer, the road so described being a private road not covered by the statute.

[Ed. Note.—For other cases, see Highways, Cent. Dig. §§ 447-455; Dec. Dig. § 164.*]

2. INDICTMENT AND INFORMATION (§ 110*)—LANGUAGE OF STATUTE — DESCRIPTIVE WORDS—SURPLUSAGE.

Though as a general rule an indictment for a statutory offense is good if the offense be charged in the language of the statute, and the indictment in this case would have been good, if it had been confined to the language of said section 1515a80, nevertheless, as the prosecutor undertook to include, therein descriptive matter showing the road alleged to have been obstructed to be a private and not a public road, thereby effectively negating the offense meant to be covered by the statute, and showing the prosecution not maintainable, the descriptive language cannot be rejected as surplusage on demurrer, and the indictment should be quashed.

[Ed. Note.—For other cases, see Indictment and Information, Cent. Dig. §§ 289-294; Dec. Dig. § 110.*]

Error to Circuit Court, Summers County.

W. J. Massie was convicted of unlawfully obstructing a road, and he brings error. Judgment reversed and entered here.

R. F. Dunlap, of Hinton, for plaintiff in error. A. A. Lilly, Atty. Gen., for the State.

MILLER, J. The indictment charges that defendant on the 15th day of February, 1911, in the County of Summers, "did knowingly, wilfully and unlawfully obstruct a certain road and pass way, to-wit, the road and pass way leading from the land of S. A. Parker, in Jumping Branch District, adjoining the said W. J. Massie, over the lands of said Massie, where he now resides, in said district, to the public county road, leading from Jumping Branch to Flat Top, by then and there unlawfully locking a gate over and across said road and pass way and continuing the same from said time hitherto, in consequence of said unlawfully locking of said gate by the defendant, W. J. Massie, said road and pass way was rendered impassable for all the time aforesaid, said road and pass way being lawfully owned by and used by said A. S. Parker, at the time aforesaid, against the peace and dignity of the State." The sole question presented is, does the indictment charge an offense under the statute, or should the demurrer or motion to quash have been sustained?

[1] Prior to chapter 52, Acts 1909, sections 1515a1 and 1515a80, Code Suppl. 1909, we had held, in *State v. Dry Fork R. R. Co.*, 50 W. Va. 235, 40 S. E. 447, and *State v. C. & O. R. R. Co.*, 24 W. Va. 809, that "to sustain

an indictment for obstructing a public road, it must be shown that the road is a public one, not merely a private road." Section 1515a80, on which the indictment in this case was found, provides: "Any person who shall * * * obstruct or injure any road * * * shall be guilty of a misdemeanor and upon conviction be fined not less than ten nor more than fifty dollars." Section 1515a1, defines public road as follows: "A public road, within the meaning of this chapter, includes any road leading from any other public road over one or more person's land to another person's land and which has been established for the convenience of one or more residents or land owners, or persons, or corporation owning or occupying or desiring to use or occupy lands which cannot be reached by any other public road and to which road the public has the right of or is not denied the use."

It is to be observed of course that section 1515a80, does not use the word "public road"; neither did section 45, chapter 43, Code 1899, involved in *State v. Dry Fork R. R. Co.*, supra. Nevertheless, that case and prior cases said the road intended was a public road. Moreover, section 1515a1, uses the words, "which cannot be reached by any other public road," implying that the road intended to be protected must itself be a public road.

But the question here is does the indictment describe a public road within the meaning of said section 1515a1? We think not. The road there described is charged to be lawfully owned and used by A. S. Parker, the prosecuting witness, and it is not charged, in the language of the statute or in equivalent words, to be a road "to which * * * the public has the right of or is not denied the use." The road described is plainly a private road. If, as the indictment alleges it is lawfully owned and used by Parker, presumably it is not a road which the public had the "right of or is not denied the use."

[2] It is argued, however, and as the cases cited hold, that when an indictment for a statutory offense follows the language of the statute it is generally good. *Johnson v. Com.* 24 Grat. (Va.) 555; *Helfrick v. Com.*, 29 Grat. (Va.) 844; *State v. Jones*, 53 W. Va. 613, 45 S. E. 916; *Smith v. Com.*, 85 Va. 924, 9 S. E. 148. And so in this case, if the public prosecutor had confined himself to the language of section 1515a80, charging defendant simply with obstructing a road, sufficiently locating it for the purposes of identification, that under the authorities would have been sufficient, and proof that the road was of the kind and description covered by section 1515a1, would have been admissible. *State v. Dry Fork R. R. Co.*, supra; *State v. C. & O. R. R. Co.*, supra. The word "road" as used in section 45, chapter 43, of the Code, in force at the time of those decisions was held to mean public road, and not to apply to a private road but to public roads only, and

that the proof upon the trial must be that the road obstructed was in fact a public road.

But it is said the court may properly treat the additional words of description as surplusage, and as the evidence is not brought up, we must assume the proof sustained the indictment. This is a correct proposition if the words may properly be treated as surplusage. *State v. Hall*, 26 W. Va. 236; *State v. Pendergast*, 20 W. Va. 672; *Boyle v. Com.*, 14 Grat. (Va.) 674, Anno. Mon. Note, 630.

But what words or matter of an indictment may be properly treated as surplusage? In *State v. Hall*, the indictment, otherwise good, was held not to be vitiated, because its conclusion contained surplus matter not necessary to be proved. *State v. Pendergast* is not much in point, though cited for the proposition in *State v. Hall*. The point presented here is rather a nice one, but nevertheless vital, and should have proper consideration. Joyce on Indict. section 263, says: "It is a general rule that an indictment will not be vitiated by matter which is mere surplusage and that such matter need not be proved." But in section 267 he says: "The principle of law which permits unnecessary and harmless allegations in an indictment to be disregarded as surplusage, does not authorize the court to garble the indictment, regardless of its general tenor and scope, so as to entirely change the meaning. And while immaterial averments may be rejected, there cannot be a rejection as surplusage of an averment which is descriptive of the identity of that which is legally essential to the claim or charge and this includes those allegations which operate by way of description or limitation on that which is material." See, also, same book, section 421. Mr. Bishop (2 Bishop's New Cr. Pro. section 482) says: "Unnecessary matter, of a sort or so averred as to negative the offense meant, or otherwise to show the prosecution not maintainable, cannot be rejected as surplusage." In 6 Com. Dig. (Ed. 1825) chapter 29, page 61, it is said: "Surplusage does not hurt." "Yet, if a man, by the allegation of a thing not necessary, shows that he had no cause of action, this, though surplusage, shall hurt; as, in assize, if the plaintiff makes a title, which he need not, and the title is not good, the whole shall abate." See, also, other illustrations there given. In *Com. v. Atwood*, 11 Mass. 93, we find this: "We cannot reject as surplusage, what may have been the ground of the conviction." In *State v. Copp*, 15 N. H. 212, it is held, that a descriptive averment must be laid as proved, and as applying to the case then before the court, it is said: "In an indictment for resisting a deputy sheriff in the discharge of his duty, an averment that the sheriff was 'legally appointed and duly qualified', is descriptive, and must be proved." Again in *State v. Canney*, 19 N. H. 135, the indictment alleged that the prisoner "broke and entered

the store of one Merrill" and certain goods "in the shop aforesaid, then and there being, then and there in the shop aforesaid, feloniously did steal, take and carry away." It was held that the words "store" and "shop," as in section 9 of chapter 215, Revised Statutes, were not synonymous, that the word "shop" being descriptive of the place where the larceny was committed, could not be rejected as surplusage, and that the demurrer was well taken. In *Lewis v. State*, 113 Ind. 59, 14 N. E. 892, the indictment was under section 1750, Rev. St. 1881, for the larceny of money. The court held, that in such an indictment it was only necessary to describe the money stolen simply as money, but that if a particular description was given, it must be proved substantially as charged, or a verdict of conviction could not be sustained. In *Fulford v. Georgia*, 50 Ga. 593, the court considered the question, "When do averments which might have been omitted become material—or, at least, so enter into the indictment as framed that they cannot be stricken or rejected as surplusage?" The court answered the question in part, as follows: "Starkie on Evidence, volume 3, page 1539, says it is a most general rule that no allegation which is descriptive of the identity of that which is legally essential to the claim or charge, can ever be rejected; and on page 1542, same volume, makes it more specific by restating the rule thus: 'The position that descriptive averments cannot be rejected, extends to all allegations which operate by way of description or limitation of that which is material.' Bishop says: 'If the indictment sets out the offense as done in a particular way, the proof must show it so, or there will be a variance. And where there is a necessary allegation which cannot be rejected, yet the pleader makes it unnecessarily minute in the way of description, the proof must satisfy the description as well as the main part, since the one is essential to the identity of the other.' 1 Bishop's C. P. secs. 234, 235. If the prosecutor state the offense with unnecessary particularity, he will be bound by that statement, and must prove it as laid: *United States v. Brown*, 3 McLean, 233 [Fed. Cas. No. 14,666]; *Rex v. Dawlin*, 5 T. R. 311." The principles of these authorities are covered in the text in 22 Cyc. 370, with citation of other decisions in note.

The principles laid down in the text books and court decisions referred to we think render the indictment in this case bad on demurrer, and in our opinion the demurrer and motion to quash should have been sustained. It may be said that the evidence showed the road to be a public road within the definition given in the statute; but assume that it did, was it admissible under the indictment, which clearly described a private road; was there not a fatal variance? We think so. Defendant was entitled on his trial to stand on the indictment and the offense charged as

laid. Having charged the obstruction of a private way or road clearly the State was not entitled to prove the obstruction of a public road. The record in this case strongly evinces, what is probably the fact, that the controversy involved was one between neighbors over a purely private way or road, in which the public had no interest. Such cases have no place in the criminal courts.

We are of opinion for the reasons given to reverse the judgment and to enter such judgment here as we think the circuit court should have entered, quashing the indictment and discharging the prisoner from further prosecution.

(72 W. Va. 449)

WINDING GULF COLLIERY CO. v. CAMPBELL et al.

(Supreme Court of Appeals of West Virginia. May 6, 1913.)

(Syllabus by the Court.)

1. PARTITION (§ 110*)—PARTITION DEED—PREDICATE.

As the basis for the introduction of a deed made in execution of a decree of partition as evidence of title, it suffices to show, by the orders made and entered in the cause, that the court rendering the decree and authorizing the deed had before it the subject-matter of the suit and the parties.

[Ed. Note.—For other cases, see Partition, Cent. Dig. §§ 398-400; Dec. Dig. § 110.*]

2. JUDGMENT (§ 497*)—RECITALS—PRESUMPTION OF REGULARITY.

Recitals by the orders, judgments, and decrees of courts of general jurisdiction that they have jurisdiction of the parties and the subject-matter are sustained by presumptions in favor of the regularity of their proceedings.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 937, 938; Dec. Dig. § 497.*]

3. PARTITION (§ 110*) — COMMISSIONER'S DEED—SUFFICIENCY.

A deed of parties to a partition suit, made for and on their behalf by a commissioner appointed for the purpose, need not show formally the signatures of the grantors by the commissioner, if the deed recites they acted in making the deed by the commissioner under the decree authorizing him to execute the same, and that acting as aforesaid, they had set their hands and seals to the instrument.

[Ed. Note.—For other cases, see Partition, Cent. Dig. §§ 398-400; Dec. Dig. § 110.*]

4. PRINCIPAL AND AGENT (§ 141*)—EXECUTION OF DEED—POWER OF ATTORNEY—SIGNATURES.

An agent executing a deed under a power of attorney, and affixing his own signature as agent and attorney in fact for his principals, together with their seals, need not affix the signatures of his principals.

[Ed. Note.—For other cases, see Principal and Agent, Cent. Dig. § 497; Dec. Dig. § 141.*]

5. PRINCIPAL AND AGENT (§ 141*)—EXECUTION OF DEED—POWER OF ATTORNEY—RECITALS.

Such agent, being a coheir with his principals, may execute the deed for and on behalf of himself and his principals without designating his principals by name. A recital in

the deed that he conveys for and on behalf of himself and the "other heirs" as their agent and attorney in fact suffices.

[Ed. Note.—For other cases, see Principal and Agent, Cent. Dig. § 497; Dec. Dig. § 141.*]

6. DEEDS (§ 38*)—DESCRIPTION—SUFFICIENCY.

A deed reciting the subject-matter of a conveyance as two lots assigned out of a larger survey in a designated suit for partition thereof, subject to numerous undefined prior conveyances of the same, giving the numbers of the lots, is not void for uncertainty.

[Ed. Note.—For other cases, see Deeds, Cent. Dig. §§ 65-79; Dec. Dig. § 38.*]

7. EJECTMENT (§ 90*)—EVIDENCE—DEED.

Such a deed is admissible in evidence in an action of ejectment, without prior proof of the location of the exceptions and reservations.

[Ed. Note.—For other cases, see Ejectment, Cent. Dig. §§ 254-277; Dec. Dig. § 90.*]

8. WILLS (§ 303*)—ADMISSION TO RECORD—PROOF—SUBSCRIBING WITNESS.

A will may be admitted to record upon proof of the due execution thereof by one of the attesting witnesses and proof of the signature and handwriting of the other; the latter being absent from the state.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 711-723; Dec. Dig. § 303.*]

9. WILLS (§ 303*)—PROOF—DEPOSITION OF SUBSCRIBING WITNESS.

The statute authorizing the taking and use of a deposition of an absent witness in such case is permissive, cumulative, and not exclusive.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 711-723; Dec. Dig. § 303.*]

10. PARTITION (§ 109*)—COMMISSIONER'S DEED—VALIDITY—JURISDICTION.

A deed by a special commissioner for land sold under a decree in a cause instituted by a part owner of the land, seeking a sale thereof instead of partition as against infants, having interests therein, is not void for want of jurisdiction, because the bill prays a sale of the land, after alleging insusceptibility of division thereof in kind.

[Ed. Note.—For other cases, see Partition, Cent. Dig. §§ 375-397; Dec. Dig. § 109.*]

11. EVIDENCE (§§ 470, 474*)—EXPERT OPINION—ADMISSIBILITY—BOUNDARIES—EJECTMENT.

The opinion of a surveyor, who has had extensive experience with the lines, corners, and boundaries of an ancient patent, as to the identity of one of its corners, which he has examined and tested, is admissible in evidence.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 2186-2219; Dec. Dig. §§ 470, 474.*]

12. BOUNDARIES (§§ 3, 40*)—ESTABLISHMENT—EVIDENCE—INSTRUCTION.

A line of survey described in a patent as commencing at one natural object, such as a tree, and running without further locative calls to another object, such as a tree, is governed in its location by the monuments called for, if they can be found, although an uncalled for marked line different therefrom is disclosed by extraneous evidence; and, if there is sufficient evidence of the identity of the monuments called for as the termini of the line, the trial court may properly submit to the jury the location of the line by the monuments called for or by the marked line, according to their

judgment as to the weight of the evidence tending to prove the respective locations claimed.

[Ed. Note.—For other cases, see Boundaries, Cent. Dig. §§ 3-41, 196-204; Dec. Dig. §§ 3, 40.*]

13. BOUNDARIES (§ 3*)—DESCRIPTION—CONSTRUCTION.

A line designated in a deed or other given muniment of title by its course and distance only must yield to an inconsistent marked line, run as the line intended by the parties; but, if the deed calls for a line by monuments as well as by course and distance, such marked line not referred to in the deed must be ignored, if the monuments called for are ascertainable.

[Ed. Note.—For other cases, see Boundaries, Cent. Dig. §§ 3-41; Dec. Dig. § 3.*]

14. DEEDS (§ 111*)—CONSTRUCTION—INCONSISTENT DESCRIPTIONS.

If a deed contain a general description of property, conforming to the manifest intention of the parties, as shown by the situation and circumstances surrounding them and the purpose they had in view, and also another description, clearly inconsistent with such circumstances and purpose, such latter description must be rejected as false and as having been inserted in the deed by accident or mistake.

[Ed. Note.—For other cases, see Deeds, Cent. Dig. §§ 309-315, 334, 335; Dec. Dig. § 111.*]

15. DEEDS (§ 115*)—CONSTRUCTION—DESCRIPTION—PRESUMPTION.

The grantor in a deed, apparently intended for conveyance of all of his land or all of a tract, is presumed not to have intended to retain a narrow strip thereof, and, upon this presumption, calls in a deed may be disregarded as being erroneous, if the deed, viewed in the light of extraneous evidence, is ambiguous in its terms.

[Ed. Note.—For other cases, see Deeds, Cent. Dig. § 325; Dec. Dig. § 115.*]

16. EJECTMENT (§ 110*)—INSTRUCTION—EVIDENCE.

If, in an action of ejectment, the title papers of the defendant, under findings of fact justified by the evidence, trace back to the same title under which the plaintiff claims, the court may properly direct an inquiry in its instructions as to whether the claims of title originated in a common source.

[Ed. Note.—For other cases, see Ejectment, Cent. Dig. §§ 319-326; Dec. Dig. § 110.*]

17. EJECTMENT (§ 15*)—PROOF OF TITLE—ESTOPPEL.

A well recognized and established exception to the rule requiring the plaintiff in ejectment to trace his title from the state is the estoppel in law arising out of a common source of title. In such case, the plaintiff need not trace his title to the state.

[Ed. Note.—For other cases, see Ejectment, Cent. Dig. §§ 59-62; Dec. Dig. § 15.*]

18. EJECTMENT (§ 86*)—LOCATION OF EXCEPTIONS AND RESERVATIONS—BURDEN OF PROOF—PRIMA FACIE CASE.

A claimant of land, under a deed falling under the rule of inclusive surveys as to the burden of proof, may establish a prima facie case of location of the exceptions and reservations outside of the land in controversy, by proving in a general way that none of the exceptions are within the bounds of the land in controversy, and, in the absence of evidence in rebuttal, he need not show the locations of

the exceptions by evidence of the location of the lines thereof.

[Ed. Note.—For other cases, see Ejectment, Cent. Dig. §§ 238-245; Dec. Dig. § 86.*]

Error to Circuit Court, Raleigh County.

Action by the Winding Gulf Colliery Company against J. A. Campbell and others. Judgment for plaintiff, and defendants bring error. Affirmed.

A. P. Farley and John M. Anderson, both of Beckley, for plaintiffs in error. McCreery & Patterson and McGinnis & Hatcher, all of Beckley, and Brown, Jackson & Knight, of Charleston, for defendant in error.

POFFENBARGER, P. The tract of land recovered in this action of ejectment contains about 150 acres, part of a larger tract of 765 acres, demanded in the declaration and treated and sought to be recovered by the plaintiff, the Winding Gulf Colliery Company, as part of a tract of 19,751 acres, known as lot No. 4 in the partition of the Moore and Beckley survey of 170,088 acres, patented on June 20, 1795. Disclaimers reduced the area described in the declaration to about 150 acres. The principal issue of fact in the case was whether the land in controversy is within the boundaries of the Moore and Beckley patent, and that resolved itself into questions as to the location of the southwest corner of the Moore and Beckley survey and the character of the western line of that survey, whether angular or straight. On this, as well as other issues, the jury found for the plaintiff.

An assignment of error charging lack of an issue has been abandoned.

Endeavoring to make out a complete chain of title from the state, the plaintiff offered a great deal of documentary evidence, nearly all of which was objected to by the defendants but admitted by the court. These documents include a deed from Alfred Beckley and others to Samuel McD. Moore, the record of a suit in chancery by Stuart's executors against Moore and others, a power of attorney from Andrew Moore to S. McD. Moore, a deed from S. McD. Moore to Morris Harvey and W. T. Mann, a copy of the will of W. T. Mann, a copy of a deed from James and Matthew Mann, executors, and others, to Riffe and others, the record of a suit by B. D. Cole v. J. N. Cole and others.

As the defendants Campbell and Curtis claim under a deed from S. W. Farley, who derived all the title he had from a conveyance made to him by B. D. Cole, the purchaser, at a judicial sale in a partition suit, of land conveyed to Adaline Cole to whom it had been conveyed by Riffe, Ford, and McCreery, as a part of the Moore and Beckley land, the plaintiff insists that the parties hereto claim title from a common source, in consequence whereof the latter cannot be heard to object to the admissibility of the

title papers, or, at least, that it was not incumbent upon the plaintiff to trace its title beyond the deed to Riffe, Ford, and McCreery; and that the admission of the documentary evidence objected to was harmless error, if error at all. Farley had but the surface and timber of 30 acres of land under his deed from Cole, according to the specification of quantity therein, but it had conveyed probably three times as much by its metes and bounds, which, however, did not go beyond the bounds of the Moore and Beckley patent as claimed by the plaintiff. Having this, he executed a deed, May 31, 1899, purporting to convey to J. A. Campbell a tract of about 150 acres, including part of his 30 acres, but reserving and excepting from the conveyance part or all of the surface and timber he actually owned. This deed went far beyond the metes and bounds of the deed from Cole to Farley, but not beyond the limits of the Moore and Beckley patent as claimed by the plaintiff, nor of lot No. 4 thereof as so claimed. Campbell conveyed to Curtis an interest in his purchase from Farley.

The land conveyed by Farley to Campbell is a strip about 1,000 poles long, 70 poles wide at one end, and 32 poles wide at the other. Within its boundaries lies the triangle sued for by the plaintiff, 40 or 50 poles wide at the southern end and running to a point at the northeast corner of the Farley survey. It lies almost entirely east of the straight western line of the Moore and Beckley survey as its location is claimed by the plaintiff, and therefore within that boundary, but west of the line as claimed by the defendants and outside of the boundary. Within this triangle Farley built a small house after his conveyance to Campbell, which the defendants claim is on the land conveyed to them and outside of the 30 acres reserved by Farley. But the plaintiff claims this house is on the 30 acres, and that possession and occupancy thereof by Farley does not constitute possession under the deed made by him to Campbell, nor on behalf of the defendants Campbell and Curtis.

The Farley deed to Campbell does not describe the land embraced in it as being part of the Moore and Beckley survey, nor purport to convey it as such. Nor does the deed from Cole to Farley. Whether any of it is within the Moore and Beckley survey is a vital issue in the case. Another is whether only a portion thereof lies within it. The western line of each of these conveyances coincides with the western line of the Moore and Beckley survey, and the Cole deed describes its beginning corner as the "north-west corner of lot No. 4 of Moore and Beckley line," and proceeds, "near the Maxwell place and with Britton and Gray's patent line, south 15¼° west," while the Farley deed starts with the same beginning corner as

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

being on the Britton and Gray patent line and runs with the same, but does not say the corner is a corner of said lot No. 4. It calls for the Moore and Beckley patent line as being on the opposite side of the tract it conveys. The deed to Adaline Cole from Riffe, Ford, and McCreery, about ten years prior in date to that of Cole to Farley, calls for the northwest corner of lot No. 4 of the Moore and Beckley tract, as the beginning corner, describes the closing line as coinciding with what is known as the Bray line, leading to a point east of that corner, as located by the plaintiff, about 32 poles, a place known as the eight-notch chestnut corner.

[1] The patent to Moore and Beckley is unquestioned. Their title, however, about 15 years after the acquisition thereof, became the subject-matter of a partition suit, brought by one Charles Stuart in the county court of Greenbrier county. Claiming an equitable interest therein, Stuart, in the year 1810, brought this suit. He alleged, as the basis of his claim, the following matter: One Ward, his debtor, had assigned to him Virginia land warrants for large areas of land, after he had arranged with Moore, a member of Congress, to dispose of the lands, when surveyed and patented, to eastern purchasers, in consideration of a share in the proceeds. Moore associated with him Beckley, the clerk of the House of Representatives. The patents having been issued to them, to enable them to make the sale, they endeavored to sell to Robert Morris and one Nicholson, but, for some reason, failed. Stuart sued for partition. Though begun in the county court of Greenbrier county, the suit ended in the superior court of chancery of Augusta county. The process in the county court of Greenbrier county and the bill filed in that court and the decrees entered in the circuit court of Augusta county, showing an adjudication of the right to partition and the execution of the decree of partition, including the report of the commissioners, disclosing a division of the survey into 12 lots for the purpose, and a decree confirming the partition and assignment of the lots, were introduced. The final decree empowered and ordered the marshal of the court to execute proper deeds of partition to the parties. The objection to the admission of these portions of the record is based upon the absence of any order showing how the cause was transferred from the Greenbrier county court to the Augusta county court of chancery. The recitals of the decrees as well as their findings and determinations show the subject-matter, the land, and the interested parties were before the court. It was a court of general jurisdiction. To sustain the deeds of conveyance made under the decrees, it was unnecessary to introduce the entire record. It sufficed to show the parties holding the title to the land and the land itself were before the court, the land divided, the parti-

tion confirmed, and authority given to execute the conveyances. *Wilson v. Braden*, 48 W. Va. 200, 36 S. E. 367; *Waggoner v. Wolfe*, 28 W. Va. 820, 1 S. E. 25; *Ronk v. Higginbotham*, 54 W. Va. 137, 46 S. E. 128. These requisites, as defined by the decisions of this court, omit the process. Similarly it would be unnecessary, when the suit appears to have been commenced in some other court, to show how it was transferred.

[2] The superior court of chancery being one of general jurisdiction, its recitals of jurisdiction of the parties and subject-matter are sustained by a presumption in favor of the regularity of its proceedings. *St. Lawrence Co. v. Holt et al.*, 51 W. Va. 352, 366, 41 S. E. 351; *Hall v. Hall*, 12 W. Va. 1; *Smith v. Henning*, 10 W. Va. 596.

[3] The marshal of the court having failed to execute the deeds, as directed by the decree above referred to, the court, by another decree entered June 23, 1835, rectifying his failure and the abolition of the office of marshal, substituted Samuel Clark, Esq., for him as a commissioner to execute them. As such commissioner, he executed a deed on behalf of Alfred Beckley, Charles Stuart, and Lewis Stuart to the heirs of Moore, who was then dead, reciting the decree of partition and direction to the marshal to execute the conveyances and his own appointment as a commissioner to make the deeds in the place of the marshal, and then proceeding as follows: "Now therefore this indenture witnesseth that the said Alfred Beckley, Charles A. Stuart & Lewis Stuart by the said Samuel Clark acting under the decree & order aforesaid for and in consideration of the sum of one dollar to them in hand paid by the said representative of the said Andrew Moore dec'd, the receipt whereof is hereby acknowledged have granted bargained and sold and by these presents by the said Samuel Clark acting in pursuance of the authority aforesaid do grant bargain and sell unto the said Samuel McD. Moore Andrew Moore Mary Moore Magdelane Moore, William Moore & Sarah Moore their heirs and assigns the following tracts or parcels of land"—describing them, one of which was lot No. 4 of the Moore and Beckley survey, assigned in the partition to the heirs of Moore. The attestation clause says: "In testimony whereof the said Alfred Beckley Charles A. Stuart and Lewis Stuart by said Samuel Clark acting under the authority aforesaid have hereunto set their hands and seals the day and year first above written." The deed does not bear the signature of Clark as commissioner or otherwise. The only signatures are those of Alfred Beckley, Charles A. Stuart, and Lewis Stuart. If the commissioner had signed his own name under the name of each grantor with the addition of commissioner and placed the preposition "by" between the name immediately preceding and his signature, he would thereby have formally delineated on the paper the character of

the act done by him and the capacity in which he acted. He would have thus shown in form what the deed says he did in fact, for it repeatedly declares the parties executed the deed through him, or, which is the same thing, that he executed the deed in their names and for and on their behalf, and the attestation clause says they, by him acting under the authority conferred upon him, set their hands and seals to the deed. The omission of his own name is clearly immaterial.

[4] In principle, the deed is the same as one executed by an agent under a power of attorney, and its form has been approved in cases of that kind. *Shanks v. Lancaster*, 5 Grat. (Va.) 110, 50 Am. Dec. 108.

The heirs of Andrew Moore seem to have been seven in number: Samuel McD. Moore; Sarah Moore, widow of Andrew Moore, deceased; D. E. Moore; Mary Moore; Magdeline Moore; William Moore; and Sally E. Moore. The last six of these executed to Samuel McD. Moore a power of attorney, dated April 30, 1836, authorizing him to sell and convey all of their right, title, and interest in lands which belonged to their ancestor, Andrew Moore, in the counties of Fayette, Logan, Nicholas, Jackson, and any other Trans-Allegheny counties in the state of Virginia, and all his lands in the states of Ohio and Kentucky. Andrew Moore executed to him a power of attorney, dated August 12, 1859, reciting the execution of a former one on the 4th day of May, 1833, and the existence of a doubt as to whether the latter conferred sufficient power upon the agent to execute sales and conveyances previously made by him and the intention and desire to remove all such doubt, ratify and confirm all such sales and conveyances, and vest full power and authority in the said S. McD. Moore to convey all the parcels of land theretofore sold by him and also all the right, title, and interest of the said Andrew Moore in and to the residue of the landed estates of his ancestor, Andrew Moore, deceased, and appointing and constituting him his true and lawful attorney for the purpose. The objection to the introduction thereof is that it is a copy of a copy. We do not understand it to be so. The former one and its supposed defect are referred to and recited only to show the reason for the execution of the subsequent one, conferring greater powers and more authority, to the end that the agent might execute his commission more expeditiously and successfully. It bears two certificates of recordation, one in Nicholas county and another in Raleigh county; but this circumstance affords no basis for the inference relied upon.

[5] The deed executed by S. McD. Moore for and on behalf of himself, and as agent and attorney in fact of the other heirs of Andrew Moore, to Morris Harvey and Wm. T. Mann, was objected to upon five grounds: Failure to name the other heirs of Moore;

failure to sign their names to the deed; omission of their names from the certificate of acknowledgment; uncertainty in the description of the land; and failure to locate certain reservations in the deed or exceptions therefrom. The first three objections are of the same character as that made to the introduction of the deed from Alfred Beckley and Charles and Lewis Stuart by Clark as commissioner. It recites that, in the execution thereof, S. McD. Moore acted for himself and as agent and attorney in fact for the other heirs of Andrew Moore. Moore affixed his own signature and then affixed his signature as agent and attorney in fact for the heirs of Andrew Moore. He acknowledged it in his individual capacity and as agent and attorney in fact for the heirs of Andrew Moore. Under the authority of *Stinchcomb v. Marsh*, 15 Grat. (Va.) 202, 209, this was sufficient. In that case Judge Lee said: "To bind the principal every deed should be executed for and in the name of his principal, though it was not material whether the attorney sign the name of his principal with a seal annexed, stating it to be done by him as attorney for the principal, or whether he sign his own name with a seal annexed, stating it to be done for the principal." The phrase "other heirs of Andrew Moore" was broad enough to include all of the heirs except himself, and, as they could be ascertained, the deed was in this respect certain. The recorded powers of attorney made a matter of record the power of disposition of the interest in the land of the persons who had executed them. Having power to dispose of these interests and his own as an heir, he executed this deed, declaring it to have been done for and on behalf of himself and the other heirs.

The following legal proposition asserted in *Walker v. Moore*, 95 Va. 729, 30 S. E. 374, is entirely sound and accurately applies in the construction of this deed: "Where a person who has a power of disposition over property, and also owns an interest in it, executes an instrument by which he disposes of the property without expressly referring to the power, the instrument will be deemed to have been intended as a disposition of his interest, and not as an exercise of the power, if the transfer of his interest will satisfy the terms of the instrument; but if he has no interest in the property, or, though he has an interest in it, yet if the instrument conveys a larger interest than he owns, then, inasmuch as the instrument would not take effect at all in the one case unless referred to the power, and would not be satisfied in the other by the transfer of his mere interest, it will be construed to be an execution of the power for the reason that it is necessary to satisfy the terms of the instrument, and the apparent intention of the party. It is only where the words of the instrument may be satisfied without an in-

tention to execute the power that it is not to be deemed an execution thereof. The subsequent acts and conduct of the donee of the power may also be looked to, for the purpose of showing that the donee regarded the instrument as an execution of the power conferred."

[6] The objection of uncertainty is untenable. The deed, read in connection with the partition proceedings, decrees, and conveyances, to which it may be said to refer in a general way, since it says the two tracts conveyed are parts of a tract of 170,000 acres divided among the heirs of Moore, Beckley, and Stuart, is readily and definitely applicable to the two lots assigned and conveyed to the Moore heirs.

[7] The deed was obviously not inadmissible because it made reservations and exceptions from the two lots it conveyed subject thereto. It was nevertheless a deed conveying land within the boundaries of the two lots. As in the case of any other deed, it had to be supplemented with oral testimony for purposes of identification of its subject-matter and application thereto. The location of the reservations and exceptions was matter of proof by oral testimony. *Stockton v. Morris*, 39 W. Va. 432, 19 S. E. 531, *Pennington v. Underwood*, 59 W. Va. 340, 53 S. E. 465, and *Mills v. Edgell*, 69 W. Va. 421, 71 S. E. 574, do no more than place the burden of proof as to location upon the claimant under the deed. They do not vary the rule as to the admissibility of the deed itself.

[8] Though subscribed by two witnesses, the will of Wm. T. Mann was proved for admission to record by only one; the other having left the state and his residence being unknown. The handwriting and signature of the absent witness were proved by two witnesses, the other subscribing witness and another person. The sufficiency of this proof has been judicially declared. "A will must be subscribed but need not be proven by two attesting witnesses." *Webb v. Dye*, 18 W. Va. 376; *Coffman v. Hedrick*, 32 W. Va. 119, 128, 9 S. E. 65; *Davis v. Davis*, 43 W. Va. 300, 27 S. E. 323.

[9] Section 27 of chapter 77 of the Code, allowing the deposition of a witness to a will residing out of the state to be taken, has been impliedly construed by these decisions as not prescribing an exclusive mode of proof in such case. Read in the light of these decisions, it is permissive, allowing proof by means of a deposition, when it is, for any reason, necessary or desirable to prove it in that way.

[10] Harvey and Mann's executors conveyed the 765-acre tract to Riffe, Ford, and McCreery, who conveyed the surface and timber thereof to Adaline Cole. After her death, her husband, Bartley D. Cole, claiming to have become the owner by purchase of several of the interests of her 17 children, in-

stituted a suit in chancery in which such proceedings were had that said surface and timber were sold under a decree and purchased by said Cole. According to the admissions of the bill, nine of said children were then infants. It charged insusceptibility of division of the land in kind, on account of its character, and inability of the infant defendants to pay the taxes on their shares, if it could be divided. For these reasons, the bill prayed a sale thereof. A guardian ad litem was appointed for the infant defendants who filed his answer and a decree of sale was pronounced. Cole's purchase thereunder for the sum of \$1,000 was confirmed, and the purchase money, when fully paid, was apportioned between him, as owner of the interests of the adult heirs, and the infants; the share of the latter being ordered paid to him as their guardian. This having been done, a deed was directed to be executed, conveying the land to him. Lack of jurisdiction of the court to decree a sale of the land upon the bill filed by Cole is charged as the basis of the objection to the introduction of the record. The argument to sustain this contention treats the bill as one filed by him in his individual capacity for the sale of the interests of the infants, under the statute permitting sales of such interests in proceedings instituted by their guardians.

Assuming such to have been the purpose or effect of the bill, counsel for the defendant say it could not be converted into a bill for partition. This argument proceeds upon an unsound premise. Cole filed the bill in his own right as part owner of the land. He had a right of partition and the court jurisdiction and power, under its general equity procedure, to grant him relief, by way of partition. His bill may have been defective, since it is usual and regular to pray for partition primarily and sale of the land alternatively, in case it is found insusceptible of partition. The case is entirely different in nature from that of *Hoback v. Miller*, 44 W. Va. 635, 29 S. E. 1014, in which the decree was held void for want of jurisdiction. There the widow, plaintiff in the suit, had no cause of action at all. Here the plaintiff did have a cause of action and set it up in his bill. He may have done this unskillfully and defectively, but his bill contains enough to call for the judgment and opinion of the court as to its sufficiency and brings before the court the parties and subject-matter of a cause of action within its jurisdiction. The decree may have been voidable at the instance of the infants because of errors in the proceedings, but it was not void for want of jurisdiction. *Stewart v. Tennant*, 52 W. Va. 559, 44 S. E. 223.

[11] Exception was taken to the action of the court in permitting a witness, G. F. Wilson, a surveyor, to state to the jury his

opinion as to the identity of a certain corner, claimed by the plaintiff to be the true corner. This witness had done much surveying in which it was necessary to ascertain and locate lines of the Moore and Beckley patent, and in which those lines, or some of them, were involved. He was entirely familiar with the character of the marks on the lines and knew their peculiarities. The corner in question was the southwest corner of the survey, described in the patent as being at a white oak and chestnut oak, also a number of other blazed trees, standing on a high ridge on the headwaters of Guyandott. For a long time nothing could be found upon the ground which seemed to answer or correspond with this call, and the witness, after a considerable search, found trees, on a high ridge, but not on the top thereof, which, in his opinion, are those called for in the patent. One of them, the chestnut oak, was standing and the annulations counted well up to the age of the survey. Near it was a depression indicating the site of a tree that had disappeared. Around it were other trees apparently marked as pointers. The question propounded to him was as follows: "As a surveyor, state whether or not that is, in your opinion, the true corner—the southwest corner—of the Moore and Beckley survey." His answer was: "Yes, sir; I do." This opinion related to the identity of a particular corner, or rather trees, monuments, called for in the muniment of title, determinable by courses and distances, the character of the ground and marks on trees. One of the lines of which the corner was the terminus was 3,380 poles long and the other 1,850 poles. Tested by the courses and distances, the trees accord very well with the call of the patent, except in one respect. To make them do so, it was necessary to change the course of one of the lines from southwest to northwest, on the assumption of a mistake in the patent call, indicated by attempts to locate it. The opinion was not as to the location of a line dependent upon general evidence in the case, nor of the location of a boundary of land. The test as to the admissibility of nonexpert opinion evidence, as declared by this court, is whether the nature of the subject-matter of the opinion is such as to make it reasonably convenient or practicable for the witness to state to the jury all the facts and circumstances within his own knowledge and upon which the opinion is founded. *Walker v. Strosnider*, 67 W. Va. 39, 71, 67 S. E. 1087, 21 Ann. Cas. 1; *Kunst v. Grafton*, 67 W. Va. 20, 67 S. E. 74, 26 L. R. A. (N. S.) 1201. In this instance, the witness had had large experience, in his work, with the lines of the Moore and Beckley, Welsh, and Nicholas patents, all made by the same man within a year of one another, and was familiar with the peculiar marks made to indicate their lines and corners, the evidence found in the

marks of the character of the instruments with which they were made, and their relation in general to the description thereof in the survey. As the identity of certain trees called for as monuments or their correspondence with calls of the patent was the subject-matter of the opinion, it was obviously impossible for the witness to detail to the jury all the facts, circumstances, and peculiarities upon which his impression was based, and his opinion was admissible under this rule. The admission of the opinion of a witness as to the location of a line was held erroneous in *Mylius v. Lumber Co.*, 69 W. Va. 346, 368, 71 S. E. 404; but the location of a line, dependent upon general evidence, differs materially from the identity of a monument. *Doe v. Fields*, 52 N. C. 37, 75 Am. Dec. 450, *Insurance Co. v. Cotheal*, 7 Wend. (N. Y.) 72, 22 Am. Dec. 567, relied upon in the brief, and *Holleran v. Meisel*, 91 Va. 143, 21 S. E. 658, are distinguishable upon the same ground.

[12] As the location of the western boundary line of the Moore and Beckley patent is the principal issue in the case, and instructions given at the instance of the plaintiff over the objection of the defendants gave the jury rules and directions for their guidance in the ascertainment thereof, a statement of this evidence in a general way is necessary to the determination of the propriety of the action of the court respecting the instructions. The northwestern corner of the Moore and Beckley patent, known in the record as the Calfee corner, is not in dispute. From this corner the call of the patent is "thence S. ten degrees W. 3,380 poles crossing a number of streams and ridges to a white oak and chestnut oak also a number of other *blazed* trees standing on a high ridge on the headwaters of Guyandott." The location of this corner is one of the storm centers of the controversy. From this point, the call of the patent is "from thence N. 85 E. 1,850 poles to three chestnuts marked I. S. on the flat top mountain in a fern break." This corner is not in dispute. On the long line from the Calfee corner to the southwest corner, straight as contended for by the plaintiff, to the chestnut oak and other trees, not on top of the ridge, but 175 feet from the top, on the slope, there are no marked trees. From the Calfee corner, to a point 40 or 50 poles east of this line and slightly more than a third of the way down, there is a marked corner called the "eight-notch chestnut." On a line from the Calfee corner to it, some marked trees are found corresponding in age with the patent, and other such trees are found south of that corner on a continuation of the line from the Calfee corner through it. This "eight-notch chestnut" was marked as the corner of the Welsh and Nicholas patents, subsequent to the date of the Moore and Beckley survey, but within a year thereafter. They describe it as being

in the line of the Moore and Beckley survey, and call for lines running with the Moore and Beckley survey to it. One contention of the defendants is that the western line of the Moore and Beckley patent begins at the northwest corner and runs straight to the "eight-notch chestnut," and thence by the same course to intersection with the line from the Flat Top corner, at which point there seems to be nothing to indicate the existence of a corner. Another contention is that said western line must begin at the Calfee corner, run to the "eight-notch chestnut," or to the end of the marked line beyond it, and thence to the southwestern corner as claimed by the plaintiff, so as to make an angular line conforming to the corner and also to the marked trees. This would exclude a portion of the triangle in controversy. The other location would exclude all of it.

Commissioner Snidow, in his division of the Moore and Beckley survey for the purposes of the partition, treated the "eight-notch chestnut" as a marked monument in the western line of the survey, though no monument is called for in the patent at that point, nor anywhere on the line except at the terminus. The streams and ridges mentioned in the description of that line are not locative calls. Snidow treated the "eight-notch chestnut" as the corner of lots 3 and 4 of the survey, as divided by him. Plaintiff claims the land in controversy is a part of lot No. 4 of the partition, notwithstanding a portion of it lies west of the line run from the "eight-notch chestnut" to the southwest corner as claimed by it. In his report of the division of the survey into lots, Snidow did not call for the "eight-notch chestnut" by name, but did call for other timber found at that point, describing it as follows: "A white oak marked C S and maple marked I S and gum in the fork of a drain." He made this the corner of lots 3 and 4. Speaking of that corner, he uses the following additional terms: "On a line of said survey and on the south side of a flat corner to lot No. 3 and leaving the line of said survey." In describing adjoining lot No. 3, he designates the corner as follows: "A gum and maple and white oak the white oak marked C S and the maple marked I S on the patent line of said survey in the forks of a drain that runs S. 10° W. and on to the south side of a flat and with the patent line." The Beckley and Stuart deed conveying lot No. 4 to the heirs of Moore does not describe the corner so minutely, but follows the general description of the survey, given in Snidow's report.

In this state of the evidence, the court, at the instance of the plaintiff, told the jury that, if they believed the straight line running from the Calfee corner to the trees claimed by the plaintiff as the southwest corner, shown on the map used in the trial

as the lower and broken line, was the true west line of the Moore and Beckley patent, the call in the deed from Samuel Clark, commissioner, to S. McD. Moore and others, running N. 10° E. 2,020 poles should be taken as running with said lower and broken line to its intersection with a continuation of the line between lots 3 and 4 of the partition suit of Stuart v. Moore and Beckley, and that if they believed the trees claimed by the plaintiff as the southwest corner of the Moore and Beckley patent, as shown on the plat used in the trial, were the true southwest corner of the Moore and Beckley patent, and that the Calfee corner was the northwest corner of the patent, the straight line, shown on the map, as the lower and broken line running from the Calfee corner to said trees, was the true line.

These two instructions, directing the jury to make the deed from Clark to Moore conform to the location of the western boundary line of the Moore and Beckley tract, as claimed by the plaintiff, in case they should find it to be the true line, notwithstanding the northwest corner of lot No. 4 conveyed by it was described as being in that line and also at a point some poles to the east thereof, submitted a single question, the location of the line. They left open for jury determination only the ascertainment of the northwest corner and the southwest corner. If they found these as claimed by the plaintiff, they were directed to establish, as the western boundary line, a straight line between the two points and then make the deed from Clark to Moore conform to it.

Conceding this to be the interpretation of the instructions, the argument against their propriety denies the sufficiency of the evidence for submission of an inquiry as to the location of the line elsewhere than along the course shown by the marked trees. The line is not described in the deed as following the direction of certain trees or any trees marked for identification thereof. In other words, the trees relied upon here as conclusively establishing the line to the southwest corner are not mentioned in the patent. Nor does it say the boundary follows a marked line from corner to corner. If it did, it would be impossible to disregard such line, for, as monuments, the trees would be of equal dignity with those marked for the terminus of the line. But not having been so called for, courts and juries are allowed more latitude in respect to their probative value. If the patent called for a straight line and a marked line between said points, there would be conflict and a latent ambiguity. The theory set up in opposition to the action of the court, in giving these instructions, applied here, would adopt a marked line in preference to an unmarked one. The description of the line involved in the deed would be so altered as to make it a crooked line instead of a straight one. This result would

involve only alteration of courses and distances, it is true, and the proposition thus apparently falls within a well-established rule, namely, that marked lines prevail over mere courses and distances. It does not do so, however, because the statement of that rule in the argument of the case as well as in some opinions is too broad. Only marked lines or corners mentioned or called for in the deed or other muniment of title prevail over courses and distances.

In *Smith v. Davis*, 4 Grat. (Va.) 50, the deed called for a straight line between the termini; it being a division line between two parts of a larger tract. The termini were undisputed, but the division line, as found on the ground, was a curved one, while the deed called for a straight line which was not marked. The trial court was requested to instruct the jury that, unless they should believe from the evidence the parties had consented to the running of a crooked line and taken possession with reference thereto and had held it for a period of 15 years, they should find the straight line as called for in the deed to be the true division line, provided they further believed the commissioners intended the line to be straight. The instruction was refused, and the appellate court disapproved the ruling, set aside the verdict, and remanded the case for a new trial. In *Marlow v. Bell*, 13 Grat. (Va.) 527, 530, Judge Allen, speaking for the court, said: "It is not controverted in argument that where notorious landmarks, as corner trees or natural objects, are called for, they are to be regarded as termini, and a straight line is to be run from one terminus to the other, without respect to course or distance. The case of *Smith v. Davis* [4 Grat. (Va.) 50], recognizes this as a general rule. But though this be the true rule where no other call is found in the grant but the call to run from one terminus to another, there certainly may be other calls which show the line was not intended to be a straight line; as where a call is to run with a river or a public road from one terminus to another, the stream or road, if it leads to the other terminus, must be followed, though it may diverge from a direct line between the two points. The same rule would apply to a marked line, if there was enough to show that such line, though not a direct line, was intended as the boundary; provided by following the marked line the other terminus can be reached." In the illustration he inserts the essential element of a call for a straight *marked* line, not merely a straight line. As in the case of a call for a straight line and a *river* or *road*, the deed by its call or otherwise must show intent to follow a straight and marked line. Then the marked line, if crooked, may control. Creating a latent ambiguity, such conflicting calls let in extraneous evidence, or, to be more accurate, the extraneous evidence, properly and necessarily let in to ap-

ply the instrument to its subject-matter, discloses the ambiguity, and then, as in other such cases, the question of intention, arising out of the extraneous evidence as well as the document, must be determined. *Armstrong v. Ross*, 61 W. Va. 38, 55 S. E. 895.

Judge Tucker stated these two propositions as follows in *Dogan v. Seekright*, 4 Hen. & M. (Va.) 125, 131: "If a patent or deed refer to any notorious landmarks or natural boundaries, which cannot be mistaken, and are not liable to change or decay, as the corners or angles of a plat, such notorious landmarks are to be regarded as termini, from whence straight lines are to be run from one to the other, without regard to the correspondence of either course or distance, which may in such cases be mistaken in the deed. * * * Where courses and distances, with marked lines and corners, are referred to in a deed, in such case lines and corners corresponding most nearly with the courses and distances, lines, and corners mentioned in the deed, are to be regarded as the true courses." In that case, the monuments called for in the deed were permitted to control courses and distances. In *Herbert v. Wise*, 3 Call (Va.) 239, decided in 1802, Judge Pendleton said: "To pursue the proper descriptions of our land boundaries would render men's titles very precarious, not only from the variations of the compass, but that old surveys were often inaccurate; and mistakes often made, in copying their descriptions into the patents; leaving out lines, and putting north for south, and east for west; and in copying those descriptions into subsequent conveyances: Whereas, the marked trees upon the land remain invariable, according to which neighbors hold their distinct lands. On this ground our juries have uniformly, and wisely, never suffered such lines, when proved, to be departed from, because they do not agree exactly with descriptions in conveyances." While the case involved a question of boundary, it was one of law and not of fact. The will contained two descriptions; one particular and the other general; one by metes and bounds, and the other by words indicative of intent to dispose of all the residue of a large tract, portions of which had been previously disposed of. The general statement in the opinion must be read in the light of decisions defining it and marking its limitations.

In *Baker v. Seekright*, 1 Hen. & M. (Va.) 177, decided in 1806, a deed described a line by courses and distances only. Parol evidence was offered and admitted showing a marked line, differing somewhat from the line as ascertained by following the courses and distances. As to this line, the deed called for no monuments, and the marked line, corresponding in age with the date of the deed, was found on the ground not far from where the courses and distances located the line. On a writ of error to the judgment

founded upon the marked line, the court held the evidence had been properly admitted. Of these two cases, Judge Roane said in *Dogan v. Seekright*, they "shew the sense of the court in favour of marked and reputed boundaries, when in opposition to mistaken descriptions in deeds or surveys, or to mere courses and distances." Speaking of *Baker v. Seekright*, he said: "In that case, parol evidence was admitted to establish a marked line, which did not correspond with that mentioned in the deed either as to course or distance. It was so admitted, on the ground that the description in the deed may have been mistaken; whereas the marked and reputed line, being more stable and permanent, ought to prevail, or, at least, be submitted without prejudice to the consideration of the jury." In his analysis of the evidence in *Dogan v. Seekright*, Judge Tucker shows one of the lines contended for was not indicated by any monuments found upon the ground, while the other was indicated by monuments answering reasonably well the description thereof in the patent. It was a case of choice between courses and distances, on the one hand, and specified monuments, on the other. The instruction he framed for the purposes of a new trial made the location a question for the jury, if they should find both of these locations supported by ancient marked lines, run either by the commissioners who divided the land or the parties to whom the lots had been assigned, but not otherwise. By the reference to a subsequent survey, he applied another rule stated by him as follows: "Where, in a grant or deed, courses and distances only are mentioned, beginning from a certain point, but not referring to any certain point for the termination, otherwise than by reference to the distance, according to the courses prescribed; in such case, courses and distances, as expressed in the deed, are only to be regarded, unless an actual survey, duly authorized, be proved to have been subsequently made, according to the courses and distances prescribed by the deed."

[13, 14] Under these principles, marked lines, though not called for in the deed, if shown to have been actually run for the purposes of the deed, prevail over calls for mere courses and distances. But they do not authorize variation of a call for a straight line, between monuments called for and found, by proof of a marked line not called for, so as to make it an angular or crooked line. In that case, a straight line from monument to monument conforms to the description in the deed and is sustained by natural monuments. The deed expresses intent to establish a straight line, and the monuments described as termini fix the location with certainty. A marked line found in close proximity to such a line, running from monument to monument, corresponding in age with the date of the survey, may be sufficient proof of an actual survey of that

line for the purposes of the conveyance; but, as the deed expressly establishes a straight line, the intent expressed in the instrument logically and justly prevails over a mere inference of a different intent raised by the existence of the inconsistent marked line. The repugnancy is attributed to mistake in the marking of the line, not in draft of the deed, for its expressed intent must control. When both the straight line and the marked line are called for, and the latter is crooked, conflicting intent is expressed in the deed. Then courts and juries are at liberty to say which shall prevail.

This proposition is asserted by the decision in *Smith v. Davis*, cited, and the opinion of Judge Tucker in *Dogan v. Seekright*, and later in *Pasley v. English*, 5 Grat. 141, 152. In that case Judge Baldwin said: "But there are no cases decided by this court to countenance the idea that a claimant of the legal title to land under deed or conveyance can disregard the calls of his deed, and rely merely upon parol evidence that, at or about the time of his purchase, a division line was run by and between him and his vendor, without any evidence to prove that the marks are found upon the ground and correspond reasonably with the date of the deed, survey, or division, or that they were once so found, and have been lost by decay or destruction." In a former portion of his opinion, he said: "Some of the American cases have held, in conformity with what a rigid adherence to principle would seem to require, that the monuments which are to control *courses* and *distances* must be called for in the instrument: but others assert that where a deed describes the land by *courses* and *distances* only, and old marks are found on the ground corresponding in age, as nearly as can be ascertained, with the date of the deed, and so nearly agreeing with *courses* and *distances* that they may well be supposed to have been made for its boundaries, the marks shall be taken as the termini of the land. * * *

The Virginia cases seem to have gone still further, and to have given much weight to marked lines of such a description, found on the ground, though corner trees, *not to be found or ascertained by evidence, are called for in the instrument*, or though inconsistent with points in a plat referred to, especially if comporting with natural objects mentioned." This he states as the limit of relaxation of the strict rule. To warrant the establishment of a marked line differing from the calls of a deed, the calls must be for course and distance only, or the corner monuments called for must be unascertainable from the evidence or not found. If they are found, and inconsistent marked lines are sought to be established, the monuments are controlling, and such inconsistent line not called for must be rejected. These observations harmonize perfectly with those of Judge Tucker in the earlier case of *Dogan v. Seekright* and the later cases of *Smith v. Davis* and

Marlow v. Bell. The principle is reasserted and applied in the comparatively recent case of *Jackson v. Land Ass'n*, 51 W. Va. 482, 41 S. E. 920, holding: "A line should not be deflected except in order to conform to the intention of the parties. And if possible, a line should be construed to mean a continuous line." See, also, *Tompkins v. Vintroux*, 3 W. Va. 148, 100 Am. Dec. 735, in which a call for a line to be so located as to convey a certain quantity of land, but described as a straight line, was held insusceptible of change from a straight, to an angular or crooked, one, so as to include the quantity intended to be conveyed.

The statute requiring surveyors of public lands to be patented by the commonwealth to bound the same by marked lines, where a water course or an established marked line shall not be the boundary, is relied upon as denying the application of this rule in the ascertainment of the lines of the patent; but the observations of Judge Baldwin in *Pasley v. English* exclude this contention. Having mentioned the statute as the cause for relaxation of the strict rule, he says: "It thus being made part of the surveyor's duty to mark the lines, if such marked lines are found on the ground, his omission to notice them in his report, or noticing their termini inaccurately, may be placed on the same footing with other omissions or inaccuracies of description in regard to courses, distances, etc., introduced into the patent from the certificate of survey. And this relaxation in regard to patents would naturally extend to deeds consequent upon, or growing out of, them, as is the case with all our conveyances." Properly construed, this statute was necessarily directory and not mandatory, in the sense that an erroneous but certain description of the patent would be so broadened by extraneous evidence as to include all the land surveyed for it or so narrowed as to exclude a portion of it. The statute contains no such provision, and, in the wilderness in which those early surveys were made, it was practically impossible to avoid mistakes. Some of the difficulties incident to running long lines and rendering mistakes inevitable are pointed out in the opinion in *State v. King*, 64 W. Va. 546, 579, 63 S. E. 468.

In giving these instructions the court treated the evidence as to the identity of the southwest corner as inconclusive and raising a question for jury determination. It also treated the evidence of the existence of a marked line from the southwest corner to the "eight-notch chestnut" as being inconsistent with the evidence offered by the plaintiff to establish the southwest corner, and tending to prove the claim of the defendants as to the location of the western line, inconsistent with plaintiff's claim as to the location of that corner. Under them, the jury were at liberty to establish the southwest corner by the evidence relied upon by

the plaintiff as to its location, or, upon the evidence of the inconsistent marked line, to reject that location and treat the corner as unascertainable except by course indicated by the marked line and the distance call. The propriety of this ruling by the court is a proper and logical conclusion deducible from the authorities here analyzed.

[15] Plaintiff's instruction No. 1 bound the jury to make the deed from Clark, commissioner, to Moore, conform to the line from the Calfee corner to the southwest corner as located by the plaintiff, and so withdrew that question from the jury as one of law for court determination. The Clark deed calls for that line as well as for the "eight-notch chestnut." It was made in execution of the decree of partition, plainly intended by the court for division and conveyance of the entire Moore and Beckley tract, as disclosed by the facts and circumstances and the purposes of the parties as well as the deeds made in execution of the decree. This being true, the call for the trees some distance east of the western boundary line must necessarily have been a mistake. It is plainly contradictory of the general purpose and intent of the conveyance. A grantor in a deed, apparently intended for conveyance of all of his land or all of a tract, is presumed not to have intended to retain a narrow strip thereof, and, upon this presumption, calls in the deed may be disregarded as being erroneous. *Clayton v. County Court*, 58 W. Va. 253, 52 S. E. 103, 2 L. R. A. (N. S.) 598; *Adams v. Alkire*, 20 W. Va. 480. If a deed contains two descriptions, one general and the other particular, the general description will prevail, if shown by the terms of the deed, its purpose, the situation of the parties, and the circumstances, to accord better with the intent of the parties than the particular description. *Herbert v. Wise*, 3 Call (Va.) 239; *Mylius v. Lumber Co.*, 69 W. Va. 346, 351, 71 S. E. 404. Of the intention of the parties to the partition suit and of Clark, commissioner, to make conveyances of the entire Moore and Beckley survey, there can be no doubt. This being true, the calls for trees west of the line as the corner of lots 3 and 4 is just as clearly a mistaken call. Under such circumstances, the court may treat the question of intent as one of law and need not submit it to the jury. *Mylius v. Lumber Co.*, cited; *Snooks v. Wingfield*, 52 W. Va. 441, 44 S. E. 277. The call is for the line of the patent as well as the trees, establishing a case of ambiguity in the terms of the instrument, permitting inquiry as to the intention. In *Matheny v. Allen*, 63 W. Va. 443, 60 S. E. 407, 129 Am. St. Rep. 984, the call was for a tree near a corner, not for the tree and the corner, or at the corner. The phrase "with Preston's line" was uncertain. It may have meant parallel with the line or by the course of the line.

[16] An instruction, submitted to the jury

whether the parties claimed titles from a common source, Riffe, Ford, and McCreery, whether either plaintiff or defendants had had actual possession of the land in controversy or any part thereof, whether plaintiff and its grantors were prior to defendants in the acquisition of its title and had paid all taxes on such lands from the date of such acquisition, and authorized a verdict for the plaintiff, even though it had not traced title to the state nor had actual possession of the land for ten years, if all the inquiries should be answered affirmatively. The submission of an inquiry as to a common source of title is one ground of objection to it. The paper title of the defendants, as has been shown, runs back to Bartley D. Cole, whose title came mediately from Riffe, Ford and McCreery. Its call for the Bray line, running diagonally across the strip between the two alleged locations of the western line of the Moore and Beckley survey, limited it to about one-half of the section of that strip, corresponding with its length, but excluded none of the surface or mineral recovered by the plaintiff. Cole's deed to Farley, instead of conveying the triangle thus formed by the deed under which he held, called for the northwest corner of the Moore and Beckley patent as being 32 poles farther west, on the division line between lots 3 and 4 continued, and, when Farley conveyed to Campbell he started at the same point. This point is in the western line of the Moore and Beckley survey, as located by the plaintiff, and the paper title of the defendants traces back to it. If it is the true line, a question submitted to the jury, these deeds call for land within that survey, in terms recognized by them. Thus connected, their paper title goes on back to the state by the same course as that of the plaintiff. The defendants were not bound to rest their defense on this title alone. Declining to show any at all, they could put the plaintiff on proof of its own title, or use their deeds as mere color of title or as evidence of good title under the Moore and Beckley patent, just as readily and effectually as the plaintiff could rely upon that title, or show superior outstanding title in a stranger. All the title papers being in evidence, it was competent for the jury to determine the relation thereof and the true status of the titles and claims. Hence no error in the submission of the inquiry as to sources of title is perceived.

[17] The effect of proof of a common source of title is not necessarily to establish good title in the plaintiff; his being prior in time. It works an estoppel against the defendants, and so dispenses with necessity of proof of perfect title in the plaintiff. *Summerfield v. White*, 54 W. Va. 311, 321, 46 S. E. 154. The rule is a recognized exception to the general rule, requiring the plaintiff to trace his

title to the state. *Witten v. St. Clair*, 27 W. Va. 762; 10 A. & E. Ency. L. 491; *Newell on Eject.* 579; *Herm. Est.* § 593. These conclusions overrule the exception to plaintiff's instruction No. 6 also.

Plaintiff's instruction No. 5, submitting an inquiry as to whether the possession relied upon by the defendants was within Farley's reservation under his deed to Campbell and excluding the statute of limitations, in the event of an affirmative answer, was properly given, since the evidence as to whether such possession was within the reservation, or beyond it and on the land claimed by Campbell and Curtis, was conflicting.

The evidence relating to the location of the western line of the Moore and Beckley survey, hereinbefore set out in substance, sustains the finding as to it. Most of the argument against its sufficiency is founded upon the untenable views as to the law already disposed of. The propriety of the alteration of the bearing of the 1,650-pole line, as being a mistaken description thereof, was a question for the jury, as in other similar and like cases. The practical agreement of that line, so run with the variation allowed, with the marked trees, claimed as the corner, and with the line from those trees to the Calfee corner and its calls for course and distance, was proper evidence for the jury on that question. It is admissible and forceful under the recognized rule, authorizing the closing of surveys, one of the tests of the identity of lines and corners.

[18] On the locations of the exceptions from the Moore deed, the testimony of a witness was adduced. Reciting his knowledge thereof in a general way, he declares positively that the land in controversy is outside of all of them. He said he had examined all the deeds for land in lots 3 and 4 of the Moore and Beckley survey, had been at the houses of many of the owners and on the land, and knew nobody other than the defendants claimed the land in controversy. This, in our opinion, makes a sufficient *prima facie* case of location outside of the exceptions, under the rule, and nothing was adduced in rebuttal. If rebuttal evidence had been adduced, it would have been necessary to show and establish the lines; but, in the absence thereof, we do not think the rule requires such exact and definite proof of location.

The verdict does not extend beyond the western line of the survey as found by the jury; and it excepts all of the surface, conveyed to Farley by Cole, beyond the lines of Farley's conveyance to Meadows, acquired by the plaintiff. In this respect, the verdict accords with the disclaimer and the proof as accepted by the jury.

The judgment is without error and will be affirmed.

(72 W. Va. 205)

FINDLEY v. COAL & COKE RY. CO.

(Supreme Court of Appeals of West Virginia.
April 15, 1913. Rehearing Denied
May 29, 1913.)

*(Syllabus by the Court.)***1. TRIAL (§ 139*)—DIRECTION OF VERDICT—EVIDENCE.**

If plaintiff's evidence is sufficient to warrant the jury in finding a verdict upon it, it is error to exclude it.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 332, 333, 338-341, 365; Dec. Dig. § 139.*]

2. MASTER AND SERVANT (§§ 265, 270*)—INJURY TO RAILROAD EMPLOYEE—NEGLIGENCE—EVIDENCE.

In an action for damages resulting from the explosion of a locomotive boiler, the mere fact of explosion raises no presumption of negligence; but testimony that the broken ends of a large number of stay bolts were rusted and corroded, indicating that they were broken off some time before the explosion, is evidence tending to prove negligence, and the jury are entitled to consider it.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 877-908, 913-927, 932, 955; Dec. Dig. §§ 265, 270.*]

3. MASTER AND SERVANT (§ 103*)—INJURY TO RAILROAD EMPLOYEE — LIABILITY OF MASTER—NONASSIGNABLE DUTY.

A railroad company is liable for injury resulting from the explosion of one of its locomotive boilers, if the explosion is due to the negligence of its servants entrusted with the duty of keeping it in repair.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 175; Dec. Dig. § 103.*]

4. WITNESSES (§ 396*)—IMPEACHMENT—RIGHT TO EXPLAIN.

A witness, whose impeachment is sought by the production of a paper, admittedly signed by him, containing a statement of facts concerning which he has testified, and inconsistent with his testimony, is entitled to explain the circumstances under which he signed it and his motive for doing so, in order that the jury may fairly judge of his credibility.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. §§ 1261-1264; Dec. Dig. § 396.*]

5. EVIDENCE (§ 483*)—INJURY TO RAILROAD EMPLOYEE—OPINION EVIDENCE.

A nonexpert witness, who saw the broken stay bolts of a boiler immediately after it had exploded, may testify that the broken ends of the bolts appeared to him to be "old and rusty looking;" but he cannot state that, "in his opinion," they were broken before the explosion, or that they appeared to him to be "in bad condition."

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 2256-2266; Dec. Dig. § 483.*]

6. NEW TRIAL (§ 150*)—AFFIDAVIT—SUFFICIENCY.

An affidavit tendered in support of a motion for a new trial on the ground of after-discovered evidence, which is made on information only, and which assigns no reason for failure to procure the affidavit of such witness, is not sufficient.

[Ed. Note.—For other cases, see New Trial, Cent. Dig. §§ 306-310; Dec. Dig. § 150.*]

Error to Circuit Court, Randolph County.

Action by Levi J. Findley, administrator, etc., against the Coal & Coke Railway Com-

pany. Judgment for defendant on directed verdict, and plaintiff brings error. Reversed, and new trial granted.

C. H. Scott and H. G. Kump, both of Elkins, for plaintiff in error. Price, Smith, Spilman & Clay, of Charleston, for defendant in error.

WILLIAMS, J. Action of trespass on the case to recover damages for the wrongful death of plaintiff's intestate, alleged to have been caused by the negligence of defendant. After plaintiff had introduced all his evidence, the court sustained a motion to exclude it, and directed a verdict for the defendant, and plaintiff obtained this writ of error.

[1] The principal question is: Is plaintiff's evidence sufficient to support a verdict in his favor, if the jury had so found? If it is, the court should have allowed the case to go to the jury.

Plaintiff's intestate, Frank J. Findley, deceased, was employed as fireman on defendant's railroad, and had made two or three runs before his death. On the 30th October, 1909, the boiler belonging to engine No. 16, which deceased was firing, exploded near a station called Yankee Dam, on Elk river, as the engine was making a north-bound trip, drawing a train of freight cars. Plaintiff's intestate, the engineer, and another fireman were instantly killed.

It is averred that defendant was negligent, in that it did not use due and proper diligence to keep its engine and boiler in a reasonably safe condition; that it "negligently and carelessly permitted and suffered the said boiler to be weak, unsafe, and insufficient, the sheets of the said boiler to be and remain insufficient to withstand the stress and strain to which they were necessarily subjected, and it negligently, carelessly, and knowingly permitted the bolts and stay bolts of the said boiler to be and remain weak, unsafe, and insufficient, broken off, rusted, and corroded, so that the same were not sufficient to hold the said boiler together, and to resist the stress necessarily placed upon them in the operation of the said boiler." The facts averred, if proven, would constitute negligence, because the master's duty to his servant requires him to provide his servant with reasonably safe machinery with which to work, and to use reasonable diligence to maintain it in a safe condition. The degree of diligence necessary to preserve a locomotive boiler in a reasonably safe condition is a mixed question of law and fact for jury determination, and must be determined from the experiences of men familiar with the construction and proper treatment of such powerful and dangerous machinery, when in use—men who have

knowledge of the purposes and durability of its several parts.

[2] The law imposes the burden of proving negligence on plaintiff; and the evidence by which he seeks to prove it is wholly circumstantial, consisting of testimony of witnesses concerning the appearance of the stay bolts which held together the fire box and the main portion of the boiler. A number of witnesses testified that they saw the broken stay bolts immediately after the explosion, and that the broken ends of them were rusted and corroded, thus indicating that they were broken some time before the explosion. Such evidence is not only proper, but apparently it is the only available evidence to support plaintiff's allegations. No living witness knows the amount of steam pressure on the boiler at the time of the explosion. But a witness who fired the engine about a month before the explosion testified that the safety valve was set to a pressure of 180 pounds. It is also proven by a witness who saw the engine from across the river, when it exploded, that it was moving at the rate of eight or ten miles an hour. While it is true that no presumption of negligence arises from the mere fact of the explosion of the boiler (*Hanley v. Railroad Co.*, 59 W. Va. 419, 53 S. E. 625, and *Veith v. Salt Co.*, 51 W. Va. 96, 41 S. E. 187, 57 L. R. A. 410), still negligence may be established by proof of facts which show that the boiler was allowed to become unsafe before it exploded.

[3] It was the duty of defendant to protect its employes against the dangers of an explosion by having its boiler continuously inspected, and repaired when necessary, by competent machinists. If its inspector was negligent, and his negligence was the proximate cause of the death of plaintiff's intestate, then defendant is liable; the duty to maintain the machinery in a reasonably safe condition being a duty which defendant could not delegate to another, so as to relieve it from liability. It is what the law denominates a nonassignable duty. *Johnson v. Railway Co.*, 86 W. Va. 73, 14 S. E. 432.

Harry Bernard, who had had several years' experience in making and repairing boilers, testified that it was a good practice, and the general custom, to wash out locomotive boilers and test the stay bolts once a month. Stay bolts have small holes, about one-eighth inch in diameter, drilled into them, longitudinally, far enough to pass beyond the inner surface of the sheets forming the fire box, and when one breaks, which appears to be not an unusual occurrence, the water and steam in the boiler is forced through the hole. In a large locomotive boiler there are about 800 of these stay bolts, placed in rows about $4\frac{1}{2}$ inches apart, each way. The fire box is built into the rear end of the boiler; the sheets of metal

forming it being held in place and strengthened by the stay bolts extending to and connecting with the sheets forming the barrel of the boiler. The space between is filled with water and steam.

Witness Bernard testified that if one stay bolt is broken more or less strain is shifted to the ones next to it; that a bolt does not break off suddenly, but begins to crack, and breaks gradually; that the breaking is caused by the vibration, contraction, and expansion of the metals; that one bolt may be found broken off and another next to it only cracked; that if a broken bolt is not removed the broken ends will become corroded; that the custom is, when replacing a broken bolt, to take out the one next to it also, and, if it is found to be cracked, to continue to remove them successively, in that row of bolts, until a sound one is reached, and that when a sound one is found it is an indication that the remaining ones in that row are sound; that the bolts usually start to break in the corners of the fire box; that they are liable to rust, but that they usually break off before they are much affected by rust; that, as a rule, they are not allowed to remain long enough to be weakened very much by rust; that a broken bolt is not an infrequent occurrence, and does not indicate that the boiler is unsafe; that if a bolt breaks while the engine is on the road it is usual for the engineer to plug the test hole in the bolt by driving a wire nail into it to prevent the flow of water and steam; that stay bolts are tested at the machine shops by getting inside the fire box and tapping on the end of the bolt with a hammer, first having removed the fire and washed out the boiler and allowed it to cool; that a broken bolt is easily detected; that good practice requires such tests to be made every 30 days, if a boiler is constantly used; and that, if proper repairs are made, he did not think a sufficient number of stay bolts would break off in that length of time to weaken a boiler to such an extent as to cause it to explode.

J. L. Peters, a machinist who used to work in defendant's railroad shops, testified that he knew engine No. 16, which was the engine that exploded; that it had been in use on the road since 1905 or 1906; that some time in the winter of 1908 or 1909, while working on the night shift, he remembers to have corked some of the broken stay bolts in the boiler by riveting the ends so as to close up the test holes; that he knew of no other workman stopping the holes in that way; that he was not told to close the leak in that way, but volunteered to do it; that the last general overhauling that he remembers engine No. 16 to have received was in 1906; that the locomotive boilers in use by defendant were supposed to be washed out and the bolts inspected every 12 days; that defendant keeps a man at its

shops for the purpose of making the tests; and that he has seen him do it by getting in the fire box and tapping on the ends of the stay bolts with a hammer.

H. O. Drodgy testified that he fired engine No. 16 about a month or so before the explosion; that some of the stay bolts leaked then "on the left side inside of the cab, and some leaking on the outside, and some on the right side"; that wire nails were driven in the holes to stop the leaks. Drodgy saw the broken parts of the boiler on the day of the explosion, and in his testimony in relation to the appearance of the broken stay bolts says: "Some had the appearance of old breaks and some new. * * * Several of them were rusty, very corroded over the ends; while others were fresh broken." That of the number that were corroded over the ends, as near as he could tell, there were "12 or 15—something like that." He also testified that when he was firing engine No. 16 he saw Mr. Rogers, the engineer, try to cork some of the leaking stay bolts on the road, at Clay Courthouse, but does not state when that was.

J. W. Boggs also saw the broken boiler shortly after the explosion, and in his testimony concerning the broken bolts, which had nails or metal in the test holes, said: "I never examined them all. I counted somewhere in 20. I would not say positive. I didn't count near all of them."

There is other evidence, similar in character. But all of plaintiff's evidence was excluded, on the ground that it did not prove negligence. This was error. Being unexplained and uncontradicted, the evidence was sufficient proof to warrant the jury in believing that the explosion was due to the large number of broken stay bolts, which it was the duty of defendant's employees in the machine shops to have replaced with sound ones. If they were negligent in that respect, defendant is liable, it matters not how skillful they were, or how frequently the engine was overhauled, if the explosion is due to the failure to make proper repairs, because the duty to provide reasonably safe machinery is an obligation from which the law does not relieve the master; it is one of his nonassignable duties.

In view of the testimony of Bernard that a broken stay bolt can be easily detected, the testimony of other witnesses as to the large number of stay bolts that were plugged with nails, and the broken ends of which were corroded and appeared to be old, signifies negligence of the inspectors, and tends to prove such a defect in the boiler, existing before the explosion, as could have been discovered and remedied by the exercise of reasonable diligence.

[4] On cross-examination of witness Drodgy defendant's counsel produced two papers which, being admitted by Drodgy to have been signed by him, were read to the jury

for the purpose of impeaching his testimony. The papers were in the form of questions and answers thereto made by the witness shortly after the accident, relating to what he knew concerning it; he having fired the engine a month or so before the explosion, and having seen the explosion from his father-in-law's home on the opposite side of the river. The statements were not sworn to; nor does it appear who propounded to Drodgy the questions. But it does appear that at the time the paper was signed Drodgy was in the service of defendant as fireman; that John Emmert was assistant general manager of defendant's road, and that Mr. Kalbaugh was superintendent of its motive power; that Mr. Emmert had written to the witness, a short time after the accident, to come to his office in Gassaway; that he did so, and on that occasion the written statements referred to in the following question, which the court refused to allow witness to answer, were signed by him: "State what, if anything, was said there by Mr. Emmert, at the time you had the talk with him, or by Mr. Kalbaugh, at the time you had the talk with him in the private car, in regard to a statement of what you might know about that explosion. What, if anything, was said in the way of advice, caution, or direction about your statement?" Counsel for plaintiff stated that if witness was allowed to answer he would say "that he was told that trouble was apt to grow out of this accident, and that he had better be careful about the statement that he had made and was going to make, and that, as he was in the employ of the company and had a family to care for, he had better be careful as to his statements and conduct." The court should have permitted witness to answer the question. The paper was offered to impeach his testimony, and witness had a right to explain his motive for signing it. The matter related to his credibility, a matter of which the jury were the judges; and before they could fairly pass on it they were entitled to hear witness' explanation for having signed a previous statement so apparently inconsistent with his testimony.

It was also error, for the same reason, to refuse permission to answer the following question, relating to the same matter: Q. State whether you made the answers, or any of them, which are written in typewriter upon this paper?"

[5] Bill of exceptions No. 5. Witness W. H. Belknap, who saw the broken parts of the boiler after it had been brought to Gassaway, on the day after the explosion, was asked what was the appearance of the ends and sides of the broken stay bolts, and replied: "Well, the appearance of them were old and rusty looking to me." The court struck out this answer, on motion of defendant's counsel. This was error. True this witness was not an expert, but the appearance of broken iron that has been long exposed to the action of air or

water, as compared to its appearance when fresh broken, is a matter of common knowledge. How it appeared to witness is how it really was, so far as it concerns the value of his testimony. And if his answer involved the expression of an opinion by the witness it was in relation to a thing which he saw and was trying to explain to the jury. The rule is that a nonexpert witness may be allowed to express his opinion in connection with the facts on which it is founded, when the matter concerning which he has testified cannot be reproduced and made clear to the minds of the jury. "In such case the witness testifies as to the present conviction of his own mind as to an actual fact, though deduced from circumstances which cannot be made palpable to others." 12 A. & E. E. L. (2d Ed.) 488. In *State v. Welch*, 36 W. Va. 690, 15 S. E. 419, a nonexpert witness was allowed to state that, in his opinion, a stain seen by him was a blood stain. The appearance which the broken bolts presented to witness was, necessarily, his opinion of their actual condition; and, in view of the common knowledge of all men in respect to such things, he could not better explain to the jury what he saw than by telling how it appeared to him. It would appear to others as it did to him. This identical question arose in a similar case, decided by the Supreme Court of Illinois (Illinois Cent. R. Co. v. Prickett, 210 Ill. 140, 71 N. E. 435), and it was there held that: "Nonexpert witnesses, in an action for damages caused by a boiler explosion, may be allowed to testify whether or not breaks in the stay bolts of the boiler had the appearance of old or new breaks, in connection with the facts, so far as they can be described in words, on which their conclusions are based."

The court likewise erred, and for the same reason, in refusing to allow answers to be made to similar questions asked of the same witness, set forth in plaintiff's bills of exceptions Nos. 6 and 7. He was also asked if he was "able to determine if the bolts were recently broken, or if they, or some of them, had been broken before the explosion." Answer to this was properly refused, because it called for witness' conclusion or opinion in regard to the very issue to be tried by the jury.

The court properly excluded the following answer by witness Belknap to a question in relation to the number, location, and condition of the broken bolts that he saw, viz.: "Well, they looked in bad condition to me." This answer implies that it was witness' opinion that the bolts were in bad condition before the explosion. It could not refer to the condition of them, produced by the explosion, because that was not germane to the point that was then the subject of inquiry. For the same reason, the court properly struck out the following answer, made by witness J. W. Boggs, to a similar question

relating to the appearance of the broken bolts, viz.: "Well, there were several bolts broken or rusted off, or burned off, or something. I don't know how they got off; but they had been off for some time." Witness could describe the appearance of the broken ends of the bolts, whether rusted or fresh broken; but it was the province of the jury to determine how long they had been broken. It was also proper to strike out the same witness' answer, set out in plaintiff's bill of exceptions No. 12, in which, speaking of the bolts, witness says they "were badly broken"; they "had been badly rusted and burned off." The language implies that, in the opinion of the witness, a large number of bolts had been broken off for a long time. He was not an expert, and it would seem from his statement that some bolts were burned off that he had but little knowledge of the construction of a locomotive boiler. The space through which the bolts passed was filled with water and steam, and it was not possible for them to burn off. His testimony that some of the bolts were plugged with nails was proper evidence. It sufficiently appears that the purpose in driving nails in the holes in the bolts was to stop a leak, and that a leak indicated a broken or cracked bolt. It is therefore a natural and fair inference that all the plugged bolts were broken before the explosion.

It was proper not to permit Bernard, the expert witness, to answer the question whether or not it would be "exercising reasonable care" to weld or plug the test holes in the stay bolts. That was a matter for the jury to decide, upon proper instructions by the court. It was one of the very issues involved.

There are a number of other exceptions taken to the ruling of the court upon similar questions of evidence; but we think what we have already said amounts, practically, to a decision of all such questions raised, and will enable the court, on a retrial of the case, to avoid the commission of error.

[6] There is, however, another assignment, involving the question of after-discovered evidence, which deserves consideration. Plaintiff moved for a new trial on the ground of after-discovered evidence, and in support thereof tendered his affidavit, in which he states that on the day of the trial, and after the verdict was rendered, he "was informed" that two other witnesses, naming them, were present shortly after the explosion, and examined the broken parts of the boiler. He then states what he is advised those witnesses will state. Affiant does not produce the affidavit of either of the witnesses, or of his informant; no cause is shown for failure to produce affidavits of the witnesses themselves. Moreover, the newly discovered evidence is only cumulative. The affidavit was clearly not sufficient. *State v. Stowers*, 66 W. Va. 198, 66 S. E. 323; *State v. Gebhart*,

70 W. Va. 232, 73 S. E. 964; and *Jacobs v. Williams*, 67 W. Va. 378, 67 S. E. 1113.

We are of the opinion that the evidence was sufficient to entitle the jury to pass on the question of defendant's negligence, and that it was error to direct a verdict to be found in its favor. We therefore reverse the judgment, set aside the verdict, and remand the cause for a new trial.

(73 W. Va. 29)

CITY BANK OF WHEELING et al. v. BRYAN et al.

(Supreme Court of Appeals of West Virginia.
Feb. 18, 1913. Rehearing Denied
May 29, 1913.)

(Syllabus by the Court.)

1. PRINCIPAL AND AGENT (§ 109*)—RIGHTS AS TO THIRD PARTIES—AUTHORITY OF AGENT—“PROMISSORY NOTES.”

Power of attorney, given an agent to purchase shares of stock in corporations, “formed or to be formed,” and to pay for same by “promissory notes,” payable at such time and place as the agent may determine, authorizes such agent to purchase stock in a newly formed corporation, and to execute his principal's commercial notes therefor.

[Ed. Note.—For other cases, see *Principal and Agent*, Cent. Dig. §§ 318-322, 360, 361, 365; Dec. Dig. § 109.*]

For other definitions, see *Words and Phrases*, vol. 6, pp. 5676-5681; vol. 8, p. 7767.]

2. BILLS AND NOTES (§§ 370, 373*)—RIGHTS ON INDORSEMENT TO BONA FIDE HOLDERS.

Such notes are collectible by an indorsee for value and without notice, who, relying upon the agent's authority, purchased them before maturity, notwithstanding the authority of the agent was procured by the fraudulent misrepresentations of a third person, and the stock for which they were given was worthless.

[Ed. Note.—For other cases, see *Bills and Notes*, Cent. Dig. §§ 963, 966-970; Dec. Dig. §§ 370, 373.*]

3. CORPORATIONS (§ 92*)—FUNCTIONS AND DEALINGS—INDORSEMENT OF NEGOTIABLE INSTRUMENTS.

A corporation owning negotiable notes made payable to its order, in consideration for capital stock to be issued to the maker of the notes, has a right to sell them.

[Ed. Note.—For other cases, see *Corporations*, Cent. Dig. § 366; Dec. Dig. § 92.*]

4. BILLS AND NOTES (§ 453*)—DEFENSES—TO WHOM AVAILABLE.

In a suit by the indorsees of such notes against the maker, it is no defense that the treasurer who indorsed them for his corporation lacked authority, the corporation itself not complaining, and having no right to complain, of his act.

[Ed. Note.—For other cases, see *Bills and Notes*, Cent. Dig. §§ 1344-1351; Dec. Dig. § 453.*]

5. BILLS AND NOTES (§ 453*)—ACTIONS—DEFENSES.

Neither can he defend on the ground that one bank, without authority to do so, indorsed them for the accommodation of another that discounted them.

[Ed. Note.—For other cases, see *Bills and Notes*, Cent. Dig. §§ 1344-1351; Dec. Dig. § 453.*]

6. BANKS AND BANKING (§ 116*)—FUNCTIONS AND DEALINGS—NOTICE TO OFFICER OR DIRECTOR.

Knowledge of the infirmity of commercial paper, acquired by an officer or director of a bank outside of his official duties, who is personally interested in having the paper discounted, is not attributable to the bank.

[Ed. Note.—For other cases, see *Banks and Banking*, Cent. Dig. §§ 282-287; Dec. Dig. § 116.*]

7. PRINCIPAL AND AGENT (§ 155*)—AUTHORITY OF AGENT—EFFECT OF WRONGFUL ACTS.

Promissory notes executed by an agent pursuant to authority, but which contain a provision that the agent is not authorized to make, empowering any attorney at law to appear in any court of record in the state where payable, and waive issuance and service of process, and to confess judgment against the maker, are not void because of such unauthorized provision.

[Ed. Note.—For other cases, see *Principal and Agent*, Cent. Dig. §§ 574-582; Dec. Dig. § 155.*]

8. BILLS AND NOTES (§ 151*)—CERTIFICATES OF DEPOSIT—NEGOTIABILITY.

Certificates of deposit, payable to the order of the depositor, are negotiable, and are governed by the law applicable to commercial paper.

[Ed. Note.—For other cases, see *Bills and Notes*, Cent. Dig. §§ 380-387; Dec. Dig. § 151.*]

9. BILLS AND NOTES (§ 337*)—RIGHTS ON INDORSEMENT—BONA FIDE PURCHASERS.

Mere suspicion of its infirmity, by the purchaser for value and in due course of commercial paper, is not evidence of bad faith.

[Ed. Note.—For other cases, see *Bills and Notes*, Cent. Dig. §§ 818, 856-863; Dec. Dig. § 337.*]

10. APPEAL AND ERROR (§ 197*)—PRESENTING QUESTION IN TRIAL COURT—VARIANCE.

A variance between the allegation and proof, not called to the attention of the lower court by any means, if not so great as to show distinct causes of suit, will be treated by this court as having been waived.

[Ed. Note.—For other cases, see *Appeal and Error*, Dec. Dig. § 197.*]

11. FRAUDULENT CONVEYANCES (§ 96*)—TRANSACTIONS INVALID—INADEQUACY OF CONSIDERATION—CONVEYANCE BETWEEN PARENT AND CHILD.

A sale and conveyance by one greatly indebted, of a material portion of his property, to a child for a consideration so grossly inadequate as to shock the moral conscience, is evidence of a fraud upon the creditors attacking such conveyance.

[Ed. Note.—For other cases, see *Fraudulent Conveyances*, Cent. Dig. §§ 289-322; Dec. Dig. § 96.*]

12. FRAUDULENT CONVEYANCES (§ 96*)—TRANSACTIONS INVALID—INADEQUACY OF CONSIDERATION—CONVEYANCE BETWEEN PARENT AND CHILD.

A conveyance of property worth \$300,000, yielding an income of \$2,000 per month, made to his daughter by a father largely indebted, in consideration of only \$20,000, held to be fraudulent and void as to creditors attacking it for inadequate consideration and for other reasons.

[Ed. Note.—For other cases, see *Fraudulent Conveyances*, Cent. Dig. §§ 289-322; Dec. Dig. § 96.*]

Appeal from Circuit Court, Marion County.

A bill in equity by the City Bank of Wheeling and others against W. J. Bryan and others. From a decree for defendants, plaintiffs appeal. Reversed and remanded.

Alfred Caldwell, T. S. Riley, Henry M. Russell, John J. Coniff, and Erskine & Allison, all of Wheeling, for appellants. W. S. Meredith, of Fairmont, J. Howard Holt, of Moundville, P. M. Hoge, of Fairmont, and D. S. Walton and W. A. Hook, both of Waynesburg, Pa., for appellees.

WILLIAMS, J. This appeal is by the First Citizens' Bank of Cameron, City Bank of Wheeling, and the Merchants' & Manufacturers' National Bank of Columbus, Ohio, from a decree rendered on the 22d of January, 1910, by the circuit court of Marion county, in four several suits brought by them, respectively, against W. J. Bryan and others, for the purpose of collecting a number of notes held by them as indorsees, aggregating \$99,000. The several suits were consolidated and heard together. Two of them are by the First Citizens' Bank, some of the notes held by it not being due at the time it brought its first suit, and one suit each by the other two banks. All of them are attachment suits in equity, attacking a conveyance made by W. J. Bryan to his daughter, Mrs. Lizzie B. Loller, on the alleged ground that it was made to hinder, delay, and defraud plaintiffs in the collection of their debt. Mr. Bryan's nonresidency is also averred. The suits were brought in the latter part of 1903 and early part of January, 1904. During their pendency W. J. Bryan died, and they were revived against his administrator.

W. J. Bryan was the owner in fee of 474 acres of valuable coal land in Marion county, W. Va., which was being operated for coal, under a lease from him to the Fairmont Coal Company. That company was garnished as his debtor, and it appears from its answer filed in the suits that the royalties accruing to Bryan on account of coal being mined amounted to \$2,000, or more, per month.

As to one note for \$6,000 sued on by the First Citizens' Bank, on which there is a balance of \$1,000, exclusive of interest, there is no controversy. The court gave a decree for this balance and its interest, but dismissed the suit as to the other notes sued on, and also dismissed the suits of the other two banks. All the notes, except the \$6,000 note and the \$3,000 note held by the First Citizens' Bank, were executed by S. W. Loller, attorney in fact for W. J. Bryan. Loller is Bryan's son-in-law, and the power of attorney clothed him with power, among other things: "(8) To indorse in my name or negotiate all checks, drafts, bills of exchange, notes or other negotiable paper, payable to me or my order, or which may

require my indorsement, and to deposit the proceeds in my name in said First Citizens' Bank of Cameron, W. Va., or in any other bank or banks, trust company or companies wherever located that my said attorney may from time to time select; and to make, draw, or sign in my name any promissory notes which my said attorney shall in his absolute discretion deem requisite in or about my business. * * * To subscribe for or purchase in my name shares of the capital stock of any company or companies, formed or to be formed, and to pay for said shares of stock in cash or by promissory note or notes payable at such time and in such manner as my said attorney shall in his absolute discretion determine."

One who deals with an agent is bound to take notice of the extent of his authority. There is no question, however, that Loller was empowered to execute promissory notes for Mr. Bryan, for the purpose of buying stock in corporations then existing, or thereafter to be formed; and it is clearly established by the proof that all the notes in question, except one for \$3,000, held by the First Citizens' Bank, were executed in consideration for stock purchased for Bryan in certain corporations. Fifty thousand dollars in notes were executed on the 10th June, 1903, payable to the Loller Manufacturing Company, for stock in that company. It had been chartered by the Secretary of State of West Virginia six days before. Notes aggregating \$47,000 were executed on July 16, 1903, payable to S. A. Englehard for stock in the American Manufacturing Company, a then existing corporation. One other note for \$3,000, held by the First Citizens' Bank, belongs to a class of notes aggregating \$90,000, which were executed on the 10th of August, 1903, by W. J. Bryan in person. The \$3,000 note was payable to S. A. Englehard; the others were payable to Benedum and Fox, and were executed for the purchase of stock held by A. E. Fox, E. C. Fox, his brother, and M. L. Benedum in the American Manufacturing Company. This \$3,000 note is the only one of that class involved in this suit.

Following is a brief history of the transactions leading up to the execution of the notes: One E. K. Ascher had invented a tank and valve for use in water-closets, to be operated under low-water pressure, and had applied for a patent. In January, 1903, a plumbing company, the Fox Tank & Valve Company, was chartered for the purpose of exploiting this device, and W. J. Bryan was induced to take \$12,000 of stock in it. The \$1,000, not controverted, is the balance of that subscription. At the time that subscription was made the Fox Tank & Valve Company owned nothing but the right to the invention, which Ascher had assigned to it. The patent was later issued to said company. W. J. Bryan was the president of that company. Later the Loller Manufacturing Com-

pany was chartered for the purpose of taking over the stock and business of the Fox Tank & Valve Company and enlarging the business of manufacturing and selling the device. S. W. Loller was made president, and A. E. Fox, treasurer, of that company. The \$47,000 of notes were executed in consideration of stock in the American Manufacturing Company. It owned a plant, located at Middleport, Ohio, and had been engaged in manufacturing plumbing fixtures. S. A. Englehard owned and controlled nearly all the stock of that company. It appears that the American Manufacturing Company was then insolvent; it owed debts amounting to \$56,000, and its plant was sold some time after, under decree of court, and brought about \$17,000. On the 15th of July, 1903, A. E. Fox and M. L. Benedum met S. A. Englehard at Pomeroy, Ohio, and took from him an option on the property and stock of the American Manufacturing Company, at \$96,000, out of which the debts, estimated not to exceed \$56,000, were to be paid. They agreed to pay cash, or to execute satisfactory notes for the remaining \$40,000, in the event the option was closed. On the day following A. E. Fox and M. L. Benedum went to Middleport, Ohio, and met S. W. Loller, who had gone there before them to look over the plant. Notwithstanding they then held an option to buy the property at \$96,000, they made Loller believe that it was worth \$150,000, and combined and conspired with Englehard in selling it to Loller and themselves at that price. The debts, \$56,000, were assumed, and the balance of \$94,000, was settled for by Loller executing Bryan's notes for \$47,000, payable to S. A. Englehard, and by A. E. Fox, E. C. Fox, his brother, and M. L. Benedum giving their pretended checks for \$47,000, which were immediately thereafter returned to them by Englehard. Loller knew of the debts owing by the American Manufacturing Company, but evidently he had no knowledge of the value of its plant. Indeed, it appears from the record that he had little, if any, business qualifications, and seems only to have been an unwitting tool in the hands of Fox and Benedum in carrying out their scheme to defraud the old man, Bryan. The court below found, and we think rightly so, that all of these notes had been procured by fraudulent means, and would not be collectible if still in the hands of the payee. It is unnecessary to state the evidence in support of this conclusion. The record abounds with it. The facts already stated indicate the character of the transactions. But the notes are commercial paper, and have been negotiated by the payees to the several plaintiffs, who claim to have acquired title to them before maturity, in due course, and without notice of their infirmity. If such is the case, then they are not subject to the equities in favor of the maker.

The First Citizens' Bank holds seven notes, aggregating \$26,000, as to all of which Mr. Bryan denied liability, except the balance

due on the \$6,000 note, for which, together with accrued interest, a decree was given. Four of the contested notes are for \$5,000 each, and bear date June 10, 1903, and are payable at the Merchants' & Manufacturers' National Bank, to the order of the Loller Manufacturing Company, one note for \$2,000, dated July 16, 1903, payable at the Middleport Bank to the order of S. A. Englehard, all signed by W. J. Bryan, by S. W. Loller, attorney in fact, and one for \$3,000, dated August 10, 1903, payable at the First Citizens' Bank to the order of S. A. Englehard, and signed by W. J. Bryan in person.

Two principal defenses are made to all those notes, viz.: (1) That S. W. Loller was not authorized to execute them; and (2) that the notes were procured to be executed by fraud, and that the banks had constructive knowledge of it at the time they purchased them, and are therefore not innocent holders. The banks were bound to take knowledge of the extent of Loller's authority, because he was only an agent, and an agent cannot bind his principal by exceeding his authority. But the power of attorney authorized Loller to buy stock in any corporation, formed or to be formed, and in consideration thereof to execute W. J. Bryan's promissory notes; and it is clearly proven that all the notes executed by Loller were given in consideration for stock in corporations. The \$50,000 of notes, executed on the 10th of June, were for stock in the Loller Manufacturing Company, and the \$43,000 of notes now held by the Merchants' & Manufacturers' National Bank were given for stock of the American Manufacturing Company.

[1] It is urged that Loller had not power to execute negotiable notes. But to so interpret the power of attorney would be to give a restricted meaning to the word "promissory" not warranted by anything contained in the writing, and clearly not warranted in law. A promissory note may or may not be negotiable, but a negotiable note is necessarily a promissory note, and the same note might be negotiable in one state and not technically negotiable in another. Its quality as commercial paper would depend upon the law of the place of payment. The word "promissory," as applied to notes, is used in a generic sense, while the word "negotiable" simply defines a particular class of that genera. The greater term necessarily includes the less. The power authorized Loller to execute "promissory note or notes payable at such time and in such manner as my said attorney shall in his absolute discretion determine." This language is comprehensive enough to give him power to execute any kind of a promissory note and make it payable anywhere. All the notes in question were either dated at McCracken, Pa., or at Middleport, Ohio, and most of them were payable in the latter state, so that, as to their negotiability, most of them are govern-

ed by the laws of Ohio. 4 Min. Inst. 614.

Are the several plaintiffs innocent holders? That they purchased the notes before maturity and paid value for them is clearly proven. But were they ignorant of the fraud perpetrated on Mr. Bryan by M. L. Benedum, A. E. Fox, and Englehard in procuring them to be executed? If not, then they are not innocent holders, although they paid full value.

First, as to the notes held by the First Citizens' Bank: Four of them, aggregating \$20,000, are a part of the \$50,000 of notes that were made on the 10th of June, payable to the order of the Loller Manufacturing Company. They were indorsed by that company by A. E. Fox treasurer, and were taken by him to the Bank of Wheeling for discount. That bank would not discount them until indorsed by the First Citizens' Bank, which was done, and the funds were placed to the credit of the Loller Manufacturing Company in the First Citizens' Bank, and were later checked out by A. E. Fox as treasurer of said company. The notes being payable at the Merchants' & Manufacturers' National Bank were forwarded to it for collection, and, not being paid, were protested. They were then taken up by the First Citizens' Bank.

[6] M. L. Benedum and A. E. Fox were president and cashier, respectively, of the First Citizens' Bank, and it is insisted that, because of their official relation to the bank, it is affected with constructive knowledge of their participation in the fraudulent procurement of the notes, and is therefore not an innocent holder. The officers and directors of a bank are its agents, and, as a general rule, knowledge acquired by an agent in respect to matters pertaining to the agency is attributable to his principal. But there is an exception to this rule in respect to an officer or member of a board of directors of a corporation who has acquired knowledge outside of his official duties, which it is to his personal interest to conceal from his corporation. When such is the case, his knowledge will not be ascribed to the corporation of which he is an officer. This exception is especially applicable in the case of an officer of a bank who has a personal interest to be served in having paper discounted by it. This point was decided by this court in *Bank v. Lowther-Kaufman Oil & Coal Co.*, 66 W. Va. 505, 66 S. E. 713, 28 L. R. A. (N. S.) 511, in which we held that: "Notice to one of the directors of a matter affecting the interest of the bank which it is to the interest of such director to conceal is not notice to the bank." The same principle was again announced in the more recent case of *Bank of Bluefield v. Ritz*, 70 W. Va. 409, 74 S. E. 679, 40 L. R. A. (N. S.) 156. We deem it unnecessary to repeat the reason for the rule, but simply refer to the opinions in those cases. Fox and Benedum were both stockholders in the Loller Manufacturing Company, and were per-

sonally interested in having the notes discounted, and for that reason the law does not attribute their knowledge to the bank or the infirmity of the notes, acquired by them while acting for the Loller Manufacturing Company. There are other stockholders in the bank, innocent of any wrongdoing, whose rights deserve to be protected.

[5] It is urged that the First Citizens' Bank did not negotiate the notes to the Bank of Wheeling, but that it only indorsed them for accommodation, that it had no power to make such indorsement and is not bound thereby, and that it purchased the notes after they became due, and is therefore not entitled to claim protection against the equities in favor of the maker. But the transaction between the two banks was treated as one of sale and purchase; the Bank of Wheeling turned the funds over to the First Citizens' Bank, and it placed them to the credit of the Loller Manufacturing Company. It was evidently regarded by the two banks as a rediscounting of the paper; and, being so considered by them, the maker of the notes has no right to complain. It was a matter between the banks. Our conclusion is that the First Citizens' Bank is not affected with notice of the infirmity of the four \$5,000 notes. The same argument applies in support of the bank's title to the \$2,000 note. It was one of the class of \$47,000 notes, dated July 16, 1903, and was discounted by the Merchants' & Manufacturers' National Bank after having been indorsed first by Englehard, the payee, and then by the First Citizens' Bank. After being protested, it was taken over by the First Citizens' Bank.

The other note for \$3,000 was discounted by the First Citizens' Bank for Englehard, the payee. For the reason above given the bank is not affected with notice of its infirmity. It is one of the class of \$90,000, and the only one of that class involved in these suits. Those notes were made by Mr. Bryan in person at the solicitation of Mr. Englehard, and were given for the purchase of Benedum and Fox's interest in the American Manufacturing Company. Some of those notes were signed in blank by Mr. Bryan and were filled out afterwards by Englehard. Benedum and Fox agreed to give Englehard \$8,000 for selling their interest to Mr. Bryan; and this \$3,000 note was taken by him as a part of his commission for the valuable services he had rendered in assisting them to unload upon old man Bryan, at the price of \$90,000, their interest in the American Manufacturing Company, which they had shortly before acquired, through the machinations of themselves and Englehard, for nothing, by giving their pretended checks to Englehard for \$47,000, but which he immediately returned to them, after Loller had executed Bryan's notes for a like sum. Of course Benedum and Fox were interested in concealing the infirmity of the note from the bank. The note was used to

discharge, in part, their own obligation to Englehard.

[7] As to the suit by the Merchants' & Manufacturers' National Bank: We have already mentioned the circumstances under which the \$43,000 of notes held by this bank were executed. They are of the class of \$47,000 which were executed by Bryan, by his attorney in fact, for the purchase of Englehard's stock in the American Manufacturing Company at Middleport. They were all made payable to the order of Englehard at the Middleport Bank. They were negotiable notes executed in consideration of stock in a corporation, and we have said that Loller had power to execute commercial notes for such a purpose. But these are what are known as judgment notes; that is, they contained a provision authorizing any attorney at law to appear for Bryan, in any action on the notes, in any court of record in the state of Ohio, and to waive issuance and service of process, and to confess judgment in favor of the holder. It is insisted that this provision, inserted in the notes, was in excess of authority, and that it avoids the notes. It is clearly without authority, and renders the provision in question void. But does it affect the promise to pay the note itself? We think not. It does not follow that, because some provision in a written instrument is void, the whole is thereby rendered nugatory. The power to confess judgment, which Loller attempted to confer, was not to be exercised unless the note was not paid at maturity. It has nothing to do with the consideration or the promise to pay. It relates wholly to the collection of the notes, to the remedy, and may be regarded as harmless surplusage.

The legal proposition here presented was decided in *Robinson v. Lowe*, 50 W. Va. 75, 40 S. E. 454. In that case the agent was authorized to execute a quitclaim deed for land, and instead he executed a deed of conveyance, with general warranty. It was urged that the deed was void because it was in excess of the agent's authority. But the court held that, notwithstanding the agent had exceeded his authority, the deed should be given the effect of a quitclaim deed, and was void only as to the warranty.

In *Yost v. Ramey*, 103 Va. 117, 48 S. E. 862, it was held (Syl. pt. 2) that: "Where an attorney in fact is authorized to sign his principal's name, as surety for an executor, to the 'bond required by the court' of the executor, and he signs the name to such bond, which contains some provisions not required by law, which conditions are severable and void, this is not in excess of the attorney's powers, and his principal is bound."

The notes in question are not rendered void by the provision authorizing any attorney at law to confess judgment on them. The unauthorized provision only is void.

[8] At the time these notes were negotiated

to the Merchants' & Manufacturers' National Bank, certificates of deposit, bearing 3 per cent. interest, were given to Benedum and Fox, respectively, amounting in the aggregate to \$40,000, payable when the notes themselves became due. The notes bore 6 per cent. interest. It is argued that this transaction indicates a suspicion on the part of the bank that the notes were defective. We do not think so. Benedum and Fox represented to it that the transaction with Englehard was a cash one, and that they could use the certificates of deposit as cash, and the bank saw a chance to make 3 per cent. in a legitimate manner. But even admitting that the bank was suspicious of the notes, mere suspicion is not enough; the bank is, nevertheless, to be considered a bona fide holder, in the absence of actual or constructive knowledge of any defect in the notes. *Bank v. Ohio Valley Furniture Co.*, 57 W. Va. 625, 50 S. E. 880, 70 L. R. A. 312.

[8] The certificates of deposit were negotiable (2 Daniel on Negotiable Instruments, § 1703, and authorities cited in note), and had been indorsed by Fox and Benedum, respectively, to innocent holders. The bank was therefore in the same situation as if it had paid the cash. It was bound to redeem its certificates.

Granting that the rule of law is that proof of such facts by the maker of negotiable notes as would render it uncollectible in the hands of the payee casts the burden upon the indorsee to prove that he is a holder for value and without notice, still we think this burden is discharged by the plaintiff bank in this case. It proved that it purchased the notes before due, and paid value therefor, and that it had no knowledge of any fraud, or of any facts which burdened it with the duty to make any further investigation in regard to the execution of the notes than it did make. The power of attorney from which we have quoted was filed for record in the recorder's office of Franklin county, Ohio, on the 9th of June, more than a month before these notes were executed; and it appears that, before discounting the notes, an officer of the bank inquired of the recorder concerning the power of attorney. But it matters not whether the bank's officers actually saw the power of attorney. They had a right to rely upon the representation that such power of attorney existed; and, while their failure to examine further into that matter might, in a proper case, be evidence of negligence of official duty, it still would not be evidence of bad faith. There is no evidence which imports an intent on the part of the bank to do wrong. Benedum and Fox, it is true, were residents of West Virginia, but they were both officers in the First Citizens' Bank, and it is very natural that the officers of another bank, having business relations with their bank, should trust their representations.

[2] It appears that there were two papers

executed by Mr. Bryan giving power of attorney to his son-in-law, designated in the record and in briefs of counsel as "No. 1" and "No. 2," and that the second one, although bearing the same date as the first, to wit, March 5, 1903, and purporting to be acknowledged before a justice of the peace in Pennsylvania on the same date, yet was in fact signed and acknowledged some time in June, 1903. Loller claims to have had no knowledge of this second paper, and Mr. Bryan swears that A. E. Fox induced him to give it by fraudulent representations. There is conflict between Fox and Loller as to whether the latter actually knew of it or not. But we do not regard it material whether he knew it or not. Because he evidently executed the notes thinking he had power to do so, and the power having been given before the notes were made and discounted, the bank could rely on either, or both, of the writings. There was nothing to put it on inquiry concerning the fraudulent procurement of the second writing, and it cannot be affected thereby. It may be that the first writing conferred power upon Loller to execute the notes in question, as well as the second. But it is unnecessary to decide this, inasmuch as the bank had a right to rely upon the second and seems to have done so.

[3] The chancellor denied relief to the City Bank of Wheeling, not because of any knowledge, actual or constructive, of fraud in the making of the notes, but on the ground that Loller was not authorized to execute notes for any other purpose than in payment for shares of stock in corporations, and that the notes held by this bank were not executed for that purpose. He also held that, if the bank had been diligent to inquire, it could have ascertained that the notes were executed simply to be placed upon the market and sold. But we do not think this view is sustained by the record. We think the proof fully establishes the fact that the \$30,000 of notes held by this bank were given in consideration for stock in the Loller Manufacturing Company. They are a part of the \$50,000 of notes executed June 10, 1903, payable to the order of that company. Upon their execution Bryan became entitled to the stock, and the company to the notes. Neither was it restricted in the use which it could make of them. It had a right to sell them. They were negotiated to the City Bank after being indorsed by the payee and by the First Citizens' Bank. And the City Bank is as much an innocent holder of these notes as either of the other two banks are of the notes which they hold. The same reasons for holding the First Citizens' Bank to be an innocent holder of the \$20,000 notes applies to sustain the title of the City Bank to the \$30,000 of notes. They are notes of the same class.

[4] It is suggested that Fox, as treasurer of the Loller Manufacturing Company, was not shown to have authority to negotiate the

notes, but that is a question between that company and the holder of the notes, and it is not complaining. It was made a party defendant in both the suit by the City Bank and in the suit by the First Citizens' Bank, and it failed to answer either bill. Both bills allege that, before the notes were due and payable, they were indorsed and transferred by the Loller Manufacturing Company to the First Citizens' Bank, and by it to the other banks, respectively, and its failure to deny those allegations must be taken as an admission of the treasurer's authority to indorse the notes, or as a ratification of his act. Moreover, it appears that the funds derived from the sales of these notes were placed to the credit of said company in the First Citizens' Bank, and were checked out by it. It would therefore be estopped to deny the authority of its treasurer to make the transfer of the notes, and certainly no one else is in a position to complain if the corporation directly affected is not.

[10] It is insisted that there is a fatal variance between the description given in the bill filed by the First Citizens' Bank as to two of the notes sued on and the notes offered in evidence. The bill describes the \$2,000 note as being payable at the Middleport National Bank, whereas the note offered in proof shows that it is payable at the "Middleport Bank." The note for \$3,000 is described as having been signed "by W. J. Bryan by S. W. Loller, his attorney in fact," whereas the note offered in proof appears to be signed by W. J. Bryan in person. The bill purports to exhibit these notes along with it; but as a matter of fact they appear to have been filed with depositions. It is a well-established principle, both in courts of law and in courts of equity, that the allegata and probata must correspond. 13 Enc. Dig. Va. & W. Va. 473, and numerous cases cited. If the variance is so material as to make the case proven wholly different from the one alleged in the pleadings, relief cannot be given. *Campbell v. Bowles*, 80 Grat. (Va.) 652; *Grigsby v. Weaver*, 5 Leigh (Va.) 197; *Doonan v. Glynn*, 26 W. Va. 225; *Bier v. Smith*, 25 W. Va. 830. The variance in this instance is not so great, however, as to show that the cause proven is wholly different from the cause alleged, and it is unnecessary to decide whether the variance is so material as to require an amendment of the pleadings to cure it, if application therefor had been made at the proper time, because of another rule of practice which we think should be applied in this case; that is, if advantage of a variance between the proof and the pleadings is not taken in some manner in the court below, and that court's attention is not called to the question, it cannot be raised for the first time in this court. It will be considered as waived. There was no exception taken to the deposition of A. E. Fox, who filed the note as a part of his deposition, and no exception to the introduc-

tion of the note. It is now too late to raise the objection. Plaintiff was entitled to an opportunity to amend its bill, in the event its evidence had been excluded for a variance. *Hill v. Proctor*, 10 W. Va. 59; *Vanscoy v. Stinchcomb*, 29 W. Va. 263, 11 S. E. 927; *Long v. Perine*, 41 W. Va. 314, 23 S. E. 611.

[11, 12] W. J. Bryan and wife conveyed to his daughter, Lizzie B. Loller, wife of S. W. Loller, 474 acres of coal land in Marion county, W. Va., for a cash consideration, recited in the deed, of \$20,000. The bills attack that deed on the ground that it was made with intent to hinder, delay, and defraud plaintiffs, and the other creditors of W. J. Bryan, in the collection of their debts. W. J. Bryan, in his answer, denies the fraud, but Mrs. Loller makes no answer to the bill. The deed bears date April 3, 1903, and the certificate of acknowledgment of D. H. Brewer, a justice of the peace in Pennsylvania, purports to have been made on the same date. But it is proven by Thomas B. Anderson, who was present when the justice drew up the deed and certified the acknowledgment, that the deed was written, signed, and acknowledged on the 12th of October, 1903. Mr. Bryan admits it. It is also proven by Mr. Jacobs, clerk of the county court of Marion county, that the date in the certificate of acknowledgment had been changed before the deed was presented for recordation; that the abbreviation "Apr." had been changed to "Oct.," and the figure "3" was written over the figures "1 and 2." Mr. Anderson remained at Mr. Bryan's house the night following the evening the deed was executed, and he testifies that, after the deed had been signed and acknowledged, it was left lying on the table, and he did not know what became of it that night, that on the next morning it was delivered to him by Mrs. Loller, to be carried to Fairmont, W. Va., for recordation, and that he was not aware that any change had been made in the date of the certificate. There was certainly opportunity for some one at Mr. Bryan's house to have made the change that night. Mr. Bryan testifies that the deed was made pursuant to a written contract of sale between himself and daughter, made on the 3d of April, 1903, and that the deed was drawn up to conform to this written agreement as to its date. He is corroborated in respect to that by Mr. Anderson, who says he heard Mr. Bryan and the justice discussing some such contract, and heard the justice tell him that the deed should be drawn according to the contract. But no reason appears why the justice should have certified to a false date, if such was the fact. The justice is dead, and his testimony was not taken. The contract of sale is not in the record. The deed makes no reservation of royalty accruing from the coal operation on the land, and Bryan collected royalties monthly, up to September 1, 1903.

The Fairmont Coal Company received its first notice to pay royalties to Mrs. Loller on the 14th of October, 1903, which appears to have been before the royalties for the month of September were payable. In this notice, given by W. J. Bryan, he states that he had sold the property to his daughter about the 1st of April, 1903, but that he had reserved the royalties until the 1st of September. There appears to have been no notice to plaintiffs of this sale, either actual or constructive, until the recordation of the deed on the 18th of October, 1903, long after all the debts sued on had been contracted. Mrs. Loller made her home with her father in the country, on his farm in Pennsylvania, and his testimony as to how his daughter accumulated the \$20,000, which she paid him for this valuable property, is very unsatisfactory. He supposes she made it by managing his farm, which he permitted her to do. It also appears that, some time after this pretended sale, Mr. Bryan had loaned to his daughter \$5,000 to be used by her husband for the benefit of the plant at Middleport, Ohio, which was then being operated by the Loller Manufacturing Company, and that he held her note for that sum when his testimony was taken. Mrs. Loller has not given the court the benefit of her testimony. Mr. Bryan's testimony concerning the disposition he made of the \$20,000, which he says his daughter paid him, is also very unsatisfactory. The property conveyed is proven to be worth from \$250,000 to \$300,000. It was yielding in royalties on coal, then being mined from it, by the Fairmont Coal Company, from \$2,000 to \$2,500 per month. The last report filed in this suit by that company shows that there was in its hands, at that time, royalties which had accrued pending this suit amounting to \$167,417.50. The royalties for one year only is more than the consideration claimed to have been paid for the entire property. That is a consideration so small as to shock the moral conscience, and is evidence of fraud. *Bierne v. Ray*, 37 W. Va. 571, 16 S. E. 804; *Wood v. Harmison*, 41 W. Va. 376, 23 S. E. 560. While it is true that the relationship of the parties is not, of itself, a badge of fraud, yet close relationship between parties to a conveyance, which is attacked on the ground of fraud, is a matter to excite suspicion, and requires a less amount of proof to establish the fraud than if the transaction were between strangers. *Bierne v. Ray*, supra; *Knight v. Capito*, 23 W. Va. 639; *Colston v. Miller*, 55 W. Va. 490, 47 S. E. 268. When this deed was executed, there were notes outstanding against Mr. Bryan aggregating nearly \$200,000, \$90,000 of which he had himself executed and delivered to Englehard. Finding himself in this embarrassed situation, he attempts to convey the bulk of his property, worth at least \$300,000, to his daughter in consideration of \$20,000. The deed having been attacked as fraudulent,

the burden was upon the grantee to prove that the consideration was adequate, and that it was paid. *Bank v. Danser*, 70 W. Va. 529, 74 S. E. 623. Yet Mrs. Loller takes so little interest in the matter as not to give her testimony. We have no hesitation in pronouncing the conveyance fraudulent in law, and void as to the attaching creditors. Mr. Bryan no doubt felt that he had been greatly wronged by Fox and his associates, in whom he seems to have had childlike confidence. He was well stricken with years, and, realizing that he had not much longer to live, he was actuated by a strong desire to make provision for his own child rather than let his property fall into the hands of those who had defrauded him. There is much to be said in palliation of his act. We do not adjudge him guilty of a moral wrong. But the rules of law are inflexible. The banks are innocent holders of the notes which were executed, either by Mr. Bryan or by his authorized agent, and put into circulation, and it is essential to the commercial life of the country that the law should preserve inviolate the rights of innocent holders of commercial paper. The banks have parted with their money, and they are as innocent of wrong as Mr. Bryan. It was he, and not they, who made the innocent mistake of intrusting power in the hands of those who have used it to his hurt, and it is he, and not they, who must suffer the consequences.

The decree of the circuit court will be reversed, and a decree entered here setting aside the conveyance from W. J. Bryan to Mrs. Lizzie B. Loller in so far only as it interferes with the rights of plaintiffs in the collection of their debts, and decreeing in favor of each of said plaintiffs against the several defendants to their respective bills, who are liable on the notes sued on, for the respective amounts thereof with interest, and decreeing said debts to be liens upon the funds in the hands of the Fairmont Coal Company due the estate of W. J. Bryan, deceased, in the order of the service of garnishment process upon it; and the cause will be remanded for the enforcement of such order, and for such further proceeding as may be necessary to the administration of the relief here granted.

(114 Va. 766)

CHAMBERS v. CITY OF ROANOKE.

(Supreme Court of Appeals of Virginia. Jan. 16, 1913. Rehearing Denied June 14, 1913.)

1. LICENSES (§ 8*)—PRODUCE VENDERS—CURB TAX.

Act March 3, 1896 (Laws 1895-96, c. 625 [Code 1904, § 1042a]), declaring it unlawful for any city to tax any one selling their farm produce outside the market square, is qualifiedly amended by Act Feb. 9, 1898 (Laws 1897-98, c. 257), amending the charter of the city of

Roanoke, so as to allow a curb tax in that city.

[Ed. Note.—For other cases, see *Licenses*, Cent. Dig. §§ 16, 17; Dec. Dig. § 8.*]

2. LICENSES (§ 8*)—MARKETS—CURB TAX.

Acts 1902-3-4, cc. 269, 566 (Code 1904, §§ 1013a-1048), amending and repealing in part chapter 44 of the Code in relation to cities and towns, do not repeal by implication amendment of Roanoke City Charter, § 23, by Act Feb. 9, 1898 (Laws 1897-98, c. 257), relating to markets, curb taxes, etc., since chapters 269 and 566 both declare that nothing in either shall repeal any charter provision, unless expressly referred to.

[Ed. Note.—For other cases, see *Licenses*, Cent. Dig. §§ 16, 17; Dec. Dig. § 8.*]

Error to Corporation Court of Roanoke.

J. W. Chambers was fined for violating an ordinance of the City of Roanoke by the police justice. The corporation court affirmed the judgment of the police justice, and the defendant brings error. Affirmed.

S. Hamilton Graves, of Roanoke, for defendant in error.

WHITTLE, J. J. W. Chambers, the plaintiff in error, is a farmer residing upon his farm in Roanoke county upon which he grows and produces farm and domestic products. On December 30, 1911, he brought a wagon load of produce from his farm to the city of Roanoke for sale, and drove his wagon upon market square, stopping on the side of the street next to the curb and outside the market houses and sheds. On his refusal to pay the curbage tax demanded under a city ordinance, he was fined \$5 by the police justice, whose judgment was affirmed on appeal to the corporation court. The case is before us on writ of error to the latter judgment.

[1] An act of the General Assembly, approved March 3, 1896 (Laws 1895-96, c. 625 [Code 1904, § 1042a]), declares "that it shall be unlawful for any city or town of this state, or for any agent or officer of any such city or town, to impose or collect any tax, fine or other penalty upon any person selling their farm and domestic products within the limits of any such town or city outside of and not within the regular market houses and sheds of such cities and towns."

On February 9, 1898 (Laws 1897-98, c. 257), the General Assembly amended section 23 of the charter of the city of Roanoke, so as to read as follows: "No. 23. To establish a market or markets in and for said city, and to appoint officers therefor, to prescribe the time and place for holding the same; to provide suitable buildings and grounds therefor, and to enforce such regulations as shall be necessary to prevent huckstering, forestalling and regrating, and for the purpose of regulating and controlling the sale of fresh meats, fresh fish, farm and domestic products in said city, the common council shall have authority to confine

the sale of such articles or products to the public market and public squares provided by the city for that purpose, and shall have authority to levy and collect a license tax for the sale of fresh meats and fresh fish, and may impose a curbage tax, not exceeding twenty cents for each wagon, cart, or other vehicle containing farm and domestic products brought into said city and offered for sale."

Thereupon the common council passed the ordinance imposing the curbage tax authorized by the amended charter. The former statute and the subsequent amendment of the city charter touching the same subject-matter are irreconcilably repugnant. The prior statute is general in its terms and applies to all the cities and towns of the commonwealth, while the latter is limited in its operation alone to the city of Roanoke. In such case the later statute must be construed to be a qualified amendment of the general law, and controlling in the locality to which it applies. This is clear from the terms of the amended charter; and, besides, if it had not been the purpose of the General Assembly to confer upon the city a taxing power that it did not previously possess under the general law, the amendment would be meaningless.

[2] Subsequent acts of the General Assembly (chapter 269, p. 412, and chapter 566, p. 886; Acts 1902-3-4 [Code 1904, §§ 1013a-1048]), amending and repealing in part chapter 44 of the Code in relation to cities and towns, retain substantially the provisions of the act of March 3, 1896 (section 1042a of the Code), and that circumstance as evidencing the last expression of the legislative will on the subject might be construed as a repeal by implication of the charter amendment. But chapters 269 and 566, supra, both declare that nothing contained in either "in conflict with any provision of the charter of any city or town shall be construed to repeal such provision," unless expressly referred to. This leaves section 23 of the charter intact, and the ordinance passed in pursuance thereof imposing the curbage tax was a valid exercise of municipal power.

For these reasons, the judgment is affirmed.

Affirmed.

(140 Ga. 15)

GEM KNITTING MILLS v. THURMAN.
(Supreme Court of Georgia. May 14, 1913.)

(Syllabus by the Court.)

1. CORPORATIONS (§ 308*) — OFFICERS — ACTIONS FOR COMPENSATION—EVIDENCE.

In an action by an officer of a corporation for salary alleged to be due him, where the defendant corporation pleaded that no corporate action had ever been taken fixing any salary for the plaintiff during the time for which

he claimed it, the court did not err, on the trial of the case, in excluding evidence offered by the corporation to the effect that no salary had been fixed or paid to the plaintiff's predecessor.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 1334-1349; Dec. Dig. § 308.*]

2. CORPORATIONS (§ 308*) — OFFICERS — ACTIONS FOR COMPENSATION—DOCUMENTARY EVIDENCE.

Where the defendant also pleaded accord and satisfaction, and offered in evidence a written instrument purporting to be an agreement whereby all differences and contentions between plaintiff and defendant, the terms being sufficiently broad to include the claim for salary by plaintiff, were adjusted and satisfied prior to the institution of the suit, which writing, however, was never signed by the plaintiff, but where there was evidence tending to show that he accepted and acted upon such agreement, and that all of its terms were carried out, both by himself and by the defendant, the court erred in refusing to permit the writing to go in evidence, although plaintiff testified that he never accepted it, nor carried it out. See *Kidd v. Huff*, 105 Ga. 209 (2), 31 S. E. 430; *Goldsmith v. Marcus*, 7 Ga. App. 849, 68 S. E. 462.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 1334-1349; Dec. Dig. § 308.*]

Error from Superior Court, Pike County; R. T. Daniel, Judge.

Action by J. P. Thurman against the Gem Knitting Mills. Judgment for plaintiff, and defendant brings error. Reversed.

Hardeman, Jones, Park & Johnston, of Macon, and E. F. Dupree, of Zebulon, for plaintiff in error. J. F. Redding and H. O. Farr, both of Barnesville, for defendant in error.

FISH, C. J. Judgment reversed. All the Justices concur.

(140 Ga. 76)

CROUCH v. CROUCH.

(Supreme Court of Georgia. May 16, 1913.)

(Syllabus by the Court.)

DIVORCE (§ 216*)—ALIMONY PENDING ACTION.

An alimony decree, awarding a given sum of money for the support of the wife and daughter pending an action for divorce, is not to be construed as awarding half of the amount in severalty to each. Such a construction, in a charge on the subject of ratification of a subsequent decree, modifying the original judgment by giving half of the amount in the original judgment to the wife for the support of the daughter, was harmful error.

[Ed. Note.—For other cases, see Divorce, Cent. Dig. §§ 635, 636; Dec. Dig. § 216.*]

Error from Superior Court, Fulton County; Geo. L. Bell, Judge.

Action by Georgia Crouch against George G. Crouch for divorce. Verdict for plaintiff, and defendant brings error. Reversed.

Mrs. Georgia Crouch instituted a libel for divorce against her husband, George G. Crouch, and in connection therewith she asked for an allowance of temporary alimony. At the hearing for temporary alimony, on

May 20, 1910, the court rendered the following decree: "It is hereby ordered and adjudged that the defendant, George G. Crouch, be and he is hereby required to pay to the plaintiff's attorney, R. E. Church, \$50 per month as temporary alimony for the support of his wife, Mrs. Georgia Crouch, and his minor daughter, Bernice Crouch, until this case is finally disposed of, beginning June 1, 1910, and that said George G. Crouch, defendant, be required to pay R. E. Church, plaintiff's attorney, \$25 attorney's fees and [on] account, to be paid \$5 per month, beginning on the 1st day of June, 1910." On the 26th of May G. G. Crouch filed his motion to modify the decree awarding alimony, alleging that the plaintiff was possessed of considerable property, largely in excess of property owned by him and ample for her own support, and that he was unable to pay the amount awarded by the court. On June 1st the attorneys for Mr. and Mrs. Crouch entered into an agreement to the effect that her divorce petition should be amended, so as to make it a suit for permanent and temporary alimony, and to strike therefrom the prayer for divorce, and that the order for temporary alimony be modified, so that the husband should pay Mrs. Crouch, "for the support of Bernice Crouch, his daughter, \$25 per month for two years, beginning June 1, 1910, until June 1, 1912, and \$20 from June 1, 1912, until the said Bernice Crouch becomes of age. This agreement for the payment of temporary alimony to be in lieu of any alimony that said party of the second part [Mrs. Crouch] may have right to recover of party of the first part until said Bernice Crouch becomes of age, but not to prejudice any right of party of the second part to sue for a recovery of any alimony which party of the first part should pay after that time, and not to prejudice any right that said second party may now have or hereafter have to sue for and obtain a divorce." On the day the agreement was executed the order of alimony was modified to conform with it, and on July 13th the petition for divorce was amended by striking therefrom the prayer for total divorce.

Subsequently Mrs. Crouch filed her motion to set aside the judgment modifying her decree for alimony and the striking of the prayer for divorce in her libel, alleging that these judgments were taken pursuant to an agreement made in her behalf by her attorney, who entered into the agreement without her knowledge or consent, and that there existed no reason for the modification of the alimony decree. In his answer the defendant set up that the agreement was made with plaintiff's attorney in accordance with her express direction, and that she had ratified the same, and had received the several payments provided for in the modified decree, with the knowledge that they were made thereunder. He further set up that at the

time the original decree for alimony was made he was prevented by a serious accident from appearing in the court, and that it was entered ex parte, and that the provision for his wife, for the support of their daughter, was a proper allowance in view of all the circumstances of the case. The case came on to be tried at the January term, 1912, of the superior court, and a verdict was rendered in favor of the plaintiff. The court refused a new trial, and the defendant excepted.

Napier, Wright & Cox, of Atlanta, for plaintiff in error. E. D. Thomas and L. Z. Rosser, both of Atlanta, for defendant in error.

EVANS, P. J. (after stating the facts as above). The case was fought out largely upon two propositions of fact, as to which there was a most serious conflict of testimony. The wife flatly denied her attorney's authority to consent to the modified judgment, or any knowledge that he had made such an agreement until shortly before filing her motion to vacate the judgment. On the other hand, the husband submitted testimony tending to show that the agreement was authorized by the wife, and that the alimony judgment was modified with her full knowledge and approval. It appeared that beginning June 1, 1910, Mr. Crouch mailed to his wife 15 monthly checks for \$25 each. Each of these checks contained the statement that it was for the support of the daughter for the past month. The checks were payable to the order of Mrs. Crouch and collected by her. One of the issues in the case was whether the acceptance of these several checks was in pursuance of the original or the modified decree. It was the contention of Mrs. Crouch that they were paid pursuant to the original alimony decree, and her husband contended that they disclosed on their face that they were given in pursuance of the modified decree, and were accepted with the full knowledge of that fact, and that, even if his wife's attorney entered into the agreement and modified the alimony decree without authority from his wife, after the decree had been modified the wife had accepted these several payments with knowledge that it had been modified, and that such acceptance amounted to a ratification or acquiescence on her part.

Several exceptions are made to the charge of the court upon this subject, the general tenor of which was that the court erred in construing the original decree as separating the amount to be paid to the wife from the amount to be paid to the daughter. Thus, the court charged: "I charge you that if Mrs. Crouch had a decree against her husband for \$25 per month for the support of her daughter, and same sum for her support, and her attorney without her consent modified said decree, so as to give her a decree only for the support of her daughter, then,

I charge you, the reception each month by Mrs. Crouch of \$25 for the support of her daughter, being the exact sum allowed for that purpose under the original decree, if there was such, would not be a ratification by her of her attorney's act modifying the original decree, unless in receiving it Mrs. Crouch intended thereby to ratify the modified decree." A reference to the original decree will disclose that the court allowed \$50 per month for the support of Mrs. Crouch and daughter pending the litigation, and the decree did not undertake to divide this sum in equal parts between the mother and daughter, but it was allowed in gross for their joint support. "The court erroneously construed this decree as providing \$25 for the support of each, instead of \$50 for the support of both. The modified decree provided for the monthly payment of \$25 for the support of the daughter, and nothing for the wife.

Perhaps the most important fact relied upon by the husband to show acquiescence in and knowledge by the wife of the modified decree was that she accepted 15 monthly payments of \$25 each, remittance being by check, with a notation thereon that it was sent for the support of the daughter, without protesting or complaining during this whole time that the full amount of the original decree was not remitted. When the judge erroneously construed the decree as awarding to the daughter \$25 monthly for her support, and instructed the jury that the reception of this sum monthly by Mrs. Crouch for the support of the daughter, as being the exact sum allowed her for that purpose under the original decree, would not be a ratification by her of her attorney's unauthorized act modifying the original decree, unless in receiving the money the wife intended thereby to ratify the modified decree, he took away a substantial defense which the defendant urged against the vacation of the judgment attacked. For this reason we think a new trial should be had.

Except in this respect, the other criticisms upon the charge are without merit.

Judgment reversed. All the Justices concur.

(140 Ga. 76)

THEATRICAL CLUB v. BERNARD.

(Supreme Court of Georgia. May 16, 1913.)

(Syllabus by the Court.)

APPEAL AND ERROR (§§ 1005, 1033*)—REVIEW—SUFFICIENCY OF EVIDENCE.

The evidence was sufficient to authorize the verdict. The motion for a new trial was based only on the grounds that the verdict was contrary to law and evidence, and the weight of the evidence, and without evidence to support it. The presiding judge approved the finding, and this court will not interfere.

(a) Although the evidence for the plaintiff might have authorized a verdict for a greater

amount than that found, under the facts of the case, this will not necessitate a reversal, on motion of the defendant.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3860-3876, 3948-3950, 4052-4062; Dec. Dig. §§ 1005, 1033.*]

Error from Superior Court, Fulton County; W. D. Ellis, Judge.

Action between the Theatrical Club and B. F. Bernard, Jr. From the judgment, the Club brings error. Affirmed.

Jas. L. Key, of Atlanta, for plaintiff in error. Thos. L. Bishop, of Atlanta, for defendant in error.

LUMPKIN, J. Judgment affirmed. All the Justices concur.

(140 Ga. 74)

McLENDON et al. v. SEIDELL.

(Supreme Court of Georgia. May 16, 1913.)

(Syllabus by the Court.)

1. BROKERS (§ 40*)—VENDOR AND PURCHASER—OFFER TO SELL—CONTRACT OF SALE—RIGHT TO COMMISSION—EMPLOYMENT CONTRACT.

By the terms of a will of a married woman it was provided that a certain lot should not be sold, if possible, during the lifetime of her husband, except by the united consent of her executors, and then only when, in their judgment, such sale should be necessary. The husband and one son of the testatrix were appointed executors. After her death, the husband wrote to a firm of real estate agents a letter containing the following: "Under the terms of my wife's will, my son [naming him] and myself are the executors, and any proposition you may make I have to submit to him for his approval and signature. I have suggested to make the total price \$50,000, \$7,500 or \$10,000 cash, and the balance in five payments for five years, at 6 per cent. interest per annum." This was signed in the individual name of the husband. Held, that this was not on its face a direct offer to sell the property at the amount named, or an authority to the real estate agents to do so. The agreement of one desiring to purchase to pay \$50,500 for the property, the payment to the real estate agents of \$200, and an entry on the back of the letter above quoted in these words, "Received of [naming the proposed purchaser] \$200 part payment of the purchase price, \$50,500, for the Stafford Apartments on Carnegie Way, under Mr. C. W. Seidell's proposition on opposite side of this sheet" (that being the name of the person signing the paper above quoted), which receipt was signed by the real estate agents, did not make a valid and binding contract of sale of the property, so as, without more, to authorize the real estate agents to recover of such person commissions on the basis of having effected a sale, if he declined to proceed further.

[Ed. Note.—For other cases, see Brokers, Cent. Dig. §§ 38-40; Dec. Dig. § 40.*]

2. BROKERS (§ 40*)—VENDOR AND PURCHASER—OFFER TO SELL—CONTRACT OF SALE—RIGHT TO COMMISSION—EMPLOYMENT CONTRACT.

Outside of what appears on the face of such paper and the receipt indorsed thereon, the evidence was conflicting as to whether the person signing such paper authorized the real estate agents to sell the property, or merely

to obtain an offer therefor and submit it to him. There was also testimony tending to show that, before the attempt on the part of the real estate agents to close the transaction by accepting the payment of \$200 and giving the receipt, the person who signed the paper quoted in the preceding headnote had revoked any authority given to such agents and withdrawn their power to negotiate further in regard to a sale of the property, although the employé or representative of such agents who was negotiating with the proposed purchaser may not have been aware thereof. There was also no evidence to prove that the coexecutor would have agreed to the sale, except certain testimony that the person who signed the instrument, and who was the defendant, expressed the opinion that his son would concur in what he might do. *Held*, that there was no error on the part of the presiding judge, to whom a suit by the real estate agents against the person signing the instrument above quoted to recover commissions was submitted for determination on issues of law and fact without a jury, in rendering judgment in favor of the defendant.

[Ed. Note.—For other cases, see *Brokers*, Cent. Dig. §§ 38-40; Dec. Dig. § 40.*]

Error from Superior Court, Fulton County; Geo. L. Bell, Judge.

Action by J. J. McLendon and others against C. W. Seldell. Judgment for defendant, and plaintiffs bring error. Affirmed.

Etheridge & Etheridge, of Atlanta, for plaintiffs in error. Jno. L. Hopkins & Sons, of Atlanta, for defendant in error.

LUMPKIN, J. Judgment affirmed. All the Justices concur.

(140 Ga. 43)

GEORGIA, F. & A. RY. CO. v. NORMAN.
(Supreme Court of Georgia. May 15, 1913.)

(Syllabus by the Court.)

1. EMINENT DOMAIN (§ 222*) — CONDEMNATION PROCEEDINGS — INSTRUCTIONS — DAMAGES.

The court did not err in charging the jury as follows: "If you decide that by the manner in which this railroad is built through that lot, or that by the operation of it through that land in the way it is located, damages result to the other land not taken, then find from the facts what that damage is, how much it is in dollars and cents, and then inquire and determine whether any benefits accrued to the owner of this land, Norman, under the same rules that you get the other information, from the witnesses, the testimony in the case. Will the owner of this land get any benefit, will it benefit him, by this road going through there, by the operation of its franchise, the operation of its trains, the carrying on of its business, or anything of that kind, will he receive benefit to that land in that respect?"—the court having given in another part of the charge the correct rule as to the assessment of consequential damages in case the consequential benefits equaled or exceeded the consequential damages.

[Ed. Note.—For other cases, see *Eminent Domain*, Cent. Dig. §§ 562-567; Dec. Dig. § 222.*]

2. RULINGS ON TESTIMONY.

There is no merit in the objections raised to the admission of testimony, the ruling in

regard to which is complained of in certain grounds of the motion.

3. SUFFICIENCY OF EVIDENCE.

There is evidence to sustain the verdict.

Error from Superior Court, Stewart County; Z. A. Littlejohn, Judge.

Condemnation proceedings by the Georgia, Florida & Alabama Railway Company against Cornelius Norman. From the award of damages and denial of new trial, the Railway Company brings error. Affirmed.

This case grew out of condemnation proceedings brought by the Georgia, Florida & Alabama Railway Company against Cornelius Norman. The assessors found a certain amount in favor of Norman against the railway company, and Norman, being dissatisfied, appealed the case under the provisions of the statute. The jury trying the case on the appeal returned a verdict for \$550 in favor of Norman. The railway company made a motion for a new trial, and excepted to the overruling of the same. Besides the general grounds, complaining that the verdict is without evidence to support it and contrary to law, the motion contains three other grounds, two relating to rulings as to the admissibility of evidence, and one complaining of a portion of the court's charge to the jury.

T. S. Hawes, of Bainbridge, T. Fort, of Roswell, N. M., and G. Y. Harrell, of Lumpkin, for plaintiff in error. Hatcher & Hatcher, of Columbus, and Frank Hooper, of Atlanta, for defendant in error.

BECK, J. (after stating the facts as above). [1] 1. Error is assigned upon the following charge of the court: "If you decide that by the manner in which this railroad is built through that lot, or that by the operation of it through that land in the way it is located, damages result to the other land not taken, then find from the facts what that damage is, how much it is in dollars and cents, and then inquire and determine whether any benefits accrued to the owner of this land, Norman, under the same rules that you get the other information, from the witnesses, the testimony in this case. Will the owner of this land get any benefit, will it benefit him by this road going through there, by the operation of its franchise, the operation of its trains, the carrying on of its business, or anything of that kind, will he receive benefit to that land in that respect?" This charge was objected to on the ground that it is argumentative, and that it does not correctly state or define what are consequential benefits, but restricts them to limits that are too narrow; movant contending that the real question is whether the value of the land would be increased by the location of the road and its operation, and not whether the operation of the road will benefit the owner. Subsequently in his charge the court gave to the jury elaborate

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

instructions, which are not complained of in the motion for a new trial, by which they should be guided in their investigation of the question as to whether or not the consequential damages would be equal to or exceed the consequential benefits, and embodying the rule as to deducting the consequential benefits from the consequential damages. The charge as given is not open to the criticism that it is argumentative, and when considered in connection with other portions of the charge, to which we have referred, it is not too restricted or limited in any respect. In fact, a comparison of the language of the charge excepted to with the provisions of section 5225 of the Code will show that the court followed substantially the rule for the assessment of damages therein laid down.

[2] 2. The evidence of certain named witnesses was objected to on the grounds stated in the motion for a new trial. There is no merit whatever in the objections raised to the testimony.

[3] 3. There is evidence to sustain the verdict.

Judgment affirmed. All the Justices concur.

(140 Ga. 46)

PADEN v. PHOENIX PLANING MILL.

(Supreme Court of Georgia. May 15, 1913.)

(Syllabus by the Court.)

1. MORTGAGES (§ 213*)—DEED ABSOLUTE IN FORM—ACTION BY GRANTEE.

The grantee in a deed conveying land to secure a debt, on refusal to pay by the grantor, may maintain an action for the recovery of the land, and in the absence of appropriate pleadings on the part of the defendant asking equitable relief the plaintiff may have a judgment for the recovery of the land.

(a) A general demurrer was properly overruled.

[Ed. Note.—For other cases, see Mortgages, Cent. Dig. §§ 482-491, 1576; Dec. Dig. § 213.*]

2. MORTGAGES (§ 213*)—DEED ABSOLUTE IN FORM—ACTION.

While the deed which was the basis of the plaintiff's action in the present case recited that the debt to secure which the deed had been executed was evidenced by notes, it was competent on the trial for the plaintiff to prove that as a matter of fact the debt had been created, but that the defendant had failed to give the notes which it was intended that he should give.

[Ed. Note.—For other cases, see Mortgages, Cent. Dig. §§ 482-491, 1576; Dec. Dig. § 213.*]

3. MORTGAGES (§ 213*)—DEED ABSOLUTE IN FORM—ACTION BY GRANTEE.

By defending the action the defendant admitted possession, and no evidence of this was required.

[Ed. Note.—For other cases, see Mortgages, Cent. Dig. §§ 482-491, 1576; Dec. Dig. § 213.*]

4. DIRECTING VERDICT.

The judge did not err in directing a verdict.

Error from Superior Court, Fulton County; Geo. L. Bell, Judge.

Action by the Phoenix Planing Mill against L. W. Paden. Judgment for plaintiff, and defendant brings error. Affirmed.

The Phoenix Planing Mill, a corporation, brought complaint against L. W. Paden to recover possession of a certain tract of land. It was alleged in the petition that the plaintiff "claims title to said land, being seised thereof in fee, as per abstract of title and deeds hereto attached, marked 'Exhibit A' and made a part hereof." The deed referred to as constituting an abstract of title was one in which the grantor is the defendant in the case and the plaintiff the grantee, and conveys the land in controversy to the grantee, "its successors and assigns, forever." It is recited in the deed that it "is given under and by virtue of sections 2771-2775 of the Code of Georgia of 1895 to secure the payment by the said first party to the said second party of the sum of eight hundred dollars * * * in monthly installments of \$10 each, beginning on or before April 3, 1906, and running regularly forward on or before the 3d of each succeeding month, with interest from date, * * * as evidenced by eighty (80) notes executed and delivered by the said party of the first part." And it is further stipulated in the deed that "if the party of the first part [the grantor] shall well and truly keep and perform all and singular the covenants, conditions, stipulations, and agreements herein contained, then the property hereby conveyed shall be re-conveyed by said party of the second part to the said party of the first part, his heirs, executors, administrators, and assigns, by quitclaim deed or by satisfaction and cancellation as provided by law." By amendment to the petition it was alleged that the debt to secure which the deed was given had not been paid, was past due, had been demanded, and payment refused. The evidence sustained the allegations of the amendment.

Jas. L. Key, of Atlanta, for plaintiff in error. Geo. B. Rush, of Atlanta, for defendant in error.

BECK, J. (after stating the facts as above). [1] 1. The court did not err in refusing to sustain the general demurrer to the petition as amended; the demurrer being based upon the ground that the petition as amended did not state a cause of action. The allegation in the petition that the plaintiff was seised of the land in fee, as shown by the deed attached as an exhibit, indicated clearly the title relied upon by the plaintiff; and title of this character, supplemented with proof that the debt after it became due remained unpaid, authorized a recovery by the plaintiff of the possession of the land, in the absence of equitable or other pleadings show-

ing that the plaintiff was only entitled to a verdict and decree or judgment for the amount of the debt and making this a special lien upon the land. *Wofford v. Wylly*, 72 Ga. 863; *Pohhill v. Brown*, 84 Ga. 338, 10 S. E. 921.

[2-4] 2-4. The second, third, and fourth headnotes require no elaboration.

Judgment affirmed. All the Justices concur.

(140 Ga. 75)

CLARK v. BALLEW.

(Supreme Court of Georgia. May 16, 1918.)

(*Syllabus by the Court.*)

APPEAL AND ERROR (§§ 1005, 1033*)—REVIEW—REFUSAL OF NEW TRIAL.

While the evidence was conflicting, and the jury might have been warranted in finding for the defendant, it was sufficient to support a finding for the plaintiff. The credibility of witnesses was for the jury, and the presiding judge having overruled a motion for a new trial, which complained only of the finding of the jury, and assigned no error upon any charge or ruling of the court pending the trial, this court will not reverse the judgment.

(a) Although the evidence for the plaintiff might have authorized a verdict for a greater amount than that found, this will not necessitate a reversal, on motion of the defendant, under the facts of this case.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 3860-3876, 3948-3950, 4052-4062; Dec. Dig. §§ 1005, 1033.*]

Error from Superior Court, Fulton County; W. D. Ellis, Judge.

Action between T. C. Clark and C. L. Ballew. From the judgment, Clark brings error. Affirmed.

Moore & Branch, of Atlanta, for plaintiff in error. J. C. Harkins, of Atlanta, for defendant in error.

LUMPKIN, J. Judgment affirmed. All the Justices concur.

(140 Ga. 51)

MONTGOMERY v. ALEXANDER LUMBER CO.

(Supreme Court of Georgia. May 15, 1913.)

(*Syllabus by the Court.*)

1. FRAUDS, STATUTE OF (§ 148*)—PETITION—SUFFICIENCY—DEMURRER.

Under former rulings of this court, which are binding, where a contract is required to be evidenced by writing under the statute of frauds, and a petition sets out the terms of a contract, but does not allege that it is in writing, such petition is not demurrable for that reason. *Allen & Holmes v. Powell*, 125 Ga. 438, 54 S. E. 137.

[Ed. Note.—For other cases, see *Frauds, Statute of*, Cent. Dig. §§ 353, 354; Dec. Dig. § 148.*]

2. DAMAGES (§ 18*)—BREACH OF CONTRACT—CONSEQUENTIAL DAMAGES.

Remote or consequential damages are not generally allowed, when they cannot be traced solely to the breach of the contract, or unless

they are capable of exact computation, such as the profits which are the immediate fruit of the contract, and are independent of any collateral enterprise entered into in contemplation of the contract. Civil Code 1910, § 4384.

[Ed. Note.—For other cases, see *Damages*, Cent. Dig. § 37; Dec. Dig. § 18.*]

3. DAMAGES (§ 147*)—PLEADINGS—PROFITS.

Where it is sought to recover damages on account of loss of profits of a contract, under the rule that damages recoverable for a breach of contract are such as arise naturally and according to the usual course of things from such breach, and such as the parties contemplated, when the contract was made, as the probable result of the breach (Civil Code 1910, § 4395), or on the ground that the contract was broken with the knowledge and for the purpose of depriving the party injured of its benefits (Civil Code 1910, § 4511), the plaintiff should allege facts showing that the special damages claimed fall within one or the other of such rules.

[Ed. Note.—For other cases, see *Damages*, Cent. Dig. §§ 410, 412; Dec. Dig. § 147.*]

4. ACTION (§ 47*)—JOINDER—BREACH OF CONTRACT—TORT.

A petition seeking to recover damages for a breach of contract, and also for a tort, is subject to demurrer.

[Ed. Note.—For other cases, see *Action*, Cent. Dig. §§ 469, 470; Dec. Dig. § 47.*]

5. DISMISSAL APPROVED.

The allegations as to damages were general in character, and failed to show a right to recover the special damages alleged. The petition was also demurrable because it sought to recover both for a tort and on a contract in the same action. A demurrer was filed on the ground of such misjoinder of causes of action, and there were also special demurrers to the paragraphs of the petition alleging damages. The court sustained the demurrers, with leave to the plaintiff to amend; but, upon failure of the plaintiff to do so, the action was dismissed. *Held*, that this was not error.

Error from Superior Court, Fulton County; J. T. Pendleton, Judge.

Action by N. D. Montgomery against the Alexander Lumber Company. Judgment for defendant, and plaintiff brings error. Affirmed.

Copeland & White and A. C. Corbett, all of Atlanta, for plaintiff in error. Watkins & Latimer, of Atlanta, for defendant in error.

LUMPKIN, J. Judgment affirmed. All the Justices concur.

(140 Ga. 45)

COOPER v. BOWEN.

(Supreme Court of Georgia. May 15, 1918.)

(*Syllabus by the Court.*)

1. ACTION (§ 57*)—CONSOLIDATION—TROVER—EQUITY.

A plaintiff, alleging herself to be the surviving partner of a partnership, brought a suit in trover to recover property as belonging to the firm. Subsequently the same plaintiff filed a suit in equity against the same defendant to recover other property of the partnership, praying an accounting, a receiver, and a merger of the trover suit in the equitable action.

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

Held, that it was not error to consolidate the former suit with the equitable action.

[Ed. Note.—For other cases, see *Action*, Cent. Dig. §§ 632-675; Dec. Dig. § 57.*]

2. TRIAL (§ 334*)—VERDICT—VALIDITY—CONSTRUCTION.

A verdict rendered in the equity suit in favor of the plaintiff for "\$750, with interest," is not void. There being no specific allegations in the pleadings for the recovery of any particular sum, with interest from a particular time, which would serve to impress the verdict as having relation to fixing interest on the amount recovered from a particular date, the verdict will be construed as a recovery of interest from the date of the verdict.

[Ed. Note.—For other cases, see *Trial*, Cent. Dig. § 785; Dec. Dig. § 334.*]

3. APPEAL AND ERROR (§ 1033*)—HARMLESS ERROR—VERDICT.

A defendant cannot complain that the plaintiff's verdict is for a less amount than authorized by the evidence.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 4052-4062; Dec. Dig. § 1033.*]

4. SUFFICIENCY OF EVIDENCE.

The verdict is supported by the evidence.

5. APPEAL AND ERROR (§ 1078*)—ASSIGNMENTS OF ERROR—ABANDONMENT.

Assignments of error upon the rulings on demurrer and the allowance of an amendment were not discussed in the brief, and will be treated as abandoned.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 4256-4261; Dec. Dig. § 1078.*]

Error from Superior Court, Dodge County; J. H. Martin, Judge.

Action by Mrs. N. R. Bowen against G. W. Cooper. Judgment for plaintiff, defendant brings error. Affirmed.

W. M. Clements, of Eastman, and W. L. & Warren Grice, of Hawkinsville, for plaintiff in error. W. M. Morrison, of Eastman, and Eschol Graham, of McRae, for defendant in error.

EVANS, P. J. Judgment affirmed. All the Justices concur.

(140 Ga. 17)

DILLARD v. HOLTZENDORF.

(Supreme Court of Georgia. May 14, 1913.)

(*Syllabus by the Court.*)

1. BILLS AND NOTES (§§ 502, 517*)—EVIDENCE (§ 142*)—PLEA OF NON EST FACTUM—CIRCUMSTANTIAL EVIDENCE—SIMILAR FACTS—VALUE.

A plea of non est factum may be established by circumstantial as well as direct testimony. Where the payee and maker of a note are brothers, and the suit is by the former against the administrator of the latter, and it is admitted that the maker did not sign the note, but that the payee signed the name of the maker, and where it was contended by the payee that the maker acknowledged its execution in the presence of the payee's son-in-law, and that the consideration of the note was for medical attention given to the maker by the payee, a physician, while his brother was on a visit to him, it was competent to show that the value of the medical service alleged to have been

rendered was grossly disproportionate to the amount of the note as one of the circumstances tending to show that the maker, who was literate and not shown to have been incapacitated from signing his name, did not authorize or acknowledge the execution of the note. Testimony that physicians in the locality of the venue of the suit were accustomed to charge certain fees for visits to patients was not inadmissible on the ground that such testimony was irrelevant and immaterial; no point being made that it did not appear that the charges in the two locations were similar.

[Ed. Note.—For other cases, see *Bills and Notes*, Cent. Dig. §§ 1708-1716, 1807-1815; Dec. Dig. §§ 502, 517.* *Evidence*, Cent. Dig. §§ 416-423; Dec. Dig. § 142.*]

2. VERDICT SUSTAINED.

The evidence was sufficient to sustain the verdict.

Error from Superior Court, Glynn County; C. B. Conyers, Judge.

Action by J. R. Dillard against C. D. Holtzendorf, as administrator. Judgment for defendant, and plaintiff brings error. Affirmed.

Hatton Lovejoy, of La Grange, and Bolling Whitfield, of Brunswick, for plaintiff in error. J. D. Sparks, of Jacksonville, Fla., for defendant in error.

EVANS, P. J. Judgment affirmed. All the Justices concur.

(140 Ga. 66)

FULTON et al. v. PARKER et al.

(Supreme Court of Georgia. May 16, 1913.)

(*Syllabus by the Court.*)

1. PARTITION (§ 63*)—EVIDENCE—TITLE OF PARTIES.

The evidence was sufficient to support the verdict.

[Ed. Note.—For other cases, see *Partition*, Cent. Dig. §§ 183-185; Dec. Dig. § 63.*]

2. PARTITION (§ 70*)—INSTRUCTIONS—DIVISION OF ESTATE.

Under the facts of this case, there was no error in giving the charge dealt with in the second division of the opinion.

[Ed. Note.—For other cases, see *Partition*, Cent. Dig. § 193; Dec. Dig. § 70.*]

3. WITNESSES (§ 139*)—COMPETENCY—TRANSACTIONS WITH DECEDENT.

Where by will an undivided interest in property is left to S. and to B., with remainder to her children, and S. and B. divide the property between them, and after the death of B. her children, as remaindermen, bring suit for a portion of the property assigned to S. in the division, against his grantees, one of such grantees is not an incompetent witness to testify as to communications had between him and B. in her lifetime. The facts stated do not make a case falling within any of the exceptions contained in Civ. Code 1910, § 5858.

[Ed. Note.—For other cases, see *Witnesses*, Cent. Dig. §§ 582-597; Dec. Dig. § 139.*]

Error from Superior Court, Marion County; Z. A. Littlejohn, Judge.

Action by B. A. Fulton and others against B. S. Parker and others. Judgment for defendants, and plaintiffs bring error. Affirmed.

J. E. Sheppard, of Americus, and W. D. Crawford, of Buena Vista, for plaintiffs in error. S. B. Hatcher, of Columbus, and W. B. Short, of Buena Vista, for defendants in error.

HILL, J. [1] 1. The plaintiffs in error, who were also plaintiffs in the court below, filed their petition for partition of certain lands described therein against the defendants, who were in the exclusive possession under a chain of title from B. A. Story, who was the grandfather of the plaintiffs. B. A. Story died leaving a will, by which he devised certain described lands to his wife, Emily J. Story, his son S. B. Story, and his daughter Mrs. D. A. V. Belk. The plaintiffs here are the children of Mrs. Belk. By item 3 of his will the testator devised a one-third interest in certain described lands to his wife during her natural life. The lands sought to be partitioned were a portion of this land. By the fourth item of his will the testator devised an undivided one-half interest in remainder in the lands described in item 3 of his will to his son S. B. Story. By the fifth item of his will the testator bequeathed an undivided one-half interest in the lands described in item 3 of his will to his daughter, Mrs. D. A. V. Belk, for and during her natural life, with remainder over to her children. The sixth item of the will provides that the property "contained in the three last articles above be equally divided between my son, S. B. Story, and my daughter, Dicy A. V. Belk, so that in no wise to interfere or to be detrimental to the one-third interest bequeathed to my wife, Emily J., which interest is only to exist for and during her natural life and then to pass to and become the property of my son, S. B. Story, and my daughter, D. A. V. Belk, in the manner aforementioned." The son, S. B. Story, and the daughter, Mrs. D. A. V. Belk, were nominated as executors of the will and qualified as such.

The testimony tended to show that the lands described in items 3, 4, and 5 were divided between the two children named and their mother Emily J., each taking possession of the portion devised. About a year thereafter the widow of testator, Mrs. Emily J. Story, died. The two children, S. B. Story and Mrs. D. A. V. Belk, divided and entered into possession of the remainder portion of the life estate lands of Mrs. Emily Story. The evidence is somewhat conflicting on the question of division and possession, but it is sufficient to sustain the verdict to the effect that they did so divide and take possession, as will be seen later. S. B. Story died a number of years after the division and possession, having conveyed in his lifetime the lands in controversy to T. E. Blanchard, as the surviving partner of Blanchard & Burrus, who in turn conveyed it to the defendants. The daughter, Mrs. Belk, remained in possession of a portion of the land set apart to

her for a number of years prior to her death. After her death her children took possession of the land as remaindermen, and had possession at the commencement of this suit. On the trial of the case, according to the certificate of the trial judge, both sides stated to the court that the right of Mrs. Emily J. Story, S. B. Story, and Mrs. D. A. V. Belk to divide the lands in which Mrs. Emily J. Story had a life interest, after her death, was not contested, and the only issue was whether or not S. B. Story and Mrs. D. A. V. Belk had divided the one-third interest of Mrs. Emily J. Story after her death.

The contention of the plaintiffs was that there was no division made of the share of Mrs. Emily J. Story, the grandmother, between S. B. Story and Mrs. D. A. V. Belk, and that they were entitled to an undivided one-half interest in the land as tenants in common with the defendants, who held under title from S. B. Story, and who, under the terms of the will, could only convey his undivided one-half interest in the same. On the other hand, it is insisted by the defendant that there *was* a division of the grandmother's share after her death between S. B. Story and Mrs. D. A. V. Belk, the mother of plaintiffs, and that the plaintiffs are now in possession of the portion assigned to their mother, and that by virtue of the division and possession under it the portion of S. B. Story vested the title in him, who subsequently conveyed the title to Blanchard, who conveyed it to the defendants. The issue of fact is thus sharply drawn; the plaintiffs contending that "there is no evidence that D. A. V. Belk ever took possession of any of the land after the death of Emily J." As previously stated, there is some conflict in the evidence; but there is evidence tending to show that after the death of Mrs. Emily Story her one-third life interest in the lands *were* divided between S. B. Story and Mrs. D. A. V. Belk, and that each took possession of his part under the division. The testimony of J. T. Belk, the husband of Mrs. D. A. V. Belk, tended to show that his wife and S. B. Story told him of the division, and that each held possession of the portion assigned them in the division of Emily J. Story's share after her death. "After Mrs. Story's death, she [D. A. V. Belk] got the second division. I reckon Mrs. Belk had something to do with that division." "My wife or the heirs are now in possession of it. She never was in possession of it until Mrs. Story died." The testimony of Pierce Belk tended to show that he had purchased a portion of the land assigned to S. B. Story under the division of Mrs. Emily J. Story's share, and later wanted to borrow money on it, and upon the demand of the loan association from which he negotiated the loan he applied to and obtained a quitclaim deed to the land from Mrs. D. A. V. Belk. A copy of the quitclaim deed was in evidence. Mrs. Belk also told the witness that she did not claim any

of the land held by S. B. Story. This witness also testified that his aunt, Mrs. D. A. V. Belk, after the death of Mrs. Emily Story, went into possession of a portion of Mrs. Story's lands, and S. B. Story went into possession of the other portion. One of the defendants, B. S. Parker, testified that S. B. Story told him that he and Mrs. Belk had divided the Emily Story lands after the death of Mrs. Story. We think the evidence of the defendant is sufficient to support the verdict of the jury, which was to the effect that there had been a division between S. B. Story and Mrs. D. A. V. Belk, after the death of Mrs. Emily J. Story, of the latter's share in the estate of B. A. Story, the testator, and that the land sought to be partitioned by the plaintiffs went into the possession of S. B. Story, and he remained in possession of it until he conveyed it to T. E. Blanchard, who conveyed it to the defendants.

[2] 2. Exception is taken to the following charge of the court: "If you find from the facts of the case that there was a division made between S. B. Story and Mrs. D. A. V. Belk after the death of their mother, and that there is no evidence in this case that the division was fraudulently made, it would be binding on the parties; and if you find that it was divided, the interest held by Mrs. Emily J. Story, the mother, subsequent to her death, these parties, S. B. Story and Mrs. D. A. V. Belk, divided the land, then that would be binding on them, and it would also be binding on the plaintiffs, the children of Mrs. D. A. V. Belk." One ground of complaint against the charge is that it erroneously states the law, in that the heirs could not by agreement bind the remaindermen who did not participate in the division. It is unnecessary whether remaindermen would be bound by an agreement as to a division made by the heirs, for the reason that a certificate of the trial judge appearing on the amended motion for a new trial was as follows: "At the trial of this case it was stated to the court by both sides that the right of Mrs. Emily J. Story, S. B. Story, and Mrs. D. A. V. Belk to divide the estate of B. A. Story, or the right of S. B. Story and Mrs. D. A. V. Belk to divide the one-third interest of Mrs. Emily J. Story after her death, was not considered; but the only issue in the case was whether or not S. B. Story and Mrs. D. A. V. Belk had divided the one-third interest of Mrs. Emily J. Story after her death, and the case was tried on this issue."

Under these facts, there was no error in giving the charge complained of. The other assignments of error with respect to this charge are without merit.

[3] 3. The only remaining special assignment of error is because the court allowed N. W. Parker, one of the defendants, to testify, over objection, that Mrs. Belk, the daughter of the testator, who was dead, had

told the witness that the lands devised to her mother, Mrs. Story, for life, and at her death to be divided between herself and brother, had been so divided after her mother's death, and each remainderman had entered into possession of his respective share. The court did not err in admitting this testimony. The defendants' title did not come through Mrs. Belk, but through S. B. Story. The defendants were not indorsers, assignees, transferees, or personal representatives of Mrs. Belk, and did not come within any of the exceptions laid down in Civil Code, § 5858. Nor did the plaintiffs occupy any relation towards Mrs. Belk which would render the witness incompetent to testify. They were not claiming under her, but as legatees of a remainder interest under the will of their grandfather, B. A. Story.

Judgment affirmed. All the Justices concur.

(140 Ga. 50)

WOOD v. WOOD.

(Supreme Court of Georgia. May 15, 1913.)

(Syllabus by the Court.)

NEW TRIAL (§§ 138, 154*) — GRANT — MOTION TO VACATE.

Where a defendant in a cause moved to set aside a verdict and the motion was not served, and no steps were taken to perfect service until after the lapse of several years, when an ex parte order for service of the plaintiff by publication was granted at the instance of the defendant, and the plaintiff promptly moved to vacate such order for service on the ground of the defendant's laches, and on the hearing the judge who granted the order vacated it as having been improvidently granted, this court will not reverse the judgment, except it be made to appear (which was not done in this case) that he abused his discretion.

(a) In such a case it is not erroneous to further direct that the defendant's motion be stricken from the court's files.

[Ed. Note.—For other cases, see New Trial, Cent. Dig. §§ 280, 281; Dec. Dig. §§ 138, 154.*]

Error from Superior Court, Fulton County; Geo. L. Bell, Judge.

Action by Capitola L. Wood against W. J. Wood. Judgment for defendant, and plaintiff brings error. Affirmed.

Geo. F. Gober, of Atlanta, S. F. Garlington, of Augusta, and Albert E. Mayer, of Atlanta, for plaintiff in error. Rosser & Brandon and B. J. Conyers, all of Atlanta, for defendant in error.

EVANS, P. J. The exception is to a judgment vacating an order to perfect service on a nonresident defendant as having been improvidently granted. On December 14, 1907, Mrs. Capitola L. Wood filed a petition in the superior court of Fulton county against W. J. Wood to set aside a verdict rendered in a divorce case on June 15, 1905. On May 3, 1912, application was made by her to have service perfected on the defendant by publication. An order was granted. The

defendant made a special appearance and, without admitting the jurisdiction of the court, moved to vacate the order to perfect service on him and that the proceeding in which the order was taken be dismissed. In his motion it was represented to the court that at the time of the filing of the proceeding to set aside the verdict he was a resident of the state of Florida, and had resided there continuously up to the time of making his motion; that a return of non est inventus was made by the sheriff of Fulton county prior to the January term, 1908, of the court, and no attempt was made to perfect service of the proceeding to set aside the verdict until December 26, 1908, when the plaintiff procured an order directing that service of the petition and process be perfected by publication twice a month for two months, and that the case be made returnable to the March term, 1909, of the court. This order was not carried out, and, notwithstanding Fulton superior court has six terms each year, the applicant in that case took no further action until May 3, 1912, when she procured an order from one of the judges of Fulton superior court directing that service of the petition and process be perfected by publication; that the case be made returnable to the September term, 1912, of the court; that the order was obtained ex parte, and his first notice was the receipt of a paper containing a marked copy of the advertisement of the order on July 9, 1912; and thereupon he promptly moved to vacate the order and to dismiss the proceeding on account of the applicant's laches in applying for an order to serve her motion, and because that since she first filed her motion a final verdict and decree had been rendered in the divorce suit granting a total divorce to the movant and awarding applicant \$1,000 as permanent alimony, which verdict and decree had been affirmed by the Supreme Court of the state, and the amount of the alimony paid to her attorney. On the hearing the court vacated the order for the service of the proceeding to set aside the verdict and dismissed the proceeding. Exception is taken to this judgment.

It is within the power of a judge of the superior court at the appearance term or at a subsequent term, where due diligence is shown, to grant an order authorizing a new process to issue, and that the defendant be served. *Allen v. Mutual Loan Co.*, 86 Ga. 74, 12 S. E. 265; *Lassiter v. Carroll*, 87 Ga. 731, 13 S. E. 825; *Rowland v. Towns*, 120 Ga. 74, 47 S. E. 581. The plaintiff must be diligent in looking after his case. If without excuse he allows several terms of the court to pass before applying for an order to perfect service, his laches ordinarily will be good ground for denying his motion to revitalize his suit by the grant of an order to have the defendant served. In *Brunswick Hardware Co. v. Bingham*, 110 Ga. 526,

35 S. E. 772, no steps were taken to perfect service until the seventh term after the declaration had been filed and the plaintiff's motion to have service perfected was denied. In that case the court said: "To allow a plaintiff simply to file his suit in the clerk's office on a cause of action which would within a few days become barred by the statute of limitations, to let it lie there for several years without taking any steps to have it served, and then to perfect service, would be virtually to repeal the statute of limitations." This remark is especially applicable to the facts of the instant case. A motion to vacate a judgment must be made within three years, and yet a longer space of time has elapsed since the filing of Mrs. Wood's petition in this case and her application to have service perfected by publication. The motion to set aside the order was made to the judge who passed it. Upon being put in full possession of the facts, he was of the opinion that the order was improvidently granted, and there is nothing in the record to show that he abused his discretion in so holding.

It is further contended that the judgment complained of is erroneous for the reason that the court was without jurisdiction to dismiss the cause upon a special appearance of the movant. It is true that one who makes a special appearance for the purpose of protesting against an illegal service cannot join issue with the plaintiff on the merits of the case; but where a petition has been allowed by a plaintiff to remain without service being perfected on the defendant for many years before applying for an order to have the defendant served, and the order is granted ex parte, and is afterwards set aside as having been improvidently granted, the court may give direction to have the same stricken from the files. The substantial effect of an order striking the case from the files of the court is the same as dismissing the action. The judgment will not be reversed.

Judgment affirmed. All the Justices concur.

(140 Ga. 71)

SOUTHERN CEMENT STONE CO. v. LOGAN COAL & SUPPLY CO.

(Supreme Court of Georgia. May 16, 1913.)

(Syllabus by the Court.)

MUNICIPAL CORPORATIONS (§ 323*)—PUBLIC IMPROVEMENTS—CONTRACT—RIGHT TO ENJOIN.

There was no error in granting a nonsuit in this case.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. §§ 842-846; Dec. Dig. § 323.*]

Error from Superior Court, Glynn County; C. B. Conyers, Judge.

Action by the Southern Cement Stone Company against the Logan Coal & Supply Com-

pany. Judgment for defendant, and plaintiff brings error. Affirmed.

F. H. Harris and R. D. Meader, both of Brunswick, for plaintiff in error. Bolling Whitfield, of Brunswick, for defendant in error.

LUMPKIN, J. A contracting company sought to enjoin another contractor from laying certain sidewalks in the city of Brunswick. The plaintiff claimed that it had the right to do such work by reason of contracts with the property owners in front of whose property the sidewalks lay. The defendant claimed the right under an award of the contract by the city. On the hearing of the application for temporary injunction by the presiding judge, he granted it as to certain parts of the sidewalk and refused it as to the balance, but required the defendant to give a bond to pay the plaintiff any profits it might lose, and which on the final trial it might be shown to be entitled to recover. The case was brought to this court, and the writ of error dismissed. 136 Ga. 475, 71 S. E. 915. The plaintiff then amended its pleadings, so as to seek to have a recovery on the bond. On the trial, at the close of the evidence introduced by the plaintiff, the court granted a nonsuit and the plaintiff excepted.

The fallacy which underlies the entire contention of the plaintiff is that it seeks to set up various grounds of complaint which possibly the property owners might have made, but did not, and which do not give to the plaintiff any right of recovery. Under its charter, power was conferred on the mayor and aldermen to require property owners to pave sidewalks in front of their property. By the act of 1905 (Acts 1905, pp. 680, 685) it was provided that if the owner should refuse to begin the work within 30 days after he should be served with a copy of the order requiring it, or, after having begun such work, should fail to complete it within a period of time to be designated by the mayor and aldermen, unless they should grant further time, they could have the work done and collect the cost thereof by execution. It provided that the notice should be served on the property owner "by the marshal or any other officer of said city." On December 12, 1907, the mayor and council adopted an ordinance requiring the sidewalks to be paved, and provided that the work should begin within 30 days, and be completed in 10 days thereafter. Nothing further was done until 1909. On April 8, 1909, a resolution was adopted requiring notices to be issued and served on property owners, requiring them to proceed with the work. Notices were issued, and were served by a special officer attached to the police department. The property owners did nothing, except that a number of them (perhaps all) had a verbal understanding with an officer of the plaintiff that, whenever the city required

the work to be done, the plaintiff would do it. The city had already required it, but no work was done. In 1910 the mayor and council proceeded to let out the work by contract. The plaintiff was a bidder, and failed to get the work. Its officer testified that the city attorney, in a conversation with him, advised him that he could go on with his private contracts without regard to the letting out of the work by the city, if such contracts were made before the awarding and signing of the city contract. This seems to have been an unofficial expression of opinion by the city attorney in the course of a conversation, and was not binding on the city. In his brief the city attorney says that it "appears to have been 'obiter dictum,' as it were." While the city was advertising for bids and preparing to make the award, plaintiff's officer went to the property owners and obtained an agreement that they "have contracted with the Southern Cement & Stone Company to pave abutting such property in accordance with city specifications for and at the same price that has to be paid for the Norwich street paving [the street involved in the controversy] when contract is awarded by the city." Thus the plaintiff was to look to the award of the city to fix the price, but not to fix the successful bidder.

The plaintiff attacked the ordinance as unreasonable, and the notice as not having been served by a proper officer, and as allowing more time than the ordinance specified. A vital trouble with this contention is that the property owners made no objection, but recognized the notice and acted on it as valid, and the plaintiff's bill of exceptions states that each of them testified that, "it becoming necessary by requirement of the municipal authorities of the city of Brunswick, by notice served by the mayor and counsel of the city of Brunswick under provisions of the city charter and city ordinance of December 12, 1907, * * * to that end the witness made and entered into a contract with the plaintiff," etc. Thus the property owners raised no objection to the notice, and it was recognized as sufficient to require them to have the pavement laid. The plaintiff claims to have obtained the contract by reason of the notice, but now attacks it.

Again, the only evidence tending to show that the time allowed was unreasonable was that of the president of the plaintiff. He testified that "it would be practically impossible, considering the fact that it takes 30 days, after cement tiling has been placed in mold, for them to cure sufficiently to lay; that no cement tiling contractor anywhere in this part of the country has a force sufficient to complete all such work in 10 days after starting it, nor is the labor skilled in such work to be obtained, so as to do the same in said period." It will be seen that he seeks to measure the time within which a municipality may require citizens to pave sidewalks

by the convenience or needs of a single contractor, who may obtain agreements from all of the property owners, and without previous preparation as to materials or labor. If he should obtain promises from substantially all of the property owners of the city, he might not be able to perform the contract in months or years. But this is not a proper test. The plaintiff did not begin work on the sidewalk at all until advertisement for bids by the city and shortly before the award of the contract to another.

It is useless to discuss the other points raised. They are equally without merit. The plaintiff made out no *prima facie* case, and the award of a nonsuit was proper.

Judgment affirmed. All the Justices concur.

(139 Ga. 345)

THOMPSON et al. v. H. H. SIMMONS & CO.
(Supreme Court of Georgia. May 13, 1913.)

(Syllabus by the Court.)

1. APPEAL AND ERROR (§ 654*)—DISMISSAL—ABSENCE OF BILL OF EXCEPTIONS.

Where it appears from the bill of exceptions that the judgment excepted to is the refusal to grant a motion for new trial, the bill of exceptions will not be dismissed because of the omission to specify the brief of evidence as part of the record; but if the omitted record is necessary to the proper adjudication of the case, this court of its own motion will cause a certified copy of it to be transmitted to the clerk of the Supreme Court.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2819-2822; Dec. Dig. § 654.*]

2. APPEAL AND ERROR (§ 637*)—EXCEPTIONS, BILL OF (§ 59*)—AMENDMENT—DISMISSAL.

Where, in the caption of a bill of exceptions, the case is stated as "W. E. Thompson et al. v. H. H. Simmons & Co., a firm composed of H. H. Simmons and H. F. Myers," and it is recited therein "that at the June term, 1912, of the superior court of Chatham county, Georgia, to wit, on August 3, 1912, before his honor, Walter G. Charlton, judge presiding, there came on to be heard the above-stated case, the same being petition for injunction," etc., a motion to amend the bill of exceptions from the record, by supplying the names of all the plaintiffs named in the petition, will be allowed, and upon the allowance of the amendment a motion to dismiss, on the ground that the bill of exceptions does not state all of the parties to the cause, will be denied. *Crossley v. Leslie*, 130 Ga. 782, 61 S. E. 851, 14 Ann. Cas. 703.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2784, 2829; Dec. Dig. § 637.* Exceptions, Bill of, Cent. Dig. §§ 106-111; Dec. Dig. § 59.*]

3. APPEAL AND ERROR (§ 637*)—BILL OF EXCEPTIONS—CLERICAL ERROR.

A bill of exceptions will not be dismissed because in the assignments of error it is stated that "the defendant excepted and now excepts," etc., where from the whole bill of exceptions it is apparent that the word "defendant" was inadvertently used for "plaintiffs."

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2784, 2829; Dec. Dig. § 637.*]

4. REFUSAL TO DISMISS APPROVED.

The other grounds of the motion to dismiss the writ of error are without merit.

5. INTOXICATING LIQUORS (§ 260*)—INJUNCTION—DEFENSES—"BLIND TIGER."

It is no defense to a proceeding brought under Civ. Code 1910, §§ 5335-5337, to abate and enjoin a "blind tiger" as a nuisance, that the sale of spirituous, malt, or intoxicating liquor was in open violation of law.

[Ed. Note.—For other cases, see Intoxicating Liquors, Cent. Dig. § 399; Dec. Dig. § 260.*]

For other definitions, see Words and Phrases, vol. 1, pp. 808, 809.]

Error from Superior Court, Chatham County; W. G. Charlton, Judge.

Action by W. E. Thompson and others against H. H. Simmons & Co. Judgment for defendants, and plaintiffs bring error. Reversed.

W. R. Hewlett, Wm. L. Gignilliat, and G. J. Orr, Jr., all of Savannah, and Seaborn Wright, of Rome, for plaintiffs in error. Osborne & Lawrence, Edmund H. Abrahams, and Bouham & Herzog, all of Savannah, for defendants in error.

EVANS, P. J. Several citizens of Chatham county brought a petition under Civil Code, §§ 5335-5337, against the defendants, to abate and enjoin the operation in their neighborhood of what is commonly known as a blind tiger, where spirituous, malt, or intoxicating liquors are sold. The jury returned a verdict for the defendants, and the court refused a new trial, whereupon the plaintiffs sued out a bill of exceptions.

[1-4] 1-4. We do not think the motion to dismiss the bill of exceptions should be sustained. The rulings made thereon are stated in the headnotes.

[§] 5. The controlling question in the case is the correctness of the court's instruction that a "blind tiger" is a place where spirituous, malt, or intoxicating liquors are sold in violation of law "on the sly," not openly sold, but sold "on the sly," and that if the defendants sold spirituous, malt, or intoxicating liquors in their place of business, but did not sell it "on the sly," the plaintiffs would not be entitled to a verdict. The statute involved is codified in Civil Code, §§ 5335 to 5337, as follows:

"Any place commonly known as a 'blind tiger,' where spirituous, malt, or intoxicating liquors are sold in violation of law, shall be deemed a nuisance, and the same may be abated or enjoined as such, as now provided by law, on the application of any citizen or citizens of the county where the same may be located."

"If the party or parties carrying on said nuisance shall be unknown or concealed, it shall be sufficient service, in the abatement or injunction proceedings under the preceding section, to leave the writ, or other papers to be served, at the place where such liquor or liquors may be sold, and the case may pro-

ceed against 'parties unknown,' as defendants."

"The court shall have authority to order the officers to break open such 'blind tiger' and arrest the inmates thereof, and seize their stock in trade, and bring them before him to be dealt with as the law directs."

The statute reflects a legislative intent to extend to citizens in a county where a "blind tiger" is located an additional remedy to suppress the illegal sale of spirituous, malt, or intoxicating liquors. The scope and nature of the remedy is apparent, when we consider the purpose of the statute. At the time of its passage the sale of intoxicating liquor was prohibited by law in the majority of the counties in this state, and in others was permitted only under stringent regulation. In the dry counties especially this prohibitive legislation did not entirely suppress the sale of intoxicants. In some instances, for various reasons, the vendors of intoxicating liquors escaped prosecution or conviction, and yet the demoralizing effect of the illegal business was so apparent that the need of a civil remedy for the protection of the people in the vicinity of the place where intoxicating liquors were being unlawfully sold came under the notice of the Legislature. The evil to be corrected was the illegal sale of intoxicating liquors; the remedy supplied by the Legislature was a civil suit to abate or enjoin the sale of such liquors as a nuisance. *Legg v. Anderson*, 116 Ga. 401, 42 S. E. 720. If we look to the title of the act (Acts 1899, p. 73), which is "to declare as a nuisance any place where spirituous, malt or intoxicating liquors are sold in violation of law," etc., there can be no doubt of the legislative purpose that the act is applicable to any place where intoxicating liquors are unlawfully sold, irrespective of the manner of sale, whether conducted secretly or openly.

Much stress is laid upon the use of the words "blind tiger," as indicating a restriction of the act to places where intoxicants are furtively sold, and the exclusion of places where intoxicating liquors are sold in open defiance of law. We do not think that the use of the term "blind tiger" in the body of the act narrows the scope of the title. The term "blind tiger" is a colloquialism, or slang expression. In some instances it is applied to the vendor of the liquor; in others it is used to describe the place of sale; and in still other instances it is employed to characterize the device of the vendor in effecting the sale. In our statute the term is used in its generic sense. If the applicability of the statute was confined to places where intoxicants were secretly sold, why the language of the statute that it applies to "any place commonly known as a 'blind tiger,' where spirituous, malt or intoxicating liquors are sold in violation of law"? The descriptive words after the term "blind tiger" are definitive of the meaning of the slang expression.

And as said by Cobb, J., in *Legg v. Anderson*, supra, in discussing this statute: "A law having for its purpose the suppression of an acknowledged existing evil, which is destructive of the public peace and order as well as the welfare and happiness of individuals, should not, of all laws, be frittered away by construction." In that case the provision of the act was held to apply, so as to enjoin the defendant from maintaining a blind tiger upon the premises used by him as a livery stable.

The trial court's construction of the statute was predicated upon certain expressions appearing in the majority opinion in *Cannon v. Merry*, 116 Ga. 291, 42 S. E. 274, as appears from his opinion overruling the motion for new trial. In that case a dispensary for the sale of intoxicating liquors was being operated under an ordinance of the town of Pelham. The mayor and council contended that the charter of the town authorized the enactment of the ordinance. Certain citizens denied the legality of this contention, and brought their action under this statute to enjoin the mayor and council from operating the dispensary. It is true that, in the discussion of the applicability of the act to the facts in the case, the justice delivering the opinion quoted from the *Standard Dictionary* a definition of a "blind tiger" as a place where intoxicating liquors are sold on the sly; yet it is apparent from the context that no precise definition of the term was intended, for he says: "Whatever a 'blind tiger,' as 'commonly known,' may be, we are quite sure that the dispensary in question, which was being openly and publicly operated in the town of Pelham, in pursuance of an ordinance of the town, which those engaged in operating the dispensary evidently thought to be valid, was not such a place as is commonly known as a blind tiger." The ground of decision, as made manifest in the syllabus, is that a public dispensary, operated under color of law, by public officials, in the honest belief of the legality of their action, was not subject to abatement under the blind tiger act. This was the point decided, and the definition from the *Standard Dictionary* was simply used as an illustration in the course of the argument.

In view of the foregoing discussion, the instruction was erroneous; and, as it related to a vital point in the case, a new trial must be had.

Judgment reversed. All the Justices concur.

(140 Ga. 44)

PARRISH v. O'NEAL.

(Supreme Court of Georgia. May 15, 1913.)

(Syllabus by the Court.)

BOUNDARIES (§ 52*)—PROCESSIONING—RETURN—DISMISSAL OF CASE.

On the application of J. B. O'Neal to have the lands adjoining his entire tract of land

(describing it) surveyed and marked anew, the processioners, with the county surveyor, traced and marked certain lines and made their return. Attached to the return was a plat alleged by them to have been made by the county surveyor, and duly certified by the latter, and which plat and certificate the report alleged "correctly represents said tract as marked out by said processioners and said surveyor." On the plat were written the words "Mrs. O'Neal." The certificate of the surveyor accompanying the plat was as follows: "I hereby certify that this plat correctly shows the lines marked anew and established around the land of Mrs. Helen O'Neal by the processioners appointed by the ordinary for that purpose, surveyed by me this August —, 1910. A. J. Stanaland, County Surveyor, Thomas County, Ga." On the trial of the case, the applicant offered the return of the processioners, including the plat and certificate of the surveyor, in evidence. The protestants objected to the return as evidence, and moved to dismiss it upon various grounds, among others, "that the return of the processioners does not show that the lines around the entire tract of J. B. O'Neal's land as applied for in his application were run at all and old lines marked anew around the whole tract." *Held*, the plat and certificate of the surveyor showing only that lines around the land of Mrs. Helen O'Neal were run, and not showing that any lines were run around the land of the applicant, the court erred in not sustaining the motion of protestant to rule the return out of evidence and to dismiss the case.

[Ed. Note.—For other cases, see *Boundaries*, Cent. Dig. §§ 263-260, 262, 263; Dec. Dig. § 52.*]

Error from Superior Court, Thomas County; W. E. Thomas, Judge.

Application by J. B. O'Neal to have lands surveyed and marked anew, and B. E. Parish protested. Judgment for applicant and protestant brings error. Reversed.

W. C. Snodgrass, Roscoe Luke, and Louis Moore, all of Thomasville, for plaintiff in error. Theo. Titus, of Thomasville, for defendant in error.

HILL, J. Judgment reversed. All the Justices concur.

(140 Ga. 55)

STALLINS v. SOUTHERN RY. CO.

(Supreme Court of Georgia. May 15, 1913.)

(*Syllabus by the Court.*)

1. TRIAL (§ 255*) — INSTRUCTIONS — DUTY TO REQUEST.

Where there is conflicting evidence as to the issue in the case, and one party also introduces a written statement made out of court by a witness who has testified on behalf of the other party, not as evidence of the truth of such statement, but for the purpose of impeaching the witness, it will not require a new trial if the court omits to charge that the statement so introduced should be considered by the jury solely for the purpose of impeaching the witness, in the absence of a request for such an instruction.

[Ed. Note.—For other cases, see *Trial*, Cent. Dig. §§ 627-641; Dec. Dig. § 255.*]

2. TRIAL (§ 307*) — DELIBERATION OF JURY — TAKING PAPERS TO JURY ROOM.

Where a written statement made out of court by a witness was admitted in evidence

for the purpose of impeaching such witness, and counsel for the party on whose behalf the witness had testified mistakenly objected to the allowing of such statement to be carried by the jury to their room, when they retired to consider the case, on the ground that such paper had not been introduced in evidence, permitting the paper to be carried out with them by the jury, over such an objection, furnished no ground for a new trial.

[Ed. Note.—For other cases, see *Trial*, Cent. Dig. §§ 732-737; Dec. Dig. § 307.*]

3. VERDICT AND DENIAL OF NEW TRIAL APPROVED.

The evidence was conflicting, but was sufficient to support the verdict, and there was no error in overruling the motion for a new trial.

Error from Superior Court, Fulton County; Geo. L. Bell, Judge.

Action by Ephraim Stallins against the Southern Railway Company. Judgment for defendant, and plaintiff brings error. Affirmed.

A. H. Davis, of Atlanta, for plaintiff in error. McDaniel & Black and Edgar A. Neely, all of Atlanta, for defendant in error.

LUMPKIN, J. [1] 1. The plaintiff claimed that, while in the service of the defendant, he had been hurt by reason of a sudden, negligent jerk given to what was called "a transfer car," which he was in the act of leaving. The defendant contended that there was no such jerk, but that the injury occurred by reason of the careless manner in which the plaintiff stepped from the car. A witness was introduced by the plaintiff, and testified as to the manner in which the transfer car was being operated, and the occurrence of the jerk when the plaintiff was injured. To impeach this witness, the defendant offered in evidence a written statement which had been made by another person, who was working with the plaintiff when he was injured, together with a writing signed by the witness for the plaintiff, entered on the same paper as the statement above mentioned, and adopting it, except in certain specified particulars. It conflicted with his testimony. When this paper was offered, objection was made to it; but upon the explanation of counsel for the defendant that the paper was not offered as the statement of the person who first signed it, but as the statement of the witness who had testified for the plaintiff, counsel for plaintiff said: "For that purpose I think it is admissible. I object to any statement made by any other person in that paper." The statement was thereupon admitted. Error was assigned because the court did not give instructions to the jury, limiting them to considering the statement in so far as it might tend to impeach or contradict the oral testimony of the witness, and in his charge gave no instruction to that effect. One ground of the motion for a new trial was based on this alleged error.

It has frequently been held by this court that, if evidence is admissible for any purpose, the fact that it is not admissible for all purposes furnishes no ground for its exclusion. *Nugent v. Watkins*, 129 Ga. 382, 58 S. E. 888; *McCommons v. Williams*, 131 Ga. 313, 319, 62 S. E. 230; *Becker v. Donaldson*, 133 Ga. 864, 67 S. E. 92. Where there is conflicting evidence as to the issue in a case, and certain evidence is also admitted for the purpose of impeaching a witness, it has been held not to be error requiring a reversal for the court to omit to charge on the subject of impeachment. *Brown v. McBride*, 129 Ga. 92 (7), 58 S. E. 702. Under such circumstances, where statements of a witness, not a party, made out of court, were introduced to impeach such witness, it has also been held not to require a reversal if the court omits to charge that the impeaching evidence should be considered by the jury solely for that purpose, and not as direct proof, in the absence of a request for that purpose. *Long v. State*, 127 Ga. 350 (4), 56 S. E. 444.

The cases relied on by counsel for plaintiff in error to support the contrary contention are not in conflict with the decision last cited, when considered in connection with the facts involved. In *Watts v. Starr*, 86 Ga. 392, 12 S. E. 585, it was held that, though declarations made out of court by a witness (not a party to the case, or one whose admissions could affect the parties) may be used to impeach such witness, they cannot be treated as substantive evidence to establish the facts which they affirm, and a charge of the court so treating them, whether expressly or by necessary implication, is erroneous, and that such a charge is vicious, as based on an assumed state of facts, where this class of declaration is the only evidence to which it could apply. In *Central Railroad & Banking Co. v. Maltby*, 90 Ga. 630 (4), 16 S. E. 953, a similar ruling was made. In each of those cases there was no evidence as to a material fact, unless the statements of a witness made out of court, and which were admissible solely for the purpose of impeaching such witness, could be considered as direct proof of the fact. There was therefore no legal evidence of the fact in question, and it was error for the court to charge the jury on the assumption that there was such legal evidence, or in a manner to lead them to believe that this evidence, which was admitted solely for the purpose of impeachment, should be considered by them as affirmative proof of the fact in controversy. It will be readily seen that this is a very different proposition from holding as a general rule that an omission on the part of the judge to charge as to certain evidence admitted for purposes of impeachment, and the extent to which the jury could consider it, will require a rever-

sal, in the absence of a request for that purpose.

In the case before us the defendant introduced evidence to show that there was no jerk, and no such negligence on its part as the plaintiff alleged. In addition to that, it introduced a written statement, made out of court by a witness who had testified on behalf of the plaintiff, conflicting with some of his testimony. The charge of the judge did not direct the jury to consider the statement of the witness out of court as being direct proof of the substantive fact in issue, nor was it so expressed as to lead the jury to believe that they should so consider it, as in the cases above cited. Counsel for the plaintiff at no time requested the court to instruct the jury as to the extent to which they could consider the impeaching evidence.

In *Jones v. Harrell*, 110 Ga. 373, 35 S. E. 690, it was said that, where a witness denied making certain declarations, evidence tending to show that he did make them was admissible, not for the purpose of establishing the fact to which they related, but only to contradict him, "and the trial judge should so instruct the jury." On turning to that part of the opinion dealing with this subject (110 Ga. 381, 35 S. E. 690), it appears that a witness was asked if he had not told certain persons that he was the agent of his wife, and denied having done so. A witness was later introduced to show that he had so stated. Objection was made to this evidence. The objection was overruled, and the evidence was admitted for the purpose of contradicting the witness; "the judge remarking at the time that he would charge the jury as to the effect of it." This, however, he failed to do, and such failure was held to be error, which might have affected the finding, as the existence of the agency was a material fact in the case. It will be seen that the point as to the limitation upon the jury in considering this testimony was brought to the attention of the court, and that he recognized it, and stated that he would give the jury a proper instruction on the subject. It was accordingly unnecessary to further request that he should do so. The objecting party no doubt relied upon the statement of the court, and therefore did not make any request on the subject. The difference between that case and the one under consideration is plain.

It is the better practice for the presiding judge to instruct the jury as to the purpose for which evidence admitted solely to impeach a witness, such as statements made out of court conflicting with his testimony, may be considered. But it cannot be laid down as a general rule that an omission to do so will necessitate a reversal.

[2] 2. A written statement having been admitted in evidence for the purpose of impeaching a witness, there was no error in allowing the jury to take it to their room,

when they retired for the purpose of considering the case. Counsel objected to this on the ground that the paper had not been introduced in evidence; but, as he was in error in that position, the overruling of the objection furnished no ground for a new trial.

[3] 8. The evidence was conflicting, but was sufficient to support the verdict, and there was no error in overruling the motion for a new trial.

Judgment affirmed. All the Justices concur.

(140 Ga. 71)

BAILEY v. FREEMAN.

(Supreme Court of Georgia. May 16, 1913.)

(*Syllabus by the Court.*)

LIMITATION OF ACTIONS (§ 180*)—PLEADING (§ 34*)—CONSTRUCTION—DEMURRER.

This case is substantially controlled by the decisions in *Bennett v. Bird*, 76 S. E. 568 (November 18, 1912), and *Spence v. Queen*, 77 S. E. 820 (March 1, 1913). The demands sought to be asserted were barred by the statute of limitations; and, where not expressly so appearing, the pleadings must be construed most strongly against the pleader. While the word "fraud" was freely used, no such facts were alleged as showed fraud preventing the discovery of plaintiff's rights by the use of the slightest diligence on her part, or the bringing of suit by her within the statutory period. There was accordingly no error in dismissing the petition on demurrer setting up the bar of the statute.

[Ed. Note.—For other cases, see *Limitation of Actions*, Cent. Dig. §§ 670-675, 681; Dec. Dig. § 180;* *Pleading*, Cent. Dig. §§ 5½, 66-74; Dec. Dig. § 34.*]

Error from Superior Court, Laurens County; K. J. Hawkins, Judge.

Action by Emma Bailey against H. B. Freeman. Judgment for defendant, and plaintiff brings error. Affirmed.

R. Earl Camp, of Dublin, for plaintiff in error. J. S. Adams, M. H. Blackshear, and R. D. Flynt, all of Dublin, for defendant in error.

LUMPKIN, J. Judgment affirmed. All the Justices concur.

(140 Ga. 70)

FOUNTAIN v. HAGAN GAS ENGINE & MFG. CO.

(Supreme Court of Georgia. May 16, 1913.)

(*Syllabus by the Court.*)

1. EVIDENCE (§ 450*)—SALES (§ 279*)—PAROL CONTRACT OF SALE—CONSTRUCTION—"ELECTRIC OUTFIT."

The defendant sold to the plaintiff, under a written contract, an engine, pump, tank, "electric outfit," certain piping, and a grinder and boiler. In the contract it was provided that "the material and workmanship of the above is guaranteed to be good, and the engine, when installed and run according to your [the seller's] instructions, shall develop the horse power named above. This guaranty is

good for six months, but does not apply to batteries." The purchaser afterward sued the seller, alleging that the latter had sold to him a storage battery, claiming that it had a capacity of 15 lights for 3 hours, and that the plaintiff paid therefor; that after the battery was put to work it was found that it only had a capacity of 6 lights for 3 hours. The plaintiff accordingly brought suit for damages, on the ground that the property was not of the character which he bought. *Held*, that the expression "electric outfit," as used in the written contract, was ambiguous, and was subject to explanation by parol. It was accordingly error to reject parol testimony offered for the purpose of showing what the parties to the contract included in that expression.

(a) The statement that the guaranty of the engine was good for six months, but did not apply to batteries, merely excluded the application of the six-months guaranty from applying to the batteries, and did not mean that the seller could install different batteries from those which he contracted to sell.

[Ed. Note.—For other cases, see *Evidence*, Cent. Dig. §§ 2066-2082, 2084; Dec. Dig. § 450;* *Sales*, Cent. Dig. §§ 783-792; Dec. Dig. § 279.*]

2. APPEAL AND ERROR (§ 843*)—DISPOSITION OF CAUSE—DIRECTION OF VERDICT—EXCLUSION OF EVIDENCE.

Having ruled out evidence, which was admissible and material, offered on behalf of the plaintiff, it was error to direct a verdict against him.

(a) Inasmuch as the court rejected material evidence, which was essential to the proof of the case by the plaintiff, it is not decided whether a prima facie case would have been made, had the plaintiff been allowed to introduce all legitimate evidence, or whether it would have been subject to a motion for nonsuit.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 2999, 3011; Dec. Dig. § 843.*]

Error from Superior Court, Taylor County; S. P. Gilbert, Judge.

Action by T. J. Fountain against the Hagan Gas Engine & Manufacturing Company. Judgment for defendant, and plaintiff brings error. Reversed.

C. W. Foy, of Butler, and Jere M. Moore, of Montezuma, for plaintiff in error. Carson & McCutchen, of Columbus, for defendant in error.

LUMPKIN, J. Judgment reversed. All the Justices concur.

(140 Ga. 80)

SMITH v. MURPHEY.

(Supreme Court of Georgia. May 16, 1913.)

(*Syllabus by the Court.*)

EXECUTION (§ 171*)—INJUNCTION—GROUNDS.

An equity petition does not lie to enjoin proceedings under a levy, where the defendant in execution has a complete and adequate remedy by illegality, or where the defendant's homestead rights in the property levied on may be as completely asserted in a statutory claim.

[Ed. Note.—For other cases, see *Execution*, Cent. Dig. §§ 497-518; Dec. Dig. § 171.*]

Error from Superior Court, Floyd County; John W. Maddox, Judge.

Suit by M. M. Murphey against J. M. Smith. Judgment for plaintiff, and defendant brings error. Reversed.

M. B. Eubanks, of Rome, for plaintiff in error. John W. Bale, of Rome, for defendant in error.

EVANS, P. J. A fl. fa. issuing on a judgment obtained by John M. Smith against Mary Miller and Rosa Miller was levied on a lot of land as the property of Mary Miller (now Mary Murphey), and she sought to enjoin its further progress. The grounds assigned for equitable interference were: That she alone was served with process in the suit (a return of non est inventus having been made as to the other defendant); that her codefendant has died, and that by virtue of the deed under which she holds the land the interest of her codefendant upon her death vested in petitioner; that she has been discharged in bankruptcy from the debt sought to be enforced; and that the land levied on was duly set apart to her, over the creditor's objection, as an exemption by the bankrupt court.

If the judgment debt of the moving creditor has been discharged in bankruptcy, this defense can be met by affidavit of illegality. *Monroe v. Security Mutual Life Insurance Co.*, 127 Ga. 550, 56 S. E. 764. The moving creditor contends that the debtor's discharge in bankruptcy did not affect his judgment, which was a foreclosure of a materialman's lien on the land; that, though his judgment was obtained within four months of the adjudication of bankruptcy, nevertheless the materials were furnished and his claim of lien recorded more than four months before the adjudication. To this contention the petitioner replies that a debt for materials furnished for the improvement of property subsequently set apart as a homestead, when reduced to judgment, will not subject the homestead estate (*Wilder v. Frederick*, 67 Ga. 669); that an exemption set apart by the bankrupt court is no more subject to be levied on than if the exemption had been allowed as a homestead by the ordinary of the county (*Ross v. Worsham*, 65 Ga. 624; *Evans v. Rounsaville*, 115 Ga. 684, 42 S. E. 100); and that, moreover, it had been adjudicated by the United States court that the exempted property was not subject to the creditor's judgment. Even if the exemption of the land from levy and sale could not be set up by illegality, it certainly could be asserted by a statutory claim. *Brantley v. Stephens*, 77 Ga. 467.

The rule is that equity will not entertain a petition to enjoin the levy of a fl. fa., if the defendant has a full and adequate legal remedy. *Booth v. Mohr*, 122 Ga. 333, 50 S. E. 173; *Hitchcock v. Culver*, 107 Ga. 184, 33 S. E. 35. It was therefore erroneous to grant an interlocutory injunction restraining

the creditor from further proceeding with the levy of his execution.

Judgment reversed. All the Justices concur.

(12 Ga. App. 735)

LINAM et al. v. ANDERSON (two cases).

(Nos. 4,459, 4,615.)

(Court of Appeals of Georgia. May 20, 1913. Rehearing Denied June 10, 1913.)

(Syllabus by the Court.)

1. PLEADING (§ 205*) — PETITION — SUFFICIENCY.

The demurrer to the petition was without merit.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 491-493, 495, 496, 498-510; Dec. Dig. § 205.*]

2. BILLS AND NOTES (§ 129*)—PREMATURE ACTION—WAIVER.

Where a note contains a condition that a failure to pay any installment of interest when due gives to the holder thereof the right, at his election, to declare the note due and payable, the acceptance of a payment on the principal of the note before the note is due does not, without an agreement to that effect, prevent the holder from subsequently exercising the option above stated.

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. §§ 283-292; Dec. Dig. § 129.*]

3. BILLS AND NOTES (§ 126*)—CONSTRUCTION—ATTORNEY FEE.

Where a note provides for the payment of 10 per cent. on principal and interest as attorney's fees in the event the note is placed in the hands of an attorney for collection, on giving the statutory notice the plaintiff would have the right to recover this amount as attorney's fees, although the note had not matured by lapse of time, but had been declared due by the plaintiff, according to its terms, on failure to pay an installment of interest when due.

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. §§ 272, 273; Dec. Dig. § 126.*]

4. PLEADING (§§ 205, 223*)—DEMURRER—JUDGMENT—CONSTRUCTION—PLEA IN ABATEMENT—SUFFICIENCY.

When a plea in abatement is demurred to on both general and special grounds, and the trial court renders a judgment thereon in the following language: "This demurrer is sustained and the plea in abatement is stricken"—this judgment will be construed as applicable only to the questions raised by the general demurrer, and the questions raised by the special demurrer will be regarded as not adjudicated. The allegations of the plea in abatement, setting up that the plaintiff had made an agreement with defendants, in consideration of the payment by them of \$500 on the note before the same was due, to waive the condition of the note giving the right at the election of the holder to declare the note matured upon a failure to pay any installment of interest when due, were sufficient to withstand a general demurrer.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 491-493, 495, 496, 498-510, 568; Dec. Dig. §§ 205, 223.*]

5. BILLS AND NOTES (§ 135*)—CONSTRUCTION—CONFLICT BETWEEN NOTE AND DEED.

A condition in a promissory note that, in the event any of the "interest coupons, or any part thereof, remain unpaid for the space of thirty days after the same shall have become due and payable, then the entire principal, with

all arrearages of interest, shall immediately become due and collectible, at the option of the holder of this note," and a condition in a deed given to secure the payment of the note that "if any of said interest coupons should not be promptly paid at its maturity, or should any tax or assessment accruing against said property become delinquent or liable to have execution issued therefor, then and in either of said events said principal note, together with all arrearages of interest thereon, shall at once become due and collectible at the option of the holder thereof," are not in conflict. But even if so, the condition of the note would prevail, and in the present case the principal note was declared due and collectible under the condition above referred to as set out in the note.

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. § 332; Dec. Dig. § 135.*]

6. PLEADING (§ 194*)—DEMURRER TO ANSWER.

The allegations made by the answer were wholly irrelevant and immaterial, setting forth no defense whatever to the suit on the note, and therefore the answer was properly stricken on demurrer.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 444, 445, 446, 449-452; Dec. Dig. § 194.*]

7. JUDGMENT (§ 253*)—CONFORMITY TO PLEADING—AMOUNT DEMANDED.

The evidence demanded the verdict as directed; and the judgment entered thereon, both in form and substance, was in accordance with the pleading and the proof.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 443, 444; Dec. Dig. § 253.*]

(Additional Syllabus by Editorial Staff.)

8. ABATEMENT AND REVIVAL (§ 81*)—TIME OF FILING.

A plea in abatement, alleging that the suit was prematurely brought, being a dilatory plea, was too late when not filed until after the lapse of three terms.

[Ed. Note.—For other cases, see Abatement and Revival, Cent. Dig. §§ 10, 22, 175-177, 225, 499-504, 506; Dec. Dig. § 81.*]

9. PAYMENT (§ 60*)—PLEADING.

A plea of payment, which fails to allege when, how, and to whom payment was made is demurrable.

[Ed. Note.—For other cases, see Payment, Cent. Dig. §§ 144-148; Dec. Dig. § 60.*]

Russell, J., dissenting in case No. 4,615.

Error from City Court of Atlanta; H. M. Reid, Judge.

Two actions by Laura D. Anderson against G. W. Linam and others. Judgments for plaintiff, and defendants bring error. Reversed in part, and affirmed in part, with directions.

T. O. Hathcock and J. E. Golightly, both of Atlanta, for plaintiffs in error. Moore & Pomeroy, W. W. Hood, and R. F. Jones, all of Atlanta, for defendant in error.

HILL, C. J. This was a suit brought by Mrs. Laura D. Anderson against the defendants as makers of a promissory note; it being alleged in the petition that the defendants were indebted to the petitioner on said note in the principal sum of \$10,500, that the original principal sum of the note was for \$11,000, but that defendants had paid \$500

of the principal, which payment was credited on the note, leaving the balance of the principal due \$10,500. It was also alleged that the defendants were indebted to the petitioner in the sum of \$420 as interest on said principal sum up to February 23, 1912; that defendants had executed and delivered to petitioner interest coupon notes representing the interest to be earned upon the principal note; that the coupon note for \$420 sued on was originally for the sum of \$440, but that the payment of \$500 on the principal had reduced the interest represented by this coupon note to the sum of \$420. The principal note with the coupon note are made a part of the petition. It is also alleged that, according to the note and the deed to certain real estate therein described, which was given to secure the payment of the note, and the interest coupons, time was of the essence of the contract, and that a failure to pay any of the interest coupon notes when due, or to pay the taxes when due on the real estate described in the security deed, would result in the holder of the note having the option of declaring the whole principal due, and that the defendants had failed to pay the interest coupon note maturing February 23, 1912, and had likewise failed to pay the state and county taxes on the property described in the security deed referred to, for which reasons the principal note became due and was payable; and therefore suit is brought to recover the principal and the coupon note due February 23, 1912, and also 10 per cent. of the principal and interest as attorney's fees, under the stipulation of the note and the deed alleging that the statutory notice had been duly given as to attorney's fees. A demurrer was filed to the suit, which being overruled, exceptions pendente lite were preserved. Defendants also filed what was called a plea in abatement. This plea in abatement was demurred to generally, and specially. The trial judge sustained the demurrer and struck the plea, and this judgment was excepted to. The rulings in the lower court on the demurrer and on the plea in abatement were brought to this court by direct bill of exceptions. Subsequently the case was reached for trial on the merits in the lower court. A motion was made to strike the answer, and (there being no offer to amend after time had been allowed for amendment) the motion was sustained and the answer stricken; and thereupon a verdict was allowed against the defendants and in favor of the plaintiff, and judgment entered accordingly for the various sums sued for. To the judgment striking the answer and to the final judgment entered in the case, a writ of error was sued out to this court. Both cases are here now for review, and will be considered together.

We will endeavor to take up the questions raised by both records and decide them in

the order in which they were made in the court below.

[1] First, as to the demurrer. The first ground of the demurrer is that the petition sets forth no cause of action. This being a plain suit on a promissory note, and containing all the allegations essential in such a suit with copies of the note and of the security deed (a part of the same contract) attached to the petition as exhibits, it is manifest that this ground of the demurrer is without merit.

[2] The second ground of the demurrer is that there was a change in the contract because \$500 had been paid on the principal of the note; in other words, that the payment of the \$500 on the principal changed the original contract to the extent of eliminating therefrom the right to declare the principal due on a failure to pay any of the coupon notes when due. This ground of the demurrer is manifestly without merit. We fail absolutely to understand why, as a matter of law, payment of any part of a note before due, by mutual consent of the parties thereto, in any manner affects or alters the terms of the original note or the character of the contract. The only effect such payment could have would be simply to reduce the principal of the note in accordance with payment made thereon; and in the present case the payment of \$500 reduced the principal of the note from \$11,000 to \$10,500 and also necessarily reduced in proportion the amount of the outstanding coupon notes.

The third ground of the demurrer is that the interest coupon due February, 1911, has been paid, and no judgment is prayed against defendants on said coupon note. We do not see the relevancy or materiality of this ground of the demurrer. It is true that the coupon note due February, 1911, had been paid, and therefore no judgment is asked for as to this, but why this fact should furnish any reason in law why the plaintiff would not have the right to declare the principal due upon the failure to pay a subsequent coupon note according to the contract is not apparent.

[3] The fourth ground of the demurrer is that attorney's fees are recoverable only where the defendants fail to pay the note at maturity, and that the condition of the contract relating to the failure to pay interest represented by the coupon notes in giving the option to declare, for such failure, the principal amount of the note to be due, would not authorize the recovery of attorney's fees, but that such failure would only authorize the recovery of the principal and arrearages of interest. The note expressly provides: "If this note is not paid at maturity, and is put into the hands of a lawyer for collection, we severally and jointly agree to pay ten per cent. on principal and interest as attorney's fees." Under this clause of the contract, upon giving the statutory notice, the plaintiff would have a right to re-

cover attorney's fees, whether the note matured by lapse of time or by election of the plaintiff to declare it matured by failure to pay the interest as therein provided. In either event, if the plaintiff was compelled to bring suit to recover the amount of the note and interest, she would be entitled to attorney's fees. In other words, the right to recover attorney's fees depended entirely upon a failure to pay the note at maturity, whether that maturity was by lapse of time or at the election of the holder of the note, according to its terms. We therefore conclude that there was no error in overruling the demurrer.

[4] The plea in abatement is based upon the idea that the suit was brought prematurely, it being alleged: That "the plaintiff in this case has waived her right to sue on the note before maturity in this: that she did agree, on the 9th day of October, 1911, to receive, and did receive, not only \$440 and interest, the interest coupon note then due, but she received from these defendants \$500 in cash, which sum paid the interest on said note for over six months, and paid the interest due on February 23, 1912; and, having agreed with these defendants to waive the original condition of the note, and receiving the money in advance, she cannot now sue and recover on the note before its maturity, and she cannot recover especially on this note for the reason that all interest was duly paid October 9, 1911, and not only the interest paid to maturity, but \$500 was paid on the note 4½ months before the coupon interest note due February 23, 1912, became due, and because the plaintiff knew at the time these payments were made that they, the defendants, so believed, that no suit would be filed on this note until its final maturity, and this they did believe, and she knew they did believe it, and, acting on this belief, she accepted this sum of \$500, and she did not intend, at the time she accepted the \$500, to ever sue on the note before its maturity, and she did not at that time intend to claim a right to sue on the note by reason of the failure to pay the additional \$440 on February 23, 1912." General and special demurrers were filed to the plea in abatement, and the trial judge passed an order thereon in the following language: "This demurrer is sustained, and the plea in abatement is stricken." It is inferable from this order that only the questions raised by the general demurrer were decided. *Simpson v. Sanders*, 130 Ga. 271, 60 S. E. 541. Placing this construction upon the order, a majority of the court is of the opinion that the striking of the plea in abatement was erroneous, that the allegation therein made that, in consideration of the payment by defendants of the sum of \$500 on the note before the same was due (whether this payment was to be applied on the principal or in payment of the coupon note to become due February 23, 1912),

the plaintiff agreed to waive her right to declare the whole note matured upon a failure to pay any subsequent installment of interest when due was sufficient as against a general demurrer. The writer does not concur in this opinion. He thinks that the allegations are wholly insufficient to show any agreement, express or implied, to waive this condition of the note, and that the judgment dismissing the plea in abatement was correct. It may be that the trial judge dismissed the plea in abatement upon a consideration of all the questions raised by the demurrers, special and general. But in view of the general language of his order, and the absence of any evidence of an opportunity to amend, this court, following the decision in the Simpson Case, *supra*, must conclude that he struck the plea on general demurrer, and did not consider the questions raised by the special demurrers. This being true, we have no jurisdiction to pass upon these questions, and leave them for the determination of the trial court.

[5] The next ground of the plea in abatement is that: "The conditions in the note and the one set out in the deed are repugnant to each other, and there is no expressed condition in the entire contract making the note suable before maturity. The note and the security deed together not stating that a default in payment of interest or taxes would authorize a suit thereon—one stating that a suit might be brought at once, and the other in 30 days, and as they are in conflict with each other, these conditions in the note and deed are void, and will not authorize a suit before the maturity of the note." If there were any conflict in the conditions relating to this subject, the condition recited in the note would govern, for the principle is that where a deed is given to secure the payment of a note or bond, the two instruments being made at the same time, they are to be read and construed together as parts of the same transaction, and hence the terms of the one may explain or modify the terms of the other, and a stipulation of condition inserted in the one is an effective part of the contract of the parties, although not found in the other, provided there is no necessary inconsistency; but in respect to the terms of the debt or interest, or the time for its payment, if the note and mortgage contain conflicting provisions, the note will govern, as being the principal obligation. 27 Cyc. 1135. We do not think, however, that there is any necessary conflict between the terms of the note in this case and the terms of the deed made to secure the payment of the note. If the defendants sustain by proof the allegation of the plea in abatement, relating to the waiver of the plaintiff of the condition of the note, this would result in a dismissal of the suit because prematurely brought. If the plea is not sustained, the disposition made of the case by the trial court on the merits, and the judgment of this

court on the questions raised in that record, should end the litigation. We will now consider and decide these questions.

[8] First, the court disallowed an amendment to the plea which alleged, in substance, that the suit was begun prematurely, in that the coupon note for \$420, claimed as interest, and due February 23, 1912, on default of payment of which the principal had been declared due, had in fact been paid before the notice was served, and that there was no interest due on the note at the time same was sued on, and that the defendants were not delinquent in the payment of taxes or interest, as alleged in the petition. The matter of this amendment related to a plea in abatement, and should have been made a part of that plea when the same was before the court on demurrer. It was a dilatory plea which went, not to defeat the right of the plaintiff to recover, but merely to the right of the plaintiff to file suit at the time she did, and this plea should have been filed at the first term. It was not filed at the first term, but after a lapse of some three terms, and therefore it was too late. *Realty Co. v. Ellis*, 4 Ga. App. 402, 61 S. E. 832; *Johnson v. Dodge Mfg. Co.*, 7 Ga. App. 231, 66 S. E. 548; *Kilcrease v. Johnson*, 85 Ga. 600, 11 S. E. 870.

[9] Considered as a plea to the effect that the interest had been paid, as well as the taxes, the allegations are too vague and indefinite, and it was incumbent upon the pleader to relate when, how, to whom, and by whom the payment was made. *Thomas v. Slesel*, 2 Ga. App. 663, 58 S. E. 1131. A plea which falls to allege when, how, and to whom payment was made is properly stricken on demurrer. *Wortham v. Sinclair*, 98 Ga. 173, 25 S. E. 414.

[6] The writ of error further challenges the correctness of the striking of the defendants' answer on demurrer. This answer is quite voluminous, and the demurrer thereto is even more so. We have examined the answer and the demurrer very carefully, and we have come to the conclusion that the answer set up no defense, that the averments thereof are wholly irrelevant and immaterial, and that there is no error in the judgment striking the answer. The answer was clearly ambiguous, uncertain, evasive, irrelevant, and immaterial, going largely into transactions which had no pertinency to the suit on the note, or any defense thereto; and for these reasons the court did right in striking it. *A. C. L. R. Co. v. Hart Lumber Co.*, 2 Ga. App. 88, 58 S. E. 316; *Brinson v. Birge*, 102 Ga. 802, 30 S. E. 261.

[7] Error is next assigned upon the judgment, because it is said that the judgment is for \$10,920 principal, while the amount of the principal alleged in the petition was only \$10,500. It will be seen, by reference to the petition, that the suit is for a principal note which was originally for \$11,000, but that

a payment of \$500 had been made on this principal, which reduced it to \$10,500, for which suit was brought; that in addition to this, suit is also brought upon a coupon note of the denomination of \$440. This note reads: "On the 23d day of February, 1913, we, jointly and severally, promise to pay to the order of Laurie D. Anderson, four hundred and forty dollars, at Atlanta, Georgia, with interest at the rate of eight per cent. per annum after maturity," etc. The amount of this coupon note was reduced, by the payment of the \$500 on the principal, to the \$420 which was sued for. It follows, therefore, that the plaintiff claimed the principal of \$10,500, which had matured, and which bore interest from February 23, 1912, and likewise claimed the amount of the coupon note of \$420, which matured on the same day, also bearing interest from that date at 8 per cent. per annum, or a sum total of \$10,920, upon which principal sum the plaintiff was entitled to future interest at 8 per cent. per annum. It is wholly immaterial whether the sum represented by the \$420 coupon note be called principal or interest. It is all the same to the defendants whether called principal or interest. We think, under these facts, that the verdict and judgment in favor of the plaintiff was correct. *Union Savings Bank v. Dottenhelm*, 107 Ga. 606, 614, 34 S. E. 217; *Smith v. Champion*, 102 Ga. 92, 29 S. E. 160. In view of the fact, however, that the judgment striking the plea in abatement is reversed, the affirmance of the judgment striking the answer and directing a verdict and entering up judgment for the plaintiff will not be effective or made the judgment of the court below, unless the defendants fail to prove the allegations of the plea in abatement. If the plea in abatement is sustained, the suit will be dismissed as having been prematurely brought; if the plea in abatement is not sustained, then the judgment of affirmance in striking the answer and directing a verdict for the plaintiff will be made the judgment of the trial court.

Judgment reversed in part, and affirmed in part, with directions.

RUSSELL, J. (dissenting). This court considered together the two writs of error in the same case. In the first bill of exceptions error was assigned upon the ruling on the plea in abatement. After the trial judge had stricken the plea in abatement the case proceeded to trial, and the trial resulted in a judgment in favor of the plaintiff, and the defendants filed their bill of exceptions, complaining, among other things, of the overruling of their motion for new trial. A majority of this court is of the opinion that the judge erred in striking the plea in abatement, and I concur in this judgment. This ruling disposes of the first of the writs of error. I cannot agree to the conditional

judgment of affirmance rendered upon the second writ of error. I think it perfectly well settled that since the trial court erred in striking the plea in abatement, all subsequent proceedings in the trial were nugatory, and that the second bill of exceptions should be dismissed as having been prematurely brought. In my opinion, nothing is better settled than that, where a plea in abatement which would entirely bar a recovery has been filed, the issue therein raised must be legally determined before there can be an adjudication upon the merits of the case, unless, under the peculiar circumstances of the particular case, the plea in bar and the issue upon the merits can legally be tried together.

In a case such as the one before us this court cannot know what would have been the result if the issue formed by the plea in abatement had been tried. If upon the plea in abatement the defendants had prevailed, the result would have been that the suit would have ended. Since we cannot know what the result may be in the hearing which we now order upon the plea in abatement, we should not, in my opinion, prejudge, and perhaps prejudice, the rights of the plaintiffs in error in the second bill of exceptions, by denying to them what I consider they were legally entitled to—a trial upon the merits, after a legal adjudication upon the plea, which we hold should have been submitted to a jury.

(12 Ga. App. 305)

SMITH v. CITY OF ATLANTA. (No. 4,846.)
(Court of Appeals of Georgia. June 10, 1913.)

(Syllabus by the Court.)

SUFFICIENCY OF EVIDENCE.

No error of law is complained of, and the evidence authorized the judgment of conviction. It was therefore not error to overrule the certiorari.

Error from Superior Court, Fulton County; Geo. L. Bell, Judge.

W. C. Smith was convicted of an offense, and from denial of certiorari he brings error. Affirmed.

John Y. Smith, of Atlanta, for plaintiff in error. J. L. Mayson and W. D. Ellis, Jr., both of Atlanta, for defendant in error.

POTTLE, J. Judgment affirmed.

(12 Ga. App. 756)

HOLLEMAN v. GEORGIA S. & F. RY. CO.
(No. 4,719.)

(Court of Appeals of Georgia. June 10, 1913.)

(Syllabus by the Court.)

CARRIERS (§ 320*)—INJURY TO PASSENGER—EVIDENCE.

A passenger was unable to obtain a seat on a car on account of its crowded condition.

He asked the conductor for a seat, and the conductor replied that there was no seat for him. The car was so crowded that he could get only a "little piece" in the door. While he was standing near the door, which was open, the car gave a sudden jerk, more severe than the ordinary jerk and harder than the ordinary jerk, and by reason of the jerk he lost his balance, and in endeavoring to regain it, and to keep from falling outside the door, he caught with his hand the facing of the door, which, by reason of the sudden jerk, slammed against the fingers of his hand, causing the injuries complained of. *Held*, these facts raised a presumption of negligence against the company, and in order to exculpate itself it should show that the jerk which was the proximate cause of the injury was either incident to the ordinary and usual operation of the train, or was the necessary result of its operation at the particular time. The court erred in granting a nonsuit.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 1118, 1126, 1149, 1153, 1160, 1167, 1179, 1190, 1217, 1233, 1244, 1248, 1315-1325; Dec. Dig. § 320.*]

Error from City Court of Macon; Robt. Hodges, Judge.

Action by C. L. Holleman against the Georgia Southern & Florida Railway Company. Judgment for defendant, and plaintiff brings error. Reversed.

O. C. Hancock, of Macon, for plaintiff in error. J. E. Hall, of Macon, for defendant in error.

HILL, C. J. Judgment reversed.

(12 Ga. App. 755)

DOUGLAS v. MOORE. (No. 4,721.)

(Court of Appeals of Georgia. June 10, 1913.)

(Syllabus by the Court.)

EVIDENCE (§ 265*)—EXECUTION (§ 194*)—CLAIM BY THIRD PERSON—ADMISSION OF POSSESSION—EFFECT—BURDEN OF PROOF—SUFFICIENCY OF EVIDENCE.

In a claim case, where the claimant admitted that at the time of the levy the possession of the personal property levied upon was in the defendant in execution, she thereby prima facie admitted title in the defendant, for possession of personalty indicates title thereto. By this admission the burden was cast upon the claimant to overcome this possessory title, by showing that the title to the property was in her before the judgment was obtained, and was still in her when the levy was made. In the present case this burden was successfully carried by the claimant, the undisputed evidence showing that the property levied upon was bought and paid for by her before the judgment was obtained, and that, while possession at the time of the levy was in the defendant, this possession was not in his own right, but that he held possession for the claimant. The verdict finding the property "not subject" was demanded by the evidence, and any error in the charge or in the admission of testimony was immaterial.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 1029-1050; Dec. Dig. § 265.* Execution, Cent. Dig. §§ 571-574; Dec. Dig. § 194.*]

Error from City Court of Columbus; G. Y. Tigner, Judge.

Claim case by D. D. Moore against J. E. Douglas, administratrix. Judgment for claimant, and the administratrix brings error. Affirmed.

McCutchen & Bowden, of Columbus, for plaintiff in error. T. T. Miller, of Columbus, for defendant in error.

HILL, C. J. Judgment affirmed.

(12 Ga. App. 793)

COLEMAN v. KEA. (No. 4,795.)

(Court of Appeals of Georgia. June 10, 1913.)

(Syllabus by the Court.)

1. EVIDENCE (§ 450*)—SALES (§ 179*)—PAROL EVIDENCE—AMBIGUOUS CONTRACT—ACCEPTANCE.

A written contract to furnish "lumber enough to build one dwelling house" is ambiguous; and it is competent to show by parol that the parties had in mind a particular dwelling house, which they estimated would require not exceeding a given quantity of lumber. If more than this quantity is delivered and accepted, the party receiving it is bound to pay for the excess.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 2066-2082, 2084; Dec. Dig. § 450.* Sales, Cent. Dig. §§ 456-468; Dec. Dig. § 179.*]

2. VERDICT AND DENIAL OF NEW TRIAL SUSTAINED.

The evidence fully authorized the verdict rendered, and there was no error of law requiring a new trial.

Error from City Court of Swainsboro; H. R. Daniel, Judge.

Action between A. D. Coleman and W. C. Kea. Judgment for Kea, and Coleman brings error. Affirmed.

Williams & Bradley, of Swainsboro, for plaintiff in error. S. J. Tyson and F. H. Saffold, both of Swainsboro, for defendant in error.

POTTLE, J. Judgment affirmed.

(123 N. C. 352)

McCALL v. GALLOWAY.

(Supreme Court of North Carolina. May 23, 1913.)

1. APPEAL AND ERROR (§ 213*)—PRESENTATION OF GROUNDS OF REVIEW IN COURT BELOW—NECESSITY.

If the issues framed are defective or insufficient, the party excepting must lay the proper foundation for an appeal by suggesting proper corrections at the time.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1149, 1165, 1304-1308; Dec. Dig. § 213.*]

2. HUSBAND AND WIFE (§ 348*)—CRIMINAL CONVERSATION—ACTIONS—EVIDENCE.

In an action for criminal conversation, evidence of acts of intimacy between defendant and plaintiff's wife subsequent to the time the action was brought is admissible in corrobora-

tion of the proof of the relations prior to the commencement of the action.

[Ed. Note.—For other cases, see *Husband and Wife*, Cent. Dig. §§ 1132, 1133; Dec. Dig. § 348.*]

3. WITNESSES (§ 58*) — COMPETENCY — HUSBAND AND WIFE.

Under Revisal 1905, § 1636, providing that nothing shall render any husband or wife competent to give testimony in any action on account of criminal conversation, the wife is incompetent to testify against her husband in such an action.

[Ed. Note.—For other cases, see *Witnesses*, Cent. Dig. §§ 159½-162, 164; Dec. Dig. § 58.*]

Appeal from Superior Court, Transylvania County; Long, Judge.

Action by J. B. McCall against M. W. Galloway. From a judgment for plaintiff, defendant appeals. Affirmed.

The case was tried upon these issues:

"(1) Did the defendant, M. W. Galloway, unlawfully entice the plaintiff's wife from him and unlawfully and licentiously debauch and carnally know her, as alleged in the complaint? Answer: Yes.

"(2) What damages, if any, has the plaintiff sustained by reason of the defendant's alleged wrongful acts? Answer: \$500."

From the judgment rendered, the defendant appealed.

Welch Galloway and W. W. Zachary, both of Brevard, for appellant. Geo. A. Shuford, of Asheville, D. L. English, of Brevard, and Manning & Kitchin, of Raleigh, for appellee.

BROWN, J. There is evidence in the record sufficient to be submitted to the jury tending to establish the allegations of the complaint. It is unnecessary and will serve no good purpose to set it out.

[1] The defendant excepted to the issues, but tendered no others. If the issues framed by the court are deemed insufficient to develop the case, the party prejudiced thereby must lay the foundation for an exception and appeal by suggesting the proper corrections at the time. *Moore v. Hill*, 85 N. C. 218; *Robinson v. Sampson*, 121 N. C. 99, 28 S. E. 189. The defendant, having failed to tender such issues as he deemed essential, cannot now assign as error the failure of the court to submit such issues. *Clark's Code*, § 391, and cases cited. The issues submitted by the court are the real issues raised by the pleadings and were properly submitted. Under them the defendant had opportunity to submit any evidence pertinent and competent in his defense.

[2] Exception is taken to the ruling of his honor in admitting the testimony of Tom Loftis, a witness for the plaintiff, as to acts of intimacy between plaintiff's wife and defendant subsequent to the time the action was brought. This evidence was admitted only as corroborative of the principal allegation and to be considered by the jury only

as it may tend to corroborate the proof as to the relations of the defendant and plaintiff's wife prior to the commencement of the action. We see no error in this.

[3] The defendant contends that the court erred in excluding the following evidence contained in the deposition of Mrs. J. P. Malley: "Did you ever hear Mrs. Etta McCall, wife of J. B. McCall, while in the presence of her husband, make any statement in regard to the suit pending between her husband and M. W. Galloway? Answer: Yes."

The plaintiff in apt time objected to the foregoing question and answer. The objection was sustained, and the defendant excepted.

Question 20 in said deposition was as follows: "Please give, as nearly as you can, what the conversation was and all that she said in his presence to you about this case? Answer: Mrs. McCall told him in my presence that she was not going into court and swear to any pack of lies for him or anybody else; that she had heard all about swearing for him that she wanted to hear; and that she would die before she would be made to do such a thing. She said further that he had made her go before the clerk of the court and swear enough to send her soul to hell, if she had been held accountable for it." Of course the declarations and conduct of the defendant are competent against him, but as we construe this it is intended solely to put in evidence the declarations of the wife as against the husband, and it is therefore incompetent. This court said in *Grant v. Mitchell*, 156 N. C. 15, 71 S. E. 1087, Ann. Cas. 1912D, 1119, that, in an action brought by the husband for damages for criminal conversation with his wife, "the wife was incompetent as a witness for or against the husband at common law. The statute [Revisal, § 1636] removes this disability in certain actions, but specifies those actions in which she cannot testify, and as to the one under consideration, 'on account of criminal conversation,' says: 'Nothing herein shall render any husband or wife competent or compellable to give evidence for or against the other, in any action or proceeding on account of criminal conversation.'" There are several other assignments of error which it is unnecessary to consider.

We have examined the entire record and find no error.

(152 N. C. 324)

DIXIE FIRE INS. CO. v. AMERICAN BONDING CO.

(Supreme Court of North Carolina. May 28, 1913.)

1. TRIAL (§ 350*)—SPECIAL ISSUES—SUFFICIENCY.

Where the issues submitted embraced the controverted facts set out in the pleadings and afforded defendant an opportunity to make

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

every possible defense, they were not subject to exception.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 828-833; Dec. Dig. § 350.*]

2. INSURANCE (§ 147*)—CONSTRUCTION—LAW GOVERNING.

Where, as required by a contract between an insurance company and its general agent in Illinois, he procured from a bonding company a bond indemnifying the insurance company against loss through his embezzlement or default, which when executed was intended to be transmitted and delivered to the insurance company for its approval, and which was approved and accepted by it at its home office in this state, the bond was to be construed and enforced under the laws of this state, and hence in an action thereon it was immaterial whether there had been any breach under the laws of Illinois.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. § 293; Dec. Dig. § 147.*]

3. EMBEZZLEMENT (§ 14*)—ACTS CONSTITUTING.

Fraudulent and felonious conversion of a principal's money by an agent to his own use constitutes "embezzlement" under the laws of this state.

[Ed. Note.—For other cases, see Embezzlement, Cent. Dig. §§ 13-15; Dec. Dig. § 14.*]

For other definitions, see Words and Phrases, vol. 3, pp. 2350-2358; vol. 8, p. 7649.]

4. INSURANCE (§ 668*)—NOTICE TO INDEMNITOR—QUESTIONS OF LAW OR FACT.

Whether a delay of five days by an employer in giving notice of an employé's embezzlement to a company which had agreed to indemnify it against such embezzlement after the employer learned thereof was an unreasonable delay was a question of law for the court.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 1556, 1732-1770; Dec. Dig. § 668.*]

5. INSURANCE (§ 539*)—NOTICE TO INDEMNITOR—FAILURE TO GIVE—EFFECT.

Where a bond given to indemnify an employer against the embezzlement or default of an employé expressly provided that the failure to comply with some of its provisions should render it void, but did not so provide with reference to a provision requiring immediate notice by telegraph and in writing of the discovery of any default or loss, and such provision was not made a condition or express warranty, the failure to give immediate notice by telegraph did not relieve the indemnitor of liability, where written notice was given five days after discovery of the default.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 1322-1336; Dec. Dig. § 539.*]

6. INSURANCE (§ 622*)—CONTRACT LIMITATIONS—STATUTORY PROVISIONS.

Where a bond given to an insurance company in this state to indemnify it against the embezzlement or default of an agent provided that no suit or proceeding at law or in equity should be brought against the surety after the expiration of six months from the end of the time during which, under the bond, the employer's claim might be filed with the surety, and also provided that the employé should have 30 days within which to make good any loss sustained by the employer, an action on the bond was properly brought within one year and 30 days after the discovery of the employé's default, under Revisal 1906, § 4809, providing that no insurance company authorized to do business in this state shall make any condition or stipulation in its contracts limiting the time within which suit or action may

be commenced thereon to less than one year after the cause of action accrues.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 1540, 1544-1550; Dec. Dig. § 622.*]

7. INSURANCE (§ 616½*)—CONCLUSIVENESS OF JUDGMENT AGAINST PRINCIPAL AS AGAINST INDEMNITOR.

In an action on an employer's indemnity bond against the indemnitor, a judgment against the employé for the employer's loss due to the employé's embezzlement or default was admissible but was prima facie evidence only of the amount of the indemnitor's liability and might be impeached by it for fraud, collusion, or mistake.

[Ed. Note.—For other cases, see Insurance, Dec. Dig. § 616½; Judgment, Cent. Dig. § 1224.]

8. EVIDENCE (§ 252*)—ADMISSIONS—PRINCIPAL AND SURETY.

In an action on a bond given to indemnify an employer against the default or embezzlement of an employé, the declarations of the employé after the employment was terminated were not admissible against the indemnitor, since they were not part of the res gestæ, and the admissions of the principal are receivable against a surety only when made during the transaction of the business for which the surety is bound so as to become a part of the res gestæ.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 980-993; Dec. Dig. § 252.*]

9. TRIAL (§ 191*)—INSTRUCTIONS—ASSUMING FACTS TO HAVE BEEN PROVEN.

In an action on an employer's indemnity bond, where the fact of the employé's embezzlement was not admitted, and there was only prima facie evidence of the amount, the court erred in charging that there was no controversy about the fact of embezzlement, and the only question was whether it was with a fraudulent intent.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 420-431, 435; Dec. Dig. § 191.*]

Appeal from Superior Court, Guilford County; Peebles, Judge.

Action by the Dixie Fire Insurance Company against the American Bonding Company and another. Judgment for plaintiff, and the defendant named appeals. New trial ordered.

The indemnity bond provided that the employer should, at the surety's expense, immediately give the surety notice by telegraph addressed to the surety at its office in the city of Baltimore, and in writing by registered letter addressed in like manner, of the discovery of any default or loss thereunder, and should give full particulars thereof as soon as practicable.

Civil action tried at January term, 1913, upon these issues:

"(1) Did the defendant L. S. MacEnaney, while acting as general agent of the plaintiff, collect and receive as such agent, for and on behalf of the plaintiff, the sum of \$5,007.21 between the 1st day of February, 1909, and the 1st day of February, 1910, and fraudulently convert the same to his own use as alleged in the complaint? Answer: Yes.

"(2) Was the defendant L. S. MacEnaney

gully of larceny or embezzlement under the laws of the state of Illinois by reason of the acts and things alleged in the complaint? Answer: No.

"(3) Is the plaintiff's cause of action barred by the statute of limitations? Answer: No.

"(4) What amount, if any, is the plaintiff entitled to recover of the American Bonding Company of Baltimore on account of its general fidelity bond herein sued upon, executed and delivered to the plaintiff on the 24th day of April, 1909? Answer: \$5,007.21, and interest from March 4, 1910."

From the judgment rendered, the defendant American Bonding Company appealed.

Alfred S. Wylie and Thos. J. Shaw, both of Greensboro, for appellant. Brooks, Sapp & Hall, of Greensboro, for appellee.

BROWN, J. The facts, briefly stated, are that on the 23d day of April, 1909, L. S. MacEnaney, a resident of the city of Chicago, entered into an agreement with the Dixie Fire Insurance Company, of Greensboro, N. C., whereby he became the general agent for said company in the states of Illinois and Indiana for the purpose of writing and effecting fire insurance and collecting premiums and remitting same to the Dixie Fire Insurance Company at its home office in the city of Greensboro. In said written contract of agency it was provided that the agent MacEnaney furnish to the Dixie Fire Insurance Company a bond in the sum of \$10,000 in some guaranty company acceptable to the said Dixie Fire Insurance Company for the faithful performance of his duties under the contract. MacEnaney applied to the American Bonding Company of Baltimore for a fidelity bond, and the same was executed by said bonding company and delivered to MacEnaney to be transmitted to the Dixie Fire Insurance Company, at its home office in the city of Greensboro, for its approval, which said bond the Dixie received, inspected, and approved. The bond covered a period from the 1st day of February, 1909, to the 1st day of February, 1910, and provided, among other things: "That if the employé shall in the position of general agent in the employer's service make good to the employer within 30 days any loss sustained to the employer by larceny or embezzlement committed by the employé during the term commencing on the 1st day of February, 1909, at 12 o'clock noon, and ending on the 1st day of February, 1910, at 12 o'clock noon, this obligation shall be null and void, otherwise in full force and effect."

This action is brought to recover for a breach of the bond. We will not consider *seriatim* the 35 assignments of error, but only such as we regard as pertinent in determining the real points of controversy.

[1] 1. There is no merit in the exception to the issues. Those submitted embrace the controverted facts set out in the pleadings,

and under them the defendant had opportunity to make every possible defense. *McCall v. Galloway*, 78 S. E. 429, this term; *Clark's Code*, § 391.

[2] 2. The indemnity bond is a contract solvable in North Carolina and is to be construed and enforced under the laws of that state. The bond was a species of indemnity insurance in which the plaintiff was the beneficiary, taken out for its benefit, and not for the benefit of its agency. It may have been taken out by MacEnaney in Chicago but it was intended by defendant that it should be transmitted and delivered to plaintiff at its general offices in Greensboro, N. C.

It is provided in the written contract creating MacEnaney an agent of the Dixie Fire Insurance Company that MacEnaney shall furnish a general fidelity bond satisfactory to the company, and the evidence is undisputed that MacEnaney obtained the bond from defendant and sent it to the Dixie Fire Insurance Company, at its home office in the city of Greensboro, where and when it approved and accepted same.

This state is therefore the *locus pro solutione* and the *locus celebrationis* of the contract. *Pritchard v. Norton*, 106 U. S. 124, 1 Sup. Ct. 102, 27 L. Ed. 104; *Bell v. Packard*, 69 Me. 105, 81 Am. Rep. 251; *Dickinson v. Edwards*, 77 N. Y. 573, 33 Am. Rep. 671; *American Mortgage Co. v. Jefferson*, 69 Miss. 770, 12 South. 464, 30 Am. St. Rep. 537; *Scott v. Perlee*, 39 Ohio St. 63, 48 Am. Rep. 421; *Milliken v. Pratt*, 125 Mass. 374, 28 Am. Rep. 241; *Hill v. Chase*, 143 Mass. 129, 9 N. E. 30; *Bell v. Packard*, 69 Me. 105, 81 Am. Rep. 251.

Milliken v. Pratt, *supra*, is a case which we think is directly in point; the facts in this case being that the plaintiff resided in Portland, Me., and the defendant was the wife of Daniel Pratt and resided with her husband in Massachusetts. He (Daniel Pratt) asked credit of the plaintiffs, and they required a guaranty, which he procured, and had the defendant, his wife, to execute the same at her home in Massachusetts, and there delivered it to her husband, who sent it by mail from Massachusetts to the plaintiff in Portland. The plaintiffs received it from the post office in Portland. Chief Justice Gray, in discussing the *locus celebrationis*, used the following language: "The contract between the defendant and plaintiffs was complete when the guaranty had been received and acted on by them at Portland, and not before. * * * It must therefore be treated as made and to be performed in the state of Maine"—citing cases to sustain this position.

In *Minor on Conflict of Laws*, p. 372, this rule is laid down: "Notes, deeds and other contracts of that character do not become completed and binding contracts merely by the fact of the promisor's signing them. They must also be delivered. Hence, if the

signing occurs in one state, while the delivery takes place in another, the latter state, not the former, is the *locus celebrationis*."

Having concluded that this state is the place where the contract is to be construed and performed according to the plain intention of the parties, it necessarily follows that it is immaterial to inquire whether under the laws of Illinois a breach of the bond has been proven.

[3] There is evidence sufficient to be submitted to a jury that plaintiff's agent MacEnaney fraudulently and feloniously converted to his own use the sum of \$5,007.21 of plaintiff's money, as found by the jury under the first issue. This constituted embezzlement under the law of this state. *State v. McDonald*, 133 N. C. 682, 45 S. E. 582.

[4, 5] 3. The cause of action is not barred for failure to give notice to defendant under section 8 of the contract. The evidence was undisputed that the first information plaintiff had of the defendant's having collected the amount in controversy for and on behalf of the company and refused to make good to it the amount so collected was on the 20th day of January, 1910, and that on the 25th day of the same month the bonding company was notified by letter of the default of the agent MacEnaney. The facts being undisputed, it became a question of law to be passed upon by the court as to whether or not the delay of five days in notifying the bonding company was unreasonable. *May on Ins.* § 482; *Joyce on Ins.* § 229.

In *Perpetual Building, etc., Co. v. Fidelity, etc., Co.*, 118 Iowa, 729, 82 N. W. 696, it is held that: "A delay of six or eight days in notifying a surety company of an employee's default, where no prejudice resulted, was not, as a matter of law, a violation of the condition of the bond requiring immediate notice." *Employers' Liab. Ass'n v. Heat & Power Co.*, 28 Ind. App. 487, 63 N. E. 54; *American Fire Ins. Co. v. Hazen*, 110 Pa. 590, 1 Atl. 605. This provision of the contract stating that the employer shall give the surety immediate notice is not of a character to avoid the entire contract, unless performed literally. It is not in the form of a condition or an express warranty, and therefore failure to strictly comply will not always prevent a recovery.

An examination of this bond shows that by its express terms a failure to comply with some of its provisions renders it void. But failure to give immediate notice by telegraph is not expressly made a ground of forfeiture. The maxim, "*expressio unius est exclusio alterius*," applies. *Ostrander*, § 223; *Gerringer v. Insurance Co.*, 133 N. C. 412, 45 S. E. 773; *Dixon v. State Mut. Ins. Co.*, 34 Okl. 624, 126 Pac. 794.

It is declared in *Joyce on Insurance*, § 3282, referred to in this opinion: "If a policy of insurance provides that notice and proofs of loss are to be furnished within a

certain time after loss has occurred, but does not impose a forfeiture for failure to furnish them within the time prescribed, and does impose forfeiture for a failure to comply with other provisions of the contract, the insured may, it is held, maintain an action, though he does not furnish proofs within the time designated." *Northern Assurance Co. v. Hanna*, 60 Neb. 29, 82 N. W. 97; *Kenton Insurance Co. v. Downs & Co.*, 90 Ky. 236, 13 S. W. 882; *Steele v. German Ins. Co.*, 93 Mich. 81, 53 N. W. 514, 18 L. R. A. 85.

[8] 4. This cause of action is not barred under section 9 of the contract which provides that: "No suit or proceeding at law or in equity shall be brought against the surety after the expiration of six months from the end of the time during which, under the term of this bond, the employer's claim may be filed with the surety." As this contract is governed by the laws of this state, it is subject to the statutes of North Carolina (Revisal, § 4809), forbidding the time for bringing suit on contracts of this character to less than one year. This bond contains a clause "that if the employé shall in the position of general agent in the employer's service make good to the employer within 30 days any loss sustained by the employer by larceny or embezzlement committed by the employé," etc.

The undisputed evidence shows that the first intimation of loss as contemplated by the bond was on the 20th day of January, 1910, and under the terms of said bond the agent, MacEnaney, had 30 days within which to make good to the company, to say nothing of the 90 days allowed the agent to make good under the contract of agency. The action was commenced February 1, 1911. His honor correctly held that the action, according to all the evidence, was not barred by lapse of time before February 20, 1911.

[7] 5. It is contended that the court erred in admitting in evidence the duly certified record of the municipal court of Chicago, a court of record, of the judgment of this plaintiff against the agent, L. S. MacEnaney, for \$5,007.21. It must be admitted that the admission of this judgment record in an action against the surety company cannot be justified under our Revisal, § 285. We must resort to the precedents, and we admit they are in hopeless discord. In a learned note to the case of *Charles v. Hoskins*, 83 Am. Dec. 380, the annotator, Judge Freeman, says: "The question how far a judgment or decree is conclusive against a surety of a defendant, or against one who is liable over to a defendant, and who was not a party to the action, is involved in the greatest confusion. Between the intimate relations which exist between such a person and the defendant in the suit, on the one side, and the fundamental principle that no one ought to be bound by proceedings to which he was a stranger, on the other, the courts have found it difficult to steer."

It seems that our predecessors in office upon this bench have intimated, and in one case held, that such judgments, unaided by the statute, are inadmissible in evidence against the surety. *Moore v. Alexander*, 96 N. C. 36, 1 S. E. 536. But an examination of the question has convinced us that the decided trend of modern authority is to the effect that such a judgment against the principal prima facie only establishes the sum or amount of the liability against the sureties, although not parties to the action, but the sureties may impeach the judgment for fraud, collusion, or mistake, as well as set up an independent defense. *Charles v. Hoskins*, 14 Iowa, 471, 83 Am. Dec. 379, and notes. In the notes to this case all the authorities are carefully reviewed. In that case it is said: "When one is responsible by force of law or by contract for the faithful performance of the duty of another, a judgment against that other for failure in the performance of such duty, if not collusive, is prima facie evidence in a suit against the party so responsible for that other."

[8] 6. His honor erred in admitting the declarations of MacEnaney, as the defendant MacEnaney was no party to this action, and, if he had been, his declarations would be competent only against himself. They were made some time after his agency had been terminated and were no part of the res gestæ.

The general rule is well settled that the admissions of the principal can only be received as evidence against the surety when they are made during the transaction of the business for which the surety is bound so as to become a part of the res gestæ. Admissions and declarations made after the employment has ceased are not competent to bind the surety. *U. A. F. Ins. Co. v. Am. Bonding Co.*, 146 Wis. 573, 131 N. W. 994, 40 L. R. A. (N. S.) 662, and cases cited.

[9] His honor further erred in instructing the jury that "there is no controversy about the fact that he converted \$5,007.21 of the plaintiff's money to his own use. The only question for you to decide upon is whether he did that with a fraudulent intent." We find no such admission in the record. The judgment of the Chicago court was only prima facie evidence of the amount. It remained still a contested issue.

New trial.

(152 N. C. 363)

HURST v. SOUTHERN RY. CO.

(Supreme Court of North Carolina. May 28, 1913.)

1. REMOVAL OF CAUSES (§ 27*)—DIVERSITY OF CITIZENSHIP.

A suit against a purchasing corporation cannot be removed from the state to the federal court upon the ground of diversity of citizenship by the purchasing corporation, which was a foreign corporation purchasing

under mortgage foreclosure, by virtue of Code, § 697, which provides that upon the conveyance being made the selling corporation shall ipso facto be dissolved and the purchaser be a new corporation.

[Ed. Note.—For other cases, see Removal of Causes, Cent. Dig. §§ 64-68; Dec. Dig. § 27.*]

2. REMOVAL OF CAUSES (§ 89*)—TRIAL OF ISSUES.

While the issues of fact made upon a petition for removal of a case to the federal court must be tried in the federal court, the state court may determine for itself whether on the face of the record a removal had been effected.

[Ed. Note.—For other cases, see Removal of Causes, Cent. Dig. §§ 162, 165, 189, 192-195, 197, 200, 201; Dec. Dig. § 89.*]

Walker and Brown, JJ., dissenting.

Appeal from Superior Court, Swain County; Long, Judge.

Action by George W. Hurst against the Southern Railway Company, a Virginia corporation. On defendant's motion to remove the action to the federal court. From an order allowing the motion, plaintiff appeals. Reversed.

Frye, Gantt & Frye, of Bryson City, for appellant. Martin, Rollins & Wright, of Asheville, for appellee.

ALLEN, J. The plaintiff has followed the allegations of the complaint in *Carolina Coal & Ice Co. v. Southern Railway Co.*, 144 N. C. 732, 57 S. E. 444, and the allegations in the petition for removal are substantially as those made in a similar petition filed in that case. The question now presented is not, therefore, a new one, but was fully considered in the case referred to, in a learned and exhaustive opinion by Justice Connor, concurred in by all the members of the court, and decided in favor of the contention of the appellant, and we have no disposition to disturb that decision.

[1] It is alleged in the complaint that the defendant became the purchaser of the Western North Carolina Railroad Company under foreclosure proceedings, and the conclusion reached by the court in the *Coal Co. Case* was: "A suit cannot be removed from the state to the federal court upon the ground of diversity of citizenship by a corporation of another state which became the purchaser of a corporation of this state under a sale made pursuant to a deed of trust or mortgage, by virtue of the Code, § 697, providing, upon the conveyance being made to 'the purchaser, the said corporation shall ipso facto be dissolved and the said purchaser shall forthwith be a new corporation, by any name which may be set forth in the conveyance,' etc."

[2] The case of *Herrick v. Railroad*, 158 N. C. 310, 73 S. E. 1009, is not in conflict with this view. It was there held that "all issues of fact made upon the petition for removal must be tried in the circuit court, but the

state court is at liberty to determine for itself whether, on the face of the record, a removal has been effected," and that the theory on which the rule as to removals rests is "that the record closes, so far as the question of removal is concerned, when the petition for removal is filed and the necessary security furnished. It presents, then, to the state court a pure question of law, and that is whether, admitting the facts stated in the petition for removal to be true, it appears on the face of the record, which includes the petition and the pleadings and proceedings down to that time, that the petitioner is entitled to a removal of the suit. That question the state court has the right to decide for itself."

Applying this rule to the record before us, it appears that there is no dispute as to the facts, and that the real controversy is whether, upon these facts, the defendant is, as matter of law, a North Carolina corporation under our statutes, by reason of its purchase of the Western North Carolina Railroad Company, and this question the state courts can decide.

Reversed.

CLARK, C. J. (concurring). The state courts are certainly competent to try a controversy arising over $6\frac{1}{2}$ bushels of Irish potatoes, and as to the damages claimed there is no reason to believe that the state courts will be less fair to either side than the federal court. On the other hand, though the Constitution does not guarantee to every man a trial by "jury of the vicinage," this is reasonable, and while a jury in the federal court may be called such, still it is a great inconvenience, and usually an imposition of considerable expense, to require a plaintiff, by removal to the federal court, to litigate his case over 100 miles away possibly, at Asheville, or Charlotte, or Greensboro, when other defendants find a just trial in the same county in which the transaction occurred. It is not unnatural that our people should prefer to try their causes before their neighbors as jurors and before judges selected by themselves, and not before judges appointed by a distant authority and with the enormous cost attending trial at a distant point. Of course, when the statute grants a removal to another jurisdiction, it must be complied with. But whether it does so, being in derogation of common right and not applying to resident defendants, nor to nonresident defendants where the amount does not exceed \$3,000, the courts will not be astute to find ground for removal unless the statute is clear.

In this case, so far from being clear, the statute was held by the unanimous decision of this court not to confer this right upon this defendant. *Coal & Ice Co. v. Railroad*, 144 N. C. 732, 57 S. E. 444. That opinion was written with great care, and, after

thorough examination of the federal decisions, by Mr. Justice Connor, now the accomplished judge of the United States federal court for the Eastern district of North Carolina, and was concurred in by the other four judges, all of whom are still on this bench, and now by Mr. Justice Allen, who occupies the seat then filled by Judge Connor. Such a decision so carefully considered and so ably and fully discussed, if reversed, should be set aside only by the United States Supreme Court. The inconvenience to the public of reversing this decision will be so great to the people along the line of this road and throughout Western North Carolina that we should be slow to question its authority.

The defendant itself has recognized the justice of that decision, and has been acting upon it, by exercising the right of eminent domain which it could not do unless it possessed that power as a North Carolina corporation. This is not the question of "domestication," as in the *Allison Case*, 190 U. S. 326, 23 Sup. Ct. 713, 47 L. Ed. 1078, but the defendant here bought the franchises and property it now uses, knowing that by the terms of the statute its purchase would be invalid, and its title void, unless, by the terms of the statute and of the deed it accepted ipso facto as purchaser, it became a North Carolina corporation. Solely by virtue of being such has it exercised any corporate or other functions, in operating the Western North Carolina Railroad.

There is the Southern Railroad of Virginia, which as lessee operates the North Carolina Railroad, and there is the Southern Railroad of North Carolina, which is ab initio a North Carolina corporation and by virtue thereof, only, operates the former Western North Carolina Railroad franchise. It is not unusual that there should be two individuals of the same name, but that does not make them identical. The same is true of corporations. We have the Atlantic Coast Line, a North Carolina corporation, as we held in *Staton v. Railroad*, 144 N. C. 148, 56 S. E. 794. There is the Atlantic Coast Line of Virginia; the Atlantic Coast Line of Georgia; the Atlantic Coast Line of South Carolina; the Atlantic Coast Line of Connecticut. This court held that this did not entitle the Atlantic Coast Line to remove a case to the federal court when the cause of action arose in this state, for the Atlantic Coast Line of North Carolina was responsible and properly sued here. This is sustained by *Patch v. Railroad*, 207 U. S. 277, 28 Sup. Ct. 80, 52 L. Ed. 204, 12 Ann. Cas. 518, which holds that if a railroad is incorporated in two states, if sued in that one in which the cause of action arose, the case is not removable.

The subordinate federal courts are created and have been abolished at will by statute, and their jurisdiction also has been conferred

and modified from time to time, within the limits authorized by the Constitution, by acts of Congress. The primary function of these courts is to aid in the execution of the federal laws. So far as jurisdiction is given them by reason of "diverse citizenship," this was based on the prejudice existing in 1787 (when the Constitution was formed), but now outworn, between different sections, and the limit has been raised from \$500 in the Judiciary Act of 1789 (Act Sept. 24, 1789, c. 20, 1 Stat. 73) to \$3,000. By uniform decisions it was held by the United States Supreme Court that "corporations" were not "citizens" within the meaning of this section until the court overruled itself in *Railroad v. Letson*, 43 U. S. (2 How.) 497, 11 L. Ed. 353, in 1842. Certainly there can be no reason to exempt from the jurisdiction of the state courts a corporation that is living, acting, and doing business here, under the daily protection of the state government and its courts. Beyond question a corporation like this, which has been created and given existence and its franchises to do business by a state statute, cannot exempt itself from the jurisdiction of this state, its creator as a "foreign corporation."

The opinions of this court, rendered by Judge Connor in *Coal & Ice Co. v. Railroad and Staton v. Railroad*, both above cited, are so fully discussed and so clearly expressed that nothing can be added thereto.

WALKER, J. (dissenting). While hesitating always to disagree with my Brethren of the majority, for whose opinion I entertain the most deferential respect, my mind is so thoroughly convinced of the error in this case that I cannot withhold my dissent to their view. The action was brought to recover accumulated penalties to the amount of \$14,050, for failure to receive and ship $6\frac{1}{2}$ bushels of Irish potatoes from Wesser Creek station, N. C., to Bushnell, N. C. We are not concerned now with the merits of this demand, as the amount stated, if recoverable, is certainly sufficient to justify a removal of the case if the defendant is otherwise entitled to it.

The petition for removal alleges that the defendant in this case, whose agent was served with process, is a Virginia corporation, and so far as this court may consider that allegation it must be taken as admitted. If there is any controversy about it, we cannot settle it here. *Stone v. South Carolina*, 117 U. S. 432, 6 Sup. Ct. 799, 29 L. Ed. 962; *Carson v. Hyatt*, 118 U. S. 279, 6 Sup. Ct. 1050, 30 L. Ed. 167. In the case last cited, Chief Justice Waite said: "The state court is not bound to surrender its jurisdiction until a case has been made which, on its face, shows that the petitioner for removal has a right to the transfer; but it may also be said that 'all issues of fact made upon the petition for removal must be tried in the

circuit court.' The state court is only at liberty to inquire whether, on the face of the record, a case has been made which requires it to proceed no further." This feature of the case will be referred to again. The petition further alleges that the Southern Railway Company of Virginia is authorized, by its charter, to acquire property and operate railroads in other states.

I think the decision of this court is wrong, and that of Judge Long, who presided at the hearing of this motion, is right, upon two grounds. Let me say in the beginning that there is an essential difference, in my opinion, between the facts in this case and those presented by the record in *Carolina Coal & Ice Co. v. Southern Railway Co.*, 144 N. C. 732, 57 S. E. 444, upon the authority of which the court alone bases its judgment.

First. There are two propositions which cannot be gainsaid at this time: (1) That a corporation has general power to hold property in states other than the one which incorporated it, in the absence of statutory prohibition in such states, is firmly established. *United Lines Telegraph Co. v. B. S. Dep. & Trust Co.*, 147 U. S. 431, 13 Sup. Ct. 396, 37 L. Ed. 231. (2) A corporation cannot change its residence or citizenship, but must have its legal home only at the place where it is located by or under the authority of its charter; but it may, by its agents, transact business anywhere, unless prohibited by its charter or excluded by local laws. *Ex parte Schollenberger*, 96 U. S. 369, 24 L. Ed. 853. There is another proposition, which naturally follows from the other two just stated: (3) A corporation created by the laws of one state may carry on business in another, either by virtue of being created a corporation by the laws of the latter state also, as in *Railroad Co. v. Vance*, 96 U. S. 450, 24 L. Ed. 752, or by virtue of a license, permission, or authority, granted by the laws of the latter state, to act in that state under its charter from the former state. *Martin v. Baltimore, etc., R. Co.*, 151 U. S. 673, 677, 14 Sup. Ct. 533, 38 L. Ed. 311. Other cases illustrating the difference between "incorporation" and mere "license" will be found in 6 Enc. of U. S. Supreme Court Reports, at page 308, note 8. Justice Miller said, for the court, in *Pennsylvania R. Co. v. St. Louis, etc., R. Co.*, 118 U. S. 290, 6 Sup. Ct. 1094, 30 L. Ed. 83, that it does not seem to admit of question that a corporation of one state, owning property and doing business in another state by its permission, express or implied, does not thereby become a citizen of the latter state.

With these general principles before us, let us look at the facts of this case. It appears that the Southern Railway, which purchased the franchise and property of the Western North Carolina Railroad Company, except its right to be a corporation, is itself a foreign corporation, having received its

charter from the state of Virginia. It is so alleged in the petition for removal, and the original process issued in this case was served upon an agent of said corporation, he having verified the petition, in which the allegation of such service upon him as agent of the Southern Railway Company, the Virginia corporation, is plainly and distinctly alleged. It is also alleged that the Virginia corporation purchased the said franchise and property at the sale, which, as we know, was made under a decree of the United States Circuit Court for the Western District of this state.

Upon the admitted, or at least uncontroverted, facts of this case, the Southern Railway Company has never become a resident or citizen of this state by virtue of its purchase at the said judicial sale of the franchise and property of the Western North Carolina Railroad Company. The case of *St. Louis & San F. Railway Co. v. James*, 161 U. S. 545, 16 Sup. Ct. 621, 40 L. Ed. 802, it seems clear to me, is a direct authority against any such contention. It appeared in the *James Case* that the state of Arkansas permitted a foreign railroad corporation to lease or purchase any railroad in that state upon filing its charter with the Secretary of State, whereby it should become a corporation of the state of Arkansas. With regard to a controversy in that case of substantially the same nature as the one in our case, and referring to the *James Case*, the same court said, in *Southern Ry. Co. v. Allison*, 190 U. S. 326, 23 Sup. Ct. 713, 47 L. Ed. 1078: "There was a corporation originally incorporated in the state of Missouri going into the state of Arkansas and operating a railroad in that state by leasing a portion of it therein and complying with a statute which provided that, upon filing a certified copy of its articles of incorporation with the Secretary of State of Arkansas, it should be regarded as formally incorporated in that state, and it should thereby become a domestic corporation, and yet it was held that defendant could not be sued by a citizen of Missouri in the federal court in the state of Arkansas; that, although to some extent and for some purposes it might be regarded as a corporation of Arkansas, it was for purposes of jurisdiction in the federal courts to be regarded as a corporation of the state of Missouri. The case, it will be seen, was not decided upon the ground that the cause of action had arisen in the state of Missouri. It was admitted that the cause of action was transitory, but the broad question was decided that the company was a corporation of Missouri and a citizen of that state, and could not be sued by another citizen of that state in the federal courts of Arkansas."

And in the same connection, the court in the *Allison Case* referred with approval, and as strongly supporting its view of the *James Case*, to what was said by Mr. Justice Shiras, in the latter case, as follows: "The pre-

sumption that a corporation is composed of citizens of the state which created it accompanies such corporation when it does business in another state, and it may sue or be sued in the federal courts in such other state as a citizen of the state of its original creation. We are now asked to extend the doctrine of indisputable citizenship, so that if a corporation of one state, indisputably taken, for the purpose of federal jurisdiction, to be composed of citizens of such state, is authorized by the law of another state to do business therein, and to be endowed, for local purposes, with all the powers and privileges of a domestic corporation, such adopted corporation shall be deemed to be composed of citizens of the second state, in such a sense as to confer jurisdiction on the federal courts at the suit of a citizen of the state of its original creation. 'We are unwilling to sanction such an extension of a doctrine which, as heretofore established, went to the very verge of judicial power. That doctrine began, as we have seen, in the assumption that state corporations were composed of citizens of the state which created them; but such assumption was one of fact, and was the subject of allegation and traverse, and thus the jurisdiction of the federal courts might be defeated. Then, after a long contest in this court, it was settled that the presumption of citizenship is one of law, not to be defeated by allegation or evidence to the contrary. There we are content to leave it.'"

And in *Louisville, N. A. & C. R. Co. v. Louisville Trust Co.*, 174 U. S. 552, 19 Sup. Ct. 817, 43 L. Ed. 1081, the court, upon a state of facts not materially different from, and certainly not stronger for the corporation which was seeking a removal than, those in this record, thus stated the law: "But a decision of the question whether the plaintiff was or was not a corporation of Kentucky does not appear to this court to be required for the disposition of this case, either as to the jurisdiction, or as to the merits. As to the jurisdiction, it being clear that the plaintiff was first created a corporation of the state of Indiana, even if it was afterwards created a corporation of the state of Kentucky also, it was and remained, for the purposes of the jurisdiction of the courts of the United States, a citizen of Indiana, the state by which it was originally created. It could neither have brought suit as a corporation of both states against a corporation or other citizen of either state, nor could it have sued or been sued as a corporation of Kentucky, in any court of the United States.' So it seems that a corporation may be made what is termed a 'domestic corporation,' or in form a domestic corporation, of a state in compliance with the legislation thereof, by filing a copy of its charter and by-laws with the Secretary of State; yet such fact does not affect the character of the original corporation. It does not thereby become a citizen of the state in which a copy of its

charter is filed, so far as to affect the jurisdiction of the federal courts upon a question of diverse citizenship."

The case of *Memphis & C. R. Co. v. Alabama*, 107 U. S. 581, 2 Sup. Ct. 432, 27 L. Ed. 518, was distinguished in the *Allison Case* from it and the other cases, because it appeared in the *Alabama Case* that there was not only a separate corporation created in Alabama, but also a real one in law and in fact; there having been a full organization under a provision of law for that purpose, and not merely a declaration of corporate existence. There had been, in other words, a genuine incorporation of two distinct companies in the states of Tennessee and Alabama. Speaking of this view of that case, the court, in *Allison's Case*, said: "This court held that, by reason of the particular language used in the act, there was a separate original Alabama corporation formed; that the sections, taken altogether, made it a corporation created as well as controlled by the state of Alabama." The two railroad companies were, in fact, separate corporations or entities, though they connected at the state line and had joint traffic arrangements. Each had control and jurisdiction, so to speak, over distinct railway systems.

While I am entirely unable to perceive any practical difference between the *James* or the *Allison Case* and this one, it seems to me that the question as to what corporation was the purchaser at the judicial sale of the franchise and property of the Western North Carolina Railroad Company is completely foreclosed by the decision of the Supreme Court of the United States in *Julian v. Central Trust Co.*, 193 U. S. 93, 24 Sup. Ct. 399, 48 L. Ed. 629. That was a writ of certiorari to the United States Circuit Court of Appeals for the Fourth Circuit to review a judgment which affirmed a decree of the Circuit Court for the Western District of North Carolina, enjoining a sale of the franchise and property of the Western North Carolina Railroad Company, purchased by the Southern Railway Company at the foreclosure sale, under certain judgments and executions obtained by certain persons in the state courts against said Western North Carolina Railroad Company. It was then determined, upon a full review of all the records and facts in the case, that the purchase at the foreclosure sale was made by the Southern Railway Company, the Virginian corporation, which was protected by law against any sale of the same by the judgment creditors. In the course of its opinion by Mr. Justice Day, the court said: "It is true the sections of the North Carolina Code herewith given clothe the purchaser with the right and privilege of organizing a corporation to operate the purchased property, but we find no requirement that he shall do so. The language of the last paragraph of section 1936 is: 'Such purchaser or purchasers may associate with him or them any number of

persons, and make and acknowledge and file articles of association as prescribed in this chapter; such purchaser or purchasers and their associates shall thereupon be a new corporation, with all the powers, privileges and franchises, and be subject to all the provisions of this chapter.' This confers a privilege, but does not prevent the purchaser from transferring the property to a company already formed and authorized to purchase and operate a railroad. *People v. Brooklyn, F. & C. I. R. Co.*, 89 N. Y. 75. The Southern Railway Company was authorized by its charter, among other things, to purchase or otherwise acquire the property of any railroad company organized under the laws of another state. We have been cited to no statute of the state of North Carolina forbidding the purchase of a railroad at foreclosure sale by a corporation of another state." In that case the court reviewed the decision of this court in *James v. Western N. C. R. Co.*, 121 N. C. 523, 28 S. E. 537, 46 L. R. A. 306, in which it was held by unanimous decision that the Southern Railway Company, a Virginia corporation, purchased the franchise and property of the Western North Carolina Railroad Company and had gone "into possession and control of the same, and has been running and operating the same ever since, under said purchase and deed." This is a clear and unmistakable decision by this court upon the very question, in favor of the correctness of the order of removal made by Judge Long in this case, because if the Southern Railway Company, of Virginia, owns and operates the road, it follows, by all the authorities, that, being a citizen of another state sued in one of the courts of this state, it has the right to a removal of the case to the United States court.

In discussing questions of this kind we are very apt to lose sight of the well-marked distinction between legislation of a state which domesticates a corporation to the extent of subjecting it to control and regulation of local laws, and legislation which attempts to create a domestic out of a foreign corporation in such a sense as to make it a citizen of a state other than that of its origin, and thus deprive it of the right of removal to the United States courts of a suit brought against it by a citizen of the state where it is claimed to have been domesticated. When the question involves the jurisdiction of the federal courts, the distinction is an important one; its subjection to the influence and operation of local laws being generally conceded.

Second. This brings me to the consideration of my second proposition. If the facts in this case are not practically admitted or undisputed, then there must be an issue or question of fact as to the diverse citizenship of the parties to the record, and as that disputed question can only be tried by the federal court, which must determine as to its own

jurisdiction, the removal by Judge Long was proper in order that it might be tried in the only forum designated by law for the purpose. *Rea v. Mirror Co.*, 158 N. C. 24, 73 S. E. 116; *Herrick v. Railroad*, 158 N. C. 307, 73 S. E. 1008. The petition filed in this case alleges facts entitling the plaintiff to a removal, if they be true. If they had been contested, the issue thus raised would have been one to be settled by the federal court alone. As said in *Rea v. Mirror Co.*, supra: "That court, being charged with the duty of exercising jurisdiction in such case, must have the power to consider and determine the facts upon which the jurisdiction rests"—citing numerous cases to support the position. In any view, therefore, the case was properly removed by Judge Long.

It may be observed, in conclusion, that no railroad corporation has ever been recognized by this state, in its legislative or executive department, as the owner of the Western North Carolina Railroad, except the Southern Railway Company of Virginia. No such corporation has ever been organized in this state, nor has it ever been recognized by the North Carolina Corporation Commission in any way. On the contrary, that Commission has always considered it as a part of the system of the Southern Railway Company of Virginia, and has fixed transportation rates over it and assessed it for taxation, and otherwise dealt in respect to it upon the basis of that understanding. Such a corporation is therefore of a most anomalous character, existing only in the imagination, or at most on paper, and so far is it from having any tangible or legal existence that it is entirely mythical. If it be contended that the Southern Railway Company of Virginia has no right to hold the franchise and own, use, and operate the property of the Western North Carolina Railroad Company, the conclusive answer is that the state alone can complain of the wrongful exercise of corporate rights and privileges, or of such ultra vires action of the railroad company. *Barcello v. Hapgood*, 118 N. C. 729, 24 S. E. 124; *Bass v. Navigation Co.*, 111 N. C. 449, 16 S. E. 402, 19 L. R. A. 247, and cases cited, and especially *Asheville Division No. 15 v. Aston*, 92 N. C. 578. This is familiar learning. The court held, in the case of *Asheville Division No. 15 v. Aston*, that for an abuse of powers and franchises by a corporation or for usurpation of powers not granted or for nonuser of such as may have been granted, the only remedy is in the name of the state, as such a cause of forfeiture or a usurpation of corporate rights not granted by the state should not be questioned collaterally, but by a direct proceeding, so that the corporation may be heard by answer. The court said, quoting from *Elizabeth City Academy v. Lindsey*, 28 N. C. 476, 45 Am. Dec. 500: "The sovereign alone has a right to complain, for, if it is a

usurpation, it is upon the rights of the sovereign, and his acquiescence is evidence that all things have been rightfully performed," citing *Atty. Gen. v. Railroad*, 28 N. C. 456, which is very pertinent to the facts of this case, for there it is said: "If the sovereign—with us, the lawmaking power—with a distinct knowledge of the breach of duty by the corporation, a knowledge declared by the Legislature, or so clearly to be inferred from its own archives that the contrary cannot be, thinks proper by an act to remit the penalty or to continue the corporate existence, or to deal with the corporation as lawfully and rightfully existing, notwithstanding such known default, such conduct must be taken, as in other cases of breaches of condition, to be intended as a declaration that the forfeiture is not insisted on, and therefore as a waiver of the previous default."

The "archives" and statutes of this state nowhere sanction the view now taken by the court of the rights of the Southern Railway Company of Virginia; but, on the contrary, it appears from them that it has been fully and continuously for many years recognized in all branches of the government, having dealings with it, as the owner of the franchise and property of the Western North Carolina Railroad Company, and this recognition is in strict accordance with the legal rights of the defendant, as declared by the court of last resort, which has supreme jurisdiction to finally pass upon and determine the question.

BROWN, J., concurs in the dissent.

(36 S. C. 16)

THOMPSON v. EQUITABLE LIFE ASSUR. SOCIETY OF THE UNITED STATES.

(Supreme Court of South Carolina. May 28, 1913.)

1. INSURANCE (§ 558*) — PROOF OF LOSS — WAIVER—ADMISSION OF LIABILITY.

Where an insurance company in an action upon a policy of life insurance by its answer admits liability and alleges that it does not know to whom to pay the money, it cannot raise the question that there was a failure to furnish proof of death before the commencement of the action.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 1382-1390, 1406; Dec. Dig. § 558.*]

2. INSURANCE (§ 207*)—ASSIGNMENT OF POLICY—CONSENT BY INSURER AFTER DEATH OF INSURED.

Where a life insurance policy showed on its face that it had been assigned in compliance with its requirements, the fact that the assignment was indorsed thereon by the company after the death of the insured, but before it had knowledge thereof, is no equitable reason why the court should set aside the indorsement; it not appearing that the rights of the company will be prejudiced in any way by the indorsement.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 475-477; Dec. Dig. § 207.*]

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

3. INSURANCE (§ 207*)—ASSIGNMENT OF LIFE INSURANCE—ORAL ASSIGNMENT—VALIDITY.

Where a life insurance policy, payable to the personal representatives of the insured, was delivered by him to his brother with the intent to vest the title in him, the rights of the brother were paramount to those of the representatives of decedent, even though the assignment was not completed by the company's indorsement until after the death of the insured, since it was binding before indorsement upon the insured and the representatives stand on the same ground.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 475-477; Dec. Dig. § 207.*]

4. EXECUTORS AND ADMINISTRATORS (§ 439*)—NECESSARY PARTIES—ACTION ON INSURANCE POLICY.

In an action by the assignee upon a life insurance policy originally payable to the personal representatives of the insured, the court will not require the representatives to be made parties when such requirement would serve no useful purpose.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. §§ 1765, 1766, 1770, 1771, 1774, 1786; Dec. Dig. § 439.*]

Appeal from Common Pleas Circuit Court of Richland County; Thos. H. Spain, Judge.

"To be officially reported."

Action by Richard A. Thompson against the Equitable Life Assurance Society of the United States. Judgment for the plaintiff, and defendant appeals. Affirmed.

Melton & Belser and R. E. Carwile, all of Columbia, for appellant. Frank G. Tompkins, of Columbia, for respondent.

GARY, C. J. This is an action on a policy of life insurance. By consent of the parties to the action, his honor the circuit judge heard the case without a jury, and rendered judgment in favor of the plaintiff, for the amount of the policy, whereupon the defendant appealed.

The circuit judge thus stated the facts: "This is an action brought for the purpose of recovering \$1,000 on an insurance policy and for all additional sums due thereon. The complaint alleges that the insured, Joseph J. Thompson, assigned the policy to his brother, Richard A. Thompson, as beneficiary thereof or as assignee; that the said Joseph J. Thompson is dead; and that his brother, Richard A. Thompson, is entitled to recover the money due under the policy. The defendant admits that the policy was delivered to the said Joseph J. Thompson, and that he is dead; admits that the policy was indorsed, as required by said policy, to Richard A. Thompson, but contends that it was done through misapprehension of its officers, as the policy did not reach them before the death of the said Joseph J. Thompson; admits that they retained possession of the said policy, for the benefit of the person or persons entitled thereto. I find the following facts: That the defendant insured the life of Joseph J. Thompson for the sum of \$1,000, and that the policy was duly delivered to him, and that the money was made payable

to the executors, administrators, or assigns of the said Joseph J. Thompson, and the policy contained the following provisions: 'Promises to pay at the home office of the society, in the city of New York, to Joseph J. Thompson, of Georgetown, county of Georgetown, state of South Carolina, herein called the insured, on the twenty-ninth day of December, nineteen hundred and twenty-eight, if the insured be then living, or upon receipt at the said home office of due proof of the prior death of the insured, to the executors, administrators, or assigns, of said Joseph J. Thompson, beneficiary, with the right of revocation, one thousand dollars, less any indebtedness thereon to the society and any unpaid portion of the premium for the current year, upon surrender of this policy properly receipted. Change of Beneficiary.—When the right of revocation has been reserved, or in the case of the death of any beneficiary under either a revocable or irrevocable designation, the insured, if there be no existing assignment of the policy, made as herein provided, may, while the policy is in force, designate a new beneficiary with or without reserving right of revocation by filing written notice thereof at the home office of the society, accompanied by the policy for suitable indorsement thereon. Such change shall take effect upon the indorsement of the same on the policy by the society. If any beneficiary shall die before the insured, the interest of such beneficiary shall vest in the insured. No assignment of this policy shall be binding upon the society unless it be filed with the society at its home office. The society assumes no responsibility as to the validity of any assignment.' That on the 18th day of August, 1910, Joseph J. Thompson delivered said policy to his brother, Richard A. Thompson, along with the following paper: 'Declaration. Georgetown, S. C., August 18, 1910. The Equitable Life Assurance Society of the United States of America, New York, N. Y.—Gentlemen: Policy No. 1580047, \$1,000.00, J. J. Thompson. I hereby and herewith authorize and request you to assign the above policy No. 1580047, issued in my name on the 29th day of December, 1908, to my brother, Richard A. Thompson, as the sole beneficiary in the event of my death. His address is Georgetown, South Carolina. Witness my hand and seal this 18th day of August, A. D. 1910. Joseph J. Thompson. Witnesses: St. J. Tucker. T. B. Dennison.' That in accordance with instructions, the said policy and request were mailed to the defendant, and they reached the said home office on the 22d of August, 1910. That on the 19th day of August, 1910, the said insured died, and on the 24th day of August, 1910, the name of Richard A. Thompson was indorsed on said policy as beneficiary. That the said insured intended that the legal title to said policy

should vest in his said brother, and that proof of death was waived by said defendant."

[1] The first assignment of error is because there was a failure to furnish proofs of the death of the insured before the commencement of the action.

The circuit judge overruled this defense, on the ground that the answer of the defendant admitted the death of the insured, and also admitted its liability, but alleged that it did not know to whom to pay the money; whether to the plaintiff or the representatives of J. J. Thompson's estate. We do not deem it necessary to cite authorities to show that the exceptions raising this question cannot be sustained.

[2] The next question for consideration is whether there was error on the part of the circuit judge in ruling that the delivery of the policy, together with the paper called a "declaration," by the insured to Richard A. Thompson, was effectual as an assignment of the policy. It appears upon the face of the policy that there was a compliance with the requirements thereof, in regard to its assignment.

When this fact appeared, it was incumbent on the insurance company to satisfy the court that there were good reasons why the assignment should be declared a nullity. It undertook to do this, by proving that the indorsement was made, after the death of the insured, and before it had notice of such fact. It failed to adduce any testimony tending to show that its rights would be prejudiced if the indorsement was not declared to be null and void. On the contrary, it appears from the admitted facts that the defendant has no interest in the proceeds of the policy, except, practically, as a stakeholder; for, as just stated, the answer admits its liability and that it is holding the policy, because it does not know whether payment should be made to the plaintiff or to the representatives of the insured's estate. Therefore there is no equitable reason why the court should grant the defendant relief by setting aside the indorsement.

[3] There is another reason why the court should refuse to grant the defendant relief in this respect. Even if it should be held that there was a failure to comply with the requirements of the policy, in regard to the assignment thereof, the rights of the plaintiff whether regarded as legal or equitable, are paramount to those of the executor or administrator of J. J. Thompson's estate. As between the plaintiff and the representatives of the insured's estate, the delivery of the policy to Richard A. Thompson, with the intention that the legal title should vest in him as found by the circuit judge, had the intended effect. A policy of insurance, like any other chose in action, may be transferred, even by parol. *Barron v. Williams*,

58 S. C. 280, 36 S. E. 561, 79 Am. St. Rep. 840; *N. Y. Life Ins. Co. v. Flack*, 3 Md. 341, 56 Am. Dec. 742.

A failure on the part of the insured to comply with the requirements of the policy does not defeat the rights of the assignee—whether legal or equitable—to the proceeds of the policy where they are paramount to those claimed in behalf of another. In the present case there can be no doubt that the rights of the plaintiff are paramount to those of the insured's estate, and there is no good reason why this court should grant relief to the defendant that would be of no practical benefit to it, but would only delay the plaintiff in the collection of the amount due him under the policy.

If the insured had previously assigned the policy, Richard A. Thompson would not be entitled to the proceeds; nor would he be entitled to the proceeds, if a beneficiary had been named when the policy was delivered to him, unless there was a change of the beneficiary in the manner provided by the policy. *Holder v. Insurance Co.*, 77 S. C. 299, 57 S. E. 853; *Deal v. Deal*, 87 S. C. 395, 69 S. E. 886, Ann. Cas. 1912B, 1142. The executor or administrator of the insured, however, does not stand upon higher ground than the insured, and any act that would estop him would be binding upon them. As the delivery of the policy, together with the writing executed by the insured, empowering the insurance company to make the necessary changes, so as to assign it to Richard A. Thompson, would be binding upon the insured if he were now living, it also estops his representatives from claiming the proceeds.

[4] The cases of *Fogle v. Church*, 48 S. C. 86, 26 S. E. 99, and *Grant v. Poyas*, 62 S. C. 426, 40 S. E. 891, show that the court will not require an executor or administrator to be made a party, when such requirement would subserve no useful purpose.

These views practically dispose of all the exceptions.

Judgment affirmed.

WOODS, HYDRICK, WATTS, and FRASER, JJ., concur.

(95 S. C. 1)

PARRY v. SOUTHEASTERN LIFE INS. CO.

(Supreme Court of South Carolina. April 23, 1913. On Rehearing, May 23, 1913.)

1. INSURANCE (§ 349*) — LIFE INSURANCE — NONPAYMENT OF PREMIUMS—FORFEITURE.

A life policy, stipulating that failing to pay at maturity any premium or installment thereof, or any note given as a lien against the policy, will render the contract void, is forfeited for nonpayment at maturity of a premium note reciting that the policy shall be void on failure to pay at maturity; the receipt given by insurer declaring that it is subject to the condi-

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

tions of any notes which have been given for the premium.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 891, 895-902, 913; Dec. Dig. § 349.*]

2. INSURANCE (§ 392*) — LIFE INSURANCE — NONPAYMENT OF PREMIUM — FORFEITURE — WAIVER.

An insurer issuing a life policy stipulating for forfeiture for nonpayment at maturity of any renewal premium, and accepting a premium note declaring that the policy shall be void on failure to pay the note at maturity, does not waive a forfeiture for nonpayment at maturity of the note by writing to insured a letter stating its disappointment at insured's failure to pay and requesting him to request time within which to pay.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 1041-1056, 1058-1070; Dec. Dig. § 392.*]

Appeal from Common Pleas Circuit Court of Newberry County; R. W. Memminger, Judge.

Action by Julia O. F. Parry against the Southeastern Life Insurance Company. From a judgment for plaintiff, defendant appeals. Reversed, and new trial granted.

Haynsworth & Haynsworth, of Greenville, and Hunt, Hunt & Hunter, of Newberry, for appellant. F. H. Dominick, of Newberry, for respondent.

GARY, C. J. This is an action on a policy of insurance. On the 10th day of March, 1907, the defendant issued a policy of insurance on the life of J. W. Parry, wherein his wife, the plaintiff, was named as the beneficiary. One of the conditions contained in the policy was as follows: "Failing to pay when due any renewal premium or installment thereof, or any note or other obligation given as a lien against this policy, will render this contract null and void. * * * The receipt given by the company for the premium contained this clause: "This receipt is subject to the conditions of any and all notes, which have been given or may be given for the amount of said premium, or any part thereof." The insured delivered to the company his promissory note whereby he promised to pay three months after the date thereof \$23.40, being the premium on said policy, due March 15, 1907. Said policy, including all conditions therein for surrender of continuance as paid-up term policy, to be null and void on the failure to pay said note at maturity." The insured failed to pay said note, and on the 17th of July, 1907, the company wrote the following letter to him: "We are so disappointed at not hearing from you, about your premium note and interest of \$23.88 past due since June 1st, that we are inclosing self-addressed stamped envelope for reply from you, saying why you have not attended to same. If we can help you by accepting part cash and extending note, or make it easier for you in any other way,

please be free to express your views, and we will give your prompt reply." The insured made no response. The case was heard by his honor the presiding judge without a jury, and he found as a fact that "a conclusive case of waiver of forfeiture for nonpayment at maturity of premium note is established," and accordingly rendered judgment in favor of the plaintiff for the amount of the policy, whereupon the defendant appealed.

The letter was the only testimony introduced by the plaintiff to show that there was waiver of the right to insist upon the forfeiture. The question presented by the exceptions is whether there was any evidence tending to show waiver.

[1] The authorities cited by the appellant's attorneys unquestionably sustain the proposition that there was a forfeiture of the policy, when the insured failed to pay the note at maturity.

[2] There is nothing in the letter manifesting an intention on the part of the company to waive the forfeiture. It was the intention of the company that the letter should be prospective in its operation; that it was merely intended to afford the insured the opportunity of entering into negotiations that might culminate in a waiver of the forfeiture, if the insured complied with the terms and conditions upon which they might agree. It cannot be successfully contended that the ignoring of the letter by the insured was as beneficial to him as if the parties had entered into an agreement and had performed the conditions upon which the forfeiture was to be waived.

Judgment reversed, and a new trial granted.

WOODS, HYDRICK, WATTS, and FRASER, JJ., concur.

On Rehearing.

PER CURIAM. After careful consideration of the petition herein, the court is satisfied that no material question of law or of fact has either been overlooked or disregarded.

It is therefore ordered that the petition be dismissed and that the order heretofore granted staying the remittitur be revoked.

(95 S. C. 61)

CURRENCE v. SOVEREIGN CAMP WOODMEN OF THE WORLD.

(Supreme Court of South Carolina. May 28, 1913.)

1. INSURANCE (§ 825*)—MUTUAL BENEFIT INSURANCE—REINSTATEMENT—WAIVER OF OBJECTIONS—EVIDENCE.

Evidence held sufficient to warrant submission to the jury of the question of waiver of the provisions of the constitution and by-laws of a fraternal benefit association, requiring a

certificate of good health as a condition of reinstatement after forfeiture for nonpayment of dues.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. § 2009; Dec. Dig. § 825.*]

2. APPEAL AND ERROR (§ 909*)—REVIEW—CONCLUSIVENESS OF VERDICT—FRAUD.

Where the question of fraud on the part of an insured in procuring reinstatement in a fraternal benefit association is properly submitted to the jury, their verdict is not subject to review by the Supreme Court.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3912-3921, 3923, 3924; Dec. Dig. § 909.*]

Appeal from Circuit Court, York County; Thos. S. Sease, Judge.

Action by B. J. Currence, as administrator, against the Sovereign Camp Woodmen of the World. Judgment for the plaintiff, and defendant appeals. Affirmed.

A copy of the answer referred to in the opinion is as follows:

"The defendant answering the complaint of the plaintiff respectfully shows to the court:

"(1) The defendant denies each and every allegation in plaintiff's said complaint contained not hereinafter specifically admitted.

"(2) This defendant admits it is a fraternal beneficiary association incorporated under the laws of the state of Nebraska, and duly authorized to transact business in South Carolina as such, and during all the times mentioned in the complaint was doing business in South Carolina acting under the authority of the statute law of this state. The defendant also admits that it has subordinate lodges or camps and that it has such in South Carolina, one of which is and was known as 'Black Jack Camp No. 247,' of which W. M. Joy became a member in August, 1907; but this defendant alleges that membership in said order and the suspension of members from said order and the restoration of members to said order, and the beneficiary certificates issued to the members of the order, and whether the same shall be of force and effect or not, are all governed and controlled by the constitution, laws, and by-laws of the Sovereign Camp of the Woodmen of the World, as well as by the statute laws of the state of South Carolina relating to fraternal beneficiary associations.

"(3) Further answering, this defendant shows to the court: That while plaintiff's intestate was accepted as a member of the defendant corporation through initiation in one of its subordinate camps on the 27th of August, 1907, and on said date a beneficiary certificate was issued to plaintiff's intestate, yet the defendant alleges that plaintiff's intestate was suspended on the 1st day of May, 1911, for not paying his monthly assessment, which said suspension was authorized and required under section 109 of the constitution and by-laws of the defendant corporation,

which said section reads as follows: 'Sec. 109. (a) Every member of this order shall pay to the clerk of his camp each month one assessment payment, as required in section 56, which shall be credited to and known as "Sovereign Camp Fund," and he shall also pay such camp dues as may be required by the by-laws of his camp. He shall pay any additional assessments for the Sovereign Camp fund and camp dues, or either, which may be legally called. (b) If he fails to make any such payments on or before the first day of the month following, he shall stand suspended, and during such suspension his beneficiary certificate shall be void.'

"(4) That section 115 of the constitution and by-laws of the defendant corporation contains the following provisions: 'Sec. 115. (a) Should a suspended member pay all arrearages and dues to the clerk of his camp within ten days from the date of his suspension, and if in good health and not addicted to the excessive use of intoxicants or narcotics, he shall be restored to membership and his beneficiary certificate again become valid. (b) After the expiration of ten days and within three months from the date of suspension of a suspended member to reinstate he must pay to the clerk of his camp all arrearages and dues and deliver to him a written statement and warranty signed by himself and witnessed that he is in good health and not addicted to the excessive use of intoxicants or narcotics as a condition precedent to reinstatement, and waiving all rights thereto if such written statement and warranty be untrue. (c) Any attempted reinstatement shall not be effective for that purpose unless the member be in fact in good health at the time, and if any of the representations or statements made by the said applicant are untrue, then said payments shall not cause his reinstatement nor operate as a waiver of the above conditions.'

"(5) That on the 4th of July, 1911, one Robert Saye Riddle, the clerk of subordinate camp No. 247, of which W. M. Joy had been a member, attempted to reinstate the said W. M. Joy into membership in said corporation by remitting to said defendant corporation the sum of \$3, the same being some two months after his suspension, and the said W. M. Joy not having given the clerk of said camp a written statement and warranty signed by himself and witnessed that he was in good health, and so on, and the defendant here alleges that at the time of the attempted reinstatement, on the 4th day of July, 1911, the said W. M. Joy was sick of typhoid fever, dying of said dread disease on the 21st day of July, 1911. And this defendant further alleges that under section 7 of an act of the General Assembly of South Carolina entitled 'An act for the regulation and control of fraternal benefit associations,'

approved February 23, 1910, it is provided, 'No subordinate body or any of its officers or members shall have the power or authority to waive any of the provisions of the laws and constitution of the association, and the same shall be binding upon the association, and each and every member thereof and their beneficiaries,' and therefore this defendant pleads as a matter of law that the clerk of the subordinate camp, of which W. M. Joy had been formerly a member, could not by accepting dues from a man then sick unto death reinstate him in the defendant corporation.

"(6) That plaintiff's intestate having been suspended legally under the constitution, laws, and by-laws of the Sovereign Camp of the Woodmen of the World on the 1st day of May, 1911, for nonpayment of monthly assessments, and his certificate of insurance being void under the constitution, laws, and by-laws of the defendant company during the period of suspension, and said intestate having died without being restored to membership in said order, the beneficiary certificate issued to plaintiff's intestate by the defendant is and was at the death of the intestate null and void and of no force and effect.

"(7) But still further answering, the defendant shows to the court that, after his suspension, plaintiff's intestate solemnly declared to the officers of the subordinate camp of which he had been a member his intention of forever severing his connection with the Woodmen of the World, and defendant alleges that said intestate died without knowing of the efforts made by his friends to restore him to membership; and the \$3 that the friends of the said intestate raised and paid over to the clerk of the subordinate camp (when they knew that the intestate was sick with the fever whereof he died in a short time thereafter) was forwarded by the said clerk to the Sovereign Camp, but with no information as to the sickness of the intestate, and as soon as the Sovereign Camp was informed of the facts and that said clerk had no certificate of the good health of the intestate signed by him and witnessed, the Sovereign Camp promptly returned the \$3 to the clerk of the subordinate camp, Robert Saye Riddle, who paid it over to the parties who paid it to him in the first instance, and the same was received and accepted by them.

"(8) The defendant does therefore especially deny that it is liable to plaintiff as administrator in the sum of \$1,000 and interest thereon from July 21, 1911, and does especially deny that it is liable to plaintiff as administrator in any sum whatsoever.

"Wherefore defendant prays that the complaint be dismissed with costs."

J. S. Brice, of Yorkville, for appellant.
John R. Hart and Hart & Hart, all of Yorkville, for respondent.

GARY, C. J. In order to understand the facts and the issues raised by the pleadings, it will be necessary to set out a copy of the answer in the report of the case.

[1] The first question that will be considered is whether there was any testimony tending to show waiver on the part of the defendant.

It was the duty of the clerk of the local camp to make collections for the camp. Section 93 of the constitution and by-laws of the Woodmen of the World provides that "it shall be the duty of the clerk to have charge of the records, attend to the correspondence, accounts and literature of the camp, and all miscellaneous matters pertaining to its welfare." (It was admitted that this has reference to the clerk of the local camp.) Subdivision "c": "He shall remit all funds due and belonging to the Sovereign Camp to the Sovereign Clerk as by law provided." It was the duty of the local clerk to make his report to the clerk of the Sovereign Camp and to state whether the insured had delivered to him a written statement that he was at that time in good health. The clerk of the local camp wrote the following letter to the Sovereign Camp: "Olover, S. C., No. 2. Camp No. 247, S. C. Located at Oak Ridge. Mr. Jno. T. Yates—Dear Sir: Find P. O. order for \$3.00, for reinstatement of Sov. W. M. Joy, Cer. No. 18523. He was suspended on assessment No. 247 and now wishes to be reinstated, and made payment to me this morning, and I made my report yesterday, so I told him I would mail same to you, and if you accepted it it would be O. K., and if you didn't, he could take the matter up with you. Hoping to hear from you in regard to this, at your earliest convenience, I beg to remain, Yours very fraternally, Robert Saye Riddle, Clerk. This July 4, 1911." This letter shows that the clerk of the Sovereign Camp knew that the certificate of good health had not been delivered; or at least gave to him such notice, which, if pursued with due diligence, would have led to knowledge of the fact that the certificate had not been delivered, which is equivalent to notice. It is true that, under the provisions of the statute, the local clerk did not have the power to waive compliance with the requirements of the constitution and by-laws; but the testimony tends to show that there was waiver by the Sovereign Camp.

[2] The other question is whether the insured was guilty of such fraud as rendered the policy null and void. Even if it should be conceded that the question of fraud was made an issue by the pleadings, it was, however, properly submitted to the jury, and their finding is not subject to review by this court.

Judgment affirmed.

HYDRICK, WATTS, and FRASER, JJ., concur. WOODS, J., concurs in the result.

(94 S. C. 496)

OSTEEN et al. v. BULTMAN et al.
(Supreme Court of South Carolina. May 27, 1913.)

1. APPEAL AND ERROR (§ 1099*)—LAW OF THE CASE.

A determination on appeal that defendant was not entitled to a jury trial is conclusive on a subsequent appeal.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4370-4379; Dec. Dig. § 1099.*]

2. APPEAL AND ERROR (§ 1195*)—REMAND—ISSUES FOR JURY.

A determination on appeal that defendants were not entitled to a jury trial did not conclude the right of the trial judge to refer issues to a jury for his own enlightenment.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4661-4665; Dec. Dig. § 1195.*]

3. PARTY WALLS (§ 9*)—LIS PENDENS (§ 24*)—RIGHTS AND LIABILITIES OF PURCHASERS—PROVISIONS OF DEED—LIEN.

A grantor, by the terms of his deed, was to have the right to join to any wall constructed on the side of the lot by the grantees, or if the grantees did not build on such line before the grantor desired to use the wall, the grantor and his assigns might enter and construct a wall sufficient to support a three-story building, and join to the same, for which the grantees would pay the cost, which was to be a lien on the lot conveyed as long as it remained the property of the grantees, or if conveyed before payment, the lien was to continue until the wall was paid for. After the conveyance the grantor erected a building, built a party wall, and demanded the cost of the grantees, who refused to pay, and thereafter conveyed to a third person, who had both actual and constructive notice of the agreement. *Held*, that the building of the wall during the ownership of the grantees vested the lien in favor of the grantor, and such lien was not discharged by the conveyance, and the commencement of an action to foreclose it, and the filing of a lis pendens fixed the rights of the parties, so that the subsequent grantee took subject to the lien.

[Ed. Note.—For other cases, see Party Walls, Cent. Dig. §§ 42-53; Dec. Dig. § 9.* Lis Pendens, Cent. Dig. §§ 38-40, 42-46; Dec. Dig. § 24.*]

Appeal from Common Pleas Circuit Court of Sumter County; S. W. G. Shipp, Judge.

Action by C. P. Osteen and another against F. A. Bultman and another. Judgment for plaintiffs, and defendants appeal. Affirmed.

See, also, 90 S. C. 452, 73 S. E. 874.

Lee & Moise and J. H. Clifton, all of Sumter, for appellants. R. D. Epps, of Sumter, for respondents.

HYDRICK, J. On May 8, 1909, plaintiffs conveyed to defendants a lot in the city of Sumter. The deed of conveyance contains the following recital: "Whereas, the grantors herein convey the lot of land hereinafter described for the consideration hereinafter stated, and as additional consideration for said conveyance, the grantors shall have the right to join to and connect with any wall constructed on the eastern edge of the lot hereinafter described, by the grantees, their heirs or assigns; but should the grantees,

their heirs or assigns, not build the wall on the eastern edge of said lot, before the grantors or their heirs or assigns desire to use such wall, then the grantors, their heirs or assigns shall have the right to enter on the eastern edge of said lot and move any obstructions and construct a wall on the eastern edge of said lot, sufficient to support a three-story building and join to the same, and the grantees herein agree to pay to the grantors or their heirs or assigns the cost of said wall. The cost to be ascertained from the contractor who constructs said wall. The cost of said wall to be a lien on the lot conveyed as long as the same remains the property of the grantees or if before said wall is paid for the grantees should convey said lot to any corporation for the use of the Elks Club or to the Elks Club, then the lien shall continue until said wall shall have been paid for. The acceptance of this deed shall be conclusive evidence of the grantees' agreement to the foregoing."

A short time after the delivery and acceptance of the deed, plaintiffs erected a three-story building on their lot adjoining and east of the lot conveyed to defendants, and, for the purpose of joining to the same, they built along the entire eastern edge of the lot which they had conveyed to defendants a three-story wall, sufficient to support their building. On September 20, 1909, the wall having been finished, plaintiffs demanded of defendants payment of the sum of \$1,684.93, the cost thereof. Their demand having been refused, they brought this action to recover said sum, and to foreclose the lien therefor, stipulated for in the recital of their deed to defendants above quoted. At the commencement of the action, plaintiffs filed a notice of the pendency thereof. Thereafter and before judgment, to wit, on March 4, 1911, defendants conveyed the lot to one W. T. Andrews, who had both actual and constructive notice of the agreement between these parties relative to the wall and of the pendency of this action. By supplemental answer, defendants set up their conveyance to Andrews, and assert that, under the terms of the deed above recited, it had the effect of discharging the lien on the lot therein provided for. In their original answer defendants had set up certain other claims or defenses, to wit, that there was an agreement between the parties, in addition to and independent of that contained in the recital of the deed, to the effect that the wall to be built for the benefit of plaintiffs should be only 80 feet long and two stories high, though strong enough to support a three-story building; that it should not cost over \$750, and that it was not to be paid for until it was used by the defendants or their successors in title, and, finally, that even if they are liable for the cost of the wall, the alleged cost thereof to plaintiffs was excessive and unrea-

sonable. After the case had been referred to the master to take the testimony, defendants moved to be allowed to file a supplemental answer, setting up, as a defense, their conveyance of the lot to Andrews, hereinbefore mentioned, and their motion was granted. Upon the filing of their supplemental answer, they moved to discharge the reference and demanded trial by jury, and, failing in that, they moved for the submission of certain issues to a jury. The court held that they were not entitled to a trial by jury as of right, and that they had failed to comply with rule 28 of the circuit court relative to the submission of issues in equity cases to a jury, and refused their motion. On appeal to this court, that order was affirmed. 90 S. C. 452, 73 S. E. 874. The case was then heard on the testimony taken and reported by the master, after the refusal of another motion for a jury trial, both as a matter of right and for the submission of issues to a jury. The court found against the contention of defendants on all their grounds of defense, and gave judgment in favor of plaintiffs for the amount claimed by them and for the foreclosure of their lien therefor. From this judgment, the defendants have appealed.

[1, 2] Those exceptions which question the rulings of the circuit court upon the contention of the defendants for a trial by jury, and for their submission of issues to a jury, will not be considered, for the matter is res judicata, having been concluded by the former decision of the circuit court and the decision of this court thereupon. Of course that decision did not conclude the right of the trial judge to refer issues to a jury for his own enlightenment, and there is no intimation in the refusal of defendants' motion that the circuit judge so construed the previous order. The submission of any or all the issues of fact in an equity case to a jury for his own enlightenment is the privilege of the judge who hears the cause, and not a right of the parties. Upon the defenses of the defendants which involve questions of fact, we concur in the findings of the circuit court.

[3] We concur also on the holding that under the terms of the recital in their deed to defendants, plaintiffs had a lien upon the lot for the cost of the wall erected by them, and that the conveyance of the lot to Andrews by the defendants did not discharge the lien. The only reasonable construction to be given to the recital is that it was the intention of the parties that, if the plaintiffs, their heirs and assigns, failed to exercise their right to build the wall while the defendants, or the Elks Club, or any corporation holding for the Elks Club, owned their lot, they should have no lien thereon, but that they should have such lien, if the wall was built during the ownership of the lot by any of

said parties. The building of the wall, therefore, during the ownership of defendants vested the lien in favor of plaintiffs, and the commencement of the action to foreclose it and the filing of lis pendens fixed the rights of the parties so that the subsequent conveyance to Andrews was subject to those rights. Affirmed.

GARY, C. J., and WOODS, WATTS, and FRASER, JJ., concur.

(95 S. C. 35)

BRAND SHOE CO. v. WOMEN'S WEAR SHOP.

(Supreme Court of South Carolina. May 28, 1913.)

1. APPEAL AND ERROR (§ 103*)—ORDERS APPEALABLE—RULINGS ON PLEADINGS.

An order refusing to strike out an answer for frivolousness is not appealable.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 699-710; Dec. Dig. § 103.*]

2. PLEADING (§ 123*) — GENERAL DENIAL — FORM.

An answer that defendant for a first defense alleges that it denies every allegation in the complaint contained and therein stated was sufficient as a general denial and was not fatally defective in "alleging that defendant denied" instead of denying in terms.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. § 255; Dec. Dig. § 123.*]

Appeal from Common Pleas Circuit Court of Barnwell County; Thos. H. Spain, Judge. "To be officially reported."

Action by the Brand Shoe Company against the Women's Wear Shop. Judgment for defendant, and plaintiff appeals. Dismissed.

Thos. M. Boulware, of Barnwell, for appellant. James M. Patterson, of Allendale, for respondent.

GARY, C. J. This is an action on account for goods, which the complaint alleges were sold by the plaintiff to the defendant, and the appeal is from an order refusing to strike out the answer as frivolous.

The answer is as follows: "The defendant, Women's Wear Shop, answering the complaint herein, and for a first defense thereto, alleges that it denies every allegation in said complaint contained and therein stated." His honor, the circuit judge, refused the motion to strike out the answer as frivolous on the ground that it is a general denial.

[1] In the first place, an order refusing to strike out an answer on the ground of frivolousness is not appealable. *Bank v. Witcover*, 77 S. C. 441, 58 S. E. 146; *Harbert v. Atlanta, etc., Ry.*, 74 S. C. 13, 53 S. E. 1001. But, waiving such objection, the appeal cannot be sustained.

[2] The defendant concedes that the answer would have been sufficient if the defendant had denied the allegations of the

complaint, without alleging that it did so. We do not deem it necessary to cite authorities to show that the difference in form is wholly immaterial.

Appeal dismissed.

WOODS, HYDRICK, WATTS, and FRASER, JJ., concur.

(34 S. C. 492)

BROWN et ux. v. BROWN et al.

(Supreme Court of South Carolina. May 27, 1913.)

1. DOWER (§ 35*) — "INCHOATE RIGHT OF DOWER."

An "inchoate right of dower," while it cannot be properly denominated an estate in lands nor a vested interest therein, is a substantial right, possessing the attributes of property to be estimated and valued as such, a right attaching by implication of law, and which, from the moment that the fact of marriage and of seisin have concurred, is so fixed on the land as to become a title paramount to that of any other person claiming under the husband by a subsequent act; it is such a right as equity will protect.

[Ed. Note.—For other cases, see Dower, Cent. Dig. §§ 85, 86; Dec. Dig. § 35.*]

For other definitions, see Words and Phrases, vol. 4, pp. 3493, 3494.]

2. DOWER (§ 85*)—VALUE—STATUTES.

Under the express provision of Civ. Code 1912, § 3491, relating to proceedings for allotment of dower to widows, the value of land aliened in the lifetime of the husband at the time of alienation, with interest from the death of the husband is the value upon which to assess dower.

[Ed. Note.—For other cases, see Dower, Cent. Dig. §§ 325, 326; Dec. Dig. § 85.*]

3. DOWER (§ 32*)—INCHOATE RIGHT OF DOWER—VALUE.

The proper rule for computing the present value of the wife's contingent right of dower, during the life of the husband, is to ascertain the present value of an annuity for her life equal to the interest in the third of the proceeds of the estate to which her contingent right of dower attaches, and then to deduct from the present value of the annuity for her life the value of a similar annuity depending upon the joint lives of herself and her husband, and the difference between these two sums is the present value of her contingent right of dower.

[Ed. Note.—For other cases, see Dower, Cent. Dig. § 84; Dec. Dig. § 32.*]

4. DOWER (§ 35*)—INCHOATE RIGHT OF DOWER—PROTECTION BY INJUNCTION.

While equity will protect an inchoate right of dower, it should do so in such a way as to discourage the improvement of estates as little as possible, and where it appears that the alleged waste will not substantially impair the value of the land, an injunction should be refused.

[Ed. Note.—For other cases, see Dower, Cent. Dig. §§ 85, 86; Dec. Dig. § 35.*]

5. DOWER (§ 35*)—INCHOATE RIGHT OF DOWER — RIGHT OF GRANTEE — VALUATION OF DOWER.

The owner of land to which an inchoate right of dower has attached may implead the contingent doweress to have the value of the right judicially ascertained, so that he may make improvements upon the estate without

fear of losing them by having them assigned to the widow as part of her dower, or in enhancement thereof in the event that her inchoate right should become consummate.

[Ed. Note.—For other cases, see Dower, Cent. Dig. §§ 85, 86; Dec. Dig. § 35.*]

Appeal from Common Pleas Circuit Court of Chesterfield County; Thos. W. Spain, Judge.

Action for injunction by J. H. Brown and Nancy A. Brown, his wife, against Jesse C. Brown and another. From an order refusing to enjoin the defendants from committing waste on land in which the wife of the plaintiff had a mere inchoate right of dower, plaintiffs appeal. Reversed and remanded.

Miller & Lawson, of Hartsville, for appellants. Dennis & Tison, of Hartsville, for respondents.

HYDRICK, J. This is an appeal from an order refusing to enjoin the defendants from committing waste, on the ground that the wife of a grantor is not entitled to the equitable aid of the court, in the protection of a mere inchoate right of dower.

In substance, the complaint alleges: That the plaintiffs were lawfully married; that during coverture the plaintiff J. H. Brown conveyed the land described in the complaint to Jesse C. Brown; that the plaintiff Nancy A. Brown has never relinquished her dower in said lands; that Jesse C. Brown has sold to the defendant A. M. McNair all the timber on said lands, without which they would be rendered almost, if not altogether, worthless; that the defendants have already committed acts of waste, and threaten to continue to do so, unless enjoined, to the irreparable injury of the plaintiff Nancy C. Brown; that the defendant Jesse C. Brown is insolvent; and that the plaintiffs have no other adequate remedy.

[1] In the consideration of this question, it will be necessary to determine the nature of the inchoate right of dower, which is thus described in 2 Scribner on Dower 5: "It is difficult to state with precision the nature or qualities of inchoate dower interest, when considered as a right of property. A certain vagueness of expression uniformly characterizes the discussions of the subject, and these discussions are commonly attended with unsatisfactory results"—and after considering the cases in which the nature and qualities of this right have been discussed, the author concludes in these words: "Although, therefore, an inchoate right of dower cannot be properly denominated an estate in lands, nor indeed a vested interest therein, and notwithstanding the difficulty of defining with accuracy the precise legal qualities of the interest, it may, nevertheless, be fairly deduced from the authorities that it is a substantial right, possessing, in contemplation of law, the attributes of property, and to be estimated and valued as such."

After quoting the foregoing language with approval, Mr. Justice McIver (afterwards Chief Justice), in the case of *Shell v. Duncan*, 31 S. C. 547, 10 S. E. 330, 5 L. R. A. 821, says: "The inchoate right of dower has been treated as such a substantial right of property as will afford a basis for an action to protect it. * * * Its present value may be judicially ascertained and protected." He cites authorities to sustain these propositions. In *Park on Dower*, 237, it is said to be "a right attaching by implication of law, which although it may possibly never be called into effect (as where the wife dies in the lifetime of the husband), yet from the moment that the fact of marriage and of *seisin* have concurred is so fixed on the land as to become a title paramount to that of any other person claiming under the husband by a subsequent act." This language is quoted with approval in the case of *Cunningham v. Shannop*, 4 Rich. Eq. 135. In the case of *McCreery v. Davis*, 44 S. C. 195, 22 S. E. 178, 28 L. R. A. 655, 51 Am. St. Rep. 794, the court, in speaking of the right of dower, says: "Although it is inchoate, yet it is a substantial right of property." From the foregoing citations of authority, it is clear that the circuit judge erred in holding that equity would not protect an inchoate right of dower.

[2-4] But while the court will protect the right, it should do so in such a manner as to discourage the improvement of estates as little as possible. In a case like this, where the land has been aliened in the lifetime of the husband, the statute (Civil Code 1912, § 8491) fixes the value of the land at the time of alienation, with interest from the death of the husband, as the value upon which to assess dower. No fixed rule has been adopted in this state by which the present value of an inchoate right of dower may be ascertained. In some cases, after the death of the husband, one-sixth of the value of the land has been assigned to the widow absolutely as a fair equivalent of one-third thereof during her life. Clearly this cannot be adopted as an invariable rule, because the value of the dower depends upon other elements besides the value of the land, such, for example, as the age, habits, constitution, and health of the widow, while the value of the inchoate right depends not only upon these as they affect the wife, but as they affect the husband also. In *Payne v. Melton*, 69 S. C. 370, 48 S. E. 277, the court held that one-sixth of the value of the land was too much to be reserved by a purchaser to protect himself against the inchoate right of dower of the wife of his vendor. The rule which seems to be based upon the best reason is that announced by

Chancellor Walworth in *Jackson v. Edwards*, 7 Paige (N. Y.) 386, 408. It is there said that "the proper rule for computing the present value of the wife's contingent right of dower during the life of the husband is to ascertain the present value of an annuity for her life equal to the interest in the third of the proceeds of the estate to which her contingent right of dower attaches, and then to deduct from the present value of the annuity for her life the value of a similar annuity depending upon the joint lives of herself and her husband, and the difference between those two sums will be the present value of her contingent right of dower." This rule was adopted by the Supreme Court of Alabama in *Gordon v. Tweedy*, 74 Ala. 232, 49 Am. Rep. 818, and impliedly by this court, by the citation of that case in *Shell v. Duncan*, 31 S. C. 566, 10 S. E. 330, 5 L. R. A. 821, as authority for the proposition that the present value of the right may be judicially ascertained and protected.

When the present value of the inchoate right of dower shall have been ascertained, the court will be in better position to make adequate provision for its protection, which may be done in various ways, according to the discretion of the court, depending upon the circumstances of each case. *Wannamaker v. Brown*, 77 S. C. 64, 57 S. E. 665; *Jackson v. Edwards*, *supra*. If it should appear that the alleged waste will be so inconsiderable that the value of the land will not be substantially impaired, injunction should be refused; for instance, the destruction of a body of timber on a plantation might be waste from a legal standpoint, yet if it is done for the purpose of bringing the land into cultivation, it might result in materially enhancing its value, and to enjoin it might prevent a substantial improvement.

[5] As it may be difficult, if not impossible, after the lapse of many years, to prove the value of the land at the date of alienation, either the owner of the land to which the inchoate right of dower has attached or the contingent dowress may implead the other—the one, that the value of the right may be judicially ascertained, so that he may make improvements upon the estate without fear of losing them by having them assigned to the widow as part of her dower, or in enhancement thereof in the event that her inchoate right should become consummate; the other, that her right may be protected.

The order appealed from is therefore reversed, and the case remanded for further proceedings not inconsistent with the views herein announced.

GARY, C. J., and WOODS, WATTS, and FRASER, JJ., concur.

(140 Ga. 81)

RENFROE et al. v. CITY OF ATLANTA
et al.

(Supreme Court of Georgia. May 28, 1918.)

*(Syllabus by the Court.)***1. MUNICIPAL CORPORATIONS (§ 863*)—LIMITATION ON INDEBTEDNESS—EFFECT.**

By article 7, § 7, par. 1, of the Constitution of Georgia (Civ. Code 1910, § 6563), it is declared that no municipality shall incur any new debt, except for a temporary loan or loans to supply casual deficiencies of revenue, not to exceed one-fifth of 1 per cent. of the assessed value of taxable property therein, without the assent of two-thirds of the qualified voters thereof, at an election for that purpose, to be held as may be prescribed by law. It further prescribes a limit upon the amount of indebtedness which can thus be incurred.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 1824-1827; Dec. Dig. § 863.*]

2. MUNICIPAL CORPORATIONS (§ 863*)—LIMITATION ON INDEBTEDNESS—EFFECT.

By article 1, § 4, par. 2, of the Constitution (Civ. Code 1910, § 6892), it is provided that "legislative acts in violation of this Constitution, or the Constitution of the United States, are void, and the judiciary shall so declare them."

[Ed. Note.—For other case, see Municipal Corporation, Cent. Dig. §§ 1824-1827; Dec. Dig. § 863.*]

3. MUNICIPAL CORPORATIONS (§ 864*)—LIMITATION ON INDEBTEDNESS—CONSTRUCTION OF CONTRACT—"CREATION OF DEBT."

A contract was entered into by the city of Atlanta and a private corporation, whereby the latter agreed to erect a crematory for the former, for a total price of \$376,800, of which it was agreed that an installment of \$50,000 should be paid in the year in which the contract was made, and that the balance should be paid in installments of \$75,000 each, except the last, extending through a series of years; that the installments to be paid annually should bear interest at the rate of 6 per cent. from the time when they fell due; that the city pledged its good faith for their payment, and the term "good faith" was understood to mean that the city could not bind itself to pay beyond the current year, but the mayor and general council of that year by resolution recommended to the mayor and general council of succeeding years to make appropriations to cover the deferred payments specified in the contract; and that, if a default in the payment by the city of any future installment of the purchase money should be made, this should, without any legal process whatever, transfer the possession of the plant to the contractor company, and that the company should "immediately become vested with the title, possession, and control of said plant, exclusive of the land, as against the city of Atlanta, and said company shall have the right to operate the same free of rent, for its own account, for a period of ten years from the date of such default." *Held*, that such contract sought to create a debt within the meaning of the constitutional provision on that subject set out in the first headnote, and, being entered into without submitting the question to a preliminary vote of the people, it was invalid.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 1828-1835; Dec. Dig. § 864.*]

4. MUNICIPAL CORPORATIONS (§ 993*)—ILLEGAL CONTRACTS—INJUNCTION—PARTIES.

Taxpayers of the city have such an interest in the municipal funds arising from taxation

that they may enjoin the creation of illegal debts by the corporation, or their payment.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 2158-2161; Dec. Dig. § 993.*]

5. MUNICIPAL CORPORATIONS (§ 867*)—POWERS—CREATION OF INDEBTEDNESS.

Nothing in this decision prevents the mayor and council of the city of Atlanta from erecting a crematory in such manner as will not violate the Constitution, or from submitting to the qualified voters the question of whether the city shall incur an indebtedness for the purpose of erecting a crematory, or from incurring such indebtedness if duly authorized by the voters in the manner prescribed by the Constitution. But the city and the contractor must be enjoined from creating a debt on the part of the city without the authority of the qualified voters, and from carrying out a contract entered into without such lawful authority which will have that effect.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. § 1841; Dec. Dig. § 867.*]

Error from Superior Court, Fulton County; Geo. L. Bell, Judge.

Action by J. N. Renfroe and others against the City of Atlanta and others. Judgment for defendants, and plaintiffs bring error. Reversed.

C. P. Goree, of Atlanta, for plaintiffs in error. J. L. Mayson, W. D. Ellis, and Evans, Spence & Moore, all of Atlanta, for defendants in error.

FISH, O. J. Certain citizens and taxpayers of the city of Atlanta, in behalf of themselves and such others similarly situated as might desire to become parties plaintiff, brought a petition against the city and certain named officers thereof, and the Destructor Company, a corporation, to enjoin the defendants from carrying out a contract entered into between the city and the Destructor Company for the erection of a crematory by the company for the city, on the ground, among others, that the contract was void, for the reason that it was an effort to create a debt against the city without complying with the constitutional provisions requiring the assent of two-thirds of the qualified voters of the city, expressed at an election held for the purpose of determining whether the debt should be created. An interlocutory injunction was refused, and the plaintiffs excepted.

So much of the contract as is necessary to be considered in deciding the case will be hereinafter set forth.

The first section of our Civil Code enumerates the laws of general operation which are of force in this state. After referring to the Constitution of the United States, the laws of the United States passed in pursuance thereof, and treaties made under the authority of the United States, the next item enumerated is with reference to the local laws of the state, and the Constitution

of this state is declared to be the supreme law therein next in order. Thus, at the very threshold of the Code of Georgia, the Constitution and its provisions are declared to be the supreme law, to which other laws must yield if they are in conflict therewith. At the close of the Civil Code are placed the Constitution of the state and that of the United States. It is significant that the beginning and the end of the law for the protection of the citizens, as embodied in the Civil Code of the state, are its constitutional provisions; and that at the beginning and at the end—the Alpha and Omega—of the Code, stands the declaration of the supreme law of the Constitution as a safeguard and fundamental guaranty of the rights of person and property. Once let it be understood that the Constitution can be violated or evaded at will, and no law of lesser force can be safe from a similar fate.

[1, 2] By article 7, § 7, par. 1, of the Constitution of this state (Civil Code, § 6563), it is declared: "The debt hereinafter incurred by any county, municipal corporation, or political division of this state, except as in this Constitution provided for, shall not exceed seven per centum of the assessed value of all the taxable property therein, and no such county, municipality, or division shall incur any new debt, except for a temporary loan or loans to supply casual deficiencies of revenue, not to exceed one-fifth of one per centum of the assessed value of taxable property therein, without the assent of two thirds of the qualified voters thereof at an election for that purpose, to be held as may be prescribed by law," etc. By section 10, par. 1, of the same article (Civil Code, § 6567), it is declared: "Municipal corporations shall not incur any debt until provision therefor shall have been made by the municipal government." In article 1, § 4, par. 2 (Civil Code, § 6392), it is declared: "Legislative acts in violation of this Constitution, or the Constitution of the United States, are void, and the judiciary shall so declare them." Here we have in the fundamental law, where rights and limitations are deliberately declared, not in the heat of political excitement, or the haste of mass meetings, or the like, but in the calm consideration of the people's representatives, formulating fundamental regulations for the protection of their persons and property even against hasty legislation or inconsiderate action by the Legislatures or municipal authorities, a limitation upon municipalities in regard to the creation of debts, and municipal councils are prohibited from creating debts without the consent of the taxpayers duly expressed. This constitutional provision is not a mere arbitrary or technical declaration of a rule of procedure, but it is a substantial protection to the taxpayers of a community against the action of municipal authorities, who are at last but the agents and servants of the

people, if they seek to impose indebtedness upon the taxpayers without their consent.

This provision of the Constitution was not hastily declared or based on mere theory, but it grew out of the sad experience of the past, and was intended to prevent a repetition of it in the future. In *Walsh v. City Council of Augusta*, 67 Ga. 293, Chief Justice Jackson said (page 299): "What was the evil? It was the evil attendant upon all people who handle money not their own. The cities of the state incurred a very heavy indebtedness—some of them became insolvent. To levy taxes enough to pay them would work the ruin of the citizens and blight the prosperity of the city. Not to levy and pay them would be to destroy credit and soil honor. The cities are the arteries of the body politic. With them destroyed or sluggish, the heart, the very life, of the republic would cease to beat, or pulsate with feeble supply of vital fluid. So that in their health is involved that of the entire commonwealth, and to suffer their honor to be tarnished is to soil that of the state." See, also, the remarks of Mr. Justice Cobb on the same subject in *City of Dawson v. Dawson Waterworks Co.*, 106 Ga. 696-704, 32 S. E. 907, et seq.

It is well to mention, as a part of the history of the adoption of this constitutional provision in its present form, that in the constitutional convention of 1877 a committee reported the paragraph with a provision contained therein giving to such corporations the power to increase their indebtedness to an amount not exceeding 2 per cent. upon the amount of taxable property therein, without the assent of two-thirds of the qualified voters thereof. Mr. Mynatt, who was a member of that convention, one of the representatives for the county of Fulton and the city of Atlanta as a part of that county, opposed the inclusion in the section of any such power, and offered a substitute therefor which prevailed, and the paragraph was adopted as it now appears in the Constitution. In the course of his argument on the subject Mr. Mynatt said: "Now, sir, we have \$15,000,000 of property in the city of Atlanta, and 2 per cent. on it would be \$300,000, which the city council can involve us in every year. They can ruin us without asking permission. I move to amend by striking out in the fourth line the words, 'or increase its indebtedness to an amount exceeding 2 per cent.' and inserting in lieu thereof the following words: 'Except for a temporary loan or loans to supply casual deficiencies of revenue not to exceed one-fifth of 1 per cent.' The one-fifth will amount in the city of Atlanta to \$30,000, the amount which the city council may borrow for the purpose of supplying casual deficiencies in the collection of taxes. I think they should not be allowed to borrow any money whatever, unless it is for this purpose, and then, when the money is collect-

ed, it is to be paid back. Let us not empower them to involve us in any increased indebtedness at all. I propose to stop the city council at that point, and not allow them to create a debt upon the people." A member of the convention asked the speaker: "Does not your city charter restrict the council in this matter of increasing the public debt?" Mr. Mynatt replied: "It does, sir." His interlocutor then asked: "Under that restriction, then, can they borrow any money at all?" Mr. Mynatt replied: "I think not, but I want it passed here in this convention that it shall not do it at all." *Small's Debates of the Constitutional Convention*, p. 306.

It will thus be seen that not only was it deliberately considered by the constitutional convention, representing the people of the entire state, that this restriction should be put upon municipal councils, but that a representative of the people of Atlanta and Fulton county emphasized and insisted upon the importance of making this a constitutional limitation, and not leaving it to the legislative prohibition contained in the charter of the city. That convention and those representatives knew full well the conditions to which Chief Justice Jackson referred in the excerpt from his opinion above quoted, and they determined to place it in the fundamental law that such a situation should not again be brought about by a municipal council. It is unnecessary to discuss here the meaning of the words "casual deficiency," further than to say that they are not involved in the present question, and that they have received a fixed construction and declaration as to what they mean and what can be done under them. The constitutional plan was to pay current expenses each year from funds belonging to that year. *Butts County v. Jackson Banking Co.*, 129 Ga. 801, 60 S. E. 149, 15 L. R. A. (N. S.) 567, 121 Am. St. Rep. 244.

The condition of affairs above mentioned, and the placing of constitutional limitations upon the power of municipal corporations to contract indebtedness or impose liabilities upon the taxpayer, were not confined to Georgia; but similar conditions occurred in a number of states, and constitutional limitations upon municipal councils were correspondingly imposed.

[3, 5] Let it be distinctly understood, and let there be no mistake, that the question before this court is not whether a crematory is desirable for the city of Atlanta, or whether a crematory can be built. This court in no manner declares that the city of Atlanta cannot have a crematory. On the contrary, it can have a crematory, and can contract an indebtedness therefor, if it is deemed desirable, by pursuing the method pointed out in the Constitution. The question is not whether the city can have or should have a crematory, but whether the municipal council can impose on the taxpayers an indebtedness

to pay for a crematory, without the consent of the taxpayers expressed in the manner required by the Constitution of the state, and whether the city council have undertaken to do this in substance. It must not be forgotten that the people are the sovereigns, and that the mayor and councilmen are but their agents elected to represent them. The former are the masters; the latter, the servants. The sovereign people have seen fit, not only to prohibit the municipal council of Atlanta, but those of all other cities of the state, from incurring indebtedness except in the manner which the Constitution provides. To allow municipal councils directly or by indirection to violate these constitutional restrictions, made by the people for their own protection, would be to exalt the agent above his principal, the servant above his master.

It was claimed that there was a necessity for a crematory in order to protect the public health, and that prompt action was required. But this argument loses its force in the light of the facts that the contract now under consideration was proposed in the spring or early summer of 1912. After consideration by council, the contract was finally made in July, 1912. There was litigation in the effort to prevent the crematory, which the city formerly had on the property where this one is sought to be erected, from being removed, and it appears from the record that the work was not begun on the new crematory for some time, and that only \$26,000 out of a total contract price of \$376,800 had been expended by the contractor when the present litigation was instituted. The petition in this case was filed February 25, 1913, the order of the judge of the superior court was passed on March 11, the transcript of the record was filed in the office of the clerk of this court April 10, and (neither side requesting an advancement of the hearing) it was argued on May 9, 1913, in this court.

From this brief recital it will be seen that the matter has been pending before the council and the courts for more than a year. Section 403 of the Civil Code provides for holding an election to determine whether a municipality will incur an indebtedness, other than a bonded debt, upon giving notice for 30 days preceding the date of the election. It is apparent that 12 times the requisite time for giving the notice and holding the election has elapsed, without the slightest effort to do so. In the meantime it appears that the mayor and certain members of the council and certain taxpayers have continuously insisted that the contract was void, and both the municipal council and the contracting party have acted with full knowledge of this fact, and of the fact that the mayor vetoed the action of council in making the appropriation to carry out the contract. So that it is perfectly clear that there has been ample opportunity to submit the question of incurring an indebtedness for

this purpose to the people, that it could have been done long ago, and that any delay occurring is not to be charged to a want of time to make such a submission, but to the determination of the council and the contractor to make the contract without the submission. It cannot, therefore, be placed either on the ground of the necessity of haste in protecting the public health or on the ground of lack of time for submitting the question to the people; but the case presents the bald question of whether the municipal council have the right to make this character of contract without submitting to the people the question of incurring the debt, or whether to do so is in violation of the constitutional provision above quoted.

Taking up the question, then, not as a matter of municipal health or of municipal necessity, but as a question of the power of the municipal council to make this contract without a submission to the people, we will now consider the question whether the contract so made creates an indebtedness within the meaning of the constitutional prohibition on that subject. Numerous definitions of the word "debt" have been made, some of them quite restricted in meaning, and some of them quite broad. In determining whether or not the contract violates the provisions of the Constitution on the subject of indebtedness, the question is not to be determined merely by prescribing any exact, exhaustive definition of the word "debt," covering all cases, and applying it as a verbal yardstick to the particular contract, but rather by considering the great beneficial purpose of the Constitution and the intent of that instrument in making the provisions. It is not so much a matter of nicety in definition of words as of substance in obeying the Constitution. May we not, without sententiousness, say: Let him who standeth confidently upon a definition take heed lest he fall, since it has been wisely said: "Definition, simple, positive, hard and fast as it is, never tells the whole truth about a conception." In a note to *Superior Mfg. Co. v. School Dist. No. 6*, 37 L. R. A. (N. S.) 1054, at pages 1060, 1061, the annotator says: "In interpreting debt limit provisions in the Constitutions of the states and local statutes and charters of municipal corporations, the conditions which existed prior to their enactment, which they were designed to remedy, should not be forgotten. It was not until the people in many states found themselves carried along by a wave of public extravagance which was likely to bring them to bankruptcy that they determined to put an end to the danger by setting a limit to expenditures in the Constitutions themselves. The evil was one of extreme seriousness. The debt limit provisions were written in the fundamental law to be obeyed. * * * In the main the courts have shown a disposition to uphold the debt limit provisions in the spirit in which they

were enacted, although various schemes have been devised to evade them." In *Walsh v. City Council of Augusta*, 67 Ga. 293, *supra*, Chief Justice Jackson, in dealing with this very clause of the Constitution, said (page 297): "In order to arrive at the true construction of all statute law, whether organic and fundamental, or legislative, the cardinal rule, if there be ambiguity in the words, is to consider the old law, the mischief or evil, and the remedy."

In Pennsylvania the same conditions arose in municipalities as those above mentioned, and it was found necessary to place in the Constitution a restriction upon the power of cities to contract debts. An effort was made to evade this provision of the Constitution by making a contract which in some of its important features was remarkably similar to that under consideration. In the case of *Brown v. City of Corry*, 175 Pa. 528, 34 Atl. 854, it was held: "A contract by which W. was to construct a system of waterworks for a city, to be delivered to and operated by it when completed, requiring the city to pay him \$6,000 annually for 20 years, and to deposit \$3,000 annually for that time, to be given to him, with accrued interest, at the end of that period, and transfer of title to the waterworks then to be made to it, creates an indebtedness, within Const. art. 9, § 8, providing the debt of a city shall never exceed a certain limit, though the contract provides that the payments and deposits are to be made from the current revenues of the city, and not otherwise, and that, if said revenues are insufficient to meet the payments and deposits, the interest of the city in the works shall revert to W. and the contract be terminated." This was declared in a state in which it was held that a contract pertaining to ordinary expenses, but extending through a series of years, might be made; but it was said that such ruling did not apply to a contract of the character of that mentioned. In *City Council of Dawson v. Dawson Waterworks Co.*, 106 Ga. 696, 32 S. E. 907, it was held in this state that, "without the preliminary sanction of a popular vote as required by the Constitution, a municipal corporation cannot contract for a supply of water, on the credit of the city, for a longer period than one year." So that the decision just above cited was made in a state in which a more liberal construction is given in regard to contracts for water or light, extending through a series of years, than that declared in this state.

In Maryland it was declared by the Constitution of 1867 that "no debt shall be created by the mayor and city council of Baltimore, unless it be authorized by an act of the General Assembly, and by an ordinance of the mayor and city council of Baltimore, submitted to the legal voters of the city, and approved by a majority of the votes cast." The mayor and council sought to avoid the

restriction quoted by pledging certain railroad stocks, with the agreement that the pledgee should look for the payment of the money exclusively to the stock pledged, and in no event was the city to be liable for the return or payment of any part thereof, even though the stock pledged should prove insufficient. It was held that the restrictive provision applied to such a contract, that it could not be thus evaded, and that the ordinance making provision therefor was void. *Mayor and City Council of Baltimore v. Gill*, 31 Md. 375. In the opinion *Bartol, C. J.*, said (page 287): "We hazard nothing in saying that no one can read it [the ordinance] without being impressed with the conviction that the city council must have been sensible of the difficulties which the Constitution interposed in the way of such legislation, and that its phraseology was ingeniously chosen for the purpose of avoiding the restrictions imposed by that instrument. But in considering it we must not forget that we are dealing with substance, not with form. It is the thing done, or sought to be accomplished, which must determine the question of the power of the mayor and city council to pass the ordinance. This depends upon the true construction, operation, and effect of the whole ordinance, not upon the form or mere phraseology of some of its parts. * * * Though in the title and body of the ordinance the word *invest* is used, and it purports to be a mere change of investment, it is impossible to shut our eyes to the fact that the whole scheme of the ordinance is to borrow the sum of \$1,000,000, and to secure its repayment by hypothecating stock of the Baltimore & Ohio Railroad Company held by the city. * * * It has been argued that no debt is created by the ordinance, because by the second section it is provided that the parties loaning the money shall look for its repayment exclusively to the stock pledged, and that, in no event is the city to be liable or responsible for the return or repayment of any part thereof, even though the stock pledged should prove insufficient. This provision was doubtless adopted for the purpose of avoiding the restriction imposed by the Constitution. We think it altogether ineffectual for that purpose. A debt is money due upon a contract, without reference to the question of the remedy for its collection. It is not essential to the creation of a debt that the borrower should be liable to be sued therefor. No suit can be maintained against the state by one of its citizens, and yet debts are created by the state which it is bound in good faith to pay."

In *Browne v. City of Boston*, 179 Mass. 321, 60 N. E. 934, the facts were these: The city authorities of Boston desired to acquire certain land adjoining land of the city used for a hospital. The price of the land was \$228,000. The borrowing capacity of the city

under St. 1885, c. 178, limiting its indebtedness, was but little over \$24,000, and it had no money in its treasury available for the purchase of the land. It was arranged with the owners of the land that they should mortgage it to third parties for \$202,000, and the city should buy it subject to the mortgages for \$24,000. The mortgages were to be payable three years after the conveyance to the city, with a privilege to the owners, their grantees and assigns, to pay them off before maturity. The city was not to be mentioned in the mortgages and, the deeds to the city were to contain the statement that the city was not to be held liable in any way for the payment of the mortgages or the interest thereon. Upon a petition of taxable freeholders of Boston to enjoin the city from carrying out the transaction, it was held that the proposed action of the city must be enjoined as an attempted evasion of the statute of 1885, and within its prohibition; that the transaction was in substance and effect a purchase of the land by the city for the sum of \$228,000, of which it was to pay \$24,000 in cash and the rest in three years with interest, with the privilege of paying sooner, and this notwithstanding the fact that the city could not be sued for the balance of the purchase money; the manner in which the indebtedness was created being immaterial, if the result was to subject the city to a present liability, direct or indirect, which the taxpayers eventually would be called upon to meet.

In *Ironwood Water Works Co. v. City of Ironwood*, 99 Mich. 454, 58 N. W. 371, it was held that "municipal corporations cannot avoid restrictions upon the amount of indebtedness they may incur by purchasing property for public purposes subject to liens." In the opinion *Grant, J.*, said (99 Mich. 460, 58 N. W. 373): "Obviously the city of Ironwood will have no way to protect the property thus purchased except by payment of the lien thereon. * * * The city must pay the mortgage, or lose all the benefits to be derived from the purchase. It is expected and understood that it will pay it and the interest on it. Such was the evident intention of all parties." See *Rodman v. Munson*, 13 Barb. (N. Y.) 63; *Newell v. People*, 7 N. Y. 9; *Earles v. Wells*, 94 Wis. 285, 68 N. W. 964, 59 Am. St. Rep. 886; *Reynolds v. Waterville*, 92 Me. 292, 42 Atl. 553.

These authorities are sufficient to show that, in dealing with constitutional limitations upon the power of municipal corporations to incur indebtedness, courts incline to look to substance rather than to form, and not to allow the mandate of the Constitution to be evaded, either by mere plausible devices of language or by refined and hair-splitting definitions of the meanings of words supported by references to dictionaries or to expressions of judges in discussing cases before them.

Counsel for defendants in error rely much upon the case of *Hay v. City of Springfield*, 64 Ill. App. 681. It is unnecessary to discuss that case at length. But it may be remarked that in the opinion it is said: "It is perfectly plain that it was not intended to bind the city to take the light for any particular time or to take the plant." In the case before us it is perfectly plain that it was the intention to bind the city to take the plant or to suffer loss. Again, that decision was not rendered by the highest court of the state, but by the Appellate Court. Its reasoning does not seem in harmony with that of the Supreme Court in *City of Joliet v. Alexander*, 194 Ill. 457, 62 N. E. 861. In any event, it does not accord with the decisions which we have cited above, and which we believe to announce sound principles of law.

In the light of the foregoing discussion, let us see what were the provisions of the contract here involved, what was its real meaning and intent, and what did it undertake to accomplish. The Destructor Company made a proposition to the city of Atlanta to erect for the latter a refuse incinerating plant or crematory. The price stated for the completed plant was \$376,800. On the 3d day of June, 1912, a resolution was adopted by the mayor and general council which contained, among other things, the following expressions: "That the proposal of the Destructor Company of New York for the erection and completion of an incinerating plant and plants for the generation of electric current, as per plans and specifications filed herewith and fully covered by item 1 of said proposal, at a cost of \$376,800, payable not exceeding \$50,000 during the year 1912, provided that any saving in the cost of the construction of the building from the amount provided therefor in said proposal shall inure to the benefit of the city, be and the same is hereby accepted. Resolved, further, that the city of Atlanta hereby pledges its good faith to pay the balance of the cost of said construction as follows: \$75,000 in each of the years 1913, 1914, 1915, and 1916, remainder in the year 1917, deferred payments to bear interest from date same are due under estimate at not exceeding 6 per cent. per annum. The city reserves the right to pay one or all of said deferred payments on or before maturity. Resolved, further, that his honor the mayor be directed to execute a contract in the name of the city upon approval of the city attorney as to form." On July 15th an amendment to this resolution was approved, which contained, among other things, the following statement: "The deferred payments which the above-described resolution pledges the good faith of the city of Atlanta to make in the years 1913, 1914, 1915, 1916, and 1917 are hereby recommended to the mayor and general council of said years to be made on or before the 15th day of February in each of the aforesaid years, provided same are due

under approved estimates. All deferred payments to bear interest at 6 per cent. per annum from the date of approved estimates, as provided in said original resolution and bid. * * * Resolved, that the Destructor Company shall retain title to any and all material or other things of value furnished by said company to the city of Atlanta in accordance with its contract, before and after the same is erected into an incinerating or electric generating plant upon a site furnished by the city of Atlanta, with the right of supervision over the operation of said plant by the board of health, until the city has made the final payments therefor. The Destructor Company shall be given no further remuneration for such supervision. The city shall pay all labor and operating costs of the plant in the same manner and method as though the Destructor Company did not have such supervision. * * * Resolved, further, that after the city of Atlanta has accepted said plant, as having been built in accordance with the specifications and as fulfilling all guarantees as to capacity, cost of operation, etc., and the operation of said plant has been taken over by the board of health, under the supervision of the Destructor Company, a default in the payment of any future installment of the purchase money by the city shall ipso facto, without any legal process whatever, transfer the possession of the plant to the Destructor Company, and said company shall immediately become vested with the title, possession, and control of said plant, exclusive of the land, as against the city of Atlanta, and said company shall have the right to operate same, free of rent, for its own account for a period of ten years from the date of such default." The contract entered into between the company and the city embraced these resolutions and they contracted accordingly. It contained the following provisions (after providing for the payment of \$50,000 in the year 1912): "As to the remainder of the cost, under the plans herein provided for, the city of Atlanta hereby pledges its good faith to pay said contractor for same as follows, to wit: Seventy-five thousand (\$75,000.00) dollars on or before the 15th of February in each of the years 1913, 1914, 1915, and 1916, and the remainder on or before the 15th of February, 1917, and recommendation has been made to the mayor and general council of said several years to make appropriations to cover said amount, provided same are due under approved estimates. All deferred payments to bear interest at the rate of six (6%) per cent. per annum from the date of approval of estimates as provided in original resolution and bid. The term 'good faith' is hereby understood to mean that the city cannot bind itself to pay beyond the current year, but the mayor and general council of 1912 by said resolution does hereby recommend to the mayor and general council of the succeeding

years to make appropriations to cover the said deferred payments as above provided."

It is impossible to read this contract and these resolutions without seeing plainly that the intention of the parties was for the city to contract for the building and equipping of a crematory at a fixed price, a part of which was to be provided for and paid in 1912, and much the larger part of which was to be paid in installments in subsequent years, and that it was sought at least to pledge the good faith of the city for the payment of the future installments. It went even further. It provided that, if any installment should not be paid, the company should at once be vested with the title, possession, and control (except as to the land), and that it should have the right to operate the plant for ten years for its own account, free of rent. Thus the city might pay every installment but the last one, but if the council in that year conscientiously and correctly believed that the contract was illegal, and refused to violate the law as they saw it, the city would have neither its money nor a crematory. This would be to apply, not only moral, but pecuniary, coercion to future councils to force them to pay or lose, and to take from the city its crematory and put it in the hands of the other party, by virtue of the terms of the contract. To say that this creates no debt within the meaning of the Constitution is simply to juggle with words.

We know of no law which authorizes a city council to pledge the good faith of the city for the payment of money in future years, any more than to mortgage the city hall for the same purpose. The city's good faith is a great asset, and no council has the right to pledge it to evade the Constitution. Certainly no council has the right to admit that it cannot bind future councils, and yet to fix payments for future councils to make, and so arrange the contract that, if the future councils do not make the payments, moral and pecuniary loss will automatically fall upon the city, and it will be put to serious inconvenience.

Moreover, this contract bristles with other earmarks of creating an indebtedness. It distinctly contracts for binding the city as to the manner of operation of the crematory in future years, and until final payment. Future councils are left no discretion on the subject. It is liberally interspersed with such words as "installments," "deferred payments," "when due," and the like—words peculiarly applicable to debt. It provides that the installments shall bear interest from the time when they are due, at 6 per cent. per annum. Who ever heard of a sum of money being due by one person to another, and bearing interest from the date when due, and yet not being a debt? Does any one think for a moment that this company contracted to take \$50,000 for its crematory? If not, is it not palpable that it was understood that the balance should be paid in other years, and

that it was sought by a skillfully drawn contract to so provide as to force future councils, by arguments of morals and money, to pay them? If the city council should incur a debt, it would be none the less a debt by solemnly declaring that it was not such, or by resolving that it was constitutional.

If this constitutional restriction does not apply, then there is no restriction, and the council can purchase millions of dollars of property, drain the treasury to make the first payments, provide for future payments, and coerce future councils to make them under penalty of losing both the good faith of the city and the installments already paid; and this is equally true of every municipality in Georgia. Then the taxpayers in future years must be burdened with taxes to meet these deferred payments, in the contracting for which they had no voice, as the Constitution declared that they should. Besides, improvements in future years from regular income must be postponed to these payments, lest the city suffer in reputation or purse, or else the process of piling up installments which are not debts, but which must be paid, must be continued indefinitely. It was just such conditions which the Constitution sought to prevent.

When read in the light of the facts of the case then under discussion, there is nothing in the decision in *City Council of Dawson v. Dawson Waterworks Co.*, 106 Ga. 696, 711, 32 S. E. 907, 913, or other cases preceding or following it, decided by this court, on which counsel for defendants in error rely, which conflicts with what is here held. Much stress was laid upon the following statement in the opinion of Mr. Justice Cobb in that case: "'Debt,' therefore, as used in the Constitution, is to be understood as a liability which is undertaken and which must be discharged at some time in the future, but which is not to be discharged by a tax levied within the year in which the liability is undertaken. The purpose of the framers of the Constitution was to prevent an accumulation of liabilities upon municipal corporations which could be enforced against such corporations in the future by the compulsory levy of taxes. * * * If the character of the undertaking is such that he who deals with a municipal corporation can, under the contract, in the future, of his own volition, and without the consent and over the protest of the authorities of the municipality, place upon it a liability which must be discharged by the levy of a tax in the future, such an undertaking creates a debt within the meaning of the Constitution of this state, and one of the very classes of debts which the constitutional provision was made to guard against." The learned judge who wrote that opinion declared that, if a contract could be made by which a contracting party had the right from year to year by simple performance to put himself in a position where he could demand of the authorities a discharge

of the obligation, then the framers of the Constitution did a vain and idle thing in placing in the fundamental law of the land the clause under consideration. A fair reading of that opinion will show that Mr. Justice Cobb was demonstrating the fact that an agreement of the character then before him did create a debt, but that he never intended to hold that such an agreement was the only one that would create a debt. The expression that such an undertaking was "one of the very classes of debts which the constitutional provision was made to guard against" shows that he did not consider that the Constitution was confined to the particular class which he was then discussing. We have already undertaken to show that it is not essential that one should have the right to sue in order to create a debt; otherwise, the state would never be a debtor as to individual bondholders, though it has millions of dollars worth of bonds outstanding. It is not the remedy that creates the debt, but the remedy is generally a method provided for collecting the debt. The substitution of the contractual remedy in lieu of the ordinary remedy by suit does not operate to prevent the amount which is to be collected from being a debt. Furthermore, we have already undertaken to show that this contract did seek to make the city liable in the future to make payments, to place future councils in the position where they must make the payments specified or must sacrifice for the city its good name, and also cause it to suffer pecuniary loss and embarrassment. This is probably quite as efficacious a mode of enforcing payment as a mere common-law suit.

The position of the defendants in error is not sustained by the rulings in the Dawson Waterworks Case, and other similar cases in this state, that where water had been furnished under a contract for one or more years before any question of its validity had been made, and where it was held that in equity and good conscience the city should pay for the water actually used while the contract was supposed to be valid. In some states contracts like that involved in the Dawson Waterworks Case are held valid on the theory that a municipality could contract for water to be furnished year by year, the furnishing of water being a matter of annual expenditure and the city not exceeding the limitation upon such expenditure, and that it could therefore within that limit contract for more than one year. In this state, as already mentioned, it has been held that a municipal corporation could not contract for a supply of water on the credit of the city for a longer period than one year, without the preliminary sanction of a popular vote as required by the Constitution. In the case last mentioned, and others like it, where the city could have contracted for a supply of water for one year at a time, though the contract

provided for more than one year, yet where the city actually used the water by the year, and all parties were in good faith, there was strong equitable ground for holding that during the time the water was so used, and before any question was made as to the validity of the contract, the water used should be paid for. From the time when the point was made that the contract for a series of years was invalid it was held not to be binding as a contract. Had the point been made in limine, it would doubtless have been then declared invalid, just as it was so declared when the point was raised. In the case now before us there has been no furnishing of water or lights or similar matters of municipal use, which could have been procured as a part of the ordinary annual expenses for the year, but a contract for a plant at a bulk price, payable in installments. The point in regard to the illegality of the contract was made in the beginning, before the city had received or used anything, and before the city had paid anything. In fact, it can be drawn from the record that there has been a constant fight to prevent the contract from being carried into effect, and an effort on the part of the Destructor Company to proceed with the contract, and to enforce payment of the amounts provided therein, in spite of objections on the ground that the contract was illegal, in spite of the refusal of the mayor to sanction any payment under it, and in spite of the fact that citizens filed a proceeding to enjoin it. In other words, it has not furnished the city with water or light, or any similar thing of daily use by the city, and then had the point made that the contract was illegal. On the contrary, the company entered into a contract which we have endeavored to show bore on its face an effort to evade the Constitution and to make an illegal contract with the city, which would create a debt, without submitting the question to the qualified voters as the Constitution requires. The difference between the situation of the Dawson Waterworks Company, as to water which it had furnished for the use of the city before any question was raised as to the validity of the contract, and the position of this company, which has entered into a contract illegal on its face and has persistently insisted on its execution, is manifest. Nor is this like the Butts County Case, *supra*, where the original warrants were considered legal, and though the contract to loan money to pay them was invalid, the bank which took them up and held them was treated as acquiring a species of equitable assignment.

[4] It was argued that the contract had already been signed, and that the taxpayers who were plaintiffs had no right to an injunction. The injunction cannot stop the signing of the illegal contract, but it can stop the carrying of the contract into effect, the illegal imposition of an indebtedness upon the city, and the illegal payment of such an

indebtedness. It is too well settled by former decisions to require argument that a taxpayer has such an interest in the municipality and its funds that he may enjoin the unlawful use of such funds. Mayor and Council of Americus v. Perry, 114 Ga. 871 (6), 40 S. E. 1004, 57 L. R. A. 230; Mayor and Council of Macon v. Hughes, 110 Ga. 795, 36 S. E. 247; Fluker v. City of Union Point, 132 Ga. 568, 64 S. E. 648. The argument that, because the city might make annual appropriations for the disposition of filth or refuse matter, it might make annual appropriations without regard to the contract, and therefore could make appropriations under the contract, is ingenious, but unsound. The right to make annual appropriations for the discharge of municipal functions during the current year is an entirely different thing from the appropriating of money annually to pay an illegal indebtedness, contracted in bulk, but to be paid in annual installments. The entire case hinges upon the question whether the contract under consideration attempts to create an illegal indebtedness on the part of the city; and we have sought to show that it does.

It follows from what has been said that the presiding judge erred in refusing to grant interlocutory injunction. Such an injunction does not prevent the municipal council from submitting to the qualified voters of the city whether or not the city shall incur a debt for the purpose of erecting a crematory. It enjoins the city and the Destructor Company from carrying into effect an illegal contract seeking to impose a debt upon the city.

Judgment reversed. All the Justices concur.

(140 Ga. 31)

STEWART, Tax Collector, v. ANDERSON et al., Com'rs, etc. ARMISTEAD, Tax Receiver, v. SAME. WILKINSON, Ordinary, v. SAME.

(Supreme Court of Georgia. May 14, 1913.)

(Syllabus by the Court.)

STATUTES (§§ 76, 163*)—REPEAL — OFFICERS — SALARIES.

The act of August 22, 1911 (Acts 1911, p. 186), touching the salaries of certain county officers, while employing certain general terms, is so hedged about with provisions, restrictions, and limitations that it is in reality a special act, and, being in regard to a subject for which provision has previously been made by an existing general law, it is invalid.

(a) The act being unconstitutional, it was error to grant a mandamus to compel certain officers of Fulton county to file reports with the county commissioners, as therein provided.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. §§ 77½-78½, 238; Dec. Dig. §§ 76, 163.*]

Error from Superior Court, Fulton County; J. T. Pendleton, Judge.

Three actions by C. L. Anderson and others, as Commissioners of Roads and Re-

venues—one against A. P. Stewart, as Tax Collector; one against F. M. Armistead, as Tax Receiver; and the other against J. R. Wilkinson, as Ordinary. Judgments for plaintiffs, and defendants bring error. Reversed.

The commissioners of roads and revenues of Fulton county instituted three separate actions against A. P. Stewart, tax collector, J. R. Wilkinson, ordinary, and T. M. Armistead, tax receiver, of Fulton county, seeking the writ of mandamus to compel each, respectively, to file detailed statements of the number of assistants needed and the amount necessary to be expended for deputies, assistants, bookkeepers, clerks, and other employes of his office for the year 1913, as provided in section 5 of the act of August 22, 1911 (Acts 1911, p. 186). The defendants severally answered, setting up that the act of the Legislature requiring such statement was unconstitutional and void, and specifically setting forth wherein it was contended that the act was unconstitutional. On the hearing the cases were presented in such manner as to make the ruling dependent upon the constitutionality of the act. In each instance the judge granted a mandamus absolute as prayed, thereby holding in effect that the act was not subject to any of the attacks made upon it. The defendants severally excepted to the judgment, and all the cases were heard in the Supreme Court together, and will be considered together.

J. D. Kilpatrick and Little & Powell, all of Atlanta, for plaintiffs in error. L. Z. Rosser and Hooper Alexander, both of Atlanta, for defendants in error.

ATKINSON, J. (after stating the facts as above). It is declared in article 1, § 4, par. 1, of the Constitution (Civil Code, § 6391), that "laws of a general nature shall have uniform operation throughout the state, and no special law shall be enacted in any case for which provision has been made by an existing general law." A general law may be repealed or modified by another general law, but it cannot be repealed or modified by a special or local law. If the act under consideration is a general law, it is valid as against the contention that it violates the section of the Constitution above quoted. If it is a special or local law dealing with a subject as to which provision has already been made by an existing general law, then it is in conflict with that section and invalid. The question, therefore, is whether the act under consideration is a general or a special law. Has it uniform operation throughout the state? It does not purport to apply to all counties in the state, but only to such as meet a certain description. The Legislature may make classification for purposes of legislation and pass general laws with reference to such classes. They may

classify counties. The basis of classification must have some reasonable relation to the subject-matter of the law, and must furnish a legitimate ground of differentiation. Mere arbitrary discriminations are not permissible under the Constitution. If a legitimate classification is made with respect to persons, the law must be applicable to all persons within the class, or coming within the class. If the classification is sought to be made with reference to counties, and the basis of classification is legal, the law must apply to all counties within the class, or which may come within the class. The Legislature could not constitutionally classify one county by itself. There must be some reasonable basis of classification, so that all which fall within the class may come within the scope of the provisions of the law. Although the act may purport to make a classification of counties for purposes of legislation, yet if the so-called class is so hedged about and restricted that the act applies to only one county, and that other counties coming within the class provided cannot also come within the purview of the law, it is in fact a local or special act, and not a general one. See *Worth County v. Crisp County*, 139 Ga. 117, 76 S. E. 747; *Vaughn v. Simmons*, 139 Ga. 210, 76 S. E. 1004; *Futrell v. George*, 135 Ga. 265, 69 S. E. 182.

In the *Worth County* Case the act considered by this court purported to be a general one in regard to changing the dividing line between two counties, as to which subject-matter a general law already existed. The act provided that, where there are two contiguous counties, and according to the last United States census one of them has a population of not less than 16,422 nor more than 16,424, and the other has a population of not less than 19,146 nor more than 19,148, the dividing line between them may be changed in the manner therein pointed out. According to the last United States census, before the act was adopted, only the counties of *Worth* and *Crisp* had such populations as would render it applicable to them. It will be perceived that the act allowed a margin of only three as to the population of each county. While shaped in the form of a general act, it was palpable that the possibility of there being two other contiguous counties which would ever have populations respectively within those limitations were so remote as to form no basis for a reasonable classification, and that in effect the act applied to those two counties alone. It was accordingly held to be a special act, and unconstitutional. In the case of *Vaughn v. Simmons*, an act which sought to create a special school district, where there was a general law providing the manner of such creation, was held invalid, although it sought to accomplish that purpose by declaring the school district to be an incorporation. In the case of *Futrell v. George*, there was an

attempted classification of counties having a population of between 7,000 and 8,000, or of between 13,700 and 14,000, or of between 16,000 and 21,000, as shown by the United States census for 1900, and it was sought to vary the general road law by such an act. It was patent that the description included only a few counties under the census of 1900, and that other counties which might at any time thereafter have a population within the limitations stated could not come within the provisions of the act. It was accordingly held unconstitutional.

Applying these tests to the present act, could it properly be called a general law, or is it a local or special one? The sole basis of classification mentioned in the act is that of population. It purports to make a class of all counties having a population of 100,000 by the last census or any future census. We think that the population of a county bears such a legitimate relation to the amount of work which county officers do and to the compensation which they receive by way of fees therefor as to furnish a reasonable basis for a classification relative to the constitutional requirement of generality which is now being considered. But, having specified a population of 100,000 as the basis of the classification, the Legislature did not stop there, but proceeded to hedge the act about with so many provisions, restrictions, and limitations that it not only excluded counties which might possess the alleged basis of classification by some future census, so that the act could not apply to them, but practically restricted its application to *Fulton* county. When it was declared that the class should consist of all counties having 100,000 inhabitants by the last or any future federal census, with no other basis of classification than this, in order to be a general law it was necessary that it should be open to let in any county which by any future census might have that population, and to be so framed as not to exclude such a county, but to apply to it. It is not so shaped that this could be done. No more conclusive evidence of this fact could be produced than by referring to the office of solicitor general. There are 28 judicial circuits in the state, each having a solicitor general. In only two of these does one county constitute an entire circuit. In all others a circuit contains several counties. There was existing, prior to the passage of this act, a general law regulating the fees of solicitors general throughout the state. This act declares that in any county which may hereafter have a population of 100,000 the solicitor general shall fall within its provisions, and receive a salary, instead of fees, as at present. Take the *Augusta* circuit by way of illustration: It contains four counties. Suppose that at some time in the future *Richmond* county, in which *Augusta* is located, should have a population of 100,000. How could this act be

applied to it? Would it be said that the county of Richmond should pay the solicitor general a salary in accordance with the act, and in the other three counties he should continue to collect fees? If so, then the solicitor general in the Atlanta circuit, which is composed of but one county, would be paid in one way, and the solicitor general of the Augusta circuit would be paid partly in one way and partly in another. This would not be uniform. On the other hand, could it be contended that the county of Richmond should pay the entire salary provided by this act, and that the other three counties in the circuit should pay nothing to the solicitor general, and he should collect no fees therein? If so, it would again be lacking in uniformity, by seeking to impose upon one county the payment of the solicitor general for services rendered in the entire circuit (omitting the small salary of \$250 paid by the state), while there would be nothing paid in the other counties, either by way of salary or fees. So the Macon judicial circuit includes three counties. If the county of Bibb should in the future have 100,000 inhabitants, how could the provisions of this act apply to it, and how could there be any uniformity in regard to that county and the others in the circuit?

Again, the act provides for the making of reports to the county commissioners, and confers on them very extensive authority in regard to the salaries of the officers named in it. It happens that Fulton county has a board of county commissioners; but there are a number of counties in the state which have no such officers. It is palpable that the act would not be applicable to them, whether they should have a population of 100,000 in the future or not. It could not be said that in such counties the intention would be that the reports should be made to the ordinary and the authority given by the act would be conferred on him, because the ordinary is himself one of the officers who is required by such act to make the report and be subject to the regulations of the county commissioners. Still further, according to the last census only one county in the state, namely Fulton county, has a population of 100,000; and at least until the year 1920, when the next census will be taken, the act could not apply to any other county, so that it was patently the object of the act that for at least that length of time it should apply to but one county. It was passed after the census of 1910 had been taken, and with knowledge of that fact. Nevertheless it provided that the first statement should be filed with the county commissioners on November 20, 1912. While this alone would not serve to show that the act was intended as a local one, it contains an indication that it was intended to operate in only one county for a number of years; and when taken in connection with the fact

that it could not operate in some counties at any time in the future, whether or not they had the requisite population, declared to be the basis of classification, it serves forcibly to indicate that the Legislature did not intend that the act should apply, now or hereafter, to all counties having that population, or, if they did so intend, they framed the act so it could not have such an application.

There are also other indicia pointing to the fact that this act was intended to apply to Fulton county, and not in fact to be a general law. Thus, in the first section it is declared that the clerk of the superior court shall receive a salary of \$5,000 a year, which shall be in full of his services as such clerk, and for services as clerk of the city courts or other courts served by him. So, also, it refers to the solicitor of city courts, and solicitors of criminal courts. These provisions are applicable to Fulton county, and all of them are not applicable in other counties in the state. We know of no other county where there is a superior court, a city court, and a criminal court, and where the clerk of the superior court is ex officio clerk of the city court and the criminal court, and where there is a separate solicitor for the criminal court. If there is any other county having this combination of officials, it has not been brought to our attention. While the making of provisions for such a case would not alone be sufficient to show that the act was intended as a local one, yet, as already stated in regard to other provisions, these things are all sign posts pointing with fixed fingers in the direction of Fulton county; and when elaborate provisions are made applicable to Fulton county, many of which are not applicable to any other county, and in fact could be applied to no other county, although it might have 100,000 population, we think it so plain that he who runs may read that this is a special law, making provision for Fulton county and for no other. Having, therefore, held that this act was special in its nature, and not general, and it being in regard to matters for which provision had previously been made by an existing general law, it is violative of the clause of the Constitution quoted in the beginning of this opinion, and is therefore void.

Numerous other grounds of attack are made upon the act, and some of them appear to be serious in character. By way of illustration of some of the questions so raised, it may be stated that the act provides that for any neglect or refusal to make a report to the commissioners, or for any willful violation of any of the provisions of the act, an officer subject to such provisions shall be guilty of a misdemeanor, and on conviction shall be punished therefor, and that such conviction shall work immediate forfeiture of his office. It was contended with much force that some of the officers included within the provisions of this act are

constitutional officers, having a term prescribed by that instrument, and are not subject to removal except in the manner therein prescribed. The Constitution contains general provisions in regard to impeachment (Civil Code, section 6429), and also in regard to removal of county officers on conviction for malpractice in office (section 6599). It was forcibly urged that the Legislature could not provide for a forfeiture of the office of a constitutional officer in any other manner than that provided by the Constitution itself. Still further, the tax collector collects the revenue of the state, as well as that of the county. For collecting the taxes of the state there is a general law providing what shall be his fees. The present act requires these fees to be paid into the county treasury by the tax collector. It was suggested that the fees taken from the state's revenue as compensation for the tax collector for the collecting of the state's taxes belong either to the state or to the tax collector, and could not be the property of the county, from the revenue of which they were not taken, and for services to which they were not paid; that, if these fees belong to the state, the Legislature could not make a donation of them to the county, under the provision of the Constitution which prohibits donations (Civil Code, § 6573); and that if, after they had been received and separated from the state's funds by the tax collector as his compensation for serving the state, they belonged to him, such fund was his property, and the Legislature could not take his property and give it to the county without violating the provision of the Constitution of the state and that of the United States in regard to due process of law; also, the provision for the appointment of an auditor and his payment from the fees collected by the officers, at a salary to be fixed by the county commissioners, whether or not the officers receive the full amount of the salaries specified for them (payable from fees) was attacked. And other questions were raised.

As we have held that the act was a special one, and therefore unconstitutional, we do not deem it necessary to enter into a discussion of these questions, or to determine whether any of them would have affected the validity of the act, had it been a general one. It is not necessary to decide whether it might or might not have been valid, had it been something else than what it is. We content ourselves on this subject by simply mentioning some of the more important contentions. It follows from what we have said that, as the act is unconstitutional, it was error for the presiding judge to grant a writ of mandamus to compel the officers to make the report to the county officers for which the act provided.

Judgment reversed. All the Justices concur.

(140 Ga. 39)

CONTINENTAL FERTILIZER CO. v. J. F. MADDEN & SONS et al.

(Supreme Court of Georgia. May 15, 1913.)

(Syllabus by the Court.)

1. MOTION TO DISMISS.

There was no merit in the motion to dismiss the writ of error.

2. EVIDENCE (§ 222*)—ADMISSIONS—CHATTEL MORTGAGES—FORECLOSURE—DISPOSITION OF PROCEEDS—RULE AGAINST SHERIFF—EVIDENCE.

Where a money rule was brought against a sheriff, and while it was pending the movant transferred to another the mortgage *fi. fa.* under which the property had been sold, and such transferee, by order of court, was substituted as the movant, this did not render admissions made by the original movant prior to the transfer, when offered in evidence on the hearing of the rule by contestants for the fund, subject to objection on the ground that his admissions could not affect his transferee, and that he should be sworn as a witness.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 786-800, 803, 808; Dec. Dig. § 222.*]

3. CHATTEL MORTGAGES (§ 288*)—FORECLOSURE—DISPOSITION OF PROCEEDS—RIGHT OF CONTESTANTS TO ATTACK MORTGAGE.

Where a fund was raised by the sale of property under an execution based on the foreclosure of a mortgage signed by the defendants as a firm, which (as well as its members) was conceded to be insolvent, and where, under a money rule, such fund in the hands of the sheriff was claimed by other contestants who held executions based on mortgages on different parts of the property as that of the individuals claimed by the first mentioned creditor to be members of the firm, and by creditors holding common-law executions against such individuals, and where the contestants denied the existence of the firm or that the property was firm property, such contesting creditors could attack the mortgage held by the movant on the ground that it was based on an illegal and immoral consideration, namely, the settlement of a prosecution for a felony, and was not therefore entitled to the fund.

(a) The pleadings set up this ground of attack, and it was admitted by all parties that the firm and its members were insolvent; and no objection was duly raised to the sufficiency of the pleadings.

(b) Even if the fund in court were to be conclusively treated as that of a firm because arising from a sale under an execution against the firm, yet, as such firm and its members were insolvent, holders of liens against the partners could attack a mortgage against the firm, covering the same property, in order to obtain priority of payment of their claims.

[Ed. Note.—For other cases, see Chattel Mortgages, Cent. Dig. §§ 577, 578; Dec. Dig. § 288.*]

4. CHATTEL MORTGAGES (§ 73*)—VALIDITY—NOTES SECURED—LEGAL CONSIDERATION.

The evidence was sufficient to sustain the finding that the note which the mortgagee joined in giving to the fertilizer company was given to suppress a criminal prosecution, and was not binding. If so, and there was no liability on such note by the mortgagee, the mortgage given as a part of the transaction was without legal consideration.

[Ed. Note.—For other cases, see Chattel Mortgages, Cent. Dig. § 144; Dec. Dig. § 73.*]

5. EVIDENCE RULINGS IMMATERIAL.

This being so, other grounds of attack on it and rulings as to evidence bearing on them need not be dealt with.

6. APPEAL AND ERROR (§ 880*)—SCOPE OF REVIEW—PARTIES NOT APPEALING.

The movant not being entitled to any part of the fund, and no other party excepting, the manner of its distribution among the other contestants and for the payment of the cost furnished no ground for a reversal.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3584-3590; Dec. Dig. § 880.*]

7. NO ERROR.

None of the other errors assigned require a reversal.

Error from Superior Court, Pike County; R. T. Daniel, Judge.

Action by J. J. Hudgins against A. U. & J. C. Hudgins. Judgment for plaintiff, execution levied and property sold, and plaintiff brought rule against the sheriff to require him to pay over the fund and several contestants for the fund intervened. After rule brought, plaintiff's assignee, the Continental Fertilizer Company, was substituted as movant. From an adverse judgment the Continental Fertilizer Company brings error. Affirmed.

J. J. Hudgins foreclosed against A. U. & J. C. Hudgins, as a firm, by affidavit, a mortgage on certain cotton raised on two plantations. The execution was levied and the property sold. The plaintiff in *fi. fa.* brought a rule against the sheriff to require him to pay over the fund. After the rule was brought, J. J. Hudgins assigned the mortgage *fi. fa.* to the Continental Fertilizer Company, and an order was taken substituting it as the movant. Several other contestants for the fund intervened. One held an execution against J. C. Hudgins, based on the foreclosure of a mortgage on the crop raised on one of the plantations. Another held an execution against A. U. Hudgins, based on the foreclosure of a mortgage on the crop on the other plantation. A third had taken out an attachment against A. U. Hudgins, based on notes signed by A. U. & J. C. Hudgins, and caused the sheriff to be garnished. This creditor (a firm) also brought a common-law action on the notes against J. C. Hudgins. Pending the rule against the sheriff, the firm last mentioned obtained a judgment on the attachment against A. U. Hudgins and also a common-law judgment against J. C. Hudgins. Still another contestant held an execution against A. U. Hudgins based on the foreclosure of a laborer's lien on a part of the crop which produced the fund.

The case was, by consent, submitted to the presiding judge without a jury. All parties conceded that certain taxes, a claim for rent, and the laborer's lien should be paid. The contestants attacked the execution of the movant on several grounds, among them that there was no such firm and the prop-

erty was not that of a firm, but of the individuals, that the only consideration of the note and mortgage under which the movant claimed the fund was to secure the mortgagee in signing a note to suppress a criminal prosecution against the mortgagors by the fertilizer company, to which company the *fi. fa.* based on an *ex parte* foreclosure of such mortgage was later transferred; and that the note given to it was based on an illegal and immoral consideration and created no legal liability on the part of the mortgagee.

The court held, among other things, that the note given by the mortgagors to the fertilizer company and signed or indorsed by the mortgagee (who afterwards transferred to the company the *fi. fa.* based on a summary foreclosure of the mortgage given to him) was based on an illegal and immoral consideration and was void; that the mortgage transferred by the mortgagee was antedated and constituted a legal fraud on other creditors; that the fund should be awarded to other claimants, making provision for the payment of costs and expenses of gathering the crop.

Anderson, Felder, Rountree & Wilson, of Atlanta, for plaintiff in error. E. F. Dupree and E. M. Owen, both of Zebulon, for defendants in error.

LUMPKIN, J. (after stating the facts as above). The evidence was sufficient to warrant the finding that the mortgage under the foreclosure of which the fund arose was given as a part of an arrangement to suppress a criminal prosecution, which had been begun by the transferee of it, and that it was not supported by a legal consideration. Penal Code, §§ 328, 329; Civil Code, § 4491; Southern Express Co. v. Duffey, 48 Ga. 358; Godwin v. Crowell, 56 Ga. 566; Wheaton v. Ansley, 71 Ga. 35; Jones v. Dannenberg Co., 112 Ga. 426, 37 S. E. 729, 52 L. R. A. 271.

It was urged that, where a fund is brought into court by a sale under an execution against a certain defendant, the fund is to be treated as his, whether the property sold was in fact his or not, as the purchasers bought subject to the doctrine of *caveat emptor*; and it was sought to apply that principle to an execution against a firm and contestants for the fund holding liens against the alleged partners. This argument seems to overlook three things by which it may be affected: That the alleged partners are not strangers to the firm and its funds and debts, and a firm debt is also a debt of the partners; that the alleged firm and its members being conceded to be insolvent, unless the lien creditors of the individuals can attack the claim asserted against the firm, they must fail to obtain any payment; and that, on the trial of a money rule, equitable principles may be invoked by pleading and evidence. Civil Code, § 5348.

The pleadings of the contestants set out their respective claims and attacked the mortgage under which the movant claimed. No point was raised on the trial as to the sufficiency of the allegations, but on the contrary the insolvency of the debtors was admitted.

The headnotes sufficiently state the rulings without further elaboration.

Judgment affirmed. All the Justices concurred.

(140 Ga. 18)

KEEFER v. KEEFER.

(Supreme Court of Georgia. May 14, 1913.)

(*Syllabus by the Court.*)

1. ATTORNEY AND CLIENT (§ 190*)—FEES—PROTECTION AGAINST DISMISSAL OF ACTION.

Where a wife brought suit against her husband, alleging a permanent separation on account of misconduct on his part, and praying for permanent alimony and for an allowance as temporary alimony and counsel fees, and pending the case, but before the allowance of temporary alimony or counsel fees, the parties adjusted their differences, resumed cohabitation, and desired that the case be dismissed, it was proper to enter an order of dismissal, and to refuse to permit the attorneys for the wife to intervene and become parties to the case, or to render a judgment in that proceeding for attorney's fees.

[Ed. Note.—For other cases, see Attorney and Client, Cent. Dig. §§ 412-417; Dec. Dig. § 190.*]

2. ATTORNEY AND CLIENT (§ 190*)—FEES—PROTECTION AGAINST DISMISSAL—RECEIVERSHIP—EFFECT.

The inclusion in the original petition of a prayer for the appointment of a receiver to hold the property of the husband within the jurisdiction, as a means of realizing on such judgment as the wife might obtain, and the appointment of a temporary receiver, did not alter the case.

[Ed. Note.—For other cases, see Attorney and Client, Cent. Dig. §§ 412-417; Dec. Dig. § 190.*]

(*Additional Syllabus by Editorial Staff.*)

3. HUSBAND AND WIFE (§ 295*)—ACTION FOR SEPARATE MAINTENANCE—ALLOWANCE OF ALIMONY—DISCRETION.

In an action for separate maintenance, the allowance of temporary alimony, including attorney's fees, is within the sound discretion of the trial court, and not a matter of arbitrary right.

[Ed. Note.—For other cases, see Husband and Wife, Cent. Dig. §§ 1084-1088; Dec. Dig. § 295.*]

Error from Superior Court, Fulton County; J. T. Pendleton, Judge.

Action by Mrs. Grace Macy Keefer against D. H. Keefer and others. The parties settled their differences, and on defendant's petition the action was ordered dismissed, to which order counsel for plaintiffs excepted, and bring error. Affirmed.

On January 20, 1912, Mrs. Grace Macy Keefer filed in Fulton superior court her petition against D. H. Keefer and others, alleging in substance as follows: On April 11, 1906, she was married to D. H. Keefer in the

city of New York. They came almost immediately to the city of Atlanta, where the defendant had previously resided. They lived together as husband and wife until a few months since, with the exception that on several occasions the plaintiff was compelled to live separate from him on account of his cruel and inhuman treatment of her, and also with the exception that the defendant several times absented himself from her without cause or reason. After her separation from him, she went back to live with him on the faith of his promise to treat her with kindness and consideration, and at all times she has been a devoted and faithful wife to him. In July, 1909, he left the plaintiff and took up his residence in the city of New York; and he now claims to be a citizen of the state of New York, though he maintains an office in the city of Atlanta and claims to be a member of the bar of that place. There is no issue of the marriage. The plaintiff has two children by a former marriage. The husband and wife are now living in a bona fide state of separation, and no action for divorce is pending in the state of Georgia. She alleges upon information and belief that since the separation the defendant has been guilty of various acts of adultery. She also alleges upon information and belief that he owns a large amount of real and personal property, of the probable value of \$80,000, and has a large income. He owns certain real estate in Fulton county, of the aggregate value of at least \$30,000, and also a number of shares in certain named corporations. Plaintiff owns certain property (a description of which is omitted from the record), and other than this she has no property which will produce an income, except certain shares of stock, from which she receives \$335 a year. She is dependent upon the defendant for maintenance and support, and a reasonable sum for that purpose would be \$250 per month. In order to maintain this action, it will be necessary to employ counsel in New York and to take numerous depositions, and a reasonable allowance for these expenses and for the employment of counsel will be \$2,000. The plaintiff is fearful that the defendant may transfer his personal property and convey his real estate, in which event she will be completely at his mercy and without adequate means to compel him to provide for her support and maintenance. She prayed for the appointment of a receiver to take charge of all the property of the defendant to be found within the jurisdiction of the court; that the defendant be enjoined from transferring or encumbering such property; that the corporations named, in which he holds stock, be enjoined from transferring any of it; that she have judgment against the defendant for \$250 per month, and for \$2,000 for counsel fees and expenses incident to this litigation, and that the judgment be satisfied out of the property

coming into the hands of the receiver, unless the defendant shall submit himself to the jurisdiction of the court, in which event a general judgment is also prayed against him, and for general relief and process.

A temporary receiver was appointed. On April 19th thereafter the defendant presented his petition to the court, alleging that he and his wife, the plaintiff in the cause, had adjusted their differences and were living together as man and wife; that since such adjustment, and after the renewed cohabitation, the plaintiff had repeatedly directed her counsel to dismiss the case, but such counsel declined to do so. The defendant prayed that an order should be passed calling upon counsel to show cause why the case should not be dismissed and the receiver discharged. An order was granted accordingly. Counsel for the plaintiff filed a response to the rule, alleging in substance as follows: During the latter part of October, 1911, the plaintiff employed them to advise and counsel with her in regard to the differences then existing between her and her husband. At that time the plaintiff and the defendant were living in a state of separation, and the defendant was residing in New York. The plaintiff decided that it was best to obtain an absolute divorce from her husband, and accordingly employed certain named lawyers of the New York bar to co-operate with these respondents in carrying out her wishes. As the defendant was at the time a resident of the state of New York, and the marriage had been performed in that state, its courts had jurisdiction of the suit for divorce, which was accordingly there filed. The plaintiff and her two children were living in Atlanta, and the property of the defendant was located in Fulton county. In order to procure temporary and permanent alimony it was necessary that the petition should be filed in the superior court of Fulton county. Accordingly these respondents, as attorneys for the plaintiff, prepared and filed such a petition, and upon it an order was passed placing the property in the hands of a receiver. They have faithfully performed all services required of them by the plaintiff, and have advised and counseled her in regard to the suit for divorce pending in New York; but they have received no compensation for their services, nor has she offered to pay them therefor. On February 6, 1912, the plaintiff wrote from New York to her counsel, directing them to dismiss her petition, but declined to state to them at whose cost the proceeding should be dismissed, and refused to make any provision for their compensation. Two thousand dollars is a reasonable amount to be allowed to them as plaintiff's attorneys. The report of the receiver shows that he has abundant property of the defendant in his possession with which to pay all court costs and counsel fees. They prayed that they be made parties plaintiff in the action; that they be allowed \$2,000 as counsel fees, to be recovered

out of the property in the hands of the receiver; that the receiver's fees and expenses and all court costs be paid out of the property in his hands; and that the prayer of the petition filed by the defendant be denied.

Upon the hearing of the petition for dismissal of the action and the response thereto, the presiding judge passed this order: "It having been admitted in open court that Mrs. Grace Macy Keefer has, situated in Fulton county, this state, property of the value of \$20,000, and other valuable property not situated in the state of Georgia, the value of which is not stated, it is therefore considered, ordered, and adjudged that the petition to dismiss said cause be and the same is hereby granted, and said case is hereby dismissed." To this order the counsel of the plaintiff excepted. The judge also entered judgment against the plaintiff for the court costs and receiver's fee.

Evins & Spence, of Atlanta, for plaintiff in error. Rosser & Brandon, of Atlanta, for defendant in error.

LUMPKIN, J. (after stating the facts as above). The argument in this case has taken a wide range. It has included, among other things, a discussion of the marital right of the husband as to the wife's property, under the common law, its effect in leaving her practically helpless to bring a divorce suit against her husband or defend one brought by him, unless "suit money" were allowed her, the consequent treating of her attorney's fees in such cases as in the nature of necessities, where the attorney in good faith and on probable cause prosecuted or defended a wife's divorce suit with her husband, the recognition of that theory in this state (*Sprayberry v. Merk*, 30 Ga. 81, 76 Am. Dec. 637, decided in 1860, distinguished from a case involving other facts in *Glenn v. Hill*, 50 Ga. 94, decided in 1873), the question of the effect of the adoption of the Code, which first became of force in 1863, and contained express provisions in regard to allowing temporary alimony and attorney's fees pendente lite, and of the enactment of what is commonly called the Married Woman's Act of 1866, preserving her separate property to her. We do not deem it necessary to follow counsel over the entire field covered by their arguments. The case before us is not a suit by the attorneys for the wife against either her or her husband, after the termination of the alimony suit between them; and it would be ranging into the by-paths of obiter dictum to determine what might be ruled in such an action. Here the wife sued her husband for permanent alimony, and prayed for the allowance of temporary alimony and attorney's fees, under the statute; and incidentally a receiver was prayed. The parties settled their differences and desired to dismiss the case. The wife's attorneys objected, so far as it affected the allowance of attorney's fees, and prayed to

be made parties, and to have fees awarded to them in that case.

[1,3] Upon an application for the allowance of temporary alimony, including counsel fees, pending a suit for divorce, or permanent alimony, such allowance is not a matter of arbitrary right, under our statutes, but a matter to be determined by the use of a sound discretion applied to the facts of the case; the causes of the separation, and the circumstances of the parties. Civil Code, §§ 2976, 2977, 2979; *Parks v. Parks*, 126 Ga. 437, 55 S. E. 176. In the opinion in the *Parks* Case the expression was used that the allowance of both alimony and counsel fees, or the allowance of one and the disallowance of the other, is a matter addressed to the sound discretion of the judge, after examination into the causes of the separation and the circumstances of the parties. This did not mean that the two things were wholly distinct, with the right to apply for one in the client, and for the other in the attorney, but that, upon such an application by the wife, the judge might allow a sum for her support and also for counsel fees, one or both, or neither, if the evidence so authorized. This is made evident by considering that opinion in the light of the facts involved, and in connection with other decisions of this court and the language of the statute itself. Civil Code, § 2976; *Sweat v. Sweat*, 123 Ga. 801, 51 S. E. 716; *Hughes v. Hughes*, 133 Ga. 187, 65 S. E. 404. It has been said that the application for temporary alimony, including attorney's fees, should be made and determined pendente lite, but that a judgment for such fees based upon a verdict therefor was not a nullity. *Van Dyke v. Van Dyke*, 125 Ga. 492, 54 S. E. 537. In *Weaver v. Weaver*, 33 Ga. 172, on the hearing of an application therefor, an order was passed directing a husband to pay into court a certain amount to compensate counsel who represented the wife, and also an amount for the maintenance of the wife. After the case had been prepared, but before trial, it was dismissed. It was held that this operated to rescind the order as to the alimony proper allowed to the wife, but not as to the fees of counsel. It was said: "We see no reason for compelling counsel to resort to an independent action when his fees have been already adjudged." In view of this ruling, it was held in *Roberts v. Roberts*, 115 Ga. 259, 41 S. E. 616, 90 Am. St. Rep. 108, that when an application was made for the grant of alimony and attorney's fees, counsel for the applicant had such a pecuniary interest in the result that, under our statute, a judge related to him within the fourth degree was disqualified from presiding. What was said in the opinion must be considered in connection with the question before the court.

We are aware that there is some conflict of authority as to whether a court may refuse to dismiss a divorce case without the

payment of attorney's fees to the wife's attorney, or whether an order for such fees may be granted before or in connection with the dismissal. It is unnecessary to discuss the basis of such decisions, or the English practice of taxing attorney's fees as costs. We think the decisions which rule that counsel for the wife cannot prolong such a suit against the wishes of their client are the sounder and more applicable to the statutory procedure in this state for obtaining temporary alimony, including counsel fees, as well as more in accord with public policy. There is no law authorizing attorneys, pending a suit for divorce or permanent alimony, to make application for the allowance of temporary alimony on their own behalf. Such allowance is not a matter of course, but a matter to be determined upon a consideration of the facts. After a wife has condoned the misconduct alleged against the husband, and the two have resumed their former relations, and when they desire to stop the legal controversy between them, it would be against sound public policy to say that they could not do so, but must continue their case involuntarily, and display the family skeleton and parade their forgiven grievances, so as to aid the judge to determine whether, in his discretion, he would have granted alimony, and would still award counsel fees.

This public policy in favor of permitting a settlement of matrimonial differences has been declared in other states. In *Jordan v. Westerman*, 62 Mich. 170, 28 N. W. 826, 4 Am. St. Rep. 836, the court was discussing a contract by a married woman made with her solicitor, in advance of a decree for divorce, to pay to him one-half of what should be awarded to her as alimony. *Champlin, J.*, said: "Public policy is interested in maintaining the family relation. The interests of society require that those relations shall not be lightly severed, and that families shall not be broken up for inadequate causes, or from unworthy motives; and where differences have arisen which threaten disruption, public welfare and the good of society demand a reconciliation, if practicable or possible. Contracts like the one in question tend directly to prevent such reconciliation, and, if legal and valid, tend directly to bring around alienation of husband and wife, by offering a strong inducement, amounting to a premium, to induce and advise the dissolution of the marriage ties as a method of obtaining relief from real or fancied grievances which otherwise would pass unnoticed." In *Hillman v. Hillman*, 42 Wash. 595, 85 Pac. 61, 114 Am. St. Rep. 135, it was held that a wife could enter into a stipulation for the dismissal of her action for divorce and a pendente lite application for temporary alimony without the consent of her attorneys, and the court could not allow them to intervene in the action, and thereupon enter a judgment in their favor for their fees

and for costs advanced by them. Fullerton, J., said: "It is the policy of the law to encourage husband and wife to compromise and settle between themselves their domestic troubles, and to discourage actions for divorce. Actions for divorce, therefore, which both parties desire dismissed, should not be kept alive merely to settle the claims of counsel for attorney's fees." In *Reynolds v. Reynolds*, 67 Cal. 176, 7 Pac. 480, it was held that if, pending an action for divorce, the parties thereto admit a condonation and ask that the action be dismissed, the court should order a dismissal, and could not thereafter enter judgment against the husband for the counsel fees of the wife. Myrick, J., tersely said: "When the husband and wife forgave and were forgiven, and abandoned their criminations and recriminations, the attorneys had but to gather up their briefs and retire." See, also, *Petersen v. Petersen*, 76 Neb. 282, 107 N. W. 391, 124 Am. St. Rep. 812; *Stover v. Stover*, 7 Idaho, 185, 61 Pac. 462; *Carden v. Carden* (Tenn.) 37 S. W. 1022; *McCulloch v. Murphy*, 45 Ill. 256, 258.

It may be further mentioned that a failure to pay alimony is enforceable by attachment, and if counsel fees awarded in such an application may be enforced in the same way, we might have the spectacle of a forgiving wife being unwillingly compelled to proceed to obtain a judgment and then enforce it by putting her repentant husband in jail for nonpayment of her attorney's fees. The exact point as to public policy has not been decided in Georgia. In *Chastain v. Lumpkin & Wright*, 184 Ga. 219, 67 S. E. 818, after a petition by a wife for divorce and for permanent and temporary alimony had been filed, but before it had been served, the parties "resumed their relations to each other as husband and wife," and the plaintiff notified her counsel and the sheriff to proceed no further in the case. It was held that her counsel could not thereafter press the case, over her protest, by having service perfected and obtaining judgment for fees. Had the attorneys in the present case, after service had been perfected, such a lien as gave them a right to prosecute the suit of the wife in spite of her desire to dismiss it? We think not. By Civil Code, § 3364, subsec. 2 (the only clause here relevant), an attorney is given a lien upon "all suits; judgments, and decrees for money," and it is declared that no person shall be at liberty to satisfy such suit, judgment, or decree until the lien of the attorney for his fees is fully satisfied, and further that attorneys shall have the same right and power over such suits, judgments, or decrees, to enforce their liens, "as their clients had or may have for the amount due them thereon." While the language is somewhat broad, we think it was not intended to cover an application for alimony and counsel fees. It refers to suits "for money," and again to "the amounts

due" the clients. Applications for alimony are in several respects quite dissimilar from ordinary suits for money. An order or judgment for the payment of alimony may be enforced by imprisonment, though the Constitution prohibits imprisonment for debt. *Carlton v. Carlton*, 44 Ga. 216; *Lewis v. Lewis*, 80 Ga. 706, 6 S. E. 918, 12 Am. St. Rep. 281. A decree granting alimony is not a debt "founded on a contract," within the meaning of a statute providing for relief from such debts by a discharge in insolvency. *Noyes v. Hubbard*, 64 Vt. 302, 23 Atl. 727, 15 L. R. A. 394, 83 Am. St. Rep. 928. Alimony has been held not to be assignable in advance of its allowance. *Jordan v. Westerman*, 62 Mich. 170, 28 N. W. 826, 4 Am. St. Rep. 836, supra. Its basis is a duty on the part of the husband, rather than an indebtedness. These illustrations will serve to show that such an action (at least before a judgment fixing a sum as an allowance) is not a suit "for money," or one for an "amount due" a client, within the meaning of the statute regulating attorney's liens. Certainly the Legislature never contemplated that an attorney could insist on continuing to prosecute a wife's suit for divorce after she had condoned the alleged offense, and resumed cohabitation with her husband, and no longer desired a divorce.

[2] The same reason of public policy applies to the cessation of a suit for alimony based on the fact that the husband and wife were living separate at the time of its commencement. The mere addition of a prayer for a receiver to hold the property of the husband to be found within the jurisdiction, as a means of securing payment of such amount of alimony as might be awarded, and the appointment of a temporary receiver, would not change the nature of the action. The situation of the attorneys in this case is not so unfortunate as it might seem at a casual glance. It appears that their client and her husband are both amply solvent, and the ruling here made only goes to the extent of holding that the attorneys cannot intervene in this suit, or obtain a judgment for fees therein, or prevent its dismissal.

Judgment affirmed. All the Justices concur.

(140 Ga. 52)

ATKINSON v. KREIS.

(Supreme Court of Georgia. May 15, 1918.)

(Syllabus by the Court.)

1. RECEIVERS (§ 174*)—LEAVE TO SUE RECEIVER—NECESSITY.

Where a landowner and a railway company contract in writing that in consideration of the landowner's relinquishment of a road necessary to the enjoyment of his property, which traverses the track of the railway company, the latter will donate and dedicate for road purposes a road opened on its right of way for the benefit of the landowner and the public, and subsequently to the closing of the original road the railway company is placed in the hands of a re-

ceiver by a United States court, and the receiver closes a part of the substituted road in order to furnish track facilities to a patron, an action for the trespass against the receiver is maintainable in virtue of the act of Congress (Aug. 13, 1888, c. 866, § 3, 25 Stat. 436; 4 Fed. Stat. Ann. 387 [U. S. Comp. St. 1901, p. 582]), without the previous leave of the court in which such receiver was appointed.

[Ed. Note.—For other cases, see Receivers, Cent. Dig. §§ 333-343; Dec. Dig. § 174.*]

2. EASEMENTS (§ 70*) — OBSTRUCTION — MEASURE OF DAMAGES.

The measure of damages in such a case is the difference in the market value of the landowner's property with the substituted way opened and with it closed.

[Ed. Note.—For other cases, see Easements, Cent. Dig. §§ 145, 146; Dec. Dig. § 70.*]

3. EASEMENTS (§ 69*) — OBSTRUCTION — EVIDENCE.

Evidence to show the market value of the property before and after the contractual way was closed is competent.

[Ed. Note.—For other cases, see Easements, Cent. Dig. § 143; Dec. Dig. § 69.*]

4. VERDICT SUSTAINED.

The verdict is supported by the evidence.

Error from Superior Court, Fulton County; W. D. Ellis, Judge.

Action by E. J. Kreis against H. M. Atkinson, receiver. Judgment for plaintiff, and defendant brings error. Affirmed.

E. J. Kreis is the owner of a tract of land near the city of Atlanta, access to which was over a private road from a nearby public road. In 1808 the Atlanta, Birmingham & Atlantic Railroad Company desired to construct its road across this private way. The railroad company and the landowner entered into a written contract, which recited that there was a private way running from the Garrett Bridge road to the landowner's property across the right of way of the railway company, and that in the construction of the railroad it became necessary to make a cut of 12 or 15 feet, causing a diversion of the road at the point of intersection in order to make it passable; that the railway company has opened up a road on its right of way to a point west of the present line of the private road about 150 or 200 feet, and at that point have constructed a grade crossing across the railroad, and from there have constructed a road back on the right of way to the line of the original road; and that, whereas the maintenance of this road is necessary to the enjoyment of the landowner of his property lying north of the railroad, it was agreed between the parties that the railway company donated and dedicated for road purposes the road now open on its right of way and across its road in perpetuity for the benefit of the landowner and the public; and the railway company covenanted to perpetually maintain a grade crossing in good order at the point where the grade crossing was then constructed or at some other convenient point. Subsequently H. M. Atkinson was appointed receiver of the rail-

way company by an order of the United States Circuit Court for the Northern District of Georgia, and the receiver went into possession of the railroad property. Thereafter the receiver of the railway company caused a spur track to be constructed across the road described in its contract in order to afford facilities to a patron, and ingress and egress thereover was rendered impossible because of the construction of the side track. The landowner sued the receiver for damages alleged to have accrued from the destruction of the contractual road and recovered a verdict. A motion for a new trial was made and overruled.

Rosser & Brandon and Stiles Hopkins, all of Atlanta, for plaintiff in error. Jas. L. Key, of Atlanta, for defendant in error.

EVANS, P. J. (after stating the facts as above). [1] 1. The suit was instituted against the receiver without previous leave of the United States court authorizing it. It is insisted that the suit is not maintainable without such order. This point is not tenable. The act of Congress provides that every receiver of any property appointed by any court of the United States may be sued in respect of any act or transaction of his in carrying on the business connected with such property without the previous leave of the court in which such receiver was appointed, but that such suit shall be subject to the general equity jurisdiction of the court in which such receiver was appointed, so far as the same shall be necessary to the ends of justice. Act Aug. 13, 1888, c. 866, 25 Statutes at Large, 436; 4 Fed. Stat. Ann. 387 (U. S. Comp. St. 1901, p. 582). The injury complained of in this case is the destruction of the landowner's easement which the railway contracted to give him in consideration of his relinquishment of an existing private road essential to the enjoyment of the landowner's property. It was alleged, and proof was submitted to sustain the allegation, that the interference of the contractual way was the result of the construction of a track by the receiver intended to serve a manufacturing plant located on property adjacent to the railway company. The act of the receiver in making the obstruction was in pursuance of a transaction of his in carrying on the business of the company, referred to in the act. The provision in the act that suit shall be subject to the general equity jurisdiction of the court in which such receiver was appointed, so far as the same shall be necessary to the ends of justice, applies only to suits which seek to interfere with the receiver's possession of the property, and to process, the execution of which would have that effect. *Dillingham v. Hawk*, 60 Fed. 497, 9 C. C. A. 101, 23 L. R. A. 517; *St. Louis Southwestern R. Co. v. Holbrook*, 73 Fed. 112, 19 C. C. A. 385. It does not interfere with

suits against it in respect to any act or transaction of the receiver in carrying on the business without the previous leave of the court.

[2] 2. The measure of damages for the destruction of the easement of way which the railway company contracted to give the landowner in consideration of his relinquishment of an existing right of access to his property is its effect upon the landowner's property. It was expressly recognized in the contract between the railroad company and the landowner that the contractual right of way was necessary to the enjoyment by the landowner of his property; it was treated as an easement appurtenant to that property. If the destruction of that easement affects the value of the appurtenant property, then the measure of damages is the difference in the market value of the landowner's property with the substituted way opened and with it closed. See, in this connection, *Mallory v. Morgan County*, 131 Ga. 271, 62 S. E. 179.

[3] 3. Certain witnesses were examined with reference to the value of the property before the way was closed and its value after the way was obstructed. Some criticism is made in the form of the question as indicating that the witnesses were not confined to the particular road which was closed as affecting its market value. When the testimony to which objection is taken is considered in connection with the context, we think it clear that the testimony of the witness had relation solely to the effect of the particular road described in the contract between the railway company and the landowner, its effect upon the landowner's property, if maintained according to the contract, and its effect upon the market value by reason of the road being rendered impassable by the construction of the side track over it. This evidence was competent to show the market value of the property before and after the contractual way was obstructed.

[4] 4. It is contended that the recovery is for too large an amount, but after a careful consideration of the evidence we do not think that the verdict is excessive. The verdict is authorized, and has the approval of the trial judge, and no sufficient reason is made to appear to reverse the judgment of the court refusing a new trial.

Judgment affirmed. All the Justices concur.

(140 Ga. 48)

WITT v. SIMS et al.

(Supreme Court of Georgia. May 15, 1913.)

(Syllabus by the Court.)

1. RECORDS (§ 6*)—CONTRACT WITH BROKER.

One who had purchased a lot and signed and delivered to a real estate broker an instrument in writing as follows: "I have this day purchased through Roff Sims the vacant lot in Atlanta, Georgia, from J. F. Leary [describing the lot]. The said Roff Sims, in making the

purchase for me, was obliged to reduce his commission on the sale, and in consideration I give to him the exclusive sale of the property so long as I own it, and agree to pay him the regular real estate commission upon it when it is sold, either by himself, myself, or any other person. It is hereby agreed that the real estate commission be fixed for this sale as 2½ per cent. on the dollar." Held, that there is no law in this state authorizing the record of such an instrument by the clerk of the superior court, nor is there any law authorizing the record of an entry upon it, by which the promisee in the paper sought to transfer a half interest in the contract to another.

[Ed. Note.—For other cases, see *Records*, Cent. Dig. § 7; Dec. Dig. § 6.*]

2. RECORDS (§ 6*) — RECORDABILITY — AFFIDAVIT—SUFFICIENCY.

Had the agreement set out in the first headnote been a recordable paper, if properly attested, it could not be properly recorded on the affidavit of the promisee therein that he saw the promisor sign it.

[Ed. Note.—For other cases, see *Records*, Cent. Dig. § 7; Dec. Dig. § 6.*]

3. QUIETING TITLE (§ 7*)—CLOUD ON TITLE—BROKER'S EMPLOYMENT CONTRACT.

Such a paper was not a cloud upon the title of the promisor. It did not purport to convey any title to or interest or easement in the land, or to create any lien upon it, or to affect the title thereto; but it was merely a promise to allow the promisee the exclusive right to sell such land as a broker so long as it was owned by the promisor, and to pay the broker certain commissions, should the land be sold by him, the owner, or any other person.

[Ed. Note.—For other cases, see *Quieting Title*, Cent. Dig. §§ 14-33; Dec. Dig. § 7.*]

4. CANCELLATION OF INSTRUMENTS (§ 3*)—RECORDS (§ 11*)—RIGHT.

In the absence of a statutory provision, the superior court will not, at the instance of the maker of a contract not properly recordable, order or decree the cancellation of the record thereof on the deed books by the clerk as matter of course; but the asserted right to cancellation of the paper and of an unlawful record thereof will be determined under the general law governing the right to have instruments canceled.

[Ed. Note.—For other cases, see *Cancellation of Instruments*, Cent. Dig. §§ 1, 5; Dec. Dig. § 3; * *Records*, Dec. Dig. § 11.*]

5. CANCELLATION OF INSTRUMENTS (§§ 4, 13*)—QUIETING TITLE (§ 7*)—CLOUD ON TITLE—BROKER'S EMPLOYMENT CONTRACT.

The petition in this case did not show a case for the cancellation of the instrument involved, as being an instrument which had answered the object of its creation, or a "forged or other iniquitous deed or other writing, which, though not enforced at the time, either casts a cloud over complainant's title or otherwise subjects him to future liability or present annoyance, and the cancellation of which is necessary to his perfect protection," under Civil Code 1910, § 5465; nor did the allegations make a case for the cancellation of a cloud on the plaintiff's title, under Civil Code 1910, §§ 5466, 5468.

(a) There was no allegation of fraud or wrong in the procurement of the instrument by the promisee therein, and the only ground of attack upon it was an allegation that it was made without a present consideration therefor. No insolvency was alleged, no danger of loss shown, and no reason why want of consideration, if it existed, could not be as well set up in defense

to a suit upon it as by equitable petition, or why equitable relief was necessary.

[Ed. Note.—For other cases, see Cancellation of Instruments, Cent. Dig. §§ 1, 13; Dec. Dig. §§ 4, 13;* Quieting Title, Cent. Dig. §§ 14-33; Dec. Dig. § 7.*]

Error from Superior Court, Fulton County; J. T. Pendleton, Judge.

Suit by Carl Witt against Roff Sims and others. Decree for defendants, and plaintiff brings error. Affirmed.

Carl Witt brought an equitable petition against Roff Sims, W. E. Wimpy, and the clerk of the superior court. He alleged in substance as follows: On the 2d day of January, 1909, the plaintiff entered into a writing with Roff Sims, which was as follows: "Atlanta, Ga., January 2, 1909. I, having this day purchased through Roff Sims the vacant lot in Atlanta, Georgia, from J. F. Leary, situated on the northeast corner of Peachtree street and East Harris, being one hundred (100) feet on Peachtree street by one hundred and fifty-four (154) feet deep. The said Roff Sims, in making the purchase for me, was obliged to reduce his commission on the sale, and in consideration I give to him the exclusive sale of the property as long as I own it, and agree to pay him the regular real estate commission upon it when it is sold, either by himself, myself, or any other person. It is hereby agreed that the real estate commission be fixed for this sale as 2½ per cent. on the dollar." This writing was entered into after the plaintiff had purchased the property therein described, which property is owned by him; he having purchased it from J. F. Leary. It was given for a past consideration, and is therefore without consideration, and is null and void. It casts a cloud over the plaintiff's title to the property, and subjects him to annoyance and liability. On or about December 30, 1909, Sims attempted to transfer to W. E. Wimpy a half interest in the writing above set out, such assignment being as follows: "Atlanta, Ga., Dec. 30, 1909. (\$750.) For and in consideration of the sum of seven hundred and fifty dollars, I hereby transfer and assign to W. E. Wimpy, one-half interest in the above contract, the receipt of which is hereby acknowledged." On February 25, 1911, Roff Sims attempted to probate the writing first above set out, and for the purpose of having it recorded on the records of the clerk of the superior court made an affidavit before a notary public of the county, stating that he saw Carl Witt "sign the above obligation, dated January 2, 1909, on said date." On or about February 25, 1911, Sims or Wimpy filed the writings above referred to with the clerk of the superior court, with request that they be recorded. The clerk recorded them on March 2, 1911, in a book kept for recording deeds. This writing could not be assigned, and any attempt to assign an interest in it was void. The at-

tempted probate was void. The papers were not entitled under the law to be recorded in the clerk's office, and the clerk had no legal authority to record them. The plaintiff has no other course to protect his rights than the one here pursued. Plaintiff prayed that the papers herein set out be canceled and delivered up, that the clerk of the superior court be required to expunge them from the records, that the attempted assignment by Sims to Wimpy be declared null and void, and for process. The defendants demurred to the petition. The judge sustained the demurrer, and dismissed the petition, and the plaintiff excepted.

Evins & Spence and F. R. Radensleben, all of Atlanta, for plaintiff in error. C. T. & L. C. Hopkins, of Atlanta, for defendants in error.

LUMPKIN, J. (after stating the facts as above). [1, 2] The paper involved in this case was plainly not one which the clerk of the superior court was authorized to record on the deed books of the county. It was a mere agreement between a landowner and a real estate broker in regard to giving the latter the right to sell the land, or paying him a commission, if the land should be sold by him, the owner, or any other person. It did not purport to convey any title, interest, or easement in the land, or to create any lien upon it. If it had been otherwise a recordable paper, it was not properly attested or probated for record. What is said of the paper itself applies with double force to the entry upon it purporting to transfer an interest in the contract to another.

It was conceded by counsel for the defendants that the paper was not recordable, and ought not to have been entered on the record of deeds. But it was argued that, if a clerk should cumber the books for the recording of deeds by entering on them papers which should not be recorded, in order to obtain fees, the county authorities would have the right to prevent such a use of the county's property. Perhaps they would. But the registration laws are for the benefit of the public, and the county authorities have no power to change them; nor is a property owner who may be damaged by an unlawful record without remedy, upon a proper case made. In New York there is a statute touching the cancellation of any recorded instrument relating to realty not entitled to record by law. In Georgia there is no express statute on the subject. Under some circumstances, doubtless, an entry of cancellation might be required by a court having equitable jurisdiction.

[3, 4] But in this case the allegations make no case for cancellation either of the instrument or the record of it. They do not bring the case within Civil Code, § 5465, touching

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

proceedings quia timet generally; nor do they show any cloud upon the title of the plaintiff, giving a right of cancellation under Civil Code, §§ 5466, 5468. The cases of *Thompson v. Etowah Iron Co.*, 91 Ga. 538, 17 S. E. 663, and *Hairlson v. Carson*, 111 Ga. 57, 36 S. E. 319, were relied on. While much that is said in the decisions in those cases is still the law, and a part of that in the one first cited has been codified in Civil Code, § 5468, it may be well to note, in connection with this, that the rule that, where the invalidity of an instrument appears on its face, this alone will render cancellation unnecessary, has been abrogated by statute. Civil Code, § 5466.

[5] The bare allegation that a promise to give a broker the exclusive privilege of selling property, or to pay him commissions, if it should be sold by another, was made without present consideration, does not make a case for resort to a court having equitable jurisdiction, for cancellation. Nor do the superadded allegations of conclusions that the paper is iniquitous and the plaintiff has no other remedy, with no facts to support such conclusions, make the case one for equitable relief.

Judgment affirmed. All the Justices concur.

(12 Ga. App. 749)

PILGRIMS' HEALTH & LIFE INS. CO. v. SCOTT. (No. 4,660.)

(Court of Appeals of Georgia. June 10, 1913.)

(Syllabus by the Court.)

1. APPEAL AND ERROR (§ 272*)—NEW TRIAL (§ 18*)—GROUNDS—AMENDMENT—NECESSITY OF EXCEPTION.

The improper allowance of an amendment to the pleadings cannot be made the subject-matter of a ground of a motion for new trial. *Bullock v. Cordele Sash Co.*, 114 Ga. 627, 40 S. E. 734; *Hammond v. George*, 116 Ga. 792, 43 S. E. 53; *Lowery v. Idleson*, 117 Ga. 778, 45 S. E. 51. Since no timely exception was filed to the ruling upon the amendment in the present case, the amendment must be adjudged to have been properly allowed.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1611-1619; Dec. Dig. § 272;* New Trial, Cent. Dig. §§ 24-29; Dec. Dig. § 18.*]

2. APPEAL AND ERROR (§ 1002*)—VERDICT—EVIDENCE—INSURANCE.

Under the evidence it was issuable as to whether the plaintiff (the insured) voluntarily surrendered the policy, or whether it was taken from his wife without her consent and without his knowledge; and consequently the verdict of the jury upon that point is conclusive.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3935-3937; Dec. Dig. § 1002.*]

3. INSURANCE (§ 360*)—TENDER OF PREMIUMS—NECESSITY.

After the agents of the defendant company took up the policy and notified the insured that they would receive no further

premiums from him, it was unnecessary that he should tender payment of the weekly premiums. The law does not require the doing of a vain and useless thing.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 913, 916-922, 924; Dec. Dig. § 360.*]

4. INSURANCE (§ 349*) — CANCELLATION — RIGHT OF RECOVERY.

The evidence in behalf of the plaintiff authorized a finding that he had paid in advance upon the weekly premiums at the time that he was taken sick, and at the time that his policy was taken away by the agents of the defendant company; and hence the verdict was not contrary to the evidence, nor was it error to refuse, upon this ground, to grant a new trial.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 891, 895-902, 913; Dec. Dig. § 349.*]

Error from Superior Court, Floyd County; J. W. Maddox, Judge.

Action by Charles Scott against the Pilgrims' Health & Life Insurance Company. Judgment for plaintiff, and defendant brings error. Affirmed.

Harris & Harris, of Rome, for plaintiff in error. Maddox & Doyal, of Rome, for defendant in error.

RUSSELL, J. Judgment affirmed.

(13 Ga. App. 753)

DOZIER v. CENTRAL OF GEORGIA RY. CO.

CENTRAL OF GEORGIA RY. CO. v. DOZIER.

(Nos. 4,702 and 4,703.)

(Court of Appeals of Georgia. June 10, 1913.)

(Syllabus by the Court.)

1. RAILROADS (§§ 313, 317*)—CROSSING ACCIDENT—SPEED—LIABILITY.

The plaintiff sued to recover damages for personal injuries caused by the running of the defendant's locomotive and cars. He alleged that he was injured without any fault or negligence whatever on his part, and solely by the negligence of the defendant; that he was injured at a public street crossing by the negligent conduct of the defendant's employees in charge of the locomotive in approaching the crossing, without ringing the bell or giving any other signal, and without checking speed in compliance with the statute, and in violation of a city ordinance limiting the speed of trains at public crossings in the city. *Held*, the allegations of the petition show a cause of action, and the demurrer was properly overruled. The allegations of the petition were substantially proved as laid, and the court erred in granting a nonsuit.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 1002, 1009; Dec. Dig. §§ 313, 317.*]

2. RAILROADS (§ 335*)—CROSSING ACCIDENT—DEFENSE—BURDEN OF PROOF.

Where the statutory precautions enacted for the purpose of preventing injuries by the operation of railroad trains at public crossings are not complied with, and injury results from such noncompliance, a prima facie case of liability is shown, from which the offend-

ing company can be relieved only by proving that the injury was caused solely by the plaintiff's own negligence, or that by the exercise of ordinary care he could have avoided the consequences of the defendant's negligence, or, in mitigation of damages, that the plaintiff's negligence contributed to the injury. *Bryson v. Southern Ry. Co.*, 3 Ga. App. 407, 59 S. E. 1124; *C. & W. C. Ry. Co. v. Camp*, 3 Ga. App. 232, 59 S. E. 710.

[Ed. Note.—For other cases, see *Railroads*, Cent. Dig. §§ 1028, 1084, 1086-1088; Dec. Dig. § 335.*]

Error from City Court of Swainsboro; H. R. Daniel, Judge.

Action by J. S. Dozier against the Central of Georgia Railway Company. Judgment for defendant, and plaintiff brings error, and defendant files cross-bill. Reversed on main bill, and affirmed on cross-bill.

Frank C. Shackelford and Horace M. Holden, both of Athens, for plaintiff in error. F. H. Saffold, of Swainsboro, for defendant in error.

HILL, C. J. Judgment on the main bill of exceptions reversed. Judgment on the cross-bill of exceptions affirmed.

(12 Ga. App. 754)

LITTLE v. LARY (two cases). (Nos. 4,715, 4,716.)

(Court of Appeals of Georgia. June 10, 1913.)

(Syllabus by the Court.)

1. LANDLORD AND TENANT (§ 265*)—RENT—RIGHT TO DISTRAIN.

The landlord is authorized to issue a distress warrant for rent before the rent is due, if the tenant is seeking to remove his crop from the rented premises without paying the rent. Civil Code 1910, § 3700; *Smith v. Green*, 128 Ga. 90, 57 S. E. 98.

[Ed. Note.—For other cases, see *Landlord and Tenant*, Cent. Dig. §§ 1062-1074; Dec. Dig. § 265.*]

2. EVIDENCE (§ 393*)—PAROL EVIDENCE—RENT CONTRACT.

The rental contract being in writing, and being clear and unambiguous, parol evidence was not admissible to add to or vary its terms. Civil Code 1910, § 4268.

[Ed. Note.—For other cases, see *Evidence*, Cent. Dig. §§ 1736-1744; Dec. Dig. § 393.*]

3. LANDLORD AND TENANT (§ 265*)—DISTRAINT FOR RENT—GROUNDS.

"A tenant, seeking to remove from the premises any portion of the * * * crops before the rent is due, without his landlord's consent," and without paying his landlord, "is subject to distraint immediately, no matter what may be the purpose or intent of such removal." *Daniel v. Harris*, 84 Ga. 479, 10 S. E. 1013. In the present case the defendant contended that the rent was payable in money, and that he was selling a part of the crop to raise the money for the purpose of paying the rent to his landlord. The court instructed the jury to the effect that, if they believed this to be true, they should find against the distress warrant. *Held*, that the charge was more favorable to the defendant than the law authorized.

[Ed. Note.—For other cases, see *Landlord and Tenant*, Cent. Dig. §§ 1062-1074; Dec. Dig. § 265.*]

4. LANDLORD AND TENANT (§ 266*)—RENT—DISTRESS WARRANT—SET-OFF.

A set-off of items entirely independent of and separate from the contract of rent cannot be made against the distress warrant. *McMahan v. Tyson*, 23 Ga. 43; *Johnson v. Patterson*, 86 Ga. 725, 13 S. E. 17.

[Ed. Note.—For other cases, see *Landlord and Tenant*, Cent. Dig. §§ 1075-1079; Dec. Dig. § 266.*]

5. LANDLORD AND TENANT (§ 265*)—LIEN FOR SUPPLIES—RIGHT TO ENFORCE.

A landlord's lien for supplies may be enforced before the debt is due, if the tenant is removing or seeking to remove his crops from the premises. Civil Code 1910, § 3348(3).

[Ed. Note.—For other cases, see *Landlord and Tenant*, Cent. Dig. §§ 1062-1074; Dec. Dig. § 265.*]

6. NO ERROR—VERDICT SUSTAINED.

No error of law appears, and the verdict for the plaintiff, both on the distress warrant and on the claim for supplies, is strongly supported by the evidence.

Error from City Court of Houston County; A. C. Riley, Judge.

Two cases by J. T. Lary against W. J. Little. Judgments for plaintiff, and defendant brings error. Affirmed.

Jere M. Moore, of Montezuma, for plaintiff in error. C. E. Brunson, of Perry, for defendant in error.

HILL, C. J. Judgments affirmed.

(13 Ga. App. 754)

ASHBURN AUTO CO. v. BLACK.

(No. 4,709.)

(Court of Appeals of Georgia. June 10, 1913.)

(Syllabus by the Court.)

1. MOTION TO DISMISS.

The motion to dismiss the writ of error is without merit.

2. JUDGMENT (§§ 106, 138*)—TIME TO ANSWER—DEFAULT—MOTION TO OPEN—NECESSITY.

Where the statute allows the defendant in an action at law to appear and answer on or before the first day of the term to which the process is returnable, and during that day he does appear and file with the clerk his plea or answer, he cannot be regarded as in default. In the present case the entry of default was prematurely made, and did not deprive defendant of the right to insist upon the plea and answer which he had filed in terms of the statute; and it was not necessary to move the court to open the default, though in such a case it is the better practice to do so. *Bush v. Butler*, 8 Ga. App. 345, 69 S. E. 26.

[Ed. Note.—For other cases, see *Judgment*, Cent. Dig. §§ 160, 162, 180-197, 249-251, 254; Dec. Dig. §§ 106, 138.*]

Error from City Court of Ashburn; R. L. Tipton, Judge.

Action by J. L. Black against the Ashburn Auto Company. Judgment for plaintiff, and defendant brings error. Reversed.

Jno. B. Hutcheson and A. S. Bussey, both of Ashburn, for plaintiff in error. J. A. Comer, of Ashburn, for defendant in error.

HILL, C. J. Judgment reversed.

(12 Ga. App. 779)

LONG v. MENDEL (No. 4,759.)

(Court of Appeals of Georgia. June 10, 1913.)

(*Syllabus by the Court.*)

REVIEW ON APPEAL.

The grounds of the motion for a new trial, so far as approved by the trial judge, are wholly without merit, the evidence demanded the verdict for the plaintiff, and the court did not err in so directing. Judgment is affirmed, with 10 per cent. damages for suing out and prosecuting the writ of error for delay only.

Error from City Court of Monroe; A. C. Stone, Judge.

Action by H. Mendel against J. L. Long. Judgment for plaintiff, and defendant brings error. Affirmed.

J. H. Felker, of Monroe, for plaintiff in error. Walker & Roberts, of Monroe, for defendant in error.

HILL, C. J. Judgment affirmed, with damages.

(12 Ga. App. 794)

KELLY v. BUTLER, STEVENS & CO.
(No. 4,782.)

(Court of Appeals of Georgia. June 10, 1913.)

(*Syllabus by the Court.*)

FACTORS (§ 44*)—RIGHT TO COMMISSIONS.

The evidence demanded the verdict in the plaintiffs' favor, and the court did not err in overruling the motion for a new trial.

[Ed. Note.—For other cases, see Factors, Cent. Dig. §§ 58, 59; Dec. Dig. § 44.*]

Error from City Court of Eastman; J. A. Neese, Judge.

Action by Butler, Stevens & Co. against W. H. Kelly. Judgment for plaintiff, and defendant brings error. Affirmed.

Roberts & Smith and W. M. Clements, all of Eastman, for plaintiff in error. Travis & Travis, of Savannah, and C. W. Atwill, of Eastman, for defendant in error.

POTTLE, J. The petition in the present case contained three counts, but, as the jury found for the plaintiffs on the second count, only this count is material in the consideration of the case. The case made by the petition is substantially as follows:

[1, 2] The plaintiffs were cotton factors and engaged in the business of selling cotton on commission in the city of Savannah. The defendant was engaged in the business of selling cotton, and resided in Dodge county.

On August 25, 1909, the defendant requested the plaintiffs to sell for him 50 bales of cotton for October delivery at 12¼ cents per pound. Acting upon this request, the plaintiffs sold to McFadden & Bro. for the defendant on August 25, 1909, 50 bales of cotton for 12¼ cents per pound, to be delivered on or before October 26, 1909, subject to the rules of the Savannah Cotton Exchange, basis, good middling. In order to make the sale, it was necessary for the plaintiff to guarantee the delivery of the cotton in accordance with the terms of the contract; and this they did. Immediately after making the sale, the plaintiffs notified the defendant of the sale and the terms thereof, and requested shipment of the cotton. The defendant refused to comply with the contract, and on October 26, 1909, the plaintiffs delivered to McFadden & Bro. 50 bales of cotton, the market price of which on the day of delivery was 14 cents per pound. The defendant thereupon became indebted to the plaintiff in the sum of \$441.74, being the difference between the contract price and the market value of the cotton; and also in the sum of \$50 additional, as commissions for making the sale. The defendant answered, denying that he was indebted to the plaintiffs in any sum, and denying that he authorized the execution of the contract with McFadden & Bro. From the evidence it appears that on August 25, 1909, the defendant wired the plaintiffs as follows: "Sell me fifty bales twelve quarter October delivery." On the same day plaintiffs wired the defendant: "Sold your fifty bales twelve quarter basis good mid. October delivery here." On the same day the plaintiffs addressed a letter to McFadden & Bro. stating that 50 bales of cotton had been that day sold to McFadden & Bro. under instructions from the defendant at 12¼ cents per pound, to be delivered on October 26, 1909. The letter further stated that the contract for the sale was inclosed for signature of the buyers, and that the plaintiffs guaranteed delivery of the cotton. On the same day the plaintiffs addressed a letter to the defendant, stating that the cotton had been sold to McFadden & Bro., and the terms upon which the sale was made. In this letter was inclosed a written contract for sale, to be signed by the defendant; this contract reciting, among other things, that "this sale is made subject to the rules of the Savannah Cotton Exchange," with certain modifications which were noted. The defendant made no reply to this letter, and failed to sign and return the contract. Several communications were addressed by the plaintiffs to the defendant, calling his attention to his failure to sign and return the contract, and no response was received from the defendant. On October 25th, the day before the delivery was to be made, the plaintiffs wired the defendant that they

would buy 50 bales of cotton to fill his contract; and to this telegram the defendant replied as follows: "Previous wires if you buy cotton its up to you will not authorize same." On October 26th the plaintiffs wired the defendant that they had bought the cotton to fill his contract, and inclosed him a statement of the account showing the amount due the plaintiffs on account of the transaction. The defendant did not deny sending the telegrams in reference to the transaction nor communications sent to him from time to time by the plaintiffs. He contended that he was justified in refusing to sign the contract of sale by reason of the fact that it contained a stipulation that the sale was to be made subject to the rules of the Savannah Cotton Exchange. He further contended that the sale made as evidenced by the telegram was executory, and that the conduct of the plaintiffs, in sending him the written contract to sign, was a recognition of this fact; and, further, that if the original contract was not executory there had been a novation, by reason of the fact that plaintiffs did not rely upon the telegram, but insisted upon the execution of the subsequent contract. No such issue as this was raised in the defendant's answer, but in his testimony he assigned this as a reason for failing to execute the contract sent to him by the plaintiffs. There is a suggestion in the brief of counsel for plaintiffs in error that the contract was a speculation in futures, but there is nothing in the evidence to justify this argument. The evidence demanded a finding that the contract was for the sale and delivery of actual cotton, and that the plaintiffs did deliver to McFadden & Bro. 50 bales of cotton in accordance with the contract. It is insisted, in the motion for a new trial, that the defendant should have been allowed to prove that the plaintiffs considered the contract executory, and did not rely upon the telegrams as evidencing a complete contract. But the law fixes the status of the contract. It was not executory. The defendant directed the plaintiffs as his factors and agents to sell for him 50 bales of cotton for October delivery at a certain price. The plaintiffs accepted this commission and immediately made the sale, obligating themselves to make delivery for and in behalf of the defendant in accordance with the contract. So far as the defendant and the plaintiffs are concerned, the contract was completely executed, and nothing remained to be done but to deliver the cotton in accordance therewith. The defendant became bound to make this delivery, and the plaintiffs, under their contract with McFadden & Bro., became obligated to see that delivery was made by the defendant. The failure of the defendant to execute the subsequent contract is wholly immaterial. The suit was not brought for damages for his failure to execute this

contract, but the action was predicated upon his failure to deliver the cotton in accordance with his original agreement and the loss which the plaintiffs had sustained by reason of being compelled to purchase cotton in the market and deliver it to McFadden & Bro. in accordance with the contract. The plaintiffs were entitled to their commission of \$50 for making the sale, this amount being shown by the evidence and being the usual and customary commission charged by cotton factors in Savannah. The rules and by-laws of the Savannah Cotton Exchange were immaterial, and their introduction in evidence was not hurtful to the defendant.

[3] The ground of the motion for a new trial in which complaint is made that counsel for the plaintiffs were permitted to interrogate the defendant in reference to certain matters to which he had testified to on a former trial, because counsel did not read to the defendant the testimony which he was alleged to have given on a former trial, is too indefinite to be considered. But, aside from this, it is immaterial, as the result would have been the same had the defendant not been thus interrogated. There was no error in overruling the motion for a new trial.

Judgment affirmed.

(12 Ga. App. 816)

SMITH v. CITY OF ATLANTA. (No. 4,903.)
(Court of Appeals of Georgia. June 10, 1913.)

(Syllabus by the Court.)

1. INTOXICATING LIQUORS (§ 236*)—CRIMINAL PROSECUTION—SUFFICIENCY OF EVIDENCE.

The evidence was not legally sufficient to establish guilt, and the finding of the recorder was therefore contrary to law, and on certiorari should have been reversed by the superior court.

[Ed. Note.—For other cases, see Intoxicating Liquors, Cent. Dig. §§ 300-322; Dec. Dig. § 236.*]

(Additional Syllabus by Editorial Staff.)

2. CRIMINAL LAW (§ 552*)—CIRCUMSTANTIAL EVIDENCE—PROBATIVE EFFECT.

When circumstantial evidence alone is relied on to convict of violating the prohibitory law, the circumstances must be sufficient to exclude every other reasonable hypothesis than that of defendant's guilt.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1257, 1259-1262; Dec. Dig. § 552.*]

Error from Superior Court, Fulton County; Geo. L. Bell, Judge.

Mamie Smith was convicted of violating a section of the City Code of Atlanta, and from an affirmance on certiorari she brings error. Reversed.

John S. McClelland, of Atlanta, for plaintiff in error. J. L. Mayson and W. D. Ellis, Jr., both of Atlanta, for defendant in error.

HILL, C. J. Mamie Smith, a colored woman, was tried by the recorder of the city

of Atlanta for a violation of section 1489 of the City Code of Atlanta (1910), which prohibits the keeping on hand of intoxicating liquors for the purpose of illegal sale. On certiorari the finding of the recorder was affirmed by the superior court, and this writ of error challenges the correctness of the judgment of affirmance.

[1] No special error of law is complained of; the contention being solely that the finding of the recorder was without any evidence to support it. The evidence is as follows: A police officer went to the house of the accused and found 10 half pints of whisky concealed in a chimney, in a place where several bricks had been taken out. The accused, being questioned at the time, first said that there was no whisky in her house, and when the whisky was found she claimed that it belonged to her, but she subsequently stated that it belonged to a railroad man. In addition to the whisky a small quantity of beer was found.

The recorder admitted in evidence, over objection of the accused, the following testimony of a policeman: "I stay in the station sergeant's office, and a woman called me up and told me her name was Millie Ann Murphy, and said that she had bought a half pint of whisky from Mamie Smith, and if we would go there we would find it in the right-hand room in the closet; and we went there and found it exactly where she said we would find it." The woman, Millie Ann Murphy, was introduced as a witness by the state, and she denied that she had made this statement to the officer, or had bought any whisky from the accused. The testimony of the policeman may have been admissible for the purpose of impeaching Millie Ann Murphy after proper foundation, but it certainly could have had no probative value whatever in proving the substantive fact charged against the accused. Indeed, counsel for the city in the briefs submitted to this court do not even rely upon it for any purpose. They rely upon the finding of the whisky in the house of the accused and upon the contradictory statements made by her about it, and contend that the three conflicting statements—that there was no whisky in the house, that it was hers, and that it belonged to a railroad man—raised a presumption against her that it was being kept for an illegal purpose. While these circumstances were unquestionably suspicious, it cannot reasonably be contended that they were sufficient to exclude every other reasonable hypothesis than that of guilt.

[2] In every court of this state, including the recorder's court of a municipality, parties on trial are entitled to the presumption of innocence, and should not be convicted upon merely suspicious circumstances. When circumstantial evidence alone is relied on to convict, the circumstances should be sufficient to exclude every other reasonable hypothesis

than that of the guilt of the accused; and this is true even though the charge be that of violating the prohibition law. The rule of evidence is elementary and protects all persons in any court on trial for any offense either against the laws of the state or against the ordinances of a municipality. We are therefore constrained to differ from the conclusion which the recorder came to in his finding, and to hold that the certiorari should have been sustained by the judge of the superior court. *Walker v. City of Dawson*, 7 Ga. App. 417, 66 S. E. 984; *Cain v. Mayor et al. of Cordele*, 8 Ga. App. 433, 69 S. E. 578. Judgment reversed.

(12 Ga. App. 811)

HAWTHORNE v. STATE. (No. 4,803.)

(Court of Appeals of Georgia. June 10, 1913.)

(Syllabus by the Court.)

SUFFICIENCY OF EVIDENCE.

No error of law is complained of and the evidence although circumstantial, is sufficient to support the verdict.

Error from Superior Court, Columbia County; H. C. Hammond, Judge.

Tom Hawthorne was convicted of crime, and he brings error. Affirmed.

J. B. Burnside and A. K. Forney, both of Thomson, for plaintiff in error. A. L. Franklin, Sol. Gen., of Augusta, and John M. Graham, of Atlanta, for the State.

HILL, C. J. Judgment affirmed.

(12 Ga. App. 806)

ADAMS v. STATE. (No. 4,855.)

(Court of Appeals of Georgia. June 10, 1913.)

(Syllabus by the Court.)

LARCENY (§§ 18, 68*)—WHAT CONSTITUTES —INTENT—QUESTION FOR JURY.

There is one view of the evidence for the state which strongly supports the conclusion that the accused, if guilty of any offense whatever, intended only to use the prosecutor's mule without the knowledge or consent of the prosecutor; and if the jury had taken this view the defendant should have been acquitted. However, where larceny is charged and a taking is shown the jury must necessarily be the exclusive judges of the intention which actuated the accused in the asportation. "It is not necessary, to constitute larceny, that the property should be itself permanently appropriated. It is sufficient if the property be taken and carried away with the intent to appropriate any pecuniary right or interest therein." *Slaughter v. State*, 113 Ga. 287, 38 S. E. 855, 84 Am. St. Rep. 242, and citations. Though the circumstances evidencing the animus furandi are weak, this court cannot hold them to be legally insufficient to have authorized the jury, in exercising its right to pass upon the credibility of the several witnesses, to conclude that the defendant's intention, at the time he carried the mule away,

was to steal. No error of law being complained of, it was not error to refuse a new trial.

[Ed. Note.—For other cases, see Larceny, Cent. Dig. §§ 31, 180, 181; Dec. Dig. §§ 18, 68.*]

For other definitions, see Words and Phrases, vol. 5, pp. 3991-4003.]

Error from Superior Court, Crisp County; W. F. George, Judge.

Tom Adams was convicted of larceny, and he brings error. Affirmed.

Crum & Jones, of Cordele, for plaintiff in error. J. B. Wall, Sol. Gen., of Fitzgerald, and J. W. Dennard, of Cordele, for the State.

RUSSELL, J. Judgment affirmed.

(12 Ga. App. 813)

JONES v. STATE

JEFFORDS v. SAME.

(Nos. 4,897, 4,899.)

(Court of Appeals of Georgia. June 10, 1913.)

(Syllabus by the Court.)

1. BURGLARY (§ 4*)—NATURE OF BUILDING—WAREHOUSE.

Breaking and entering a cotton seed warehouse, where valuable goods are stored, with intent to commit a felony or larceny, is not burglary, unless it is shown that at the time it was entered the warehouse was being used as a place of business.

[Ed. Note.—For other cases, see Burglary, Cent. Dig. §§ 14-18; Dec. Dig. § 4.*]

2. No ERROR SHOWN.

The court properly withdrew from the consideration of the jury that count in the indictment which charged burglary. The evidence demanded a conviction of larceny from the house; and, if there were any errors in the charge of the court, they were immaterial.

(Additional Syllabus by Editorial Staff.)

3. BURGLARY (§ 3*)—ESSENTIAL ELEMENT.

Neither larceny nor the intent to steal is an essential element in the crime of burglary.

[Ed. Note.—For other cases, see Burglary, Cent. Dig. §§ 24-27; Dec. Dig. § 3.*]

4. BURGLARY (§§ 18, 28*)—INDICTMENT—VARIANCE.

A larceny need not be charged in an indictment for burglary, but if charged it must be proved.

[Ed. Note.—For other cases, see Burglary, Cent. Dig. §§ 31, 32, 36, 67-78; Dec. Dig. §§ 18, 28.*]

5. BURGLARY (§ 23*)—INDICTMENT—SUFFICIENCY.

In an indictment for burglary it is sufficient to charge that a dwelling, mansion, or storehouse was broken and entered, without alleging that valuable goods were contained therein; but if a place of business is broken and entered, and that place is not also a dwelling, mansion, or storehouse, it must be alleged that articles of value were stored therein.

[Ed. Note.—For other cases, see Burglary, Cent. Dig. §§ 63-66; Dec. Dig. § 23.*]

6. BURGLARY (§ 4*)—PLACE OF BUSINESS.

The breaking and entering of a place of business may constitute burglary, though the place is not in the nature of a storehouse.

[Ed. Note.—For other cases, see Burglary, Cent. Dig. §§ 14-18; Dec. Dig. § 4.*]

For other definitions, see Words and Phrases, vol. 1, pp. 908-911; vol. 8, p. 7593.]

7. BURGLARY (§ 20*)—INDICTMENT—PLACE OF BUSINESS.

An indictment for breaking and entering a place of business need not expressly denominate the building as a "place of business," if descriptive words are used sufficient to show that it is such.

[Ed. Note.—For other cases, see Burglary, Cent. Dig. §§ 51-54; Dec. Dig. § 20.*]

8. CRIMINAL LAW (§ 1134*)—APPEAL—REASON FOR DECISION.

The reason given by the trial judge for withdrawing a count in an indictment from the consideration of the jury is immaterial, where the right result is reached.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2587, 2653, 2986-2998, 3056, 3067-3071; Dec. Dig. § 1134.*]

Error from Superior Court, Worth County; Frank Park, Judge.

Alf Jones and John Jeffords were convicted of burglary, and they bring error. Affirmed.

Perry, Foy & Monk, of Sylvester, for plaintiffs in error. R. C. Bell, Sol. Gen., of Cairo, for the State.

POTTLE, J. The indictment was in two counts. The first count charged burglary in breaking and entering the cotton seed warehouse of a named person, used for storing cotton seed and seed cotton, with intent to steal goods therein contained; the second count charged larceny from the house in that the accused took and carried away from the warehouse certain goods therein contained, with intent to steal the same. The evidence demanded a finding that the warehouse described in the indictment was broken and entered by the accused and three other persons, and valuable goods stolen therefrom. The trial judge instructed the jury to disregard the first count in the indictment, charging burglary, and to consider only whether the accused were guilty of a misdemeanor as charged in the second count. The accused were convicted of larceny from the house of goods less than \$50 in value, and their motion for a new trial was overruled.

The accused were convicted upon the testimony of persons jointly indicted with them and who aided and abetted them in the criminal act. It is insisted that the evidence demanded a finding that the accused, if guilty of any offense, were guilty of burglary, and that for this reason they could not, under the evidence, be convicted of larceny from the house. If this premise is sound, the conclusion stated is correct. Tarver v. State, 95 Ga. 222, 21 S. E. 381. Unless the evidence authorized a conviction of larceny from the house, the accused could not be convicted of any offense, since there was no proof of their guilt, except the testimony of accomplices.

[3] Neither larceny nor the intent to steal is an essential element in the crime of burglary. The crime of burglary is complete whenever a house which is the subject-matter of burglary is broken and entered with

intent to commit a felony or a larceny. Penal Code, § 146; *Bethune v. State*, 48 Ga. 505.

[4] A larceny need not be charged, but if charged, must be proved. *Walker v. State*, 5 Ga. App. 430, 63 S. E. 534.

[5] If the house alleged to have been broken and entered is not a "dwelling, mansion, or storehouse," it must be alleged and proved to have been a place of business where valuable goods were contained or stored.

[6] It is sufficient to charge that a dwelling, mansion, or storehouse was broken and entered, without alleging that valuable goods were therein contained; but if a place of business is broken and entered, and that place of business is not also a dwelling, mansion, or storehouse, then it must be alleged and proved that articles of value were stored or contained in the place of business. See *Lee v. State*, 56 Ga. 478; *Lanier v. State*, 76 Ga. 304.

[8] The place of business need not be a place of the nature of a storehouse. *Bethune v. State*, *supra*.

[7] Nor is it essential that the house broken and entered should be expressly denominated in the indictment as a "place of business," if descriptive words are used sufficient to show that the house was used as a place of business of another. *Keenan v. State*, 10 Ga. App. 792, 74 S. E. 297. It is essential, however, that it should appear, from the indictment and the proof, that the place broken and entered was being used as a place of business. The mere fact that valuable goods were contained or stored therein is not alone sufficient to make the house a place of business, within the meaning of the statute. *McElreath v. State*, 55 Ga. 562. In that case it was held that an indictment which charged the breaking and entering of a millhouse, with intent to steal, but which did not, either by description or substantial averment, designate the house as a place of business, was fatally defective. Judge Jackson dissented upon the ground that, as it was alleged that corn, tallow, and tobacco were stored in the millhouse, this was sufficient to authorize the inference that the millhouse was being used for the purpose of grinding corn, and was therefore a place of business. In *Hutchins v. State*, 3 Ga. App. 300, 59 S. E. 848, it was held that a barn and cornerrib, in which corn was stored, was not the subject-matter of burglary, unless it was within the curtilage of the dwelling house or unless it was alleged and proved to have been a place of business. In *Wright v. State*, 12 Ga. App. —, 77 S. E. 657, it was held that burglary could not be committed in a smoke house or meat house situated in a field between 200 and 300 yards from the mansion.

The indictment in the present case described the house broken and entered as "the cotton seed warehouse of C. J. Champion, a

warehouse used for storing cotton seed and seed cotton, in the town of Doles, said county." It is alleged that valuable goods were stored in this warehouse, but it is nowhere averred that the warehouse was being used as a place of business. Under the decisions cited, a conviction for burglary under this indictment would not have been authorized. The first count was subject to be quashed on motion, but the trial judge reached substantially the same result by instructing the jury to ignore it, and to consider only whether the accused were guilty of larceny from the house in stealing from the warehouse goods worth less than \$50.

[8] The reason given by the trial judge for withdrawing the first count from the consideration of the jury is immaterial; the right result having been reached. The accused made no statement at the trial, and the evidence demanded their conviction of the offense of larceny from the house. We find no substantial error in any of the charges complained of; but, even if they were erroneous, they afforded the accused no cause for complaint, since there was no theory of the evidence which would have justified their acquittal.

Judgment affirmed.

(12 Ga. App. 756)

CITY OF ROME v. HARRIS. (No. 4,733.)
(Court of Appeals of Georgia. June 10, 1913.)

(Syllabus by the Court.)

1. MUNICIPAL CORPORATIONS (§ 742*)—TORTS—NUISANCE—EVIDENCE.

On the trial of an action against a municipality for damages alleged to have resulted from the maintenance by the city of a pond of water upon the plaintiff's premises, it is not error to admit testimony that the city was notified of the existence of the nuisance and was requested to abate it.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. §§ 1560, 1563; Dec. Dig. § 742.*]

2. APPEAL AND ERROR (§ 801*)—REVIEW—SUFFICIENCY OF MOTION FOR NEW TRIAL.

An assignment of error upon the admissibility of documentary evidence cannot be considered when the evidence is not set forth in the motion, either literally or in substance, nor attached thereto as an exhibit.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 1743, 1753–1755; Dec. Dig. § 301.*]

3. NEW TRIAL (§ 159*)—SUFFICIENCY OF EVIDENCE TO SUPPORT VERDICT—EVIDENCE CONSIDERED.

Although a motion for a nonsuit may have been made and overruled at the conclusion of the plaintiff's evidence, after a verdict in favor of the plaintiff the question is whether, upon the evidence as a whole, the verdict was authorized.

[Ed. Note.—For other cases, see *New Trial*, Cent. Dig. § 319; Dec. Dig. § 159.*]

4. NEW TRIAL (§ 29*)—TRIAL (§ 133*)—ARGUMENT OF COUNSEL—IMPROPER REMARKS—ADMONITION BY COURT.

A new trial in the present case is demanded on account of improper remarks of counsel for

the plaintiff in his concluding argument to the jury.

[Ed. Note.—For other cases, see New Trial, Cent. Dig. §§ 43, 44; Dec. Dig. § 29;* Trial, Cent. Dig. § 316; Dec. Dig. § 133.*]

5. NO OTHER ERROR.

Except as above indicated, the trial was free from error and the verdict was not legally excessive.

(Additional Syllabus by Editorial Staff.)

6. DAMAGES (§ 210*)—INSTRUCTIONS.

In an action for damages, it is the better practice to charge the jury that the amount of the verdict is left to "the enlightened consciences of impartial jurors" instead of "the sound discretion of impartial jurors."

[Ed. Note.—For other cases, see Damages, Cent. Dig. §§ 587, 538; Dec. Dig. § 210.*]

Error from City Court of Floyd County; J. H. Reece, Judge.

Action by Mrs. J. H. Harris against the City of Rome. From a judgment for plaintiff, defendant brings error. Reversed, and new trial granted.

Max Meyerhardt, of Rome, for plaintiff in error. Eubanks & Mebane, of Rome, for defendant in error.

POTTE, J. Mrs. Harris recovered a verdict against the city of Rome for damages for an illness caused by a pond of stagnant water which had been allowed by the city to accumulate upon the property of the plaintiff's husband, on which she resided. A judgment sustaining a general demurrer to the petition was reversed by this court. *Harris v. City of Rome*, 10 Ga. App. 409, 73 S. E. 532. At the trial there was little or no conflict in the evidence in reference to the negligence of the defendant in permitting the pond of water to accumulate and remain on the premises where the plaintiff resided; this negligence consisting in raising the grade of the sidewalk in front of the premises without making suitable provision for carrying off the water which, by reason of this increased grade, would accumulate on the premises in time of heavy rainfall. The issue in the case was as to whether the stagnant water caused the plaintiff's illness, and on this question a finding either way would have been justified.

[1] 1. The court permitted the plaintiff's husband to testify that he made complaint to the city's superintendent of public works and requested him to clean out a gutter extending into a ditch, so that the water might be thus conveyed from the premises, and that if the city would not do this to permit the plaintiff's husband to do so, and that the superintendent refused to permit the witness to clean out the gutter, saying it was the business of the superintendent and not that of the witness. There was no error in admitting this testimony. It was admissible to show express notice to the city and negligence in maintaining a nuisance after a request to abate it.

[2] 2. Complaint is made that the court permitted the introduction in evidence of the written demand for damages, served on the city, but, as the demand is not set out in the motion or attached thereto as an exhibit, the question of its admissibility cannot be determined.

[6] In passing, however, we may say that the demand, which is set forth in the evidence, seems to be sufficiently full and definite. It need not contain all the elements of a complete cause of action, such as is required to be set out in a petition filed in court. *City of Sandersville v. Stanley*, 10 Ga. App. 360, 76 S. E. 535, and citations.

[3] 3. The plaintiff produced evidence to support her case as laid in the petition, and it was not error to refuse a nonsuit. Besides, after verdict, the question is whether, upon the whole evidence, the plaintiff is entitled to recover. See *Insurance Co. v. Gaynor*, 77 S. E. 1072.

[4] 4. Complaint is made of several remarks made in the argument to the jury by Mr. Mebane, one of the counsel for the plaintiff. The counsel stated that "Mr. Kinnebrew, a juror, had a similar case to this and gained it." The assignment of error upon this remark is that it is without evidence to support it, was in fact untrue, and tended to mislead the jury. The same counsel also said, "The Court of Appeals said this plaintiff could recover in this case." And also, "Suits are being brought against railroads all over Georgia for producing foul ponds of water producing sickness, etc., and the books are full of such cases." And also, "If it had not been for this big fat Worrill, they would have fixed this sidewalk and drained this pond." And further, "This man Worrill is the most contemptible scoundrel I ever knew. I do not blame him for being 500 miles away from here; he ought to be 5,000 miles from here. A man who has no more regard for a person's health ought to have been run away before he was." At the conclusion of each of these several statements, the defendant moved for a mistrial. The court certifies that, in reference to the first two remarks, Mr. Mebane was directed to confine himself to the facts and to proceed with the argument. In reference to the third remark, the court said, "I will tell the jury to pay no attention to that, at the proper time." When the last statement of counsel was made, the court admonished the jury to pay no attention to the statement of counsel and dismiss it from their minds; that they must determine the case from the law and the evidence. We are reluctant to set aside a verdict and order a new trial on account of remarks of counsel, but in the argument of counsel in this case the rule is so flagrantly violated that we have no alternative. It was particularly unfair and prejudicial to the defendant for counsel to state that another plaintiff had recovered from the city in a

similar case, and that the Court of Appeals had already held that the present plaintiff was entitled to recover. As a matter of fact, the Court of Appeals had made no such ruling, having held simply that the plaintiff had stated a case on paper, which is quite a different thing from supporting it by proof. It was highly prejudicial and grossly improper to go outside of the evidence and inform the jury that the city had already been held liable in another case for damages resulting from the maintenance of this same pond or of a similar pond.

There are many cases where the Supreme Court has pointed out that, before the defendant will be permitted to assign error in the reviewing court upon improper and prejudicial conduct of counsel for the opposite party, a motion for a mistrial should be made, and in this way a ruling from the trial court invoked. The defendant pursued this remedy in the present case. It is true that there are a number of cases where both the Supreme Court and the Court of Appeals have declined to direct a new trial where it appeared that the court rebuked counsel and gave the jury proper admonition in reference to the matter; but all these were cases where, in the opinion of the court, the action of the trial judge was such as to remove the prejudicial effect of counsel's improper argument. The conduct of counsel in the present case was such as to demand severe and unmistakable condemnation on the part of the trial judge, in order to impress the jury with the fact that the argument was improper. We do not think the prejudicial effect of counsel's language was removed by the mild form of admonition and criticism employed by the trial judge. Mr. Kinnebrew was on the panel of jurors summoned for the term; and, when counsel stated to the jury that the juror had recovered from the city in a similar case, it was not enough for the court simply to direct counsel to confine himself to the evidence and proceed with the argument. Such an admonition was rather calculated to impress the jury with the idea that the court did not attach any serious importance to counsel's improper statement. The same observation applies to the admonition of the court in reference to the statement of counsel that the Court of Appeals had already decided that the plaintiff was entitled to recover. The verdict was for \$1,500, and it is apparent that the jury settled in favor of the plaintiff the issue in reference to the proximate cause of her illness. A contrary finding would have been authorized, and it cannot be said that the jury was not influenced to some extent by the improper remarks of counsel. Courts and lawyers frequently differ in reference to the application of technical rules of law in given cases; but there is one thing upon which there is absolute unanimity of opinion, both among the

members of the bench and the bar, and that is that a litigant is entitled to a fair trial, and when he has not had it, no verdict against him ought to be permitted to stand. Upon the application of this fundamental principle of our jurisprudence to the facts of the present case, a new trial is demanded.

[5] 5. The instruction of the judge upon the subject of the measure of damages was not altogether accurate, but would not alone be ground for a new trial. Instead of stating that the amount of the verdict should be left to the sound discretion of impartial jurors, it would be better to use the language of the statute, to wit, "the enlightened consciences of impartial jurors." Except that, as above indicated, the trial was free from error, and the verdict was not legally excessive.

Judgment reversed.

(12 Ga. App. 813)

RYON v. STATE. (No. 4,894.)

(Court of Appeals of Georgia. June 13, 1913.)

(Syllabus by the Court.)

1. TIME (§ 10*)—BILL OF EXCEPTIONS—FILING—SUNDAY.

When the last day for tendering the bill of exceptions is Sunday, the following day is superseded. Civil Code, § 4 (8); Morgan v. Perkins, 94 Ga. 353, 21 S. E. 574.

[Ed. Note.—For other cases, see Time, Cent. Dig. §§ 34-52; Dec. Dig. § 10.*]

2. CRIMINAL LAW (§ 1159*)—APPEAL, AND ERROR—VERDICT—CRIMINAL INTENT—LARCENY.

The evidence in this case was weak and barely sufficient to support the verdict. The state proved that the property described in the indictment had been stolen and was found in the possession of the accused. His conduct and statements made by him upon the discovery of the property in his possession tended to negative the existence of criminal intent; but this was solely a question for the jury, and, their verdict having been approved by the trial judge, this court has no authority to interfere.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 3074-3083; Dec. Dig. § 1159.*]

Error from Superior Court, Tattnall County; W. W. Sheppard, Judge.

John Ryon was convicted of larceny, and he brings error. Affirmed.

H. H. Elders, of Reidsville, for plaintiff in error. N. J. Norman, Sol. Gen., of Hinesville, for the State.

POTTLE, J. Judgment affirmed.

(12 Ga. App. 810)

MORRIS et al. v. STATE. (No. 4,892.)

(Court of Appeals of Georgia. June 10, 1913.)

(Syllabus by the Court.)

HOMICIDE (§ 257*)—SHOOTING—SUFFICIENCY OF EVIDENCE.

The prosecutor, while sitting in his house at night, was shot at through a crack in the window and severely wounded by one of two

men, both of whom fled immediately after the shooting. The shooting was done with a shotgun, one shot being fired. It had been raining, and tracks of two men were found near the window, and these tracks were clearly and positively identified by several peculiarities as having been made by the shoes of the defendants, and they led from the house where the shooting occurred directly to the homes of the accused. In the house of one of the accused a double-barreled gun was found, with one barrel, apparently recently fired, empty. The accused were seen together going towards the house of the prosecutor about dark with guns, and shortly after the shooting two men were seen walking rapidly from the house where the shooting took place, though not identified as the accused. The accused were also seen near the house about the time of the shooting. *Held*, in the absence of complaint of any error of law, the verdict of guilty, under this evidence, will not be disturbed.

[Ed. Note.—For other cases, see *Homicide*, Cent. Dig. §§ 543-552; Dec. Dig. § 257.*]

Error from Superior Court, Columbia County; H. C. Hammond, Judge.

Tom Morris and another were convicted of shooting a person, and they bring error. Affirmed.

J. B. Burnside and A. K. Forney, both of Thomson, for plaintiffs in error. A. L. Franklin, Sol. Gen., of Augusta, and John M. Graham, of Atlanta, for the State.

HILL, C. J. Judgment affirmed.

(12 Ga. App. 809)

FLETCHER v. STATE. (No. 4,891.)
(Court of Appeals of Georgia. June 10, 1913.)

(Syllabus by the Court.)

1. INTOXICATING LIQUORS (§ 224*)—PROSECUTION—BURDEN OF PROOF.

"On the trial of an accusation of selling intoxicating liquors, where the defense relied upon is that the accused had no interest whatever in the sale, but acted therein simply as agent for the purchaser, the burden is on the accused to prove how, when, and from whom he obtained the liquor; and until this is done to the satisfaction of the jury the burden is not carried."

[Ed. Note.—For other cases, see *Intoxicating Liquors*, Cent. Dig. §§ 275-281; Dec. Dig. § 224.*]

2. INTOXICATING LIQUORS (§ 236*)—PROSECUTION—SUFFICIENCY OF EVIDENCE.

Where such a defense is relied on, the jury are authorized to convict, if the evidence warrants the inference that the defense is a mere subterfuge, and that the accused was himself the seller, or interested in the sale otherwise than as agent for the purchaser.

[Ed. Note.—For other cases, see *Intoxicating Liquors*, Cent. Dig. §§ 300-322; Dec. Dig. § 236.*]

Error from Superior Court, Cobb County; H. L. Patterson, Judge.

Will Fletcher was convicted of violating the prohibition law, and he brings error. Affirmed.

Mozley & Moss, of Marietta, for plaintiff in error. Herbert Clay, Sol. Gen., of Marietta, for the State.

POTTLE, J. [1] The state offered testimony that the accused was given money, went away, and returned with whisky, which he delivered to the state's witness. This made a prima facie case of guilt. *Cheatwood v. City of Buchanan*, 9 Ga. App. 828, 72 S. E. 284; *McGovern v. State*, 11 Ga. App. 267, 74 S. E. 1101. Where such a prima facie case is made out, the burden is on the accused to show "how, when, and from whom he obtained the liquor."

[2] If the state relies only upon the prima facie case then made, and the evidence for the accused demands a finding that he was acting solely as the buyer's agent, and was not otherwise interested in the sale, his conviction is not authorized. *Allen v. State*, 11 Ga. App. 245, 75 S. E. 11. But if the evidence or the prisoner's statement justifies the inference that the defense is a mere subterfuge, and the accused was the seller, or interested therein otherwise than as agent for the buyer, he can be convicted. *Cheatwood v. Buchanan*, supra; *Whipple v. State*, 10 Ga. App. 214, 73 S. E. 27.

One Carnes testified that he and the accused went to a place known as "Happy Flat, down back of the old Glover foundry, to a negro house," and that the accused bought the whisky from this negro. The negro's name is not given, nor is he otherwise identified. The accused said in his statement that he and Carnes went up the railroad track and met a negro, who said he had some whisky with him, and that the purchase was made from the negro then and there.

It may be doubted whether Carnes' testimony, standing alone, would have demanded an acquittal, for he failed either to tell the negro's name or to give any reason for failing to do so. But, when his evidence is considered in the light of the statement, the jury were well warranted in finding that the defense was a mere subterfuge. There was too much discrepancy between the testimony of the defendant's witness and his own statement—enough to warrant the jury in disregarding both, and convicting the accused upon the prima facie case made by the state.

Judgment affirmed.

(12 Ga. App. 804)

WALKER et al. v. ROYSTER GUANO CO.
(No. 4,809.)

(Court of Appeals of Georgia. June 10, 1913.)

(Syllabus by the Court.)

JUSTICES OF THE PEACE (§ 205*)—CERTIORARI—ANSWER—CONSTRUCTION.

There was no error in overruling the certiorari.

[Ed. Note.—For other cases, see *Justices of the Peace*, Cent. Dig. §§ 793-799; Dec. Dig. § 205.*]

Error from Superior Court, Jefferson County; B. T. Rawlings, Judge.

Action by the Royster Guano Company against F. M. Walker and others. Judgment for plaintiff. From a denial of certiorari, defendants bring error. Affirmed.

R. N. Hardeman, of Louisville, for plaintiffs in error. M. C. Barwick, of Augusta, for defendant in error.

RUSSELL, J. The case is one of a suit on a forthcoming bond. The only point insisted upon in the brief of counsel for the plaintiffs in error (the defendants) is that the record nowhere shows that the plaintiff had obtained a judgment in the claim case finding the property subject. Of course, the plaintiff would not be entitled to a judgment upon the forthcoming bond unless he had, precedent thereto, obtained a judgment finding the property subject. The fact that counsel for plaintiffs in error stakes his case upon this point, and challenges the record to support his contention, is due merely to a typographical error in the record, for it appears, from the answer of the magistrate, that there was a judgment finding the property subject, anterior to the judgment of which complaint is here made. In the answer it appears that "the transcript introduced should a verdict and judgment finding the property subject the objection and my overruling it are true." It is very apparent, from the exhibits attached to the petition for certiorari, that this sentence should read: "The transcript introduced showed a verdict and judgment finding the property subject. The objection [alluding to the petition] and my overruling it are true." The transcript from the justice's docket in the record does in fact show a verdict and judgment in full; consequently the judge of the superior court did not err in overruling the certiorari for the reason urged by plaintiffs in error, nor is the judgment erroneous for any other reason disclosed by the record.

Judgment affirmed.

(13 Ga. App. 786)

COPELAND v. McCLELLAND. (No. 4,773.)
(Court of Appeals of Georgia. June 10, 1913.)

(Syllabus by the Court.)

1. PLEADING (§ 9*) — CONCLUSIONS FROM FACTS ALLEGED—SUFFICIENCY.

The amendment to the defendant's answer set forth a good defense to the action, and was not subject to any of the demurrers filed thereto.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. § 29; Dec. Dig. § 9.*]

2. PLEADING (§ 260*)—AMENDMENT—AFFIDAVIT—SUFFICIENCY.

An affidavit attached to an amendment to an answer, in which the affiant avers that he did not discover the new facts set forth in the amendment until after the original answer was filed, and that if he had known of such facts at that time he would have pleaded them, is a substantial compliance with the

provisions of section 5640 of the Civil Code of 1910.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. § 793; Dec. Dig. § 260.*]

3. BILLS AND NOTES (§ 493*)—BURDEN OF PROOF—DEFENSES.

In a suit upon a promissory note purporting to have been signed by the defendant, who was a married woman, the burden is upon her to establish the truth of special pleas that the note was given in settlement of a debt of her husband, and that the consideration of the note had wholly failed. Where the evidence is conflicting upon the issues thus raised, it is prejudicial error to charge that, if the evidence in the case is equally balanced, the jury should find for the defendant.

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. §§ 1652-1662; Dec. Dig. § 493.*]

Error from City Court of Cairo; J. R. Singletary, Judge.

Action by T. S. Copeland against Cora McClelland. Judgment for defendant, and plaintiff brings error. Reversed.

R. C. Bell and J. S. Weathers, both of Cairo, for plaintiff in error. J. Q. Smith, of Cairo, for defendant in error.

POTTLE, J. Suit was brought against the defendant, who was a married woman, upon a promissory note for \$240 principal, with a credit thereon of \$55. The note purported to have been signed by the defendant with her mark. The defendant pleaded non est factum; that she was not indebted to the plaintiff in any sum; and that she borrowed from him \$50 and gave him her note for that amount, which she had paid in full, both principal and interest. By amendment the defendant alleged that prior to the execution of the note her husband agreed to trade horses with the plaintiff and give him \$150 boot, which agreement was unknown to her, and that two or three weeks after the agreement was entered into and when she went to give the plaintiff her note for the \$50 which she had borrowed from him the plaintiff included in the note, without her knowledge or consent, the \$150 due by her husband; that she is an ignorant woman and can neither read nor write. She further pleaded that the consideration of the note had failed because the horse received by her husband was totally worthless, that the plaintiff took it back and let her husband have another, which was as worthless as the first one, and that the plaintiff finally took the second one back without returning the one the plaintiff had received from her husband, or allowing him anything therefor. The defendant has never owed the plaintiff but \$50, which she borrowed from him and which she has paid. Annexed to this amendment was an affidavit verifying the truth of the allegations in the amendment, and reciting that the defendant did not know of the defense at the time the original answer was filed; that she knew

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

that she had borrowed \$50 from the plaintiff and had given her note for that amount and paid it, but did not know how the note came to be for \$240, until she recently found out that the plaintiff had included in the note the amount her husband agreed to pay him as boot in the horse trade. Deponent further says that, if she had known of these facts at the time of filing her original answer, she would have pleaded them. The plaintiff demurred to the amendment on the ground that it set forth no defense; that it was not alleged that the plaintiff knew that the debt was a debt of the defendant's husband, and it was not denied that the note was read over to her. The amendment was further demurred to on the ground that no affidavit was attached thereto to the effect that in the original plea the new facts set out in the amendment were not omitted for the purpose of delay, and that the amendment was not offered for delay.

The demurrer was overruled and the plaintiff excepted. The plaintiff introduced in evidence the note sued on, together with a mortgage given to secure it. This mortgage was signed by both the plaintiff and her husband; it being recited therein that the husband signed the mortgage for the purpose of relinquishing whatever interest he had in the land described in the mortgage. The defendant testified that she had never bought a mule from the plaintiff and had never owed him but \$50, and had paid him that debt; that she did not know anything about any other transaction, and never had any transaction with the plaintiff except the borrowing of the \$50; that she did not know anything about the \$240 note until after the suit was brought, when she learned that her husband had swapped mules with the plaintiff and agreed to pay him \$150 boot which was included in the note; that the note and mortgage were not read over to her before she signed them; that some time after the note and the mortgage were executed the plaintiff and one Johnson came to her home and left with her husband the mule described in the mortgage; that the mule had some kind of disease, and her husband exchanged it with the plaintiff for another mule which was no better able to work than the first one, and the plaintiff finally took back the last mule without returning the one he had received from her husband or allowing him anything therefor; that Johnson came after the last mule, acting as plaintiff's agent in the matter; that she can neither read nor write. The defendant's husband testified substantially to the same facts in reference to the mule trade, and that Johnson came and got the last mule which the plaintiff had turned over to him (the defendant's husband), and the latter never got a mule or anything else in exchange. The plaintiff testified that both the defendant and her husband came to him before the note sued on was given, and the defendant stat-

ed to him that she wanted to borrow \$50 and trade the old mule for another mule which he had and which her husband had seen and selected; that she stated that the old mule was hers, and he dealt with her, and never knew her husband in the transaction, except that he was with her when the papers were signed and selected the mule which was wanted; that there was nothing the matter with the mule which he let her have; and that Johnson was not his agent to sell or trade any mules for him. Johnson testified that he was not working for the plaintiff at the time the transaction with the defendant took place, and that he was never the plaintiff's agent to sell or trade any horses or mules; that the mule that the defendant got from the plaintiff was a good mule; that he (Johnson) afterwards traded with the defendant for this mule; that he and the plaintiff and the defendant's husband went to an attorney's office to find out if it would be all right to trade for the mule while the plaintiff had a mortgage on it; that he (Johnson) then traded an old white mule for the one that the plaintiff let the defendant have; that afterwards the defendant's husband got dissatisfied and told him (Johnson) that he could have the white mule, and he (Johnson) thereupon went and got the mule, but did not represent the plaintiff in the transaction. The defendant, in rebuttal, testified that she had never traded mules with the plaintiff, had never represented to the plaintiff that the first mule traded to him was hers, and that she had never at any time had a conversation with the plaintiff in regard to any mule or mule transaction. The jury found for the defendant, and the plaintiff's motion for a new trial was overruled.

[1] 1. The amendment to the defendant's answer set forth a good defense to the action. It was, in substance, that the defendant was not indebted to the plaintiff, that, if any debt was owed, it was by her husband, and that her husband was not indebted, for the reason that there had been a total failure of consideration. The plaintiff contended that the plea was bad because it failed to allege that the plaintiff knew that it was the debt of her husband, and not that of the wife. *Temples v. Equitable Mortgage Co.*, 100 Ga. 503, 28 S. E. 232, 62 Am. St. Rep. 326. It sufficiently appears, however, from the plea that the plaintiff knew that the debt was the husband's, and without the knowledge or consent of the wife included it in the note which she signed. The principle announced in the *Temples Case*, *supra*, is only applicable when the wife misleads her creditor into a transaction concerning her separate estate, and he deals with her in good faith, without knowledge that she is attempting to pay her husband's debts. No such transaction as this is disclosed by the answer in the present case, and the principle of that decision is not applicable.

[2] 2. "Where the defendant is present at the trial, the court cannot permit a plea setting up new facts to be filed without requiring an affidavit that the original plea did not omit such new facts for the purpose of delay, and that the amendment is not now offered for delay." The Code provides that, when "the circumstances of the case or substantial justice between the parties require it," the court has the power to allow the amendment without the affidavit. Civil Code, § 5640. The court's discretion, however, must be based upon facts justifying its exercise. If the defendant is present in court and no reason appears why he cannot make the oath, it is an abuse of discretion to relieve him from so doing. *Bass Dry Goods Co. v. Granite City Mfg. Co.*, 119 Ga. 124, 45 S. E. 980. The affidavit in the present case was, however, a substantial compliance with the section of the Code. It is not essential that the exact language of the section should be used. In the affidavit attached to the answer in the present case the defendant averred that she learned of the new facts set up in the amendment after the filing of the original answer, and, if she had known them at that time, she would have pleaded them. This is sufficient to show that the new facts were not admitted nor the amendment offered for the purpose of delay.

[3] 3. The following charge of the court is assigned as error: "If, after hearing all of the evidence in this case, you find that the evidence is equally balanced between the plaintiff and the defendant, then you should find in favor of the defendant." This charge was erroneous as applied to the pleadings and the evidence in the present case. The burden was on the plaintiff to prove the execution of the note, and this he did by the testimony of a witness that he saw the defendant sign the note. The defendant made no attempt to sustain her plea of non est factum. The plaintiff having thus made out a prima facie case, the burden was on the defendant to sustain by proof her special defenses that the note was given for a debt of her husband, and that the consideration had failed. On these two issues the testimony was directly conflicting. The plaintiff testified that the defendant represented to him that the mule which the plaintiff received was the property of the defendant, and that she desired to exchange it for another mule and pay the plaintiff \$150 as boot; that she borrowed \$50 from the plaintiff, and these two sums made the principal amount due on the note. The plaintiff further testified that the mule sold to the defendant was sound in every way, and that Johnson was not his agent and had no authority to take back from the defendant the white mule which she took in exchange for the one which she had received from the plaintiff. Of course, if the evidence had

required a finding that the plaintiff got the white mule and gave the defendant nothing in exchange therefor, or that Johnson was authorized by the plaintiff to take the white mule, the verdict for the defendant would have been demanded. But this does not appear. According to the testimony of the plaintiff and Johnson, the last trade was a transaction between Johnson and the defendant with which the plaintiff had no concern. The defendant denied all this, and the verdict in her favor was fully supported by the evidence; but, since it was not demanded, the instruction above referred to requires a new trial. The burden was on the defendant to establish the truth of her pleas. If the evidence on the issues thus raised was equally balanced, the plaintiff was entitled to a verdict upon the prima facie case which he had made by proof of the execution of the note. The effect of the instruction was that, if the jury were in doubt whether to believe the plaintiff or the defendant, they should find for the defendant, whereas the correct rule was that, if the jury were unable to reach a conclusion as to which one of the parties was telling the truth, they should find for the plaintiff, because in that event the defendant would have failed to establish her pleas. For this error alone a new trial is ordered.

Judgment reversed.

(12 Ga. App. 802)

HALL v. C. J. ROEHR & CO. (No. 4,807.)
(Court of Appeals of Georgia. June 10, 1913.)

(Syllabus by the Court.)

1. NO MATERIAL ERROR.

No material error of law was committed, and the judgment is affirmed on condition.

(Additional Syllabus by Editorial Staff.)

2. BROKERS (§ 15*)—TERMS OF SALE.

Where a jeweler is authorized to sell rings, the possession of which is retained by the principal, a sale for cash is implied in the absence of evidence of authority to grant a credit.

[Ed. Note.—For other cases, see *Brokers*, Cent. Dig. § 14; Dec. Dig. § 15.*]

3. TROVER AND CONVERSION (§ 11*)—BONA FIDE PURCHASERS—"CONVERSION."

Where one purchases personal property with knowledge that the seller has no title, his retention of the property, as against the true owner, is a conversion.

[Ed. Note.—For other cases, see *Trover and Conversion*, Cent. Dig. §§ 95-98; Dec. Dig. § 11.*]

For other definitions, see *Words and Phrases*, vol. 2, pp. 1562-1570; vol. 8, p. 7618.]

4. APPEAL AND ERROR (§ 1050*)—HARMLESS ERROR—ADMISSION OF EVIDENCE.

The admission of hearsay evidence, which is immaterial to the issues of the case, is harmless error.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 1068, 1069, 4153-4157, 4160; Dec. Dig. § 1050.*]

5. APPEAL AND ERROR (§ 1151*)—AFFIRMANCE —DIRECTION OF REMITTITUR.

In an action for the conversion of two rings, where the evidence shows the value of each of the rings, a verdict for the amount of the more valuable ring will be affirmed, though there was no evidence as to which of the rings defendant converted, but plaintiff will be required to remit the amount of his recovery in excess of the less valuable ring.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4498-4506; Dec. Dig. § 1151.*]

Error from City Court of Bainbridge; H. B. Spooner, Judge.

Action by C. J. Roehr & Co. against C. O. Hall. From a judgment for plaintiff, defendant brings error. Affirmed on condition.

R. G. Hartsfield, of Bainbridge, for plaintiff in error. J. C. Hale, of Bainbridge, for defendant in error.

POTTLE, J. [1] Upon the order of a local jeweler, the plaintiffs sent four diamond rings to the bank of Climax for inspection by Oliver, a prospective purchaser. Oliver, who was president of the bank and reputed to be a man of means, took possession of the rings, and shortly afterwards was adjudicated a bankrupt. Hall, the cashier of the bank, had received the package containing the rings, and delivered it to Oliver. Two of the rings having been accounted for and recovered, the plaintiffs brought trover against Hall to recover the other two, describing them generally as diamond rings, and identifying them by numbers. The proof shows that one of the rings was worth \$260, and the other \$280. The plaintiffs elected to take a money verdict, and the jury found in their favor a verdict for \$280, besides interest. It sufficiently appears, from the evidence, that title to the rings never passed out of the plaintiffs. No sale was ever consummated.

[2] The rings were to be sold by the local jeweler as agent for the plaintiffs; and, there being no evidence that no credit sale was authorized, he could only sell for cash. It is undisputed that Oliver got the four rings and never paid for any of them. He gave a ring to the defendant Hall, who claims that he did not know where Oliver obtained it, but the circumstances strongly indicate that this claim of Hall's was a mere subterfuge, and that he knew (what the evidence abundantly shows) that the ring belonged to the plaintiffs and had never been paid for by Oliver, and that Oliver had no right to give it to him.

[3] If Hall acquired the ring with knowledge that Oliver had no title, Hall's possession was wrongful and his retention of it a conversion. Moreover, there was evidence of a demand and refusal, as proof of conversion.

[4] The trial judge admitted some hearsay evidence, but it was harmless, as it did not affect the material issues in the case. A

verdict against Hall was practically demanded.

[5] The only trouble about the case is that the evidence fails to show which of the two rings sued for came into possession of Hall. The jury had no right to assume, in the absence of proof, that he got the more valuable one. But, as the evidence demands a finding that the less valuable ring was worth \$260, neither Hall nor his sureties on the bail bond can complain of the direction which we give the case, which is that the judgment will be affirmed, on condition that the verdict and judgment be amended so as to find for the plaintiffs the principal sum of \$260, and interest, as stipulated in the verdict. If the plaintiffs do not, within 30 days from the date on which the remittitur is entered in the court below, file in the office of the clerk of that court a written consent, signed by themselves or their counsel, that the verdict and judgment be amended as indicated, the judgment of the court below, refusing to grant a new trial, will be reversed. In either event the defendant in error will be taxed with the cost of this writ of error.

Judgment affirmed on condition.

(12 Ga. App. 779)

HOLLIDAY et al. v. COLEMAN.

(No. 4,765.)

(Court of Appeals of Georgia. June 10, 1912.)

(Syllabus by the Court.)

FALSE IMPRISONMENT (§ 13*)—MALICIOUS PROSECUTION (§ 32*)—TRESPASS (§ 79*)—WRONGFUL ARREST—DEFENSES—CRIMINAL RESPONSIBILITY.

Under the testimony of the plaintiff, he was not guilty of any criminal offense, and his arrest without a warrant justified an award of damages against the officer who made the arrest and the persons who procured him to do so. There was no error in the extract from the judge's charge of which complaint is made, and the instruction requested which the court refused to give was fully covered by the charge given.

[Ed. Note.—For other cases, see False Imprisonment, Cent. Dig. §§ 6, 7, 31, 59; Dec. Dig. § 13;* Malicious Prosecution, Cent. Dig. § 67; Dec. Dig. § 32;* Trespass, Cent. Dig. § 169; Dec. Dig. § 79.*]

Error from City Court of Dublin; J. B. Hicks, Judge.

Action by E. C. Coleman against A. B. Holliday and others. Judgment for plaintiff and defendants bring error. Affirmed.

S. W. Sturgis, of Dublin, for plaintiffs in error. T. E. Hightower, of Dublin, for defendant in error.

POTTLE, J. This was an action for damages for false imprisonment. The plaintiff testified that certain of the defendants, without authority from him, and without instituting condemnation proceedings in behalf of a telephone company which they represent-

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

ed, began erecting telephone poles on his land and stringing wires along the poles. He ordered the poles removed, and, when the defendants refused to remove them, he began pulling them down. Thereupon a constable was sent for, and by direction of the other defendants, arrested the plaintiff without a warrant, and detained him for about an hour and a half, and released him upon his agreement not to cut down the poles. The plaintiff recovered a verdict of \$75, and the defendants' motion for a new trial was overruled.

To arrest one illegally and detain him for any length of time is a criminal offense. Penal Code, § 106. It is likewise a tort for which an action for damages will lie. Civil Code, § 4447. If the imprisonment is by virtue of a warrant, good faith is a defense. Civil Code, § 4448. If the imprisonment be the act of several persons, they may be sued jointly or severally. Civil Code, § 4449. If the detention be under legal process, probable cause for issuing the process constitutes a defense, both in an action for damages and in a criminal prosecution. Bad faith or malice may be inferred from a total lack of probable cause. In this state, an arrest for a misdemeanor without a warrant is illegal, unless the crime was committed in the presence of the officer, or the offender is endeavoring to escape, or for some other reason there is likely to be a failure of justice. Penal Code, § 917. *King v. State*, 6 Ga. App. 332, 64 S. E. 1001, and cases cited. In the present case there was no warrant; and hence no amount of good faith or probable cause would excuse the defendants, for the arrest was illegal. Under the testimony of the plaintiff the defendants, and not he, were guilty of criminal trespass. They were making an unauthorized invasion and appropriation of his premises. He had a right to use whatever force was necessary to resist this invasion. The erection of the telephone poles was without any lawful authority whatever, and the plaintiff had a right to remove them. Being wrongdoers themselves, the defendants are not in the position to complain of the method which the plaintiff employed to remove the poles from his land. The trial judge charged the jury the principles above announced, and there was no error in so doing. He refused to give a written request that, if the plaintiff had consented for the poles to be put upon his land, he would be guilty of a criminal trespass if he cut them down. Without reference to whether this request was in all respects sound, it is sufficient to say that it was substantially covered by the general charge, because the judge distinctly instructed the jury that if the telephone company had acquired the right to erect the poles, either by condemnation proceedings or by permission of the plaintiff, the officer had the right to arrest the plaintiff while engaged in the act of cut-

ting the poles down. The recovery in the plaintiff's favor was quite small, and affords the defendants no just cause for complaint. Judgment affirmed.

(12 Ga. App. 764)

KING v. STATE. (No. 4,746.)

(Court of Appeals of Georgia. June 10, 1913.)

(Syllabus by the Court.)

MANSLAUGHTER—EVIDENCE.

The evidence authorized the charge of the court upon the subject of voluntary manslaughter, and supports the verdict finding the defendant guilty of that offense. There was no error in refusing a new trial.

Error from Superior Court, Lowndes County; W. E. Thomas, Judge.

Jim King was convicted of voluntary manslaughter, and he brings error. Affirmed.

R. G. Dickerson, of Homerville, and L. Goodloe, of Valdosta, for plaintiff in error. J. A. Wilkes, Sol. Gen., of Moultrie, for the State.

RUSSELL, J. Judgment affirmed.

(12 Ga. App. 805)

BESHERES v. STATE. (No. 4,854.)

(Court of Appeals of Georgia. June 10, 1913.)

(Syllabus by the Court.)

LARCENY (§ 64*)—CRIMINAL LAW (§§ 561, 823*)—SUFFICIENCY OF EVIDENCE—POSSESSION OF GOODS—REASONABLE DOUBT—INSTRUCTIONS.

No error of law was committed, and the evidence authorized the verdict.

[Ed. Note.—For other cases, see Larceny, Cent. Dig. §§ 170-178; Dec. Dig. § 64;* Criminal Law, Cent. Dig. §§ 1267, 1992-1995, 3158; Dec. Dig. §§ 561, 823.*]

Error from Superior Court, Cobb County; H. L. Patterson, Judge.

Dewey Besheres was convicted of breaking and entering a railroad car and stealing certain articles, and he brings error. Affirmed.

N. A. Morris and Geo. D. Anderson, both of Marietta, for plaintiff in error. Herbert Clay, Sol. Gen., of Marietta, for the State.

POTTLE, J. The accused was convicted of the offense of breaking and entering a railroad car and stealing therefrom certain articles of merchandise. He excepts to the overruling of his motion for a new trial. It is contended that the evidence is not sufficient to authorize a conviction, because there is no proof that the car was broken, or, if so, that the accused was the perpetrator of the offense, or that the goods described in the indictment were taken from the car by him. The evidence shows that the freight car alleged to have been broken and entered was carried from Atlanta to Marietta; that it was sealed before it left Atlanta and was examined at a station between Atlanta and

Marietta, when the seal was found to be intact; and that from that point on to Marietta there were no stops. Bills of lading and invoices were introduced, showing that goods corresponding to those alleged to have been stolen were consigned to certain persons in Marietta in the car alleged to have been broken. About 11 o'clock on the night upon which the offense is alleged to have been committed, the accused, together with Tom Evans, procured one Warren to obtain a hack and go to a railroad crossing in the city of Marietta for the purpose of carrying away certain goods. The hack was stopped at the railway crossing, and the accused and Evans went in the direction of the freight car and brought back to the hack boxes of merchandise corresponding to those described in the indictment and which were shown by the invoices introduced in evidence to have been consigned to the persons whose names are set forth in the indictment. About this time some persons unknown approached the hack, when the accused, Evans, and Warren ran away. Subsequently Warren met the accused and Evans in another part of Marietta. At this time Warren was driving the hack and had in it the goods which had been put there by the accused and Evans. The goods were afterwards found in a vacant lot in Marietta. According to the testimony of Warren, the accused and Evans were seen with the merchandise, coming from between the box car alleged to have been broken and a coal car. The evidence further showed that the car had been broken and entered by somebody, and, from the consignment of merchandise as shown by the invoices, goods corresponding to those which had been seen in the possession of the accused and his accomplice Evans were missing.

We think this evidence was sufficient to authorize a conviction. While the accused is entitled to the benefit of every reasonable doubt, the law does not require mathematical certainty. It is true that there is no direct testimony that the goods seen in the possession of the accused were actually loaded in the car, nor is there any direct and positive evidence by an eyewitness that the car was broken after it reached Marietta. The circumstances proved, however, were sufficient to authorize a finding against the accused on both of these questions. The car was broken and entered by somebody, and, under the evidence, the only reasonable hypothesis is that this was done after the car had been stopped in Marietta. There is, of course, a bare possibility that somebody else may have broken the car and taken the goods out, and that the accused and Evans were guilty merely of larceny of the goods after they had been taken from the car; but, under all the evidence, this is not a reasonable hypothesis. The accused left the hack, went in the direction of the car, was seen coming from between the car and a coal car with the stolen goods in his posses-

sion. There was ample evidence to sustain the conviction.

The motion for new trial contains several assignments of error upon extracts from the charge of the court. We have carefully read the entire charge, and, taken all together, it is as fair a charge to a defendant on trial for crime as we have ever examined. Nowhere in it is there the slightest suggestion that the trial judge leaned toward the state; but, on the contrary, the charge is that of an upright, impartial magistrate, seeking to hold the scales of justice between the state and the accused evenly balanced in conformity with the rules of law applicable to the case, and contains abundant proof that the trial judge was honestly seeking to aid the jury in arriving at the truth of the case. Complaint is made that the judge, in referring to the testimony of Warren, instructed the jury that in passing upon the credibility of a witness they should determine whether he was an accomplice, but that the fact that he was an accomplice was no ground for impeachment. This was an inaccurate expression, and, if it stood alone, might have been prejudicial; but the trial judge instructed the jury in detail that the accused could not be convicted upon the testimony of an accomplice alone, that mere proof of the corpus delicti would not be sufficient corroboration, that corroborating evidence which merely case a suspicion upon the accused would not be sufficient, and that the evidence, independently of the testimony of the alleged accomplice, must have connected the accused with the offense. Taking the charge as a whole, there is nothing in the extract excepted to which would authorize a new trial. As a whole, the charge on the subject of the testimony of an accomplice was not erroneous, nor do we find any expression or intimation of opinion by the trial judge in reference to the guilt of the accused, in certain extracts from the charge which are claimed to be subject to this criticism.

Complaint is further made that, in charging the jury on the subject of reasonable doubt, the trial judge stated that this doubt must grow out of the evidence, and that the jury should not go outside of the evidence for the purpose of raising a doubt. It is contended that this instruction practically withdrew from the consideration of the jury the statement of the accused. This exception, like some of the others, might be well taken if we should look only to the extract complained of, but, when considered in the light of the entire charge, is not cause for a new trial. The judge distinctly told the jury that they had the right to believe the statement of the accused in preference to the sworn testimony in the case, and that it was exclusively for the jury to determine what weight should be given the statement. The request to charge, in so far as it was legal and pertinent, was fully covered by the charge given.

Further complaint is made of an instruction that if the jury were satisfied that the car had been broken and entered by somebody, and that, very soon after the commission of the offense, a portion of the goods which had been in the car was shown to have been in the possession of the accused, and that he did not satisfactorily explain such possession, this would be a circumstance to be considered by the jury in determining the guilt or innocence of the accused. In this instruction there was no error of which the accused can justly complain.

The exception to the charge on the subject of alibi is not insisted on in the brief of counsel.

Judgment affirmed.

(143 N. C. 460)

YADKIN LUMBER CO. v. BERNHARDT.
(Supreme Court of North Carolina. May 22, 1913.)

1. BOUNDARIES (§ 40*)—TERMINI—LOCATION—QUESTIONS OF LAW AND FACT.

What are the termini or boundaries of a grant or deed is matter of law, but where the termini are located is matter of fact.

[Ed. Note.—For other cases, see *Boundaries*, Cent. Dig. §§ 196-204; Dec. Dig. § 40.*]

2. BOUNDARIES (§ 3*)—COURSES AND DISTANCES—CALLS OR OBJECTS—EFFECT.

Where there is a call for natural objects in a description, and courses and distances are also given, the natural objects constitute the termini, and the course and distance merely point or guide thereto, so that when the natural object called for is unique, or has properties peculiar to itself, course and distance are disregarded, but, if there are several natural objects equally answering the description, course and distance may be examined to ascertain which is the true object, in which case they do not control the natural boundary but only serve to explain a latent ambiguity.

[Ed. Note.—For other cases, see *Boundaries*, Cent. Dig. §§ 3-41; Dec. Dig. § 3.*]

3. BOUNDARIES (§ 3*)—CALLS—LINE FOR DIFFERENT TRACT.

Where the line of another tract is definitely called for as one of the termini of a call in a grant or deed, such line will be dealt with as a natural object and will control a call for course and distance; the line being run straight so as to strike the line called for, making as slight a departure as may be from the course or distance called for in the grant.

[Ed. Note.—For other cases, see *Boundaries*, Cent. Dig. §§ 3-41; Dec. Dig. § 3.*]

4. BOUNDARIES (§ 8*)—CALLS—DIFFERENT LINES.

Where there are two lines answering a call in a deed, the jury, in determining which is meant, may consider the circumstance that lines were run by the surveyor and corners made at the time of the survey leading to one of them.

[Ed. Note.—For other cases, see *Boundaries*, Cent. Dig. §§ 66-76; Dec. Dig. § 8.*]

Clark, C. J., and Brown, J., dissenting.

Appeal from Superior Court, Caldwell County; Lyon, Judge.

Ejectment by the Yadkin Lumber Company against John M. Bernhardt. Verdict

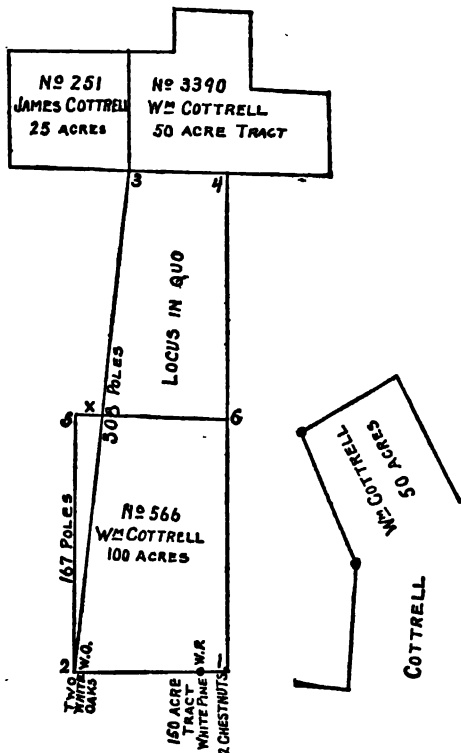
for plaintiff, and defendant excepted and appeals. New trial.

Plaintiff introduced two grants covering the land in controversy, bearing date December 29, 1875, and as to such land connected itself by mesne conveyances with the grantees and offered evidence further tending to show trespasses on the same by defendant. "Plaintiff further adduced evidence tending to show that, at the time the 100-acre grant, No. 566, was taken out by William Cottrell, James Cottrell had a 25-acre grant immediately east of the northern line of said grant; also a 50-acre grant immediately east of grant No. 3,390; also that William Cottrell had land south of No. 3,390, and that the same William Cottrell had a 50-acre grant lying to the south of grant No. 566. Evidence was also adduced tending to prove that an extension of the north line of grant No. 566 from figure 2 by way of 5 east, as called for in that grant, would strike the James Cottrell 25-acre grant and not the William Cottrell 50-acre grant."

Defendant offered in evidence entry No. 1,333 as follows: "William Cottrell, Sr., enters and locates 100 acres of land on the Long Ridge branch, waters of Buffalo creek, beginning at or near his corner of his 150-acre tract, including all the land between the 150 and 50 acre tracts. November 6, 1854." And the warrant of survey on said entry formally stated and certified as follows: "You are hereby directed and required, so soon as may be, to lay off and survey for William Cottrell 100 acres of land on the Long Ridge branch, waters of Buffalo creek. Beginning at or near his corner of his 150-acre tract, entered November 6, 1854." And the certificate of survey on said warrant, with plat attached to state's grant No. 566, containing the description: "Begins at a white pine and two chestnut trees by the falls of Pounding Mill branch, and runs north 10 poles to a white pine, corner of a 150-acre tract, the same course with the line of said tract 86 poles to two white oaks on the east side of a hill, then east 167 poles to a stake in the line of a 50-acre tract, thence south with that line 96 poles to a stake in a line running east from the beginning, then with that line west to the beginning." And grant No. 566, containing the following calls: "One hundred acres lying and being in the county of Caldwell, on the waters of Buffalo. Begins at a white pine and two chestnut trees by the falls of Pounding Mill branch, and runs north 10 poles to a white pine, corner of 150-acre tract, the same course with the line of said tract 86 poles to two white oaks on the east side of a hill (then east 167 poles to a stake in the line of a 50-acre tract), thence south with line 96 poles to a stake in a line running east from the beginning, then with that line west to the beginning. Entered 6th day of November, 1854." Plaintiff

then introduced a grant to William Cottrell for 50 acres, No. 3,390, lying entirely east from 566.

In order to a better understanding of the questions in controversy and the admissions of the parties, the plat will be inserted as follows:



Admissions were then made as follows: "That the beginning corner of the grant (No. 566) is marked on the court map at the point 1 with the hand pointing towards it, and that such is the beginning corner of said grant. It is further admitted that the second corner in said grant is at the point marked W. P. on map, 10 poles north of 1, and that such point is a corner of a 150-acre tract. It is further admitted that the third corner of grant No. 566 is at the point marked 2 W. O., with the hand pointing towards the figure 2, as shown on the court map, and that such point is 86 poles north of the white pine and 96 poles north of the beginning corner, the white pine and two chestnuts by the falls of 'Pounding Mill branch,' and that the two white oaks at the figure 2 are on the east side of a hill." And further: "That the William Cottrell, Sr., who obtained a grant for lands represented on the map as grant No. 566, was the same person as the William Cottrell who obtained a grant of lands shown on the map as grant No. 3,390 for 50 acres. Plaintiff further admits that grant No. 3,390 is correctly located as shown on the map. Plaintiff further admits that the defendant holds proper mesne conveyances from William Cottrell that constitute a good

paper title, nothing else appearing to such lands as are properly covered by grant No. 566."

It will thus appear that locus in quo, as represented on the above plat, is included within the letter and figures x, 3, 4, 6, and, if the grant 566 under which defendant claims is "to be correctly located in exact accord with course and distance, it would be represented on the map by the figures 1, 2, 5, 6 and would not include this land, but, if it may be and is properly extended to the William Cottrell 50-acre grant No. 3,390 making the northern line 308 instead of 167 poles, it would then include the land in controversy and be represented on the plat by the figures 1, 2, 3, 4. On the facts in evidence, the court held and so charged the jury that, in locating the defendant's grant No. 566, the course and distance would control, and the defendant's title, more especially in reference to running the call east 167 poles under the same, would stop where the distance gave out and go where the course carried it, regardless of the additional call 'to the line of a 50-acre tract'; the court holding that such addition to the call is too indefinite to affect the location," etc.

There was verdict for plaintiff establishing the lines at 1, 2, 5, 6. Judgment on the verdict, and defendant excepted and appealed.

Lawrence Wakefield and Mark Squires, both of Lenoir, for appellant. Council & Yount, of Hickory, and Edmund Jones, of Lenoir, for appellee.

HOKE, J. (after stating the facts as above). [1, 2] In *Tatem & Baxter v. Paine & Sawyer*, 11 N. C. 64, 15 Am. Dec. 507, it was held: "What are the termini or boundary of grant or deed is matter of law; where these termini are is matter of fact. The court must determine the first, and to the jury it belongs to ascertain the second. Where there is a call for natural objects, and course and distance are also given, the former are the termini, and the latter merely points or guides to it; and therefore, when the natural object called for is unique or has properties peculiar to itself, course and distance are disregarded, but, where there are several natural objects equally answering the description, course and distance may be examined to ascertain which is the true object, for in such case they do not control a natural boundary but only serve to explain a latent ambiguity." The principles embodied in this statement have been frequently approved in our decisions as in *Lumber Co. v. Hutton*, 159 N. C. 445, 74 S. E. 1056; *Sherrod v. Battle*, 154 N. C. 346, 70 S. E. 834; *Mitchell v. Welborn*, 149 N. C. 347, 63 S. E. 113; *Whitaker v. Cover*, 140 N. C. 280, 52 S. E. 581; *Fincannon v. Sudderth*, 140 N. C. 246, 52 S. E. 579; *Bonaparte v. Carter*, 106 N. C. 534, 11 S. E. 262; *Murray v. Spencer*, 88 N. C. 357; *Corn v. McCrary* 48 N. C. 496; *Campbell v. Branch*, 49 N. C. 313.

[3] From these and many other cases on the subject it will appear further that in reference to course and distance the call in a deed for the line of another tract of land is to be considered and dealt with as a natural object, and, applying the doctrine, it may be taken as a fully established position in our law of boundary "that where the line of another tract is definitely called for as one of the termini of a call in a grant or deed, and this line is fixed and established, it will control a call by course and distance." *Lumber Co. v. Hutton*, supra; *Whitaker v. Cover*, 140 N. C. 280, 52 S. E. 581, supra; *Fincannon v. Sudderth*, 140 N. C. 246, 52 S. E. 579. It will be noted that, in order to the proper application of this principle, the line called for must be "identified, fixed, and established," or the position does not govern; but, when the conditions exist which call for its application, it is then not a question of whether the writer of the deed or the parties to it intended to take in so much land or to extend the line of the principal deed to so great a length; but in the language of *Henderson*, Judge, in *Tatem v. Sawyer*, supra: "Where there is a call for natural objects, and course and distance are also given, the former are the termini and the latter merely points or guides to it." And if the line is properly "fixed and established" pursuant to recognized rules, it makes no difference whether it was marked or unmarked. *Corn v. McCrary*, 48 N. C. 496.

The learned judge who tried the cause was no doubt familiar with the principle to which we have referred, but held that it should not prevail in this case, being of opinion that the call of defendant's grant and deeds, to wit, "thence east 167 poles to a stake on the line of a 50-acre tract," was too indefinite to permit the reception of parol testimony either to identify or place the corner. But the authorities more directly relevant do not sustain this view. Thus in *Lawrence v. Hyman*, 79 N. C. 209, the call of the deed was, "Beginning at the north corner of the store," the store standing equally east and west and having two north corners, held that the case presented a latent ambiguity to be explained by parol testimony.

[4] In *Graybeal v. Powers*, 76 N. C. 66, the call in dispute was, "Thence south 33 west 100 poles to a stake in Simeon Graybeal's line;" and it was held among other things: "(1) A call for the line of another tract of land is 'a natural boundary' and controls course and distance." "(3) In running the call, the line must be run straight so as to strike the line called for, making as small a departure as may be from the course and distance called for in the grant. (4) Where there are two lines answering the call, the jury, in determining which is meant, may consider the circumstance that lines were run by the surveyor and corners made at the time of the survey, leading to one of them." And speaking more directly to the facts,

Pearson, C. J., delivering the opinion, said: "In our case there is a natural boundary, 'Simeon Graybeal's line,' but it so happens that Simeon Graybeal owned two tracts, one a 30-acre tract, which I will call tract No. 1, and another tract which I will call tract No. 2, lying west of tract No. 1, and distant from it some 30 or 40 poles. It is evident from that plat that 'the Simeon Graybeal line' called for is either the north or south line bounding tract No. 1 on the west and marked CD, or it is the north and south line bounding tract No. 2 on the east and marked FE." Which of these two lines is the one that is called for is "the governing fact in the location of the defendant's grant and ought to have been distinctly left to the jury, with instructions to consider all the evidence and the surroundings of the case, including the marked lines and corners," etc.

Again in *Topping v. Sadler*, 50 N. C. 357-359, the call was, "Thence southerly 80 poles to the patent line, thence with the patent line," etc., and it was held: "Where one of the calls in a deed was for a patent line, and there was one patent proved, a line of which would be reached by extending the line in question beyond the distance called for, and no other patent was alleged to be near the premises, it was held that the call was sufficiently definite to allow the extension of the line to the patent line."

The former corners of the William Cottrell 100-acre grant, No. 566, having been fixed, a proper application of the principle of these decisions will require that on the call of said grant, "then east 167 poles to a stake in the line of a 50-acre tract," the question be submitted to a jury to determine what 50-acre grant was intended, and where the same is properly placed, and, on considering the question, the fact that the same William Cottrell had a 50-acre grant to be reached by a slight deflection of the course and extending the line from 167 poles to 308 poles, and that both on the entry and warrant of survey of grant 566 for 100 acres as part of the description, "Beginning at or near the corner of his 150-acre tract, including all the land between the 150 and 50-acre tracts," are circumstances relevant to the inquiry. If the jury are unable to identify the 50-acre tract called for or to satisfactorily place the same, the courses and distances as given in the grant should prevail.

For the error in excluding the testimony, defendant is entitled to a new trial, and it is so ordered.

New trial.

CLARK, C. J. (dissenting). Grant No. 566 contains the following calls: "One hundred acres lying and being in the county of Caldwell, on the waters of Buffalo. Begins at a white pine and two chestnut trees by the falls of Pounding Mill branch, and runs north 10 poles to a white pine, corner of a 150-acre tract, the same course with the line

of said tract 86 poles to two white oaks on the east side of a hill, then east 167 poles to a stake in the line of a 50-acre tract, thence south with line 96 poles to a stake in a line running east from the beginning, then with that line west to the beginning. Entered 6th day of November, 1854."

It was admitted that the beginning corner of the grant No. 566, as marked on the map at the point 1, is the true beginning, and that the second corner is at the point marked W. P. on the map 10 poles north of 1, and that such point is the corner of the 150-acre tract. It was further admitted that the third corner of grant 566 is at the point marked 2 W. O., and that such point is 86 poles north of the white pine and 96 poles north of the beginning corner, the white pine and two chestnuts by the falls of "Pounding Mill branch," and that the two white oaks at the figure 2 are on the east side of a hill. There was no difficulty whatever in locating the grant according to course and distance, especially with these points admitted. The court properly charged that under these circumstances "course and distance control, and that the defendant's title to the 100-acre grant would stop wherever the distance gave out and would go where the course carried it, regardless of the additional call 'to the line of a 50-acre tract,' the court holding that that addition to the call was too indefinite, and the jury should find as a fact on the evidence that the corner was where the distance gave out and where the course went to." Surely this cannot be error, when to consider the additional call "to the line of a 50-acre tract" would make the call indefinite and uncertain and indeed render uncertain that which before was certain.

It has been universally held by this court in a line of decisions beginning as far back as *Harry v. Graham*, 18 N. C. 76, 27 Am. Dec. 226, and continuing to the present, that "the course and distance called for must control unless there is another call *more definite and certain than course and distance*."

The additional call here is "to a stake in a 50-acre tract." This could not possibly be made more indefinite nor uncertain. It is a call for an unfixed and unmarked point and in no particular grant. The grant is not even designated by the name of a grantee. There is evidence that there are three 50-acre tracts near this grant. One is east, though it is marked 25 acres. Another a little south of east, which the defendant wishes the jury to guess is the one intended, and another nearly southeast. Indeed, "50-acre" tracts in that section are known to be as thick as the traditional blackberry. Besides, there is no evidence whatever that the lines of the 50-acre tract which the defendant "guesses" is the correct one had been surveyed at the time that grant No. 566 was taken out. It was stated on the argument

that in fact it had not been, but that merely the east line thereof had been laid down on a plot. As the first line of said grant was on the east side of it, the west line of that tract, which would be the line in which the "stake" would necessarily be, could not be designated, and there was nothing to show the shape of said tract or where the west line would be found. It is impossible to find a more uncertain call than for a stake, in the unsurveyed west line, of a 50-acre tract, which is not identified, whose owner is not even known, and the shape of which was not indicated. The west line, when finally surveyed, might be nearer or farther from the east line of said tract. The owner of the tract is not named, the west line is not located, and "a 50-acre tract" is common in that section, and three of them are shown in this evidence to be somewhere more or less east of grant No. 566.

It is true that in *Cherry v. Slade*, 7 N. C. 82, the court held that, when the boundary of another tract is called for, it would be considered a natural boundary and more certain than course and distance, "provided it be sufficiently established." In *Lumber Co. v. Hutton*, 152 N. C. 537, 68 S. E. 2, the court held that when the course, distance, number of acres, and plat are more definite, and the application of the call for the boundary of another tract was inconsistent, the latter must give place to the former for "the reason for the rule had ceased." The rule in *Cherry v. Slade* is not a statute; neither is there any sacredness attaching to it. It was simply a judicial expression of the opinion that, when under the circumstances the boundary of another tract offered more certainty than the other descriptions, the call for the boundary should govern.

In *Lumber Co. v. Hutton*, 159 N. C. 445, 74 S. E. 1056, it was held that the call for the boundary should govern because additional evidence had been offered on the second trial which showed that the boundary of another tract was "a well-recognized and established line," and was so found to be by the jury. But even then there were two dissenting opinions, for the result had been to give the grantee 14 times the acreage named in his grant and plat. That surely should have been the ultima thule of the doctrine; but if we are now to hold that, notwithstanding definite courses and distances and admitted corners, the call for a stake in the unmarked boundary of an unlocated tract of an indefinite owner is to govern by the force of attraction, then indeed we are on a boundless and uncharted sea, without course and distance, and with the compass diverted from its direction by a power without limit and an attraction beyond calculation.

The general rule has always been that land must be located according to the primary calls of the deed, unless there are

others more certain, and that an uncertain description should yield to one which is certain and less liable to disappoint the intention of the parties. In the case at bar the call for a stake unmarked in the line of "a 50-acre tract" is not a more certain call and does not bring this case within the exception to the well-known general rule that course and distance will govern, *unless* the line of another tract, which is "known and established," is called for. To grant the defendant's contention gives him 200 acres instead of the 100 acres which the state granted him and which he paid for.

Cherry v. Slade is not a general rule, but it is an *exception to the general rule* and is only to be applied in those cases in which such exception is called for by reason of its furnishing greater certainty. The exception should not destroy and swallow up the rule. The description about which there is the least liability of error should be adopted to the exclusion of the other. *Campbell v. Branch*, 49 N. C. 313.

There was no evidence by which the jury could locate "a" 50-acre tract called for in the defendant's grant, nor any evidence that the west line of such tract, nor any line thereof, had been run and marked. The course and distance in grant No. 566 were not only the most certain means, but indeed the only means by which said grant could be located, and his honor properly told the jury to follow the definite courses and distances therein given.

BROWN, J., concurs in dissent.

(162 N. C. 495)

LLOYD v. NORTH CAROLINA R. CO.
et al.

(Supreme Court of North Carolina. May 28, 1913.)

1. REMOVAL OF CAUSES (§ 3*)—RIGHT OF REMOVAL—STATUTORY PROVISIONS.

The purpose and effect of the amendment of 1910 (Act April 5, 1910, c. 143, 36 Stat. 291 [U. S. Comp. St. Supp. 1911, p. 1325]) to the federal Employer's Liability Act (Act April 22, 1908, c. 149, 35 Stat. 65 [U. S. Comp. St. Supp. 1911, p. 1322]), providing that no case arising thereunder and brought in any state court of competent jurisdiction shall be removed to any court of the United States, was to withdraw the right of removal in cases arising under that statute when the action has been instituted in the state court and to require litigants desiring to have the results of the trial reviewed by reason of the presence of a federal question to proceed by writ of error to the state court making final disposition of the cause in its jurisdiction.

[Ed. Note.—For other cases, see Removal of Causes, Cent. Dig. §§ 4, 5; Dec. Dig. § 3.*]

2. REMOVAL OF CAUSES (§ 86*)—PETITION SHOWING FRAUDULENT ATTEMPT TO PREVENT REMOVAL.

On an application to remove a cause to a federal court, plaintiff is entitled to have

his cause of action considered as presented by him in his complaint, and, while a case may in proper instances be removed on the ground of false and fraudulent allegations of jurisdictional facts, the petitioner must not only allege bad faith and fraud but such facts and circumstances as are sufficient, if true, to demonstrate that plaintiff is making a fraudulent attempt to impose upon the court and deprive the petitioner of his right of removal, notwithstanding the rule that, where the petition for removal contains sufficient facts to require a removal, the state court cannot pass upon or decide the issues of fact so raised, this applying only to such issues as control and determine the right of removal.

[Ed. Note.—For other cases, see Removal of Causes, Cent. Dig. §§ 132, 166-179; Dec. Dig. § 86.*]

3. REMOVAL OF CAUSES (§ 86*) — PETITION SHOWING FRAUDULENT ATTEMPT TO PREVENT REMOVAL.

Where although a petition by a foreign railroad corporation to remove to a federal court an employee's action against it and a domestic corporation whose road it leased alleged a fraudulent joinder of the domestic corporation, and denied that plaintiff was engaged in interstate commerce, it appeared from a perusal of the pleadings and the admissions of record not inconsistent therewith that plaintiff was in its employ as a locomotive engineer, that he had been operating the engine, defects in which caused the injury sued for, over a portion of the leased road used as a part of the petitioner's trunk line and on to a point in another state and engaged in moving interstate freight trains, that the engine having been taken to the shops for repairs was at the time of the injury on a side track connecting with the main line of the leased road ready for a trial trip to a point in this state, and that plaintiff was inspecting and oiling it for the purpose of taking such trip and with a view of further service for the petitioner, it was not made to appear sufficient to justify a removal that plaintiff joined the domestic corporation and based his action on the federal Employer's Liability Act (Act April 22, 1908, c. 149, 35 Stat. 65 [U. S. Comp. St. Supp. 1911, p. 1322]) fraudulently for the purpose of preventing a removal.

[Ed. Note.—For other cases, see Removal of Causes, Cent. Dig. §§ 132, 166-179; Dec. Dig. § 86.*]

4. COMMERCE (§ 3*)—POWER TO REGULATE—"INTERSTATE COMMERCE."

The term "interstate commerce" includes instrumentalities and agencies by which it is conducted and the power of Congress extends to the regulation of such instrumentalities, including the right to legislate for the welfare of persons operating them.

[Ed. Note.—For other cases, see Commerce, Cent. Dig. § 3; Dec. Dig. § 3.*]

For other definitions, see Words and Phrases, vol. 4, pp. 3724-3731.]

5. APPEAL AND ERROR (§ 927*)—REVIEW—APPEAL FROM NONSUIT.

In reviewing a judgment of nonsuit, where it appeared that plaintiff submitted to a nonsuit in deference to the trial court's intimation that he had not made a case, the case would be considered as presented by plaintiff's allegations and evidence, and the evidence would be interpreted in the light most favorable to him.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2912, 2917, 3748, 3758, 4024; Dec. Dig. § 927.*]

6. MASTER AND SERVANT (§ 284*)—ACTIONS—SUFFICIENCY OF EVIDENCE.

In a railway engineer's action for injuries against his employer and another railroad corporation whose road it leased, where it appeared that he was assigned for duty, and had for some time been engaged in hauling trains over that part of the lessee's system which included a portion of the lessor's road, that this was being done by the lessee with the consent of the lessor and while operating under the lessor's franchise, that at the time of the injury the engine defects in which caused the injury sued for was on a siding connected at both ends with the main line of the lessor's road where it was being oiled and inspected by plaintiff for the purpose of making a trial trip which could only be done by passing over a portion of the lessor's road a nonsuit as against the lessor was improperly granted, it being a permissible inference from the facts that the cause of action against it was well laid.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 1000-1090, 1092-1132; Dec. Dig. § 284.*]

7. REMOVAL OF CAUSES (§ 79*)—TIME FOR APPLICATION—EFFECT OF NONSUIT AS TO ONE DEFENDANT.

While in an action against a resident and a nonresident defendant, if pending the cause plaintiff elects to discontinue as to the resident party, the nonresident's right of removal by reason of diverse citizenship then arises, the discontinuance must be voluntary, and this rule did not apply where the nonsuit was taken by plaintiff in deference to the trial court's intimation that he had not made a case, plaintiff was insisting on his right to have the nonsuit reviewed on appeal, and was in a position to assert it.

[Ed. Note.—For other cases, see Removal of Causes, Cent. Dig. §§ 135, 136, 139-160; Dec. Dig. § 79.*]

Appeal from Superior Court, Guilford County; Peebles, Judge.

Action by W. L. Lloyd against the North Carolina Railroad Company and the Southern Railroad. From a judgment of nonsuit as to the North Carolina Railroad and a judgment removing the cause to the United States court as to the Southern Railroad, plaintiff appeals. Reversed.

Civil action, heard before Hon. R. B. Peebles, judge, and a jury, at February term, 1913. The suit originally instituted against the North Carolina Railroad, a corporation of this state, having its franchise and owning a railroad property here, and the Southern Railroad, a corporation of the state of Virginia, operating the road of its codefendant under a 99-year lease, and which, among other things, provides: "For the liability of the Southern Railway Company for all of its acts and defaults in the operation of said road" and for a deposit of "not less than \$175,000 in cash, or its equivalent, to be applied" to the performance of the stipulations in the contract of lease to be performed by the lessee, and among them "to pay any judgments recovered in any court of the state or of the United States when finally adjudicated for any tort, wrong, injury, negligence, default or contract, done, made or permitted by the parties of the second part,

its successors, assigns, employes, agents or servants for which the party of the first part shall be adjudged liable whether the party of the first part is sued jointly with or separately from the party of the second part." The complaint alleged, and there was evidence on part of plaintiff tending to show, that a portion of the North Carolina Railroad included in the lease, to wit, from Greensboro through Spencer to Salisbury, N. C., was a part of the trunk line of the Southern Railroad from north to south "along and over which it was and is engaged by and with the consent of the North Carolina Company in transporting interstate commerce from Virginia and all points of North to South Carolina, Georgia, and other points south," etc.; that plaintiff at the time was a locomotive engineer in the employment of the Southern Railroad for the purpose of transporting freight trains containing interstate commerce from, to, and between "Spencer, N. C., and Monroe, Va., and along the main line of the Southern Railroad, a part of which said line included that portion of the North Carolina Railroad from Greensboro to Spencer," and had been for some time prior to the occurrence engaged on this run with an engine, No. 579; that the engine had been taken to the shops of the Southern at Spencer, and, having been overhauled and repaired, it was on a side track near the shops of the company, steamed up and ready, and plaintiff was engaged in oiling and inspecting the same for the purpose of presently making a trial trip to Barber's Junction, a point in North Carolina on the Western North Carolina Railroad, some distance beyond Salisbury, and thus to test the engine with a view of further service; that while so engaged he received serious physical injuries by reason of some defects in the structure or adjustments of the engine, the same being attributed to the negligence of the defendant the Southern Railroad, the facts as to negligence and the nature and extent of the injury being given; that this particular engine had been for some time engaged in the through freight service from Spencer, N. C., to Monroe, Va., and since plaintiff was injured it had been doing the same work; that plaintiff was assigned to the work, and had been engaged in it till his engine was taken to the shop for repairs and during that time the plaintiff had no regular run.

On his cross-examination and speaking to the circumstances of his employment and duties, the witness, in answer to questions, said: "Q. Where you were going or whether you were to do work running inside or outside of the state you did not know? A. I was marked on the division from Spencer to Monroe. I knew I was to do any kind of work that I stood for, relief work for other men running on this line I was assigned to. I was not supposed to run to Barber's Junc-

tion. My assignment was not that way. If I had been called to go to Statesville under the supervision of a competent man, I would have gone, or to Wilkesboro. I would have gone anywhere in the state if they had sent a competent man to carry me there and bring me back. I didn't know the road. I went to Selma occasionally. I think I went to Goldsboro one trip and carried a switch engine; that is in North Carolina. Q. I ask you if it was not your habit to go anywhere your call was indicated by the company as an extra engineer? A. I didn't belong to go there. It was left discretionary whether I did go. Q. Wasn't it your habit to go wherever they called you to go as an extra engineer? A. No, sir. Q. Did you ever refuse to go? A. Yes, sir. Q. Where? A. A good many different places. I refused to go on the branch road. I refused to go to the western part of North Carolina, Asheville, and I refused to go to Charlotte. I have run on the road from Selma to Monroe. That is on this division. I run between Selma and Norfolk when the division extended there. All the men had to run into Virginia out of Selma. At the time I was hurt I was not a regular engineer with a regular run." And, speaking of the place of the injury, the witness said: "The engine was standing on a side track at or near the cinder pit of the company about half way between the shops and the main line of the North Carolina Railroad and more than a hundred feet from said main line and the side track connected with the North Carolina Railroad at the north end of the Spencer yards and with the double-track part of the North Carolina Railroad on the south part of the Spencer yard leading to Salisbury, and there was no way of getting off that side track and onto the main line except over the North Carolina Railroad." In apt time, and accompanied by a proper bond, the defendant the Southern Railway Company filed its petition for removal, duly verified, setting forth its position as to the exact nature and proper place of the occurrence and containing averment that plaintiff was an employé of the Southern Railroad, and not otherwise, as locomotive engineer, his duty being to engage in his work as directed and at any place on the lines of the company; that the exact place of the occurrence was on the yards of the company near its shops, the same having been purchased and owned by the company and the shops built and used for repair and other work for engines and cars used on all portions of the company's system; that it was entirely off the right of way of the North Carolina Railroad and formed no part of that company's property; that the engine in question was subject to be used on any of the roads of the Southern and at the time of the injury it was on this company's property preparatory to taking a trial trip by Salisbury and on to Barber's Junction points entirely within the state of North Carolina, and that no freight

was to be handled by said engine at said trip, and no cars of any kind were to be attached thereto; that all these facts were well known to plaintiff when he instituted his suit and filed his complaint, and that said North Carolina Railroad Company had been fraudulently joined in said suit, and the allegation that plaintiff was at the time engaged in interstate commerce had been falsely and fraudulently made with the sole purpose of preventing a removal of the case to the federal courts and with no bona fide purpose of obtaining the relief against said North Carolina Company as stated in the complaint.

On this matter the express averments of the petition were as follows: "Your petitioner says that the plaintiff at the time he received the injuries complained of was an employé of your petitioner, and not an employé of its codefendant, the North Carolina Railroad Company, and was not, and never had been, an employé of the said North Carolina Railroad Company, and that all the said facts herein set forth, with reference to the lease, the location and situation of the cinder pit and side track, and the duties which plaintiff was to perform on the day in question, were well known to plaintiff when this action was brought and complaint filed. Your petitioner further says that to avoid the removal of this case by it to the federal court the plaintiff joined the North Carolina Railroad Company, a North Carolina corporation, and falsely and fraudulently alleged in his complaint that the side track upon which the engine was located at the time he was injured was 'one of the side tracks of the North Carolina Railroad Company's main line at Spencer,' and falsely and likewise fraudulently alleged in his complaint that he suffered injury while employed by your petitioner in interstate commerce, and falsely and fraudulently alleges that he was engaged in interstate commerce at the time of his injury, and that said engine was likewise so engaged, when, at the time said allegations were made, plaintiff well knew that they were untrue, or could, by the exercise of the slightest diligence, have ascertained the true facts in connection therewith, and your petitioner further states that plaintiff did not and does not expect to establish said allegations, and did not make them for the purpose of proving them at the trial or substantiating his cause of action therewith, but made them solely for the purpose of setting up a joint cause of action against the defendants as lessor and lessee, and to state a cause under the Employer's Federal Liability Act in order to make a case which would not be removable to the federal court." The petition for removal having been denied at December term, 1911, the petitioner excepted and appealed, but without prosecuting its appeal, and, reserving any and all exceptions to the rulings of the court, the defendants answered, again setting up the exact nature

and place of the occurrence as claimed by them, and denied any and all liability on the part of the North Carolina Railroad Company, and for both companies denied any and all negligence and setting up the defense of contributory negligence, etc. The cause coming on for trial on the issues so raised at February term, as stated, at the close of plaintiff's evidence and by reason chiefly of the place of the occurrence as described by plaintiff, the court having intimated "that there was no case made out against the North Carolina Railroad Company, the plaintiff takes a nonsuit as to said North Carolina Railroad Company." See judgment. Thereupon defendant the Southern Railroad filed its second petition for removal accompanied by proper bond on the ground of diversity of citizenship, and renewing its allegation of fraud in general terms, and chiefly by reference to the former petition.

The court entered judgment removing the case, and plaintiff excepted and appealed, assigning errors as follows:

"Plaintiff's exception No. 1. For that the court permitted the defendant Southern Railway Company to file a new petition and bond for the removal to the federal court.

"Plaintiff's exception No. 2. For that the court entered an order removing the cause to the federal court for trial.

"Plaintiff's exception No. 3. For that the court held that there was no sufficient evidence against the North Carolina Railroad Company to entitle the plaintiff to recover as against it, and for that the court dismissed the action as to the North Carolina Railroad Company and removed the cause to the federal court for trial as against the other defendant the Southern Railway Company."

A. L. Brooks and Sapp & Hall, all of Greensboro, for appellant. Manly, Hendren & Womble, of Winston-Salem, and Wilson & Ferguson, of Greensboro, for appellees.

HOKE, J. (after stating the facts as above). [1] The plaintiff in express terms bases his cause of action on the federal Employer's Liability Act April 22, 1908, c. 149, 35 Stat. 65 (U. S. Comp. St. Supp. 1911, p. 1322), as amended by Act April 5, 1910, c. 143, 36 Stat. 291 (U. S. Comp. St. Supp. 1911, p. 1325), and in his complaint makes allegation sufficient to establish liability on the part of both of defendant companies. The statute in question confers a right of action against all common carriers by railroad engaged in interstate commerce and in favor of all employes while engaged in such commerce, or their representatives, when injured or killed by reason of the "negligence of any officers, agents, or employes of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed," ways or works. The law in question has received very full consideration by the Su-

preme Court of the United States in several cases reported in 223 U. S. 1, 32 Sup. Ct. 169, 56 L. Ed. 327, 38 L. R. A. (N. S.) 44, styled the "Second Employers' Liability Cases," and it was there held among other things that the same is constitutional, that its provisions and regulations have superseded the laws of the several states in so far as the latter cover the same field, and that rights arising under the regulations prescribed by the act may be enforced as of right in the courts of the states, where their jurisdiction as fixed by local laws is adequate. And the amendment of 1910 contains provision that: "The jurisdiction of the courts of the United States under this act shall be concurrent with that of the courts of the several states," and "no case arising under this act and brought in any state court of competent jurisdiction" shall be removed to any court of the United States. Act April 5, 1910, c. 143, 36 Stat. 291 (U. S. Comp. St. Supp. 1911, p. 1325). It was no doubt the purpose and effect of this amendment as its terms clearly import to withdraw the right of removal in cases arising under the statute when the action has been instituted in the state court, and to require that litigants desiring to have the results of the trial reviewed by reason of the presence of a federal question, etc., shall proceed by writ of error to the state court making final disposition of the cause in its jurisdiction. All the decisions to which we were referred upholding the right of removal in such cases—*Lemon, Adm'r, v. L. & N. R. R.*, 137 Ky. 276, 125 S. W. 701; *Calhoun v. Central of Georgia*, 7 Ga. App. 528, 67 S. E. 274, and others—were causes disposed of prior to the amendment, and which no doubt gave rise to its enactment.

[2] And if, as defendants contend, the same right of removal exists as in cases of fraudulent joinder of a resident with a nonresident defendant, the application should be denied in this instance. On this question the authorities are to the effect that, when viewed as a legal proposition, the plaintiff is entitled to have his cause of action considered as he has presented it in his complaint (*Railroad v. Miller*, 217 U. S. 209, 30 Sup. Ct. 450, 54 L. Ed. 732; *Alabama v. Thompson*, 200 U. S. 206, 26 Sup. Ct. 161, 50 L. Ed. 441, 4 Ann. Cas. 1147; *Dougherty v. Railroad* [C. C.] 126 Fed. 239), and while a case may in proper instances be removed on the ground of false and fraudulent allegation of jurisdictional facts, the right does not exist, nor is the question raised by general allegation of bad faith, but only when, in addition to the positive allegation of fraud, there is full and direct statement of the facts and circumstances of the transaction sufficient, if true, to demonstrate "that the adverse party is making a fraudulent attempt to impose upon the court and so deprive the applicant of his right of removal" (*Rea v. Mirror Co.*,

158 N. C. 24-27, 73 S. E. 116, and authorities cited, notably *Kansas City R. R. v. Herman*, 187 U. S. 63, 23 Sup. Ct. 24, 47 L. Ed. 76; *Foster v. Gas & Electric Co.* [C. C.] 185 Fed. 979; *Shane v. Electric Ry.* [C. C.] 150 Fed. 901; *Knuth v. Electric Ry.* [C. C.] 148 Fed. 73; *Thomas v. Great Northern*, 147 Fed. 83, 77 C. C. A. 255; *Hought v. Railroad*, 144 N. C. 701, 57 S. E. 469; *Tobacco Co. v. Tobacco Co.*, 144 N. C. 352, 57 S. E. 5; *Ill. R. R. v. Houchins*, 121 Ky. 526, 89 S. W. 530, 1 L. R. A. [N. S.] 375, 122 Am. St. Rep. 205; *So. R. R. v. Grizzle*, 124 Ga. 735, 53 S. E. 244, 110 Am. St. Rep. 191). True, it is now uniformly held that, when a verified petition for removal is filed accompanied by a proper bond and same contains facts sufficient to require a removal under the law, the jurisdiction of the state court is at an end. And in such cases it is not for the state court to pass upon or decide the issues of fact so raised, but it may only consider and determine the sufficiency of the petition and the bond. *Herrick v. Railroad*, 158 N. C. 307, 73 S. E. 1008; *Chesapeake v. McCabe*, 213 U. S. 207, 29 Sup. Ct. 430, 53 L. Ed. 765; *Wecker v. Natural Enameling Co.*, 204 U. S. 176, 27 Sup. Ct. 184, 51 L. R. A. 430, 9 Ann. Cas. 757. But this position obtains only as to such issues of fact as control and determine the right of removal, and on an application for removal by reason of fraudulent joinder, such an issue is not presented by merely stating the facts of the occurrence showing a right to remove, even though accompanied by general averment of fraud or bad faith, but, as heretofore stated, there must be full and direct statement of facts, sufficient, if true, to establish or demonstrate the fraudulent purpose. *Hough v. Railroad*, 144 N. C. 692, 57 S. E. 469; *Tobacco Co. v. Tobacco Co.*, 144 N. C. 352, 57 S. E. 5; *Shane v. Railway* (C. C.) 150 Fed. 801. In *Rea v. Mirror Co.*, supra, the principle was applied where plaintiff had sued a nonresident corporation doing a manufacturing business in this state to recover for physical injuries suffered by plaintiff, and alleged to be by reason of some negligence of the company in the operation of its machinery and a resident employé was joined as codefendant. The nonresident company in apt time filed its duly verified petition, accompanied by proper bond, setting forth the facts of the occurrence with great fullness of detail, charging a fraudulent joinder of the resident employé and containing averment further that "said employé was a member of the company's clerical force in the office of the company, having nothing whatever to do with the machinery or its management, and that he was not present in the factory at the time of the injury." The petition for removal was allowed, the court being of opinion that, if these facts were established, it would make out the charge of fraudulent joinder, and bring the case with-

in the principle of *Wecker v. Natural Enameling Co.*, 204 U. S. 176, 27 Sup. Ct. 184, 51 L. Ed. 430, 9 Ann. Cas. 757, but no such facts are presented here.

[3] While the petitioner alleges a fraudulent joinder of the North Carolina Railroad, and denies that the plaintiff was engaged in interstate commerce, etc., it will appear from a perusal of the pleadings and the admissions of record not inconsistent therewith that plaintiff at the time of the injury was an employé of the defendant as locomotive engineer; that he had been operating the engine in question over a portion of the North Carolina Railroad used as a part of the north and south trunk line of the Southern Railway and on to Monroe, in the state of Virginia, and engaged in moving interstate freight trains; that this engine, having been taken to the shops for repairs, was at the precise time of the injury on a side track connecting with the North Carolina Railroad main line, ready for a trial trip to Barber Junction, and plaintiff was engaged in inspecting and oiling said engine for the purpose of taking said trip and with a view of further service for the company.

[4] It has long been understood that the term "interstate commerce" will include the instrumentalities and agencies by which the same is conducted, and that the power of Congress will extend to the regulation of these instrumentalities, including the right to legislate for the welfare of persons operating the same (*Employers' Liability Cases*, 223 U. S. 1, 32 Sup. Ct. 169, 56 L. Ed. 327, 38 L. R. A. [N. S.] 44; *Interstate Commerce Commission v. Ill. Central R. R.*, 215 U. S. 452, 30 Sup. Ct. 155, 54 L. Ed. 280); and from the admitted facts of defendant's petition and some of the recent decisions construing this statute, and that entitled *Safety Appliance Act* (Act March 2, 1893, c. 196, 27 Stat. 531 [U. S. Comp. St. 1901, p. 8174]), said by an intelligent writer to be of great aid to the proper construction of the former (*Thornton on Employer's Liability and Safety and Appliance Act* [2d Ed.] p. 40), there is grave reason to doubt if plaintiff's allegations as to the character of this transaction are not properly made (*Southern Ry. v. U. S.*, 222 U. S. 20, 32 Sup. Ct. 2, 56 L. Ed. 72; *Johnson v. So. Pac. R. R.*, 196 U. S. 1, 25 Sup. Ct. 158, 49 L. Ed. 363; *Thornton* [2d Ed.] p. 50 et seq.), and assuredly it may not be said that the charge of fraud must be necessarily inferred.

[5, 6] As to the judgment of nonsuit submitted to by plaintiff in deference to an adverse intimation of his honor here, we are required to consider the case as presented by the allegations and evidence of the plaintiff and interpret such evidence in the light most favorable to him. *Henderson v. Railroad*, 159 N. C. 531, 75 S. E. 1092, and *Deppe v. Railroad*, 152 N. C. 79, 67 S. E. 262, and, considering the record in that aspect, it will

appear that plaintiff at the time of the injury was an employé of the defendant the Southern Railroad, assigned for duty over that part of the line from Spencer, N. C., to Monroe, Va., and had for some time been engaged on engine 579 in hauling interstate freight trains over this part of the Southern system and which included that portion of the North Carolina Railroad between Spencer and Greensboro; that this was being done by the Southern road with the consent of the North Carolina Railroad, and while operating under the franchise of that company; that at the precise time of the injury the engine was on a siding, and while off the right of way of the state road the siding was connected with the main line of such road at either end, and the engine was being oiled and inspected by plaintiff with the present purpose of making a trial trip from Spencer to Barber Junction, which could only be done by passing over a portion of the state road, and it was always necessary for engines repaired in said shops to pass over the lines of the North Carolina road in order to get on the other lines of the Southern. Without present and final decision of the question thus presented, we are clearly of opinion that it is a permissible inference from these facts that as to the North Carolina Railroad also the plaintiff's cause of action is well laid and the order of nonsuit must be reversed. *Southern v. U. S.*, 222 U. S. 20, 32 Sup. Ct. 2, 56 L. Ed. 72; *Logan v. R. R.*, 116 N. C. 940, 21 S. E. 959.

[7] Having held that the cause has been erroneously nonsuited as to the North Carolina Railroad Company, the petition for removal on the ground of diversity of citizenship, the second petition is necessarily denied, and in any event this would be the correct view. It is true that when a suit has been instituted against a resident and a non-resident defendant, and pending the cause plaintiff elects to discontinue his suit as to the resident party, the right of removal by reason of diversity of citizenship will then arise to the other. *Powers v. Railway*, 169 U. S. 92, 18 Sup. Ct. 264, 42 L. Ed. 673. But that is when the discontinuance is by the voluntary action of the plaintiff and does not obtain when the nonsuit has been taken in deference to an adverse intimation of the court and the plaintiff is insisting on his right to have the same reviewed on appeal and is in a position to assert it. This we think is a fair interpretation of the record. The court having made the entry and entered same in the judgment that the nonsuit was taken in deference to an adverse intimation of the court and plaintiff having made this as one of his assignments of error, in such case the order of nonsuit must be considered as having been taken in invitum. (*Hayes v. Railroad*, 149 N. C. 131, 52 S. E. 416; *Mobley v. Watts*, 98 N. C. 284, 8 S. E.

677), bringing the case within the principle of *Whitcomb v. Smithson*, 175 U. S. 635, 20 Sup. Ct. 248, 44 L. Ed. 303, and requiring that the right of removal should be made to depend upon conditions existent at the time of filing the first petition.

There is error, and this will be certified that the order of removal and order of nonsuit be set aside and the cause restored to the docket for trial as originally instituted.

Reversed.

(163 N. C. 424)

HORTON v. SEABOARD AIR LINE R. CO.
(Supreme Court of North Carolina. May 28, 1913.)

1. MASTER AND SERVANT (§ 204*)—INJURIES TO SERVANT—FEDERAL EMPLOYER'S LIABILITY ACT.

Under Federal Employer's Liability Act (Act April 22, 1908, c. 149, § 4, 35 Stat. 66 [U. S. Comp. St. Supp. 1911, p. 1323]), providing that in any action brought against any common carrier under this act the injured employé shall not be held to have assumed the risks of his employment in any case where the violation by such common carrier of any statute enacted for the safety of the employé contributed to the injury, the term "statute" means any federal statute, and, in the absence of such statute, an employé may assume the risk of injury.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. §§ 544-546; Dec. Dig. § 204.*]

2. MASTER AND SERVANT (§ 204*)—INJURIES TO SERVANT—FEDERAL EMPLOYER'S LIABILITY ACT—ASSUMPTION OF RISK.

In an action under the Federal Employer's Liability Act (Act April 22, 1908, c. 149, 35 Stat. 65 [U. S. Comp. St. Supp. 1911, p. 1322]), the question whether the employé assumed the risk is to be determined by construction of the whole statute under the rules laid down by the federal Supreme Court.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. §§ 544-546; Dec. Dig. § 204.*]

3. STATUTES (§ 205*)—CONSTRUCTION.

Statutes should receive such a construction as will accord with the legislative intention, as gathered from the whole act.

[Ed. Note.—For other cases, see *Statutes*, Cent. Dig. § 282; Dec. Dig. § 205.*]

4. MASTER AND SERVANT (§ 288*)—INJURIES TO SERVANT—ASSUMPTION OF RISK—QUESTION FOR JURY.

In an action against a railroad company by an engineer whose eye was injured by the explosion of an unguarded water gauge, the question whether he complained of the absence of the guard and continued to use it under a promise of repair held one for the jury.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. §§ 1068-1088; Dec. Dig. § 288.*]

5. MASTER AND SERVANT (§ 221*)—INJURIES TO SERVANT—ASSUMPTION OF RISK—EMPLOYER'S LIABILITY ACT.

In an action under the Federal Employer's Liability Act (Act April 22, 1908, c. 149, 35 Stat. 65 [U. S. Comp. St. Supp. 1911, p. 1322]) against a railroad company, brought by an engineer whose eye was injured by the explosion of an unguarded water gauge, the engineer by using the engine in that condition assumed the

risk of injury, unless he complained to the proper servant of the master and was assured that the defect would be remedied, in which case he was justified in continuing to use the engine for a reasonable length of time; consequently, a charge to that effect, which also informed the jury that he assumed the risk of injury if the defect was so dangerous that a reasonable man would not continue to use the engine is more favorable to the railroad company than is proper.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 638-640, 642-645; Dec. Dig. § 221.*]

6. TRIAL (§ 261*)—INSTRUCTIONS—ERRONEOUS REQUESTS.

Prayers for instructions directed to the wrong issue are properly refused.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 484, 660, 671, 673, 675; Dec. Dig. § 261.*]

Brown, J., dissenting.

Appeal from Superior Court, Wake County; Ferguson, Judge.

Action by John T. Horton against the Seaboard Air Line Railroad Company. From a judgment for plaintiff, defendant appeals. Affirmed.

This is an action brought under the Federal Employer's Liability Act, to recover damages for injury to the plaintiff's eye, caused by the explosion of a water glass on a locomotive engine. The plaintiff, at the time of the injury, had been employed by the defendant as engineer for a period of six years, and as fireman for three or four years prior to his promotion. The engine, No. 752, which plaintiff was operating, was equipped with a patented water glass, called the "Buckner Water Glass," which was so constructed that a thick guard glass was placed over the front of the water glass to protect the eyes of the engineer in the event the inner glass should explode. The engine was also equipped with an alternative method of determining the amount of water in the boiler by means of gauge cocks. The plaintiff was called on to take this engine July 27, 1910, and on August 4, 1910, while engaged in shifting cars at Apex, N. C., the water glass exploded and injured his eye. Immediately after the explosion the fireman cut off the gauge glass at top and bottom, and the engine was operated to Raleigh with the gauge cocks as the means of determining the amount of water in the boiler. The guard glass referred to as part of the Buckner equipment is a thick piece of glass two or three inches wide and eight or nine inches long, with a thickness of a quarter or three-eighths of an inch, according to plaintiff's testimony, and is detached from the gauge, being placed in slots arranged for the purpose of holding it. The Buckner gauge is a brass tube, with an opening in front and containing a small glass tube.

The plaintiff testified that "the shield or guard glass is important as a protection to the engineer's eyes; that is all it is for."

"I knew the shield was gone, and I knew it was put there for the safety of anybody on the engine." The plaintiff also testified that after taking out the engine on July 27, 1910, he returned on July 28, 1910, and then told the roundhouse foreman of the defendant, to whom reports of defects ought to have been made, that the shield or guard glass was gone and he wanted one, and that the foreman replied that they had none in stock, to run the engine as it was, and he would send to Portsmouth and get him one; that he knew there was some danger in operating without a shield or guard glass, but that he was told by the foreman to go ahead without it, and if he had not done so he would have lost his job. The foreman denied that any objection or complaint was made to him.

There was evidence by the defendant tending to prove that it was the duty of the plaintiff to shut off the water glass, when he discovered the absence of the shield or guard glass, and to run with the gauge cocks, and that this could be done without danger and successfully.

The defendant requested the following instructions on the issue as to assumption of risk, and excepted to the refusal to give them as requested: "(1) The court charges you that if you believe the evidence the plaintiff assumed the risks of the injury from the explosion of the water glass, and you will answer the second issue, 'Yes.' (2) The right of the plaintiff to recover damages in this action is to be determined by the provisions of the Federal Employer's Liability Act, enacted by Congress at the session of 1906, and the court charges you that if you find by a preponderance of evidence that the water glass on the engine on which plaintiff was employed was not provided with a guard glass, and the condition of the glass was open and obvious and was fully known to the plaintiff, and he continued to use such water glass with such knowledge and without objection, and that he knew the risk incident thereto, then the court charges you that the plaintiff voluntarily assumed the risk incident to such use, and you will answer the second issue, 'Yes.' (3) If you find by the greater weight of the evidence that the water glass was defective, and that the plaintiff knew of the condition of the water glass on the engine, and the danger incident to its use, and that there was open to him a safe way of operating the said engine by using the gauge cocks, and that he voluntarily used the water glass in operating the engine, the court charges you that the plaintiff assumed the risk of injury from the use of the water glass, and you will answer the second issue, 'Yes.' (4) If you answer the first issue, 'Yes,' then the court charges you that if you find by the preponderance of the evidence that the plaintiff knew of the condition of the water glass on the engine, and that he could

have shut off the glass and operated his engine with safety by using the gauge cocks on the said engine, and that the plaintiff, with such knowledge, failed to shut off the glass and use the gauge cocks, then the court charges you that the plaintiff assumed the risk of injury, and you will answer the second issue, 'Yes.' (5) If you answer the first issue, 'Yes,' then the court charges you that if you find by a preponderance of the evidence that the absence of the guard glass and water gauge was open and obvious and was fully known to the plaintiff, and he continued to use the said glass with such knowledge, and that the plaintiff reported the defect and was given a promise to repair, and you further find that the plaintiff knew and appreciated the danger incident thereto and that the danger was so obvious that a man of ordinary prudence would not have continued to use the gauge without the guard glass, then the court charges you that the plaintiff assumed the risk, and you will answer the second issue, 'Yes.'"

The jury returned the following verdict: "(1) Was the plaintiff injured by the negligence of the defendant, as alleged in the complaint? Answer: Yes. (2) If so, did the plaintiff assume the risk of injury, as alleged in the answer? Answer: No. (3) Did the plaintiff by his own negligence contribute to his injury, as alleged in the answer? Answer: Yes. (4) What damages, if any, is the plaintiff entitled to recover? Answer: \$7,500.00."

Judgment was entered upon the verdict, and the defendant excepted and appealed.

Murray Allen, of Raleigh, for appellant. Douglas & Douglas, W. B. Snow, J. W. Bunn, and R. N. Simms, all of Raleigh, for appellee.

ALLEN, J. This action is to recover damages under the Federal Employer's Liability Act, and the principal question raised by the appeal is as to the application of the doctrine of assumption of risk.

[1-3] The act abolishes contributory negligence as a defense, and instead introduces the doctrine of comparative negligence, and it has the following provision as to assumption of risk: "Sec. 4. That in any action brought against any common carrier under or by virtue of any of the provisions of this act to recover damages for injuries to, or the death of, any of its employes, such employe shall not be held to have assumed the risks of his employment in any case where the violation by such common carrier of any statute enacted for the safety of employes contributed to the injury or death of such employe."

It is contended by the defendant, and may be conceded, that the term "any statute" in the section quoted means any federal statute, and that the assumption of risk is to be applied by a construction of the whole statute

and under the rules laid down by the Supreme Court of the United States. Statutes should receive such a construction as will accord with the legislative intention, as gathered from the whole act (*McKee v. U. S.*, 164 U. S. 287, 17 Sup. Ct. 92, 41 L. Ed. 437), and, when the act under consideration is so construed, it is at least debatable whether assumption of risk should be admitted as a defense in any action brought under its provisions. It says that contributory negligence on the part of the employe (that is, negligence which proximately causes the injury, because no other negligence is contributory) "shall not bar a recovery," and it would appear to be incongruous to admit as a defense assumption of risk which is based upon the fiction that the employe has assented to assume the risk of the particular injury, and when the facts relied on to prove assumption of risk generally enter into and are a part, but not all, of those necessary to sustain a plea of contributory negligence.

Mr. Justice Holmes considers the converse of this proposition in *Schlemmer v. Railroad*, 205 U. S. 1, 27 Sup. Ct. 407, 51 L. Ed. 681, in discussing a statute which abolished assumption of risk, and admitted contributory negligence as a defense, and he points out the distinction between the two and shows that the latter usually includes the former, and he also sounds the note of warning, which may well be applied here, that under statutes so framed one plea may be abolished by name and be reinstated under another name. He says: "Assumption of risk in this broad sense obviously shades into negligence as commonly understood. Negligence consists in conduct which common experience or the special knowledge of the actor shows to be so likely to produce the result complained of, under the circumstances known to the actor, that he is held answerable for that result, although it was not certain, intended, or foreseen. He is held to assume the risk upon the same ground. *Choctaw, Oklahoma & Gulf R. Co. v. McDade*, 191 U. S. 64, 68 [24 Sup. Ct. 24, 48 L. Ed. 96]. Apart from the notion of contract, rather shadowy as applied to this broad form of the latter conception, the practical difference of the two ideas is in the degree of their proximity to the particular harm. The preliminary conduct of getting into the dangerous employment or relation is said to be accompanied by assumption of the risk. The act more immediately leading to a specified accident is called negligent. But the difference between the two is one of degree rather than of kind; and when a statute exonerates a servant from the former, if at the same time it leaves the defense of contributory negligence still open to the master, a matter upon which we express no opinion, then, unless great care be taken, the servant's rights will be sacrificed by simply charging him with assumption of the risk under another name."

In the case before us, to sustain the plea of assumption of risk, the defendant undertook to prove that the plaintiff continued at work, without objection, having a knowledge of the defect and apprehension of the danger, and to sustain the plea of contributory negligence it relied on the same facts, and the additional one that the plaintiff neglected to shut off the water glass and to use the gauge cocks. But, however this may be, we will consider the question presented from the standpoint of the defendant, and as we have not been referred to any federal statute as to defective appliances, the violation of which contributed to the plaintiff's injury, we will assume that the defendant is entitled to the benefit of the doctrine of assumption of risk as declared by the Supreme Court of the United States, and will undertake to apply that doctrine to this case.

[4, 5] That court enforces the rule that it is the duty of the employer to provide reasonably safe and adequate machinery and appliances for the use of the employé and to keep and maintain them in such condition and that a failure to perform this duty is negligence. *Gardner v. Railroad*, 150 U. S. 349, 14 Sup. Ct. 140, 37 L. Ed. 1107. It also holds that the employé assumes the ordinary risks incident to his employment, and that if he continues to work, without objection, having knowledge of a defect and an apprehension of danger, and is injured, that this is one of the ordinary risks of his employment. *Railroad v. McDade*, 135 U. S. 570, 10 Sup. Ct. 1044, 34 L. Ed. 235. But it also holds that negligence of the employer is an extraordinary risk, which the employé does not assume; the court saying in *Choctaw R. R. v. McDade*, 191 U. S. 67, 24 Sup. Ct. 25, 48 L. Ed. 98: "The servant assumes the risk of dangers incident to the business of the master, but not of the latter's negligence. * * * The question of assumption of risk is quite apart from that of contributory negligence. The servant has the right to assume that the master has used due diligence to provide suitable appliances in the operation of his business, and he does not assume the risk of the employer's negligence in performing such duties." We have it then established that the employer is negligent if he fails to provide reasonably safe machinery and appliances, and to keep them in repair; that the employé assumes the risk if he continues to work in the presence of a known defect without objection; and that the employé does not assume the risk of the negligence of the employer.

There is some difficulty in applying these rules to a given case, because if it is the duty of the employer to repair, and a breach of that duty is negligence, and if the employé does not assume the risk of the negligence of the employer, it would seem to be contradictory to say that the employé may assume the risk of an injury caused by a failure to repair. This apparent conflict is

reconciled by imposing upon the employé, if he wishes to be relieved from assumption of risk, the duty of making complaint when he knows of a defect, or could discover it by the exercise of ordinary care, and by referring his conduct, when he does complain, to the principles of contributory negligence, at least for a reasonable time.

The decision in the leading case of *Hough v. Railroad*, 100 U. S. 216, 25 L. Ed. 612, which discusses particularly the assumption of the risk of the negligence of a fellow servant, rests upon this principle. In that case the evidence tended to show that the engine of which deceased had charge, coming in contact with an animal, was thrown from the track over an embankment, whereby the whistle fastened to the boiler was blown or knocked out, and from the opening thus made hot water and steam issued, scalding the deceased to death; that the engine was thrown from the track because the cowcatcher or pilot was defective, and the whistle blown or knocked out because it was insecurely fastened to the boiler; that these defects were owing to the negligence of the company's master mechanic, and of the foreman of the roundhouse at Marshall; that to the former was committed the exclusive management of the motive power of defendant's line, with full control over all engineers, and with unrestricted power to employ, direct, control, and discharge them at pleasure; that all engineers were required to report for orders to those officers, and under their direction alone could engines go out upon the road; that deceased knew of the defective condition of the cowcatcher or pilot, and, having complained thereof to both the master mechanic and foreman of the roundhouse, he was promised a number of times that the defect should be remedied, but such promises were not kept; that a new pilot was made, but by reason of the negligence of those officers it was not put on the engine; and the court, after discussing the case of *Farwell v. Railroad*, 4 Metc. (Mass.) 49, 38 Am. Dec. 339, and stating that there are well-defined exceptions to the general rule as to assumption of risk, says: "One, and perhaps the most important, of those exceptions, arises from the obligation of the master, whether a natural person or a corporate body, not to expose the servant, when conducting the master's business, to perils or hazards against which he may be guarded by proper diligence upon the part of the master. To that end the master is bound to observe all the care which prudence and the exigencies of the situation require, in providing the servant with machinery or other instrumentalities adequately safe for use by the latter. It is implied in the contract between the parties that the servant risks the dangers which ordinarily attend or are incident to the business in which he voluntarily engages for compensation; among which is the carelessness of

those, at least in the same work or employment, with whose habits, conduct, and capacity he has, in the course of his duties, an opportunity to become acquainted, and against whose neglect or incompetency he may himself take such precautions as his inclination or judgment may suggest. But it is equally implied in the same contract that the master shall supply the physical means and agencies for the conduct of his business. It is also implied, and public policy requires, that in selecting such means he shall not be wanting in proper care. His negligence in that regard is not a hazard usually or necessarily attendant upon the business. Nor is it one which the servant, in legal contemplation, is presumed to risk, for the obvious reason that the servant who is to use the instrumentalities provided by the master has, ordinarily, no connection with their purchase in the first instance, or with their preservation or maintenance in suitable condition after they have been supplied by the master. * * * If the engineer, after discovering or recognizing the defective condition of the cowcatcher or pilot, had continued to use the engine, without giving notice thereof to the proper officers of the company, he would undoubtedly have been guilty of such contributory negligence as to bar a recovery, so far as such defect was found to have been the efficient cause of the death. He would be held, in that case, to have himself risked the dangers which might result from the use of the engine in such defective condition. But there can be no doubt that, where a master has expressly promised to repair a defect, the servant can recover for an injury caused thereby, within such period of time after the promise as it would be reasonable to allow for its performance, and, as we think, for an injury suffered within any period which would not preclude all reasonable expectation that the promise might be kept.' *Shearman & Redf. Negligence*, § 96; *Conroy v. Vulcan Iron Works*, 62 Mo. 35; *Patterson v. P. & C. R. W. Co.*, 76 Pa. 389 [18 Am. Rep. 412]; *Le Clair v. First Division of St. Paul & Pacific Railroad Co.*, 20 Minn. 9 (Gil. 1); *Brabbitt v. R. W. Co.*, 38 Mo. 289. 'If the servant,' says Mr. Cooley, in his works on Torts (559), 'having a right to abandon the service because it is dangerous, refrains from doing so in consequence of assurances that the danger shall be removed, the duty to remove the danger is manifest and imperative, and the master is not in the exercise of ordinary care unless or until he makes his assurances good. Moreover, the assurances remove all ground for the argument that the servant by continuing the employment engages to assume the risks.' And the court adds, with reference to contributory negligence: "We may add that it was for the jury to say whether the defect in the cowcatcher or pilot was such that none but a reckless engineer, utterly careless of his safety, would have used the engine without

it being removed. If, under all the circumstances, and in view of the promises to remedy the defect, the engineer was not wanting in due care in continuing to use the engine, then the company will not be excused for the omission to supply proper machinery, upon the ground of contributory negligence. That the engineer knew of the alleged defect was not, under the circumstances, and as matter of law, absolutely conclusive of want of due care on his part."

In *Chicago, Milwaukee R. R. v. Ross*, 112 U. S. 383, 5 Sup. Ct. 186, 28 L. Ed. 787, after stating the rule as to assumption of risk by the employé, the court says: "But, however this may be, it is indispensable to the employer's exemption from liability to his servant for the consequences of risks thus incurred, that he should himself be free from negligence. He must furnish the servant the means and appliances which the service requires for its efficient and safe performance, unless otherwise stipulated; and if he fails in that respect, and an injury results, he is as liable to the servant as he would be to a stranger. In other words, whilst claiming such exemption, he must not himself be guilty of contributory negligence."

Again, in *Northern Pac. R. R. v. Herbert*, 116 U. S. 652, 6 Sup. Ct. 595, 29 L. Ed. 755: "Where the employé is not guilty of contributory negligence, no irresponsibility should be admitted for an injury to him caused by the defective condition of the machinery and instruments with which he is required to work, except it could not have been known or guarded against by proper care and vigilance on the part of his employer."

Running through all the cases is the idea that the employé assumes the risk, when he continues to work in the presence of a known defect, only when he fails to object.

The latest case we have found is *South Western Brewery & Ice Co. v. Schmidt*, 226 U. S. 162, 33 Sup. Ct. 68, 57 L. Ed. —, decided by the Supreme Court of the United States December 2, 1912, in which the court says: "The first point argued is that the defendant was entitled to judgment on the special findings, because the fourth was that the cooker at the time was not in such a bad condition that a man of ordinary prudence would not have used the same. But the eleventh was that the defendant did not use ordinary care in furnishing the cooker and in having it repaired, and the sixth that the defendant promised the plaintiff that the cooker should be repaired as an inducement for him to continue using it. So it is evident that the fourth finding meant only that the plaintiff was not negligent in remaining at work. Whatever the difficulties may be with the theory of the exception (1 Labatt, Mast. & Ser. c. 22, § 423), it is the well-settled law that for a certain time a master may remain liable for a failure to use reasonable care in furnishing a safe place in which to work, notwithstanding the servant's appreciation of

the danger, if he induces the servant to keep on by a promise that the source of trouble shall be removed (*Hough v. Texas & P. R. Co.*, 100 U. S. 213, 25 L. Ed. 612)."

The text-books very generally declare the same doctrine.

"There is no longer any doubt that, where a master has expressly promised to repair a defect, the servant does not assume the risk of any injury caused thereby within such a period of time after the promise as would be reasonably allowed for its performance, or, indeed, within any period which would not preclude all reasonable expectation that the promise might be kept." 1 *Shearman & Redfield on Negligence*, § 215, p. 372.

"It is also negligence for which the master may be held responsible, if, knowing of any peril which is known to the servant also, he fails to remove it in accordance with the assurances made by him to the servant that he will do so. This case may also be planted on contract, but it is by no means essential to do so. If the servant, having a right to abandon the service because it is dangerous, refrains from doing so in consequence of assurances that the danger shall be removed, the duty to remove the danger is manifest and imperative, and the master is not in the exercise of ordinary care unless or until he makes his assurances good. Moreover, the assurances remove all ground for the argument that the servant, by continuing the employment, engages to assume its risks. So far as the particular peril is concerned, the implication of law is rebutted by the giving and accepting of the assurance, for nothing is plainer or more reasonable than that parties may and should, where practicable, come to an understanding between themselves regarding matters of this nature." *Cooley on Torts*, p. 1156.

"An obvious corollary from the principles explained in section 424, subds. 'a,' 'b,' supra, is that, as long as the period is running which is conceived to be covered by the promise, the defense of an assumption of the given risk cannot be relied upon by the master. This doctrine is affirmed or taken for granted in all the decisions cited at the place referred to." *Labatt, Master and Servant*, § 425.

In the note to *Miller v. Monument Co.*, 18 Ann. Cas. 961, there is a very full citation of authority upon the distinction between assumption of risk and contributory negligence, which it is not necessary for us to consider further, as the case is presented, and in the note to *Foster v. Railroad*, 4 Ann. Cas. 153, the editor, in dealing with the effect of a promise to repair on assumption of risk, cites decisions from 35 states, and others from the federal courts, including the *Hough Case*, in support of the statement that: "It is a well-settled general rule that the assumption of risk implied from a servant's knowledge that a tool, instrument, appliance, piece of machinery, or place of work, is defective or dan-

gerous, is suspended by the master's promise to repair, made in response to the servant's complaint, so that, if the servant is induced by such promise to continue at work, he may recover for an injury which he sustains by reason of such defect within a reasonable time after the making of the promise, provided he exercises due care, unless the defect renders the appliance so imminently dangerous that a prudent person would decline to use it at all until it was repaired." And this last contingency is dealt with in the *Hough Case*, supra, under contributory negligence.

Applying these principles to the evidence, we are of opinion that the charge of his honor was favorable to the defendant, upon the issue of assumption of risk.

The plaintiff took charge of the engine on July 27, 1910, and was injured while operating it on August 4, 1910. He testified, among other things, that he discovered the absence of the guard glass on his first trip out, and that upon his return on the next day he told the roundhouse foreman, to whom complaint ought to have been made, and whose duty it was to repair, that the guard glass was gone, and asked if he had one, and that the foreman replied "they did not keep them in stock here, that they were made in Portsmouth, and he would have to send to Portsmouth to get one; to run her like she was. He said he would send to Portsmouth and get me one;" that he had the talk with the foreman between 3 and 5 o'clock and told him the shield or guard glass was gone and he wanted one, and that the foreman said he had none in stock, and to run the engine as it was and he would send to Portsmouth and get him a shield or guard glass; that he knew there was some danger, but that he was told by the foreman to go ahead and operate without the shield, and if he had not done so he would have lost his job. The foreman denied that any complaint was made to him.

In this conflict of evidence it was for the jury to determine the fact, and upon this phase of the case, his honor, among other things, charged on the second issue as to assumption of risk as follows: "On the other hand, the employer has the right to assume that his employé will go about his work in a reasonably safe way and give due regard to the machinery and appliances which are in his hands and under his control, and if you should find from the evidence, by its greater weight, because the burden in this instance is on the defendant, that the plaintiff knew of the absence of the guard or shield to the water gauge and failed to give notice to the defendant or to the agent whose duty it was to furnish the water gauge and appliance, and he continued to use it without giving that notice, it being furnished to him in a safe condition, then he assumed the risk incident to his work in the engine with the glass water gauge in that condition, although he might have handled his engine

in every other respect with perfect care. If it was received in good condition and he failed to give notice, and if he did work with it in its present condition, without the shield or guard, he then assumed the risk. How was that? It is a question of evidence for you. Did he give the notice? Did he assume the risk by failing to give notice, keeping the knowledge of the absence of the guard glass within his own breast? But if you find that he gave notice to the foreman of the roundhouse, and if you should find that the use of the water gauge was not so obviously dangerous that a reasonably prudent man, careful of himself not to get hurt, while he was about his work, and went on and used it, he would not assume the risk, but if the danger was so apparent that a reasonably prudent man, careful of himself not to receive injury, would see that he was in imminent danger and would observe by the use of it that he was endangering himself by going on and working with it, and he continued to work with it, he would be assuming the risk and responsibility, and it would be your duty to answer that issue, 'Yes.' If it was so obviously dangerous that a reasonably prudent man would not use it, and he continued to use it instead of using the other, he would assume the risk."

It therefore appears that the defendant not only had the benefit of the rule that the employé assumes the risk if he works in the presence of a known danger without objection, but in addition, and as a distinct and separate proposition, that the plaintiff assumed the risk, although he objected, if he continued to work when a man of ordinary prudence would see that there was greater danger of being hurt than otherwise, which would not be assumption of risk, but evidence of contributory negligence.

[8] The third, fourth, and fifth prayers for instructions were properly refused, because directed to the second issue, instead of to the third, to which they were applicable.

We have thus far considered the case under the decisions of the federal court. If we applied the provisions of the Fellow Servant Act of this state, as construed by our court, there could be no issue as to assumption of risk. *Coley v. Railroad*, 129 N. C. 407, 40 S. E. 195, 57 L. R. A. 817.

We have not been inadvertent to the other exceptions appearing in the record, 72 in number, but have examined them with care, and find no reversible error.

No error.

CLARK, C. J. (concurring). On the further ground that the following paragraph in section 4 of the Federal Employer's Liability Act: "Such employé shall not be held to have assumed the risks of his employment in any case where the violation by such common carrier of any statute enacted for the safety of employé contributed to the injury or death of such employés"—merely emphasizes

the fact that in such cases there is no assumption of risk. It cannot be construed fairly, to be an implied provision that assumption of risk is a defense in all other cases.

Besides, assumption of risk lies in contract, and under the provision of Revisal, § 2846, "Any contract or agreement, expressed or implied, made by any employé of such company to waive the benefit of this section shall be null and void," it has been repeatedly held that the doctrine of assumption of risk has been eliminated by this section. *Biles v. Railroad*, 143 N. C. 78, 55 S. E. 512; *Thomas v. Railroad*, 129 N. C. 392, 40 S. E. 201; *Cogdell v. Railroad*, 129 N. C. 398, 40 S. E. 202; *Coley v. Railroad*, 128 N. C. 534, 39 S. E. 43, 57 L. R. A. 817. Such contract therefore being null and void under our statute, it cannot be a defense, which depends upon the validity of such contract.

BROWN, J. (dissenting). The evidence in this case tended to establish the following facts:

The plaintiff, at the time of the injury, had been employed by the defendant as engineer for a period of six years, and as fireman for three or four years prior to his promotion. It appeared from the work reports, identified by the plaintiff, that he first made a report on this engine on July 28th, after his return from a round trip requiring two days. The explosion of the water glass, of which he complains, occurred August 4th, upon his return from the third or fourth trip to Aberdeen. At the time of the explosion plaintiff was looking at the glass. The engine, No. 752, which plaintiff was operating, was equipped with a patented water glass, which was so constructed that a thick guard glass was placed over the front of the water glass to protect the eyes of the engineer in the event the inner glass should explode. The engine was also equipped with an alternative method of determining the amount of water in the boiler by means of gauge cocks. It was the plaintiff's duty, upon boarding the engine, to look at his water glass, and test his gauge cocks, the latter being three cocks placed at intervals on the front of the boiler, in order to see that both were in working order. On the morning plaintiff was called to take this engine (he had prior to that time been operating a passenger train) and use it in operating a freight train from Raleigh, N. C., to Aberdeen, N. C., he noticed before leaving Raleigh that there was no shield or guard on the water glass. Without making complaint of the condition of the glass, plaintiff made the trip to Aberdeen and return. Upon his arrival in Raleigh at the end of his round trip, he made a written report of the condition of his engine upon forms provided for that purpose, and in accordance with the defendant's requirements he placed the reports on a file in

the roundhouse or put them in a box there for that purpose. This, according to the plaintiff's evidence, was the way provided by the company for procuring repairs. George Steele, plaintiff's witness, and a number of defendant's witnesses, said that these work reports were required to be in writing; that they were filed and distributed among the workmen for the purpose of making the required repairs.

It appears in evidence that plaintiff made a written report on this engine at the return of each round trip, and noted every defect in his engine except the absence of the guard glass. When asked by the superintendent of the division on which he was employed why he failed to report the absence of the guard, he said that *it was for reasons best known to himself*. On August 4, 1910, while engaged in shifting cars at Apex, N. C., the plaintiff testified that the water glass exploded and injured his eye. Immediately after the explosion he cut off the gauge glass at top and bottom, and the engine was operated to Raleigh with the gauge cocks as the means of determining the amount of water in the boiler. The guard glass referred to as part of the Buckner equipment is a thick piece of glass two or three inches wide, and eight or nine inches long, with a thickness of a quarter or three-eighths of an inch, and is detached from the gauge, being placed in slots arranged for the purpose of holding it. The Buckner gauge is not a complicated piece of machinery, but is a brass tube with an opening in front and containing a small glass tube. A thick piece of glass or two thin pieces of the proper size could be cut and placed in the slot and would serve the purpose of a guard glass.

Plaintiff testified that, after he returned from the first trip to Aberdeen, he ran the engine to the coal chute track, or track opposite the turntable, and told Mr. Matthews, the roundhouse foreman, that the guard glass was gone, and asked him if he had one. "He said they did not keep them in stock here, but they were made in Portsmouth, and that he would have to send to Portsmouth to get one; to run her like she was. He said he would send to Portsmouth and get me one. After Mr. Matthews told me he did not have any, I went to Charlie Murray, the glass cutter for the Baker-Thompson Lumber Company, and told him I wanted him to make me a guard glass and gave him the measurements." The conversation with Matthews, testified to by plaintiff, occurred on July 28th. Plaintiff's work reports show that he made two round trips with this engine after that time and before his injury. The accident occurred August 4th, six days after the conversation with Matthews, and during that time plaintiff was aware of the defective condition of the water glass and knew that it had not been repaired. Matthews denied that he told plaintiff the guard glasses were kept in Ports-

mouth and to go ahead and run his engine and that he would send and get one. He said he had no recollection of having a conversation with Horton. Plaintiff's testimony leaves no doubt of the fact that he was fully aware of the danger of using the water gauge without the protection of the guard glass.

George Steele, a witness for plaintiff, explained the duties of an engineer as follows: "I have been an engineer on the Seaboard six or eight years. I am familiar with the duties of an engineer. It is his duty to see that his engine is in proper working order and properly equipped. He reports 30 minutes beforehand for that purpose. He is paid for that time. He is paid until he gets off duty. He is allowed 15 or 20 or 25 minutes from the time he cuts loose from his train. Engineers are supposed to inspect engines before they give them up and make out a work report in writing. It is required by the company to be in writing and signed by the engineer. That work report is filed in the roundhouse, and the work distributed among different ones to have the defects remedied. It is the engineer's duty to report defects discovered in his cab and report them on his work report. When an engineer gets on his engine in the morning, he tests the gauge cocks to see that they are working. He tests his gauge glass to see that it is in shape and in working order. The gauge cocks indicate how much water is in the boiler. You could operate the engine with gauge cocks alone without the water glass. The water glass is arranged so that if anything should happen you could cut it off, top and bottom; that cuts it clean out, so that it is impossible for it to explode. But with the steam on and the water on, and this guard glass gone, that inner tube is nothing but a thin tube of glass. Whatever pressure the engine carries is on there. Those glasses explode frequently. Nobody can tell when one is going to explode. One might last 15 minutes and one 30 days. One has never exploded with me. They buzz a little when they are going to explode. The purpose of the guard glass is to protect anybody in the cab. It protects the engineer from explosion. Without the guard glass, he is liable to be injured by flying glass. On the line of road, if I discovered the guard glass was gone, I would report it in writing on the work report when I got in. It could be gotten by requisition from the storeroom. My duty would be to notify the foreman. It is the engineer's duty to report any defects they see on the engine in writing."

At the conclusion of the evidence, defendant moved for judgment of nonsuit upon the ground that plaintiff's evidence showed that he assumed the risk of injury from the explosion of the water glass. I think this motion should have been allowed, if it is true, as testified by plaintiff, that he reported

the defect and was given a promise to repair, his testimony shows that he continued to use the defective water glass when the danger was so imminent that a man of ordinary prudence would not have used it, and in doing so he continued to assume the risk of injury.

The federal questions in this case are properly raised, and in order to dispose of the appeal, it is necessary that they should be passed upon by this court. The construction of the National Employer's Liability Act is involved, which is in itself sufficient to give jurisdiction to the Supreme Court of the United States if the case should be taken to that court. *Railroad v. Wulf*, 226 U. S. 570, 33 Sup. Ct. 135, 57 L. Ed. —. In an action brought by an employé against a carrier for an injury sustained while engaged in interstate commerce, the federal act is supreme. Congress having acted, the competency of the state to regulate the matter is withdrawn, and all state legislation on the subject is superseded. *Mondou v. Railroad*, 223 U. S. 1, 32 Sup. Ct. 169, 156 L. Ed. 327, 38 L. R. A. (N. S.) 44. The right of action created by this act is exclusive, and the employé has no right of action either at common law or under state statutes regulating the relation of master and servant. *Railroad v. Wulf*, supra.

The plaintiff in the case before us brought his suit under the federal act, and the defendant admitted that act to be controlling and pleaded as a defense plaintiff's contributory negligence and assumption of risk. The defendant takes the position that assumption of risk as a defense is affected by the federal act only to the extent of being abolished in cases where the violation by the carrier of some statute enacted for the safety of employes contributed to the injury; that in other respects the defense of assumption of risk is unaffected and is to be determined by the principles of the common law as interpreted by the United States Supreme Court. Section 4 of the act provides: "That in any action brought against any common carrier under or by virtue of any of the provisions of this act to recover damages for injuries to, or the death of, any of its employes, such employé shall not be held to have assumed the risks of his employment in any case where the violation by such common carrier of any statute enacted for the safety of employes contributed to the injury or death of such employé." The legislative history of this act, which is a proper aid to its construction (11 Encyc. U. S. Supreme Court Reports, 143) shows the clear intention of Congress to modify the common-law defense of assumption of risk only to the extent shown by this section. The act of 1906, which was held unconstitutional, contained no reference to assumption of risk. The act of 1908, as introduced in Congress, provided in section 6 that the employé "shall not be

held to have assumed the risk of his employment in any case where the violation of law by such common carrier contributed to the injury or death of such employé." Before the passage of the act, this broad language was changed to read "where the violation by such common carrier of any statute enacted for the safety of employes contributed to the injury or death of such employé." By incorporating this section in the act, I think Congress indicated clearly that it did not regard the defense of assumption of risk as having been abolished by the other provisions of the act, and did not intend the act to have such effect.

In *Freeman v. Powell* (Tex.) 144 S. W. 1033, it is expressly held that assumption of risk is a defense to an action brought under this act, and the language of the Supreme Court of the United States (223 U. S. at pages 49 and 50, 32 Sup. Ct. 169, 56 L. Ed. 327, 38 L. R. A. (N. S.) 44) leads me to conclude that in the opinion of that court assumption of risk will bar the right of a plaintiff to recover unless the negligence of the master consists in the violation of a federal statute enacted for the servant's safety. The fact that contributory negligence is abolished as a complete defense by section 3 of the act can have no effect on the defense of assumption of risk. The two defenses are separate and distinct. In the case of *Schlemmer v. Railroad*, 205 U. S. 1, 27 Sup. Ct. 407, 51 L. Ed. 681, quoted by Mr. Justice Allen as sounding a note of warning that one plea may be abolished by name and reinstated under another name, four Justices dissented, and, when the case again came before the court, Mr. Justice Day, who had formerly dissented, wrote the opinion of the court, holding that a statute abolishing assumption of risk did not affect the defense of contributory negligence. The converse of this proposition sustains the view that a statute which abolishes contributory negligence has no effect upon the defense of assumption of risk.

It is not contended in this case that the defendant has violated any statute enacted for the safety of employes, and therefore assumption of risk, if established, would operate to defeat the plaintiff's cause of action. The court below accepted this as a correct construction of the federal act, and submitted the following issues: (1) Was the plaintiff injured by the negligence of the defendant as alleged in the complaint? (2) If so, did the plaintiff assume the risk of injury, as alleged in the answer? (3) Did the plaintiff by his own negligence contribute to his injury as alleged in the answer? (4) What damage, if any, is the plaintiff entitled to recover?

Having submitted an issue of assumption of risk, his honor was confronted with the question whether such assumption of risk should be determined by the principles an-

nounced by this court or by the decisions of the Supreme Court of the United States. It is clear that the decisions of the two jurisdictions are in conflict. The trial judge followed the decisions of this court, and, however correct they may be when applied to a cause of action arising under the state law, I think our decisions are contrary to those of the Supreme Court of the United States and are not controlling in this action. The charge cannot be read without reaching the conclusion that his honor regarded the law of North Carolina as controlling. He said: "Plaintiff has brought this suit under the United States statute, and where Congress enacts a law within the limits of its power, that law should be enforced uniformly throughout the entire United States. If it is in conflict with the state law, the state law is superseded; but, where there is no conflict expressed by the statute of the United States, then the rule of the state prevails. And in this act under which this suit is brought, it is provided that any action brought against any common carrier under and by virtue of any of the provisions of this act to recover damages for injuries to or death of any of its employes, such employe shall not be held to have assumed the risk of his employment in any case where the violation by such a carrier of any statute enacted for the safety of employes contributed to the injury or death of such employes. There has been no statute provided as applies to this glass water gauge which has been called to the attention of the court, so that leaves it open to the rights which the plaintiff might have under the law of this state, and the question of assumed risk, as has been argued by one, if not more, of counsel, grows out of the contractual relations between plaintiff and defendant."

The following instructions, which are not quoted in the opinion of the court, were given over defendant's objection and exception: "A man assumes the risk, when he takes employment, incident to the class of work which he has to perform. Some classes of work are more dangerous than others. The position of a locomotive engineer might well be regarded as more hazardous than other employments; therefore he assumes the risk of that character of employment, but he has the right when he enters into employment of that class of work to assume that his employer has done what the law requires it to do in providing him a reasonably safe place to work, with reasonably safe appliances with which to do his work, consistent with the character of the work which is to be performed. *He does not assume the risk incident to the negligence of his employer in providing machinery and appliances with which he has to work.*" And in another part of the charge, this language is used: "And the same rule applies if the use of the glass without the shield was not

so obviously dangerous as to cause a reasonably prudent man to stop the use of it, his going on and using it, of itself, would not be assuming the risk in the use of it. If it was so obviously dangerous that a reasonably prudent man would not use it, and he continued to use it instead of using the other, he would assume the risk."

The instructions quoted in the court's opinion, which it is said properly present the defendant's contention that by continuing to work in the face of a known danger plaintiff assumed the risk of injury, are made dependent upon a finding by the jury that the guard glass was furnished to the plaintiff *in a safe condition*. It will be found that the instructions read: "If it was received in good condition and he failed to give notice, and if he did work with it in its present condition without the shield or guard glass, he then assumed the risk." Such limitation is improper. Whether the danger existed at the time plaintiff undertook the operation of the engine, or arose while he was engaged in its operation, is immaterial. If it was furnished him in a defective condition and he became aware of the existence of the defect and continued to work without objection and a promise to repair, he assumed the risk.

The jury had been instructed positively that the servant does not assume the risk incident to the negligence of the master in providing machinery and appliances with which he has to work, and in carrying out this view the court makes assumption of risk dependent upon the defendant's having furnished the glass in a safe condition. Plaintiff testified that, when the engine was turned over to him, the guard glass was defective. If the jury believed this evidence, it was impossible to find that he assumed the risk as set forth in his honor's instructions.

The doctrine of assumed risk as adopted by this court is stated in *Hicks v. Mfg. Co.*, 138 N. C. 319, 50 S. E. 703, as follows: "An employe will not be deemed to have assumed the risk from the fact that he works on in the presence of a known defect unless the danger be so obvious and imminent that no man of ordinary prudence and acting with such prudence would incur the risk which the conditions disclose." And this court has repeatedly said that the servant never assumes the risk incident to the negligence of the master in providing machinery and appliances with which he has to work.

The jury in this case was instructed in practically the exact language of our decisions. The Supreme Court of the United States has held in a uniform line of decisions, which I shall refer to later, that the servant does assume the risk of injury resulting from the negligence of the master when the danger is known to the servant and appreciated by him and he continues to work in the face of such danger without objection.

The defendant requested the following instructions:

"The court charges you that if you believe the evidence the plaintiff assumed the risk of injury from the explosion of the water glass, and you will answer the second issue, 'Yes.'"

"The court charges you that the statute of North Carolina (Revisal, § 2646) abolishing assumption of risk as defense to an action brought against a railroad company by one of its employes has no application in this case, and if you find that the plaintiff assumed the risk of injury from the explosion of the water glass, you will answer the second issue, 'Yes.'"

"The right of the plaintiff to recover damages in this action is to be determined by the provision of the Federal Employer's Liability Act enacted by Congress at the session of 1908, and the court charges you that if you find by a preponderance of evidence that the water glass on the engine on which plaintiff was employed was not provided with a guard glass and the condition of the glass was open and obvious and was fully known to the plaintiff, and he continued to use such water glass with such knowledge and without objection, and that he knew the risk incident thereto, then the court charges you that the plaintiff voluntarily assumed the risk incident to such use, and you will answer the second issue, 'Yes.'"

The court gave this instruction as applicable to the issue of contributory negligence, and instead of the words, "then the court charges you that the plaintiff voluntarily assumed the risk incident to such use and you will answer the second issue, 'Yes,'" used the words, "then the court charges you that the plaintiff was guilty of contributory negligence, and you will answer the third issue, 'Yes.'"

"If you find by the greater weight of the evidence that the water glass was defective, and that the plaintiff knew of the condition of the water glass on the engine and the danger incident to its use, and there was open to him a safe way of operating the said engine by using the gauge cocks, and that he voluntarily used the water glass in operating the engine, the court charges you that the plaintiff assumed the risk of injury from the use of the water glass, and you will answer the second issue, 'Yes.'"

The court refused these requests for instruction.

His honor's charge and the defendant's requests for instruction, particularly the second request quoted, present the conflicting views of the doctrine of assumption of risk. The defendant contends that the requested instructions are in accord with, and the charge as given in conflict with, the decisions of the Supreme Court of the United States. In this I think the defendant is correct. The common-law conception of assumption of risk is still the prevailing doctrine in the great majority of the state courts, and

in the United States courts. Labatt on Master & Servant says: "The doctrine applied in the older English cases and in all the American cases up to the present time, with a few possible unimportant exceptions, is that, in the case of all adult servants, except seamen, the actions must be declared not to be maintainable, as a matter of law, if the evidence leaves no reasonable doubt that the servant comprehended the abnormal risk which caused his injury." Page 7. "The doctrine that a servant who has no knowledge, actual or constructive, of an ordinary risk is not chargeable with its assumption, is implied in every jurisdiction in which the principles of the common law are recognized. The logical converse of this doctrine, viz., that a servant is to be regarded as having assumed extraordinary risk of which he had, or ought to have obtained, knowledge before his injury was received, was also applied universally until comparatively recent times, and is still the prevailing rule in the United States." Section 274. In support of the above text the author cites the English cases and decisions of the Supreme Court of the United States and the federal Circuit and District Courts and the courts of Alabama, Arkansas, California, Colorado, Connecticut, Delaware, District of Columbia, Florida, Georgia, Illinois, Indiana, Iowa, Kansas, Kentucky, Louisiana, Maine, Maryland, Massachusetts, Michigan, Minnesota, Missouri, Nebraska, New Hampshire, New Jersey (North Carolina does not appear), Ohio, Oklahoma, Oregon, Pennsylvania, Rhode Island, Tennessee, Texas, Utah, Vermont, Virginia, Washington, West Virginia, and Wisconsin. See, also, Labatt, §§ 271, 174a, 276 and 280, and pages 632, 633, 640, and 641. "In all the English cases decided before the passage of the Employer's Liability Act, the courts proceeded upon the hypothesis that an assumption of an extraordinary risk was properly inferred, as a matter of law, from the mere fact that the servant accepted or continued in the employment with a knowledge of its existence and a full comprehension of the enhanced danger to which he was exposed." Section 280.

Judge Thompson, in his work on Negligence, says that if a servant, with knowledge of a defect in a machine which he is employed to operate, continues in the employment without objection or complaint, he is deemed to assume the risk of the danger; that this doctrine is so plain that it could hardly be made plainer by multiplying special statements and explanations. Sections 4608, 4609. "It is a part of this doctrine," Judge Thompson says in another section (4707), "that the servant assumes the risks of known defects in machinery, tools, appliances, etc., or of improper appliances furnished for the performance of a particular task, or where no proper appliances are furnished, although the defect or danger results from the negligence of the master, or

from his violation of a statute, or a municipal ordinance."

In *Butler v. Frazee*, 211 U. S. 459, 29 Sup. Ct. 136, 53 L. Ed. 281, it is held that "one understanding the condition of machinery and dangers arising therefrom, or who is capable of doing so, and voluntarily, in the course of employment, exposes himself thereto, assumed the risk thereof, and if injury results cannot recover against the employer."

In *Texas & Pacific Railway Company v. Archibald*, 170 U. S. at pages 671 and 672, 18 Sup. Ct. at page 779 (42 L. Ed. 1188), Mr. Justice White (now Chief Justice) says: "The elementary rule is that it is the duty of the employer to furnish appliances free from defects discoverable by the exercise of ordinary care, and that the employé has a right to rely upon this duty being performed; whilst in entering the employment he assumes the ordinary risks incident to the business, he does not assume the risk arising from the neglect of the employer to perform the positive duty owing to the employé with respect to appliances furnished. An exception to this general rule is well established, which holds that where an employé receives for use a defective appliance and with knowledge of the defect continues to use it without notice to the employer, he cannot recover for an injury resulting from the defective appliance thus voluntarily and negligently used. * * * The employé is not compelled to pass judgment on the employer's methods of business or to conclude as to their adequacy. He has a right to assume that the employer will use reasonable care to make the appliances safe and to deal with those furnished relying on this fact, subject of course to the exception which we have already stated, by which when an appliance is furnished an employé, in which there exists a defect known to him or plainly observable by him, he cannot recover for an injury caused by such defective appliance, if, with the knowledge above stated, he negligently continues to use it."

The very case relied upon by the court to sustain the statement that a servant does not assume the risk arising from the master's negligence refers to the well-established exception that the servant does assume the risk of injury resulting from the negligence of the master when the conditions brought about by such negligence are known to the servant and the danger appreciated. *Railroad v. McDade*, 191 U. S. 67, 24 Sup. Ct. 24, 48 L. Ed. 96.

In *Railway v. Shalstrom*, 195 Fed. 728, 115 C. C. A. 518, it is said: "Although the risk of the master's negligence and of its effect unknown to the servant is not one of the ordinary risks of the employment which he assumes, yet if the negligence of the master or its effect is known and appreciated by the servant, or is obvious, or 'so patent as to be readily observed by him by the reasonable use of his senses, having in view his

age, intelligence, and experience,' * * * and he enters and continues in the employment without objection, he elects to assume the risk of it, and he cannot recover for the damages it causes," citing *Railway v. Archibald*, supra.

A very comprehensive review of the authorities on this question will be found in *St. Louis Cordage Co. v. Miller*, 126 Fed. 508, 61 C. C. A. 490, 68 L. R. A. 551, in which Judge Sanborn says: "The authorities and opinions to which reference has now been made have forced our minds irresistibly to the conclusion that the following rules of law have become irrevocably settled by the great weight of authority in this country, and by the opinions of the Supreme Court, which, upon well-settled principles, must be permitted to control the opinions and actions of this court: A servant by entering or continuing in the employment of a master * * * assumes the risks and dangers of the employment which he knows and appreciates, and also those which an ordinarily prudent person of his capacity and intelligence would have known * * * in his situation. A servant who knows, or who by the exercise of reasonable prudence and care would have known, of the risks and dangers which arose during his service, but who continues in the employment without complaint, assumes those risks and dangers to the same extent that he undertakes to assume those existing when he enters upon the employment. Among the risks and dangers thus assumed are those which arise from the failure of the master to completely discharge his duty to exercise ordinary care to furnish the servant with a reasonably safe place to work and reasonably safe appliances and tools to use. Assumption of risk and contributory negligence are separate and distinct defenses. The one is based on contract, the other on tort. The former is not conditioned or limited by the existence of the latter, and is alike available whether the risk assumed is great or small, and whether the danger from it is imminent and certain or remote and improbable. The court below fell into an error when it instructed the jury that although the plaintiff continued in the employment of the defendant by the side of the visible unguarded gearing with full knowledge that the cogs which injured her were uncovered, still she could not be held to have assumed the risk of working by their side unless the danger from them was so imminent that persons of ordinary prudence would have declined to incur it under similar circumstances."

In *Kyner v. Mining Co.*, 184 Fed. 43, 106 C. C. A. 245, Mr. Justice Vandevanter, who was then Circuit Judge, says: "As respects the first specification of negligence, it conclusively appeared that the absence of the guard about the drum and lower cable was so patent as to be readily observed; that the enhanced danger arising therefrom was so obvious that its appreciation by the plaintiff

was unavoidable, in view of his years, intelligence, and experience; and that under those conditions he voluntarily continued to work about the drum and cable. So, even if the absence of a guard was a negligent omission on the part of the defendant, the court was bound to rule, as a matter of law, that the plaintiff assumed the risk"—citing *Butler v. Frazee*, 211 U. S. 459, 29 Sup. Ct. 136, 53 L. Ed. 281. See, also, *Brick Co. v. Miller*, 181 Fed. 830, 104 C. C. A. 340; *Katalla v. Rones*, 186 Fed. 30, 108 C. C. A. 132.

It is useless to multiply authorities because the standard by which assumption of risk will be measured in construing the federal act is indicated by the language of Mr. Justice Vandevanter in *Mondou v. Railroad*, 223 U. S. pages 49 and 50, 32 Sup. Ct. 175, 56 L. Ed. 327, 38 L. R. A. (N. S.) 44. In referring to the departures from the common law made by the act, he says: "The rule that an employé was deemed to assume the risk of injury, even if due to the employer's negligence, where the employé voluntarily entered or remained in the service with an actual or presumed knowledge of the conditions out of which the risk arose, is abrogated in all instances where the employer's violation of a statute enacted for the safety of his employé contributed to the injury."

I think his honor clearly fell into error prejudicial to the defendant in his instructions on the issue of contributory negligence. It is true that issue was answered in favor of the defendant, but the court gave the jury the right to answer that issue in the affirmative upon the finding of facts that clearly entitled the defendant to have the second issue answered in its favor. His honor confused contributory negligence and assumption of risk in such manner as to be misleading. Referring to the issue of contributory negligence, he says: "That is governed largely by the same rules as applied to the question of assumption of risk. Did he continue to use the glass gauge when it was obviously dangerous that a reasonably prudent man careful of himself would not do it? Was the danger so apparent that a reasonably prudent man would cease to use that and use the other gauge? If so, it would be your duty to answer the third issue, 'Yes.' But if the danger was not so obvious that a reasonably prudent man, careful of himself, would not realize the danger of using the water glass, and he continued to use it, he would not be guilty of contributory negligence. If you find by the preponderance of the evidence that the water glass by which plaintiff was injured was not provided with a guard glass, and the condition of the water glass was open and obvious and was fully known to the plaintiff, and he continued to use such water glass with such knowledge and without objecting, and knew the risk incident thereto, then the court charges you that the plaintiff was guilty of

contributory negligence, and you should answer the third issue, 'Yes.'"

In *Schlemmer v. Railroad*, 220 U. S. 590, 31 Sup. Ct. 561, 55 L. Ed. 596, it is held that: "There is a practical and clear distinction between assumption of risk and contributory negligence. By the former, the employé assumes the risk of ordinary dangers of occupation and those dangers that are plainly observable; the latter is the omission of the employé to use those precautions for his own safety which ordinary prudence requires." *Railroad v. McDade*, 191 U. S. 64, 24 Sup. Ct. 24, 48 L. Ed. 96; *Labatt on Master & Servant*, pp. 747, 749, 767, 772.

I do not think the opinion of the court in this case is sound in assuming that if plaintiff gave notice of the absence of the guard glass that alone would be sufficient to relieve him from the charge of assumption of risk. The authorities hold that there must be a complaint and promise to repair and it must appear that the servant continued to work relying upon the promise. *Labatt on Master & Servant*, §§ 418, 419, and cases cited; *Daily v. Fiberloid Co.*, 186 Mass. 318, 71 N. E. 554; *Hood v. Packing Co. (Tex.)* 133 S. W. 446.

In discussing the standard by which assumption of risk must be measured in our case, the court starts out with the statement that a servant never assumes the risk of the negligence of the master and ends with the authorities to the effect that "the assumption of risk implied from a servant's knowledge that a tool, instrument, appliance, piece of machinery or place of work is defective or dangerous is suspended by the master's promise to repair."

Without regard to a promise to repair, the court below instructed the jury that a servant does not assume the risk of injury from danger created by the negligence of the master, and he refused to instruct the jury that if plaintiff continued to use the water glass with knowledge of its defective condition and without objection, and knew the risk incident thereto, he assumed the risk of injury. To say that the employé assumes the risk if he continues to work in the presence of a known danger without objection, and the employé does not assume the risk of the master's negligence, is to assert a proposition and deny it in the same sentence. Yet in the opinion of this court these two propositions are said to be established by the decisions of the Supreme Court of the United States. This conflict is noted and is said to be reconciled by imposing upon the employé, if he wishes to be relieved from assumption of risk, the duty of making complaint when he knows of a defect or could discover it by the exercise of ordinary care, and by referring his conduct, when he does complain, to the principles of contributory negligence at least for a reasonable time. In my opinion this does not reconcile the conflict, be-

cause, if the servant does not assume the risk of the negligence of the master, it can make no difference whether he makes complaint of the defect or not. If the defect resulted from the negligence of the master and the risk is not assumed, what is the necessity for making complaint?

The Hough Case, which the court says explains this anomaly, is based upon the assumption that there was a complaint by the employe and a promise to repair, and under such circumstances the burden of the risk is shifted to the master for a reasonable time, unless the danger is so obvious that a man of ordinary prudence would not continue to work in the face of it, in which event the assumption of the risk remains with the servant in spite of the complaint and promise. In our case the evidence of the complaint and promise to repair was in direct conflict, and the instructions requested by the defendant were based upon the jury's finding that the plaintiff had not complained of the condition of the water glass.

In any view of the charge of the court, there are conflicting instructions on material points, and under such circumstances this court should direct another trial. *Williams v. Hald*, 118 N. C. 481, 24 S. E. 217; *Edwards v. Railroad*, 129 N. C. 78, 39 S. E. 730; *Westbrook v. Wilson*, 135 N. C. 402, 47 S. E. 467.

(162 N. C. 333)

CARMICHAEL v. SOUTHERN BELL TELEPHONE & TELEGRAPH CO.

(Supreme Court of North Carolina. May 22, 1913.)

1. EVIDENCE (§ 121*)—RES GESTÆ—REMOVAL OF TELEPHONE—MISCONDUCT OF AGENT.

In an action against a telephone company for wrongful and malicious removal of plaintiff's telephone, evidence of plaintiff's daughter as to the misconduct of defendant's agent in thrusting a bill into her hand and abruptly telling her that he would cut the phone out if it was not paid promptly was admissible as res gestæ.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 303, 307-338, 1117, 1119; Dec. Dig. § 121.*]

2. TRIAL (§ 85*)—RECEPTION OF EVIDENCE—OBJECTIONS.

An objection to the entire testimony of a witness cannot be sustained where a part of it is competent.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 222, 223-225; Dec. Dig. § 85.*]

3. DAMAGES (§ 181*)—PUNITIVE DAMAGES—EVIDENCE—FINANCIAL CONDITION OF DEFENDANT.

In an action to recover actual and punitive damages against a telephone company for wrongful and malicious removal of plaintiff's telephone, evidence of defendant's financial condition was admissible.

[Ed. Note.—For other cases, see Damages, Cent. Dig. §§ 473, 474, 499; Dec. Dig. § 181.*]

4. TELEGRAPHS AND TELEPHONES (§ 67*)—WITHDRAWAL OF SERVICE—DAMAGES—KNOWLEDGE OF CONDITIONS.

Where defendant telephone company wrongfully disconnected plaintiff's telephone for al-

leged nonpayment of charges, an instruction that if defendant knew that the telephone was used to ascertain the condition of plaintiff's father-in-law, who was in a hospital, such fact might be considered in determining the damages sustained by its removal, was improper as placing a burden of proving knowledge on plaintiff which he was not required to bear; defendant being liable for all damages proximately resulting from its wrongful act, independent of knowledge.

[Ed. Note.—For other cases, see Telegraphs and Telephones, Cent. Dig. §§ 64-68; Dec. Dig. § 67.*]

5. TRIAL (§ 296*)—INSTRUCTIONS—FORM—WEIGHT OF EVIDENCE.

Where the court charged in a prior paragraph that the jury could not allow any damages under the third issue unless they found from the evidence and by its greater weight, the burden of which was on plaintiff, that his telephone was cut out through malice or wantonly or recklessly, it was not material that a subsequent instruction used the expression "if you shall find" without adding "by the greater weight of the evidence."

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 705-713, 715, 716, 718; Dec. Dig. § 296.*]

6. TELEGRAPHS AND TELEPHONES (§ 74*)—PUBLIC SERVICE CORPORATION—DUTY TO PROVIDE SERVICE.

An instruction that the business of defendant telephone company was one affected with a public use, and that it was bound to give to all its patrons courteous and prompt service in the transmission of messages and to be sure it was strictly within its rights before it undertook to deprive one of the public of the rights of its service, was proper.

[Ed. Note.—For other cases, see Telegraphs and Telephones, Cent. Dig. § 77; Dec. Dig. § 74.*]

Brown, J., dissenting.

Appeal from Superior Court, New Hanover County; Lyon, Judge.

Action by J. W. Carmichael against the Southern Bell Telephone & Telegraph Company. Judgment for plaintiff, and defendant appeals. Affirmed.

This action is to recover damages for the wrongful and malicious cutting out of the plaintiff's telephone. The facts are stated in the report of the former appeal in the same action, 157 N. C. 21, 72 S. E. 619, 89 L. R. A. (N. S.) 651.

Miss May Carmichael, a witness for plaintiff, testified as follows: "I am a daughter of Mr. J. W. Carmichael, and live on St. James square in the city of Wilmington, and have been living there for some years. My grandfather was Mr. W. H. Northrop, my mother's father, and he was in the hospital in 1908. My other grandfather was Dr. James Carmichael, the preacher. We had a telephone in our house in 1908, and had had it there ever since we lived there. It had never been disconnected before. This was what happened: The bell rang and I went to the door, and this young man was standing at the door. He asked, 'Is your father in?' and I said, 'He is not,' and he thrust

this bill in the door and said, 'Give this to him when he comes in, and tell him if he don't come down and pay this bill I will cut his phone out.' His manner was abrupt. I told my father. I told him this gentleman had come to the door and he was very rude to me; came in an abrupt way and gave this message, which I repeated to him; had thrust the bill in the door and said if he did not come down and pay the bill, he would cut his phone out." Defendant objected, objection overruled, and defendant excepted.

The plaintiff was examined in his own behalf, and testified, among other things, as follows: "Q. As a matter of fact, is the Southern Bell Telephone Company a rich corporation or not? A. They sent me a stockholder's book. Why they sent it to me I don't know; but it showed assets of \$869,000,000, which I should say was a very rich corporation." Objection by defendant, objection overruled, and defendant excepted. Cross-examination: "That was the statement of the American Bell and the Southern Bell Telephone Companies together. The consolidation was \$869,000,000. That was the statement of the American Telephone & Telegraph Company, which owns the Southern Bell, and it included the Southern Bell. That's a statement of the consolidated, but they showed separately for the minor company." This evidence was admitted on the issue of punitive damages.

The manager of the defendant at Wilmington testified, among other things: "Am in the employ of the defendant company. I would say that defendant is a reasonable sized company. I don't know what is the capital stock. I don't recollect that I ever heard. I have seen a statement and I recollect it was in the millions, but can't recollect exactly what it was. It is a subsidiary company to the American Telephone & Telegraph Company."

The court charged the jury, among other things, as follows:

(1) "And if you find from the evidence and by the greater weight thereof, the burden being on plaintiff to so satisfy you, that the defendant had knowledge, or could have known by the exercise of ordinary care, that the plaintiff's father-in-law was in the hospital and the phone was being used to ascertain his condition and communicate it to the plaintiff's wife, you may consider the mental suffering that the plaintiff sustained by reason of the disconnection of the phone." Defendant excepted.

(2) "If you should find that the defendant cut out the phone through malice to the plaintiff, or if it was cut out recklessly, wantonly, without any regard of the rights of the plaintiff, it would still be within your discretion whether or not to punish the defendant. You can give damages on the third issue if you are satisfied it was done recklessly, wantonly, maliciously; or you cannot

if you find it was so done." Defendant excepted.

"Defendant's business is one which is affected with public use, and the company is a public service corporation, with certain well-defined rights and duties, among the latter of which is to give to each and all of its patrons, and to those who desire to become patrons, courteous and prompt service in the transmission of messages; and it is the duty of the defendant to be sure that it is strictly within its rights before it undertakes to deprive one of the public of the right of its service." Defendant excepted.

There was a verdict for the plaintiff, and the defendant appealed from the judgment rendered thereon.

John D. Bellamy & Son, of Wilmington, J. Brutus Clay, and H. El Palmer, for appellant. Rountree & Carr and H. M. McClammy, both of Wilmington, for appellee.

ALLEN, J. This action has been tried in accordance with the opinion delivered on the former appeal, and we find no reversible error.

[1, 2] The testimony of the daughter of the plaintiff as to the conduct of the agent of the defendant was competent as a part of the transaction complained of; but, if not, the exception could not avail the defendant, as the objection was to the whole of her testimony, a part of which the defendant does not contend was incompetent. *Ricks v. Woodard*, 159 N. C. 647, 75 S. E. 735.

[3] The testimony of the plaintiff as to the financial condition of the defendant was admissible on the issue of punitive damages (*Tucker v. Winders*, 130 N. C. 147, 41 S. E. 8); but in any event its admission would not be reversible error because the facts objected to were brought out without objection of the cross-examination of the same witness, and in the examination of the manager of the defendant.

[4] The first exception to the charge is that there was no evidence that the defendant knew, or could have known by the exercise of ordinary care, that the plaintiff's father-in-law was in the hospital and that the phone was being used to ascertain his condition. We doubt if there was any evidence of the fact, but are of opinion it was not necessary to prove knowledge on the part of the defendant, and that his honor placed a burden on the plaintiff which he did not have to assume.

The verdict of the jury, read in the light of the charge, establishes the facts that the plaintiff had paid his phone charges and had the receipt of the defendant therefor, and that the defendant maliciously cut out the phone. If so, the defendant was guilty of a tort and is liable for all damages flowing naturally and proximately from the wrongful act, although not foreseen.

In *Johnson v. Railroad*, 140 N. C. 576, 53

S. E. 363, the court quotes with approval from Sutherland and Hale on Damages, as follows: "Mr. Sutherland, after discussing many decided cases, says: 'The correct doctrine, as we conceive, is that if the act or neglect complained of was wrongful, and the injury sustained resulted in the natural order of cause and effect, the person injured thereby is entitled to recover. There need not be in the mind of the individual whose act or omission has wrought the injury the least contemplation of the probable consequences of his conduct; he is responsible therefore because the result proximately follows his wrongful act or nonaction.' 1 Damages, 16. 'A tort-feasor is liable for all injuries resulting directly from his wrongful act, whether they could or could not have been seen by him. * * * The real question in these cases is, did the wrongful conduct produce the injury complained of, and not whether the party committing the act could have anticipated the result.' Hale, Damages, 36; 8 Am. & Eng. Enc. (2d Ed.) 265."

[5] The criticism of the second excerpt from the charge is that his honor used the expression, "if you shall find," without adding, "by the greater weight of the evidence"; but, if this should be held to be erroneous, standing alone, an examination of the whole charge shows that immediately before the part complained of his honor told the jury, "You cannot allow any damages under the third issue unless you find from the evidence and by its greater weight, the burden being on the plaintiff to so satisfy you, that the phone was cut out through malice or was cut out wantonly or recklessly."

The learned counsel for the defendant does not contend, in his carefully prepared brief, that there was no evidence to support a finding for the plaintiff on the issue of punitive damages, and it is therefore unnecessary to discuss the evidence bearing upon the issue, which in our opinion was sufficient to justify submitting it to the jury.

[6] The last exception is to a part of the charge defining the duty of the defendant to its patrons, as follows: "Defendant's business is one which is affected with a public use, and the company is a public service corporation, with certain well-defined rights and duties, among the latter of which is to give to each and all of its patrons, and to those who desire to become patrons, courteous and prompt service in the transmission of messages; and it is the duty of the defendant to be sure that it is strictly within its rights before it undertakes to deprive one of the public of the rights of its service." This rule imposes no greater burden on the defendant than is imposed on all who are under legal or contractual obligations to others, as all must be sure they are strictly within their rights before they refuse to perform a duty arising from contract or imposed by

law, or they will be liable in damages for failure to do so. The language of David Crockett, "Be sure you are right and then go ahead," has become axiomatic.

We find no error.

No error.

BROWN, J. (dissenting). The judge submitted these issues: (1) Did the defendant unlawfully cut out plaintiff's telephone, as alleged in the complaint? Answer: Yes. (2) If so, what actual damage is the plaintiff entitled to recover therefor? Answer: (\$100) One hundred dollars. (3) If so, what punitive damage is the plaintiff entitled to recover therefor? Answer: \$500. The court charged: "If you should find that the defendant cut out the phone through malice to the plaintiff, or if it was cut out recklessly, wantonly, without any regard to the rights of the plaintiff, it would still be within your discretion whether or not to punish the defendant. You can give damages on the third issue if you are satisfied it was done recklessly, wantonly, maliciously; or you cannot if you find it was so done."

I am of the opinion there is no just ground upon the evidence in this case to warrant the imposition of punitive damages. The plaintiff's own evidence shows there was a bona fide difference between him and defendant's manager as to whether he had paid his phone rental. Plaintiff admits that his phone charges became due April 1st, and that up to June 3d he had not paid them, although asked for them repeatedly. He claims to have paid them to Murray, defendant's clerk, on June 3d. The defendant had indulged him for a full month. On June 29th, being dunned again for his dues, he stated to defendant's manager, Boyd, that he had paid them in full. Boyd said, "Our books show only \$1.50 was paid, and if you will bring your receipt around we will be glad to fix our books." Plaintiff admits that he could not find his receipt. Plaintiff further testifies that on June 27th he and his wife had gone to a hospital to see her father, and on return home they found the phone cut out. Plaintiff on June 29th paid the balance of \$3 under protest and the phone was at once restored. He was without the use of a phone about 36 hours. A week afterwards his wife found the receipt. Plaintiff further testifies that Murray came to see him and asked to see the receipt and he declined to let him have it. He further says that at once Boyd, defendant's manager, came to see him and offered to settle the matter and pulled out a roll of bills, but plaintiff declined to negotiate.

There is no evidence here of either malice, wantonness, or a reckless disregard of plaintiff's just rights. There is evidence of a bona fide difference as to the payment of plaintiff's rental. He failed to produce his receipt until some time after the phone had been taken out, and at once the defendant's

manager offered to compensate plaintiff for any damage he may have sustained, but plaintiff refused even to discuss the matter.

I believe in holding public service corporations to a full performance of their duty, but they are compelled to use human beings to perform their functions for them, and humanity is not infallible.

In this case an honest mistake was made, and \$100 actual damage is a very large compensation for the injury suffered. I find nothing in the record which in my opinion warrants the imposition of "smart money" upon defendant.

(162 N. C. 409)

HINES v. CITY OF ROCKY MOUNT.

(Supreme Court of North Carolina. May 28, 1913.)

1. MUNICIPAL CORPORATIONS (§ 733*)—GOVERNMENTAL POWERS — CONSERVATION OF PUBLIC HEALTH.

Under Rocky Mount City Charter, Priv. Laws 1907, c. 209, § 40, subsec. 21, declaring that the board of aldermen shall have power to make and control regulations for the conservation of public health and may create and appoint a board of health to exercise and carry out such powers under the supervision and control of such board, the laying out of a street by the city through a brickyard, and the acts of the city's employes in filling a hole in the street with rubbish, etc., were chiefly in the exercise, or attempted exercise, of powers created by the charter, governmental in character.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 1547-1549, 1561; Dec. Dig. § 733.*]

2. MUNICIPAL CORPORATIONS (§ 736*)—NUISANCES—LIABILITY.

The rule that, unless a right of action is given by statute, municipal corporations may not be held liable to individuals for failure to perform, or neglect in performing, duties governmental in their nature is subject to the limitation that neither a municipal corporation nor other governmental agency may establish and maintain a nuisance causing appreciable damage to the property of a private owner without being liable therefor.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. § 1552; Dec. Dig. § 736.*]

3. MUNICIPAL CORPORATIONS (§ 742*)—NUISANCES—LIABILITY.

In an action against a city for maintaining a nuisance, the measure of damages was confined to the diminished value of plaintiff's property affected thereby, and hence evidence of sickness attributable to the nuisance, while admissible as bearing indirectly on the diminished value of the property, could not be properly considered as a direct element of damage.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 1560, 1563; Dec. Dig. § 742.*]

Walker and Allen, JJ., dissenting.

Appeal from Superior Court, Edgecombe County; Daniels, Judge.

Action by Watson Hines against the City of Rocky Mount to recover damages caused by an alleged nuisance. Judgment for plain-

tiff, and defendant appeals. Reversed and remanded.

On the trial, it was made to appear that in 1910 plaintiff and his family were occupying a house and lot in Rocky Mount, when the town authorities, professing to act under powers conferred by the charter, etc., and for sanitary purposes, etc., organized and directed a general cleaning up of the town; that plaintiff's house was built on a street which had been laid out by a land company, the street being through an old brickyard, and in which there was a hole 15 feet long by 12 feet wide and 2 or 3 feet in depth, and the agents and employes of the town in carrying out the purpose, and acting under instructions, threw the trash, rubbish, etc., into this hole, partly to put the same out of the way and also with a view of filling the hole that it might the better be used for the streets. The testimony on part of plaintiff tended to show that in filling this hole the employes threw garbage, refuse, etc., and caused foul stench and odors, resulting in great annoyance and inconvenience to plaintiff and his family, and rendering several of them sick with fever, causing outlay for expense, loss of time, etc. There was evidence on part of defendant tending to show that no nuisance had been created, and that there were other sources of infection on or near the premises entirely sufficient to account for the alleged sickness and much more likely to cause it.

On issues submitted, the jury rendered the following verdict:

"(1) Did the defendant maintain or cause to exist on Holly street a public nuisance by reason of filling up the hole in front of plaintiff's house, as alleged in the complaint? Answer: Yes.

"(2) Was the plaintiff damaged thereby? Answer: Yes.

"(3) If so, what damage did he sustain? Answer: \$890."

Judgment on the verdict for plaintiff, and defendant excepted and appealed, assigning for error: (1) The refusal of the court to nonsuit plaintiff; (2) allowing as a direct element of damages the sickness in plaintiff's family and costs incident to same, etc.

T. T. Thorne and L. V. Bassett, both of Rocky Mount, for appellant. J. W. Keel, of Rocky Mount, and W. O. Howard, of Tarboro, for appellee.

HOKB, J. (after stating the facts as above).

[1] The charter of the city of Rocky Mount, Priv. Laws 1907, chap. 209, sec. 40, subsec. 21, provides, in general terms, that the Board of Aldermen shall have power to make proper regulations for the conservation of the public health and may create and appoint a board of health to exercise and carry out such powers under the supervision and control of the first-mentioned board.

The acts complained of were chiefly in the exercise, or attempted exercise, of the powers there conferred, and should be considered governmental in character. *Springfield Insurance Co. v. Keeseville*, 148 N. Y. 46, 42 N. E. 405, 30 L. R. A. 660, 51 Am. St. Rep. 667; *Love v. City of Atlanta*, 95 Ga. 129, 22 S. E. 29, 51 Am. St. Rep. 64; 1 *Abbott on Municipal Corporations*, p. 304, § 147.

[2] This being the correct position, our decisions hold the general rule to be, and they are in accord with well-considered authority elsewhere, that: "Unless a right of action is given by statute, municipal corporations may not be held civilly liable to individuals for failure to perform, or neglect in performing, duties governmental in their nature, including generally all duties existent or imposed upon them by law for the public benefit." *Harrington v. Greenville*, 159 N. C. 634, 75 S. E. 849, citing and referring, among other cases, to *Hull v. Roxboro*, 142 N. C. 453, 55 S. E. 351, 12 L. R. A. (N. S.) 638; *Peterson v. Wilmington*, 130 N. C. 76, 40 S. E. 853, 56 L. R. A. 959; *McIlhenney v. Wilmington*, 127 N. C. 146, 37 S. E. 187, 50 L. R. A. 470; *Moffitt v. City of Asheville*, 103 N. C. 237, 9 S. E. 695, 14 Am. St. Rep. 810. See, also, *Hill v. Boston*, 122 Mass. 344, 23 Am. Rep. 332; *Commonwealth v. Kidder et al.*, 107 Mass. 188; *Smith's Modern Law of Municipal Corporations*, § 780.

This general principle is subject to the limitation that neither a municipal corporation nor other governmental agency is allowed to establish and maintain a nuisance causing appreciable damage to the property of a private owner without being liable for it. To the extent of the damage done to such property, it is regarded and dealt with as a taking or appropriation of the property, and it is well understood that such an interference with the rights of ownership may not be made or authorized except on compensation first made pursuant to the law of the land. *Little v. Lenoir*, 151 N. C. 415, 66 S. E. 337; *Nevins v. City of Peoria*, 41 Ill. 502, 89 Am. Dec. 392; *Winchell v. Waukesha*, 110 Wis. 101, 85 N. W. 668, 84 Am. St. Rep. 902; *Eaton v. Railroad*, 51 N. H. 504, 12 Am. Rep. 147; *Bohan v. Port Jervis, etc., Co.*, 122 N. Y. 18, 25 N. E. 246, 9 L. R. A. 711; *Joplin Min. Co. v. City of Joplin*, 124 Mo. 129, 27 S. W. 406; *Fertilizer Co. v. Malone*, 73 Md. 268, 20 Atl. 900, 9 L. R. A. 737, 25 Am. St. Rep. 595; *Franklin Wharf Co. v. Portland*, 67 Me. 46, 24 Am. Rep. 1; *Village of Dwight v. Hayes*, 150 Ill. 273, 37 N. E. 218, 41 Am. St. Rep. 367; *Langley v. Augusta*, 118 Ga. 590, 45 S. E. 486, 98 Am. St. Rep. 133; 3 *Abbott, Municipal Corporations*, § 961; 1 *Lewis, Eminent Domain* (3d Ed.) § 65.

[3] In affording redress for wrongs of this character, injuries caused by a nuisance wrongfully created in the exercise of governmental functions, our decisions hold, as the correct deduction from the above principle,

that the damages are confined to the diminished value of the property affected, and that sickness attributable to such nuisance may not be properly considered as a direct element of damage (*Metz v. City of Asheville*, 150 N. C. 748, 64 S. E. 881, 22 L. R. A. [N. S.] 940; *Williams v. Greenville*, 130 N. C. 93, 40 S. E. 977, 57 L. R. A. 207, 89 Am. St. Rep. 860), a position which finds support in decisions of other courts of recognized authority (*Hughes v. City of Auburn*, 161 N. Y. 96, 55 N. E. 389, 46 L. R. A. 636; *Folk v. Milwaukee*, 108 Wis. 359, 84 N. W. 420). The evidence, or some of it, may be relevant on the question of the diminished value of the property, and might, in given instances, present a case for injunctive relief, but may not be made the basis for a direct estimate and award of uncertain and unrestrained damages.

Speaking to some of the underlying reasons for the position, O'Brien, Judge, delivering the opinion in the *Hughes Case*, among other things, said: "If an individual injured by disease produced by the acts or neglect of a city, such as are stated in the complaint, can recover damages at all, it must be upon some principle of the common law; and, had it been suggested half a century ago that such a principle existed, the assertion would have been received with some surprise. In the form in which this case comes here there is ample room to urge in argument elements of individual hardship, well calculated to disturb the mind and divert it from the questions of law that underlie the action. On the principle that there can be no wrong without a remedy, courts are sometimes astute to discover grounds for relief in cases of this character, that, when applied as general principles to like cases, are found to be exceedingly inconvenient, if not untenable, and hence very frequently have to be distinguished, modified, or entirely abandoned. The principle upon which the judgment in this case rests is that an individual who has suffered from disease, caused by the neglect of a city to observe sanitary laws with reference to its sewer system, may recover damages from the city. This principle, if sanctioned and applied generally to all cases coming within its scope, cannot fail to produce evils much more intolerable than any that can possibly arise from such acts of omission or commission as the plaintiff states as the basis of this action. It must necessarily become the prolific parent of a vast mass of litigation which the municipality can respond to only by taxation, imposed alike upon the innocent and the guilty"—and, further: "In the construction and maintenance of a sewer or drainage system a municipal corporation exercises a part of the governmental powers of the state for the customary local convenience and benefit of all the people, and in the exercise of these discretionary functions the municipality cannot be required to respond in damages to

individuals for injury to health resulting either from omissions to act or the mode of exercising the power conferred on it for public purposes, to be used at discretion for the public good. I have attempted to state some of the reasons that underlie this principle and their application to this case with the evil results that must follow any departure from it."

Applying the doctrine as it obtains with us, we must hold that there was error in allowing the jury to consider the testimony as to sickness of various members of the plaintiff's family as a direct element in estimating the damages. The motion to nonsuit was properly overruled because there were facts in evidence tending to show the existence of an actionable nuisance, causing damage to the proprietary rights of the plaintiff and entitling him in any event to a recovery for nominal damages. It does not appear what was the nature of plaintiff's tenure, whether as owner or otherwise, but, whether as owner or renter, he is entitled to relief for wrongful injury causing damage to his proprietary rights. *Smith v. City of Sedalia*, 182 Mo. 1, 81 S. W. 165; *Grantham v. Gibson*, 41 Wash. 125, 83 Pac. 14, 3 L. R. A. (N. S.) 447, 111 Am. St. Rep. 1003.

The case of *Downs v. City of High Point*, 115 N. C. 182, 20 S. E. 385, chiefly concerned the framing and sufficiency of the issues, and the mind of the court was not directly addressed to the question presented here. To the extent, however, that the *Downs* Case sanctions the principle that damages for specific cases of sickness can be recovered at the suit of an individual citizen by reason of an injury occurring from the exercise of governmental functions, the case has been disapproved both in *Metz v. Asheville*, supra, and *Williams v. Greenville*, supra, and is no longer authoritative on that position.

And the cases of *Durham v. Cotton Mills*, 141 N. C. 615, 54 S. E. 453, 7 L. R. A. (N. S.) 321, and *Vickers v. Durham*, 132 N. C. 880, 44 S. E. 685, are addressed to the position of restraining the discharge of sewage by reason of apprehended injury, and the amount of damages for injuries committed and the proper rules which should prevail on such an issue were not directly presented or determined.

For the error indicated, defendant is entitled to a new trial, and it is so ordered.

New trial.

WALKER, J. (dissenting). While I agree with the majority of the court that the defendant is liable for damage to the property of plaintiff, it is my opinion that it is also responsible for sickness caused by its tortious act. It may be that the cases supporting the opposite view, which is now taken by this court, may be numerically larger than those favoring my position, though I have not counted them, but I do not think it can safely be said that the weight of authority,

or the greater force of reasoning, is on that side. It is held in numerous well-considered decisions that a city is not absolved, even as a governmental agency, from liability for a nuisance caused in repairing or cleaning streets by dumping unhealthy refuse or rubbish near a plaintiff's house, on the theory that street cleaning is a duty and a public benefit in which the plaintiff shared, and even a prompt abatement by the city of the nuisance does not prevent a recovery for damages arising during its continuance. *Haag v. Vanderburgh County*, 60 Ind. 511, 28 Am. Rep. 654; *New Albany v. Slider*, 21 Ind. App. 392, 52 N. E. 626.

In 28 Cyc. p. 1293, and note 42 et seq., will be found many cases sustaining the principle upon which the proposition just stated rests, and which also supports this text, under the title, "Nuisance Created or Permitted by Corporation": "If in the exercise of its corporate powers a municipal corporation creates or permits a nuisance by nonfeasance or misfeasance, it is guilty of tort, and like a private corporation or individual, and to the same extent is liable to damages in a civil action to any person suffering special injury therefrom. So a municipal corporation has no more right to erect and maintain a nuisance on its own land than a private individual would have to maintain such a nuisance on his land; it is entitled to exercise the same rights in respect to the use of its property as an individual, and any lawful use thereof, or the doing of those things which the law authorizes, cannot, it is held, amount to a nuisance in itself, although the execution of the power may be in such a manner as to result in an actionable nuisance." The cases thus collected were decided by courts entitled to the highest respect and the greatest consideration because of their admitted ability and learning. The case of *Downs v. High Point*, 115 N. C. 182, 20 S. E. 385, is cited in the note to 28 Cyc. p. 1293, as sustaining the doctrine, and we think it does. It is said that the only question presented there related to the framing of the issues, but I think not. The judge charged the jury as follows: "The plaintiff alleges that his special damage consists in the fact that proximity to alleged nuisances caused illness of a serious nature to himself and family, much expense on account of such illness, and that the other parts of his neighborhood were not so affected. If this be true, it is special damage within the meaning of the law"—and in that immediate connection, the court, in its opinion by Justice Avery, said: "We think there was no error in refusing to instruct the jury upon the evidence that plaintiff could not recover. The instruction given was warranted by the evidence, and embodied the principle laid down by leading text-writers. Wood on Nuisances, §§ 561-574."

I do not think that *Asbury v. Town of Albemarle*, 78 S. E. 146, and *Sewerage Co.*

v. Monroe, 78 S. E. 151, have any direct bearing or decisive effect upon the question. The decisions in those cases may well be sustained upon grounds and for reasons not applicable to this case, and the same may be said of the cases cited in the opinion of the court, such as *Hull v. Roxboro*, 142 N. C. 453, 55 S. E. 351, 12 L. R. A. (N. S.) 638; *Peterson v. Wilmington*, 130 N. C. 76, 40 S. E. 853, 56 L. R. A. 959; *Metz v. Asheville*, 150 N. C. 748, 64 S. E. 881, 22 L. R. A. (N. S.) 940.

It is said in 2 *Wood on Nuisances* (3d Ed.) § 561, p. 756, that "the right to have the air float over one's premises free from all unnatural or artificial impurities is a right as absolute as the right to the soil itself." We have held in *Fitzgerald v. Concord*, 140 N. C. 110, 52 S. E. 309; *Brown v. Durham*, 140 N. C. 253, 53 S. E. 513; *Brewster v. Elizabeth City*, 142 N. C. 11, 54 S. E. 784; *Kinsey v. Kinston*, 145 N. C. 106, 58 S. E. 912; *Revis v. Raleigh*, 150 N. C. 352, 63 S. E. 1049; and quite recently in *Bailey v. City of Winston*, 167 N. C. 252, 72 S. E. 966, and *Smith v. Winston*, at this term, 77 S. E. 1093—that a municipality is under a positive duty to keep its streets in reasonably passable condition, and for any defects thereon, due to the neglect of its corporate duty or to its negligence, it is liable in damages to persons injured thereby. Where it permits an excavation, or hole, in the street to remain open and unguarded, after notice of its existence, it has been held liable to a person falling therein and breaking his limb, with consequent injury to his health. I can perceive no substantial difference in law, or in fact, between an injury to health caused by digging a hole and the same general kind of injury caused by filling it up. The ground of action is the wrong to the citizen in the enjoyment of his health and property. It can make little or no difference to him whether his health is wrecked as the result of falling in a hole or by inhaling noxious odors and contaminated air thrown off from rubbish or refuse deposited in the hole for the purpose of closing it, and there can be no difference in principle between the two cases.

It is argued that it would produce a multiplicity of suits, "or become the parent of a vast mass of litigation," if a city was held liable in such a case as this one, and that taxation to pay the judgments would be "imposed alike upon the innocent and guilty." The last reason would apply whether we hold the city liable for injury to health or only for injury to property, and the former would apply to a case for a defect in the streets by which numerous persons may be injured in body and health, or where there are numerous defects in streets causing like injury. The reasons are therefore inadequate to overthrow the common-law principle that "where there is a right, there is also a remedy." The duty of the municipality to keep its streets in good condition and proper repair is statutory. It is enjoined by the

law, also that it shall take such measures as are appropriate to prevent or abate nuisances and to preserve and safeguard the health of its citizens. The corporate authorities of a town are not only required to keep its streets in good condition and repair, but are indictable for not doing so (*State v. Commissioners*, 6 N. C. 371), and are equally liable, civilly or criminally, for maintaining a nuisance upon its land within the corporate limits (2 *Wood on Nuisances*, § 743, p. 1004).

In a well-considered case it was held to be a "well-recognized rule that municipal corporations are liable for torts in certain classes of cases, including nuisances, in the same manner as natural persons." *Haag v. Board of Commissioners*, 60 Ind. 511, 23 Am. Rep. 654, citing several text-writers, among other authorities, and quoting this passage from 2 *Addison on Torts* (D. & R. Ed.) p. 1315: "A municipal corporation has no more right to maintain a nuisance than an individual would have, and for a nuisance maintained upon its property the same liability attaches against a city as to an individual." In the *Haag Case* defendant was charged with injuring the health of plaintiff's family, causing the death of her son by the erection of a pesthouse for the detention and treatment of smallpox patients. This elementary principle was applied in *Harper v. City of Milwaukee*, 30 Wis. 365, and thus stated: "The general rule of law is that a municipal corporation has no more right to erect and maintain a nuisance than a private individual possesses, and an action may be maintained against such corporation for injuries occasioned by a nuisance for which it is responsible, in any case in which, under like circumstances, an action could be maintained against an individual." *Pittsburgh City v. Grier*, 22 Pa. (10 Harris) 54 (60 Am. Dec. 65); *Brower v. Mayor, etc., of New York*, 3 Barb. (N. Y.) 254, *Young v. Leedom*, 67 Pa. 351, and *Delmonico v. Mayor, etc., of New York*, 1 Sandf. (N. Y.) 222, are a few of the numerous cases which assert or recognize this principle." See, also, *Kolb v. Knoxville*, 111 Tenn. 311, 76 S. W. 823; *Stoddard v. Village of Saratoga Springs*, 127 N. Y. 261, 27 N. E. 1030; *City of Ft. Worth v. Crawford*, 74 Tex. 404, 12 S. W. 52, 15 Am. St. Rep. 840; *Clayton v. City of Henderson*, 103 Ky. 228, 44 S. W. 667, 44 L. R. A. 474; *City of Valparaiso v. Moffitt*, 12 Ind. App. 250, 39 N. E. 909, 54 Am. St. Rep. 522.

I may remark here that not only does the case of *Harper v. Milwaukee*, supra, decide the very question before us, but it has been expressly recognized and approved by this court as stating the law correctly in *Jones v. North Wilkesboro*, 150 N. C. 646, 64 S. E. 866. Justice Connor says in that case: "It is manifest that a municipal corporation has no legal right to establish and maintain a condition which creates a public nuisance per se; that is, a condition which seriously endangers the health and lives of the peo-

ple. *Harper v. Milwaukee*, 30 Wis. 365." A municipal corporation is not exempt from responsibility when the injury is accomplished by a corporate act, which is in the nature of a trespass upon the rights of another, and it cannot, by any means, or in any manner, create with impunity a public or private nuisance, nor has it any more immunity from legal liability for causing or maintaining the same than an individual has under the law. *Noonan v. City of Albany*, 79 N. Y. 470, 35 Am. Rep. 540; *Selfert v. City of Brooklyn*, 101 N. Y. 136, at page 142, 4 N. E. 321, at page 323 (54 Am. Rep. 664). The court said in the case last cited, that: "Municipal corporations have quite invariably been held liable for damages occasioned by acts resulting in the creation of public or private nuisances, or for an unlawful entry upon the premises of another, whereby injury to his property has been occasioned." And, again (101 N. Y., at page 144, 4 N. E. 324, 54 Am. Rep. 664), speaking more directly to the question here involved, the court said in that case: "The immunity which extends to the consequences following the exercise of judicial or discretionary power by a municipal body or other functionary presupposes that such consequences are lawful in their character, and that the act performed might in some manner be lawfully authorized. When such power can be exercised so as not to create a nuisance, and does not require the appropriation of private property to effectuate it, the power to make such an appropriation or create such nuisance will not be inferred from the grant." It was further decided in that case, with reference to the liability of the corporation for an act done under authority of its charter: "The rule that a municipal corporation acting under the authority of a statute cannot be subjected to a liability for damages arising from the exercise by it of the authority so conferred is confined to such consequences as are the necessary and usual result of the proper exercise of the authority." It does not shield the corporation where injury results "solely from the defective manner in which the authority was originally exercised and from continuance in wrong after notice of the injury." These principles are also approved in *Bolton v. Village of New Rochelle*, 84 Hun, 281, 32 N. Y. Supp. 442. There is a distinction made in *Selfert's Case* between the judicial and ministerial duties of a municipal corporation with reference to its streets, which it will be well to state here in the words of that court: "It was held (in *Hines v. City of Lockport*, 50 N. Y. 236) that the duty resting upon the corporation of building, opening, and grading streets, sidewalks, sewers, etc., was judicial, but that after they were constructed the duty of keeping them in repair was ministerial, and from an omission to perform that duty liability arose." This harmonizes with our decisions upon the subject. We hold

such corporations liable for injuries from defects in their streets, as we have already seen, whether the defect causes a broken limb or produces broken and shattered health directly, or as a consequence of some preceding injury to the body or limbs. It is a very shadowy distinction to make between an injury to the body and one to the health. I do not think that it can properly be said that the placing of rubbish or other noxious or deleterious substance in a street, even to fill a hole, is the exercise of a judicial duty or a governmental function.

These ideas find strong support in what is said by a recent text-writer, not only in regard to the right of a person who incurs special damage from a tort to sue, but to recover, in such a case, against a municipal corporation when he has sustained injury to his health. "While municipal corporations have no more right than a private person to create or maintain a common nuisance, nevertheless, so long as the injury suffered by each individual is the same in kind as that suffered by every other individual in the community, or section of the community, affected by such a nuisance, none of them can maintain a private action against the corporate body. The only remedy available in such a case is by indictment. But if, even though the nuisance be a public one, a person can show that he has suffered therefrom some special and peculiar damage, differing in kind from that suffered by him in common with the rest of the community, he is entitled to recover in a civil action compensation therefor from the municipality that created or maintained such nuisance. Speaking generally, municipal corporations stand, in regard to the creation and maintenance of private nuisances, on substantially the same footing as private corporations and natural persons. Their rights are no greater; their civil responsibility is generally no less. As a rule, therefore, they are liable in a private action to any individual who suffers damage by reason of a private nuisance created and continued by them." *Williams on Municipal Liability for Torts*, pp. 305, 306. He supports his text by the citation of many cases, to a few of which I will refer specially, and to some striking passages showing the ground and extent of the decision. "These and other facts well warranted the conclusion of the trial court that the act of the defendant, in thus emptying its sewers, constituted an offensive and dangerous nuisance. Moreover, the plaintiff is found to have sustained a special injury to his health and property from the same cause, and we find no reason to doubt that he is entitled not only to compensation for damages thereby occasioned, but also to such a judgment as will prevent the further perpetration of the wrong complained of. *Goldsmid v. Com'rs*, 1 Eq. Cas. 161; 1 Ch. App. Cas. 348." *Chapman v. City of Rochester*, 110 N. Y. 273, 18 N. E. 88, 1 L. R. A. 298,

6 Am. St. Rep. 366. "My neighbor has not the right to excavate his soil in such manner as to create a stagnant and offensive pond, so near my premises as to be a private nuisance by rendering my house unhealthy. He cannot use his property for a purpose that will prevent my enjoyment of mine. 3 Blackst. Com. 217. The same law that protects my right of property against invasion by private individuals must protect it from similar aggression on the part of municipal corporations. A city may elevate or depress its streets as it thinks proper; but if, in so doing, it turns a stream of mud and water upon the grounds and into the cellars of one of its citizens, or creates in his neighborhood a stagnant pond that brings disease upon his household, upon what ground of reason can it be insisted that the city should be excused from paying for the injuries it has directly wrought?" *Nevins v. City of Peoria*, 41 Ill. 502, 89 Am. Dec. 392. It was held in *City of Jacksonville v. Doan*, 145 Ill. 23, 33 N. E. 878, that the city should not be excused from paying for injuries to health which it has directly wrought, and which proceeded from a pond of stagnant water, caused by negligence in improving its streets. The case refers, with approval, to *Nevins v. City of Peoria*, supra, and cites other strong authorities.

It is against natural justice to allow the creation of a dangerous nuisance by a city, affecting the health of a citizen, and then hold the corporation immune from damages. There lurks in this principle of exemption the danger of arbitrary power, which may be oppressively exercised over the helpless and defenseless citizen. As well at once declare that no one can acquire any rights to his home which the municipal corporation is bound to respect, for if he cannot live in it with comfort to himself and family, of what value is it to him? Can the corporation drive him from it by foul and offensive odors and a poisoned atmosphere and then restrict him to mere property damage? There is something more valuable to him, but for which the law, as now declared, allows him nothing. The power of a corporation should be regarded as subject to the just limitation that it is forbidden to be exercised in such manner as to create nuisances injurious to all private rights, health as well as property, especially where such a consequence is not a necessary result of properly exerting its power, and this I believe to be the common law of this country. *Edmondson v. City of Moberly*, 98 Mo. 523, 11 S. W. 990; *City of Hannibal v. Richards*, 82 Mo. 330.

The charter of this corporation (Acts 1907, c. 208, sec. 39) confers upon it the power to abate nuisances, not to create them, and requires the corporation to provide for the proper maintenance, repair, and regulation of the streets. It certainly cannot be argued from these provisions that the unnecessary

creation of a nuisance is a legitimate exercise of any function of government possessed by the corporation. If it is negligent in the performance of its ministerial duties, such as repairing its streets, and injury results to others of whatsoever kind, we have held repeatedly that it commits a legal wrong, for which it must respond in damages.

ALLEN, J. (dissenting). The case of *Asbury v. Town of Albemarle*, 78 S. E. 146, decided at this term, and the one now being considered, illustrate the difficulty of marking the line between the ministerial duties of a municipal corporation, in the performance of which it acts as a private corporation, and its governmental powers. In the *Albemarle* Case the court said: "It is well settled that local conveniences and public utilities, like water and lights, are not provided by municipal corporations in their political or governmental capacity, but in that quasi private capacity in which they act for the benefit of their citizens exclusively"—and upon this principle held an act of the Legislature unconstitutional because it interfered with the discretion of the municipal corporation in the establishment of a system of waterworks, this being done in its private capacity; while in this case it is held that throwing garbage in a hole in the street is governmental. I do not agree to the decision in either case. I think the act in the *Albemarle* Case constitutional, and that it is just and wise, as it simply requires a municipal corporation, when it has induced another corporation to establish a private system of waterworks within its limits, to buy or condemn such system, paying only what it is worth, before it constructs a system of its own, and thereby confiscates property, devoted to a use within the corporation, by its consent. In the present case the court admits that the defendant is liable, but restricts the recovery to damages to property, and denies the right to recover for sickness of the plaintiff or his family, or for expenses incurred in restoring them to health. I admit that there is authority in favor of the opinion of the court, but to my mind no good reason has been shown for the distinction, or for departing from the principle, well-nigh universal, that one who does a wrong is liable for all the damages caused naturally and proximately thereby. The rule adopted by the court is, as it appears to me, illogical, and has been arbitrarily established because of the fear that if recoveries are allowed for sickness, municipal corporations may become bankrupt, and also because of the growing tendency to sacrifice the rights of the individual to some idea of public policy. We are warned that "public policy is a dangerous guide in the discussion of a legal proposition," and that those who follow it far are apt "to bring back the means of error and delusion"; but, if it

should be considered at all, I think it wiser and better for a loss to be distributed among all the citizens of a municipality than to leave it, where the municipality has placed it, on the shoulders of one man, and that the best public policy includes justice to the individual.

I cannot believe it is in accordance with law or justice that a municipal corporation may throw garbage, sewage, etc., on the land of a citizen, against his will, and bring death and sickness to his wife and children, and that the citizen may recover damages for injury to his land, but can recover nothing for injury to his wife and children.

(94 S. C. 444)

ATKINSON v. SOUTHERN EXPRESS CO.
(Supreme Court of South Carolina. May 14, 1913.)

1. COMMERCE (§ 33*)—REGULATION—INTER-STATE SHIPMENT OF LIQUOR.

Cr. Code 1912, §§ 794, 814, 825, parts of the dispensary law, were unconstitutional, in so far as they attempted to prohibit the importation of liquor from another state for personal use, at the time of their adoption prior to the passage by Congress of the Webb Act, prohibiting interstate commerce in intoxicating liquors into a state to be used in violation of the state law.

[Ed. Note.—For other cases, see Commerce, Cent. Dig. §§ 26, 81; Dec. Dig. § 33.*]

2. STATUTES (§ 51*)—REMOVAL OF CONSTITUTIONAL OBJECTIONS—EFFECT.

The removal of the constitutional objections to such statutes by the enactment of the Webb Act (Act March 1, 1913, c. 90, 37 Stat. 699) did not give them force and effect by operation of law, nor can they be validated by a subsequent statute, since an unconstitutional statute is utterly void.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. § 48; Dec. Dig. § 51.*]

3. COMMERCE (§ 14*)—INTOXICATING LIQUORS—WEBB ACT.

It was not the intention of the Webb Act (Act March 1, 1913, c. 90, 37 Stat. 699) to interfere with the policy of the state in regard to the importation of liquor, but merely to provide that the enforcement of a state statute should not be interfered with by the interstate commerce clause of the federal Constitution.

[Ed. Note.—For other cases, see Commerce, Cent. Dig. §§ 30, 92; Dec. Dig. § 14.*]

4. COMMERCE (§ 14*)—INTOXICATING LIQUORS—STATE REGULATION.

Since the passage of the Webb Act (Act March 1, 1913, c. 90, 37 Stat. 699), which divests intoxicating liquors of their interstate commerce character, the Legislature has the power to adopt a statute with provisions similar to those in the dispensary law, held unconstitutional prior to that enactment.

[Ed. Note.—For other cases, see Commerce, Cent. Dig. §§ 30, 92; Dec. Dig. § 14.*]

5. CONSTITUTIONAL LAW (§ 240*)—EQUAL PROTECTION OF LAWS—REGULATION OF BUSINESS—INTOXICATING LIQUORS.

The classification of counties, so as to allow the sale of liquor in some of them while it is prohibited in others, is not a violation of Const. U. S. Amend. 14, § 1, which provides

that no state shall deny to any person within its jurisdiction equal protection of the laws.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. §§ 688, 692, 693, 697-699; Dec. Dig. § 240.*]

Fraser, J., dissenting.

Original application by W. W. Atkinson for an injunction against the Southern Express Company. Injunction granted.

John J. Earle, of Columbia, for appellant. Barron, Moore, Barron & McKay, of Columbia, for respondent.

GARY, C. J. We approach the solution of the question under consideration with a full appreciation of our responsibility, and its far-reaching consequences throughout the country. And we shall brush aside technical objections, and endeavor to rest our conclusion upon such well-settled principles, as must be given recognition by all, except those in favor of judicial legislation.

This is an application to the court, in the exercise of its original jurisdiction, for an order enjoining the defendant from enforcing the following regulation adopted by the defendant, to wit: "No intoxicating liquors should be received for, or delivered at, destination in the state of South Carolina, except when addressed to county dispensaries established by law. If any prohibited shipment should reach destination in South Carolina, they must be returned by first express to consignor, subject to charge both ways."

The determination of the plaintiff's right to relief for which he prays is dependent upon the construction of what is denominated the Webb Act (Act March 1, 1913, c. 90, 37 Stat. 699) in connection with the statutes of the state, which was recently adopted by Congress, and is as follows: "An act divesting intoxicating liquors of their interstate character in certain cases. Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, that the shipment or transportation, in any manner or by any means whatsoever, of any spirituous, vinous, malted, fermented, or other intoxicating liquor of any kind, from one state, territory, or district of the United States, or place noncontiguous to but subject to the jurisdiction thereof, into any other state, territory, or district of the United States, or place noncontiguous to but subject to the jurisdiction thereof, or from any foreign country into any state, territory, or district of the United States, or place noncontiguous to but subject to the jurisdiction thereof, which said spirituous, vinous, malted, fermented, or other intoxicating liquor is intended, by any person interested therein, to be received, possessed, sold, or in any manner used, either in the original package or otherwise, in violation of any law of such state, territory, or district of the Unit-

ed States, or place noncontiguous to but subject to the jurisdiction thereof, is hereby prohibited."

Before proceeding to construe said act, it may be well to state, in a general way, the previous law in regard to the transportation of alcoholic liquors from one state into another.

In 1890 Congress passed an act, entitled "An act to limit the effect of the regulations of commerce between the several states and with foreign countries in certain cases." This was known as the "Wilson Act," and its provisions were as follows: "That all fermented, distilled, or other intoxicating liquors or liquids transported into any state or territory or remaining therein for use, consumption, sale or storage therein, shall upon arrival in such state or territory be subject to the operation and effect of the laws of such state or territory enacted in the exercise of its police powers, to the same extent and in the same manner as though such liquids or liquors had been produced in such state or territory, and shall not be exempt therefrom by reason of being introduced therein in original packages or otherwise." Act Aug. 8, 1890, c. 728, 26 Stat. U. S. 318 (U. S. Comp. St. 1901, p. 3177).

In the case of *Rhodes v. Iowa*, 170 U. S. 412, 18 Sup. Ct. 664, 42 L. Ed. 1088, it was held that, under the Wilson Act, a state law attaches to an interstate commerce shipment, *only* after the arrival of the goods at their destination, and their delivery to the consignee; and that a state statute, attempting to operate upon the liquors so shipped, before they reached their destination and were delivered to the consignee, was unconstitutional.

In the case of *Scott v. Donald*, 165 U. S. 100, 17 Sup. Ct. 272, 41 L. Ed. 632, the court had under consideration the construction of a statute of this state containing provisions similar to those hereinbefore mentioned, and used this language: "A law may forbid entirely the manufacture and sale of intoxicating liquors and be valid. * * * But the state cannot, under the congressional legislation referred to (Act of 1890), establish a system which, in effect, discriminates between interstate and domestic commerce in commodities to make and use which are admitted to be lawful. * * * It is sufficient for the present cases to hold, as we do, that when a state recognizes the manufacture, sale, and use of intoxicating liquors as lawful, it cannot discriminate against the bringing of such articles in and importing them from other states; that such legislation is void as a hindrance to interstate commerce and an unjust preference of the products of the enacting state as against similar products of the other states."

The court in the case of *Vance v. Vandercook*, 170 U. S. 444, 18 Sup. Ct. 676, 42 L. Ed. 1100, had under consideration the con-

stitutionality of the dispensary law of this state, then of force. In that case, the court said: "In the inception it is necessary to bear in mind a few elementary propositions, which are so entirely concluded by the previous adjudications of this court that they need only be briefly recapitulated: (a) Beyond dispute the respective states have plenary power to regulate the sale of intoxicating liquors within their borders, and the scope and extent of such regulations depend solely on the judgment of the lawmaking power of the states, provided always they do not transcend the limits of the state authority by invading rights which are secured by the Constitution of the United States, and provided further that the regulations as adopted do not operate a discrimination against the rights of residents or citizens of other states of the Union. (b) Equally well established is the proposition that the right to send liquors from one state into another, and the act of sending the same, is interstate commerce, the regulation whereof has been committed by the Constitution of the United States to Congress, and hence that a state law which denies such a right or substantially interferes with or hampers the same is in conflict with the Constitution of the United States." In reply to the argument that the South Carolina statute then under consideration was not discriminatory for the reasons therein relied upon, the court further said: "But the weight of the contention is overcome, when it is considered that the interstate clause of the Constitution guarantees the right to ship merchandise from one state into another, and protects it until the termination of the shipment, by delivery at the place of consignment; and this right is wholly unaffected by the act of Congress which allows state authority to attach to the original package, before sale, but only after delivery. It follows that, under the Constitution of the United States, *every resident of South Carolina is free to receive for his own use liquor from other states, and that the inhibitions of the state statute do not operate to prevent liquors from other states from being shipped into such state on the order of a resident for his use. * * * The right of persons in one state to ship liquor into another state to a resident for his own use is derived from the Constitution of the United States, and does not rest on the grant of the state law.*" (Italics added.)

In the case of *Louisville, etc., v. Brewing Co.*, 223 U. S. 70, 32 Sup. Ct. 189, 56 L. Ed. 355, the court had under consideration the statute of Kentucky which provides that it shall be unlawful for any common carrier to transport beer or intoxicating liquor to a consignee, in any locality within the state, where the sale of such liquor has been prohibited by voice of the people, under the local option law of the state. The court said: "The legality of the attitude of the rail-

road company toward interstate shipments of intoxicating liquors to local option points in Kentucky must turn upon the validity of that legislation as applied to interstate shipments. By a long line of decisions, beginning even prior to *Lelsy v. Harden*, 135 U. S. 100 [10 Sup. Ct. 681, 34 L. Ed. 128], it has been indisputably determined: (a) That beer and other intoxicating liquors are a recognized and legitimate subject of interstate commerce; (b) that it is not competent for any state to forbid any common carrier to transport such articles from a consignor in one state to a consignee in another; (c) that until such transportation is concluded by delivery to the consignee, such commodities do not become subject to state regulation restraining their sale or disposition. The Wilson Act (26 Stat. at L. 313, c. 728, U. S. Comp. St. 1901, p. 3177), which subjects such liquors to state regulation, although still in the original packages, does not apply before actual delivery to such consignee, where the shipment is interstate. Some of the many later cases in which these matters have been so determined and the Wilson Act construed are *Rhodes v. Iowa*, 170 U. S. 412 [18 Sup. Ct. 664, 42 L. Ed. 1088]; *Vance v. W. A. Vandercook Co.*, 170 U. S. 438 [18 Sup. Ct. 674, 42 L. Ed. 1100]; *Heymann v. Southern R. Co.*, 203 U. S. 270 [27 Sup. Ct. 104, 51 L. Ed. 178] 7 Ann. Cas. 1130; *Adams Exp. Co. v. Kentucky*, 214 U. S. 218 [29 Sup. Ct. 633, 53 L. Ed. 972]. Valid as the Kentucky legislation undoubtedly was as a regulation in respect to *intrastate* shipments of such articles, it was most obviously never an effective enactment, in so far as it undertook to regulate interstate shipments to dry points."

In the case of *State v. Rookard*, 87 S. C. 444, 69 S. E. 1076, the court had under consideration the question whether there was error on the part of his honor the circuit judge in ruling that section 1 of the dispensary statute of 1909 (26 St. at Large, p. 60) prohibited the keeping in possession of liquor, under all circumstances, without regard to the manner of acquiring possession, or the purpose for which it was kept. The court said: "It seems clear that the statute cannot be so construed. Such a construction would make the act self-destructive; for other sections of this act, as well as portions of the dispensary statute of 1907 (25 St. at Large, p. 463), recognized by this statute as still in force, provide for the sale of liquor by county dispensaries; and certainly a legal sale and purchase carries the right to the purchaser to keep in his possession the liquor he has purchased, provided he does not apply it to an unlawful use. In addition to this, one may lawfully keep in his possession liquor purchased for personal use under the protection of the interstate commerce clause of the federal Constitution. An attempt by the General Assembly to interfere with this right would be futile, and the presumption is

very strong against the legislative intention to make such an attempt. Indeed, the right to keep in possession liquor so purchased is expressly recognized in section 28 of the dispensary act of 1907, which has not been repealed."

Under the laws of this state, each county is empowered to exercise what is commonly known as the right of local option, for the purpose of determining whether liquors or beverages may be sold therein, by the county through an officer called a dispenser, in the manner provided by the statute.

Elections for the purpose of determining such question were held in the respective counties, and as a result the county of Richland (in which the city of Columbia is situated), and five other counties, voted for the sale of alcoholic liquors; and there are dispensaries at this time, in those counties. This case arose in Richland county.

[1] Section 794 of the Criminal Code provides that "all alcoholic liquors and beverages, whether manufactured in this state or elsewhere, or any mixture by whatsoever name called, which if drunk to excess will produce intoxication, are hereby declared to be detrimental, and their use and consumption to be against the morals, good health and safety of the state, and contraband."

Section 814 of the Criminal Code is as follows: "All fermented, distilled or other liquors, or liquids containing alcohol, transported into this state, or remaining herein for use, sale, consumption, storage, or other disposition, shall, upon introduction and arrival in this state, be subject to the operation and effect of this law to the same extent and in the same manner as though such liquors or liquids had been produced in this state."

Section 825 contains the following provisions: "No person except, as expressly permitted in this chapter, shall bring into this state, or transport from place to place within this state, by wagon, cart or other vehicle, or by any other means or mode of carriage, any liquor or liquids containing alcohol, under a penalty of one hundred dollars, or imprisonment for thirty days, for each offense, upon conviction thereof, as for a misdemeanor. * * * Provided, that said penalty shall not apply to any liquor in transit when changed from car to car to facilitate transportation across the state. Provided, further, that this section does not apply to liquors in course of shipment to a county dispensary, or purchased from a county dispensary and being transported for a lawful purpose to some place in a county where there is a dispensary, and their delivery is otherwise lawful. All liquors in this state, except those purchased from a county dispensary for a lawful use, and those passing through this state, consigned to points beyond this state, shall be deemed contraband, and may be seized in transit without warrant. And any steamboat, sailing vessel,

railroad, express company or other common carrier transporting or bringing into this state alcoholic liquors for sale or use therein, except by the dispensary, shall suffer a penalty of five hundred dollars."

From the foregoing it clearly appears that the provisions of the dispensary law, in so far as they attempt to prohibit the importation of liquor into the state from another state for personal use were unconstitutional when the statute was enacted. It was because of this fact that liquors for personal use have been permitted to be brought from another state, into a county, even after the sale and use of liquor had been prohibited therein, as the result of an election under the local option laws.

We next proceed to determine whether the provisions of the dispensary statutes which we have declared were unconstitutional became operative after the adoption of the recent act of Congress.

[2] The removal of the constitutional objections to a statute, that rendered it null and void, does not by operation of law give it force and effect, nor can it be made valid, by a subsequent statute.

One reason why vitality cannot be imparted to an unconstitutional statute is that, after the objections that rendered it null and void are removed, it might have an entirely different effect from what it had when it was enacted. Let us take the present case as an illustration. When the elections were held, under the local option laws of 1907, for the purpose of determining whether the sale of liquor should be permitted or prohibited in the respective counties, the electors were presumed to know the law. Prior to that time, the United States Supreme Court had rendered a decision in *Vance v. Vandercook*, 170 U. S. 468, 18 Sup. Ct. 645, 42 L. Ed. 1111, and in the other cases hereinbefore mentioned, which held that any resident or citizen of this state had the right to order liquor from another state, for his own personal use; and that when it was brought into the state and delivered to him it was not subject to seizure under the state laws for the reason that a state statute, prohibiting the importation of liquor into the state, was discriminatory, *as long as the state recognized it as a legitimate subject of commerce, by authorizing its sale through a dispensary.*

Even when the liquor was imported, for personal use, into a county where the sale thereof was absolutely prohibited, the liquor was not subject to seizure.

The fact that an elector may have been willing to vote against the sale of liquor in a county, except when it was imported therein from another state for personal use, does not necessarily show that he would be willing to vote against the sale of liquor therein when he knew he could not import it for that purpose.

"When a statute is adjudged to be uncon-

stitutional, it is as if it never had been. Rights cannot be built up under it; contracts which depend upon it for their consideration are void; it constitutes a protection to no one who has acted under it; and no one can be punished for having refused obedience to it before the decision was made. And what is true of an act void in toto is true, also, as to any part of an act which is found to be unconstitutional, and which, consequently, is to be regarded as having never, at any time, been possessed of any legal force." *Cooley's Con. Lim.* 222.

"Courts are bound to treat unconstitutional enactments as void, in whatever proceedings they may be encountered. An unconstitutional statute, though having the form and name of law, is in reality no law." *Ex parte Hollman*, 79 S. C. 9, 60 S. E. 19, 21 L. R. A. (N. S.) 242, 14 Ann. Cas. 1105.

The pivotal point in a healing or validating statute is that it must be confined to acts *which the Legislature could previously have authorized.*" (Italics added.) *State v. Whitesides*, 30 S. C. 579, 9 S. E. 661, 3 L. R. A. 777; *State v. Neely*, 30 S. C. 587, 9 S. E. 664, 3 L. R. A. 672.

"Although necessarily retroactive, curative acts are not for that reason invalid; for the general rule is that the Legislature can validate any act which it might *originally* have authorized." 26 Enc. of Law, 698, 699; *Hodge v. School District*, 80 S. C. 518, 61 S. E. 1009.

In the case of *State v. Tuffy*, 20 Nev. 427, 22 Pac. 1054, 19 Am. St. Rep. 374, there was an application for a writ of mandamus, requiring the State Treasurer to invest a certain amount, pursuant to the provisions of an amendatory act, which was passed under the mistaken belief that a proposed amendment to the Constitution had been legally adopted, but which the court declared was null and void. Thereafter there was an election for the purpose of determining whether said amendment should be adopted, and after the election the question before the court was whether the subsequent adoption of the constitutional amendment gave force and effect to the statute, which had been declared to be unconstitutional. In denying the application for a writ of mandamus, the court used this language: "It is a misnomer to call such an act a law. It has no binding authority, no vitality, no existence. It is as if it had never been enacted, and it is to be regarded as never having been possessed of any legal force or effect. * * * The act being void, no subsequent adoption of an amendment to the Constitution, authorizing the Legislature to provide for such investment, would have the effect to infuse life into a thing that never had any existence."

In the case of *Vance v. Vandercook*, 170 U. S. 468, 18 Sup. Ct. 645, 42 L. Ed. 1111, it was held that the provisions of a previous statute, which had been declared to be unconstitutional, could not be considered as part

of a statute subsequently enacted, from which they were omitted, merely because they were not inconsistent with its provisions, when there was a clause which only repealed those statutes that were inconsistent with it. In that case the court thus stated the principle: "The law now before us was passed subsequent to the decision in *Scott v. Donald*, holding that the discriminatory clauses in the previous law, and which were declared unconstitutional by this court, are not inconsistent with the present law, therefore they continue to exist, and the present law must be interpreted, as if they were written in it. The error of the argument is so self-evident as to require only a passing notice. The very fact that the omitted provisions had been, before the enactment of the new law, declared to be unconstitutional, affords a conclusive demonstration of their inconsistency, with the present law."

[3] It was not the intention of the Webb Act to interfere with the policy of the state, in regard to the importation of liquors, but merely to provide that the enforcement of a state statute would not be interfered with, or hampered, by the interstate commerce laws. In other words, the act in this respect is passive, while it is incumbent on the states to enact legislation of an active nature, if they are desirous of prohibiting the importation of liquors for personal use or other purpose. But even if Congress had undertaken to give validity to an unconstitutional state statute, it would have been beyond its powers.

[4] While the Legislature cannot pass an act, validating the provisions of the dispensary statute, which we have declared to be unconstitutional, so as to give it a retroactive effect, it nevertheless has the power to adopt a statute with similar provisions, having a prospective effect prohibiting alcoholic liquors from being imported into this state. Such a statute would not contravene any provision of the United States Constitution. As we have already said, the recent act of Congress divests intoxicating liquors of their interstate commerce character, and invests the respective states with power either to prohibit the importation absolutely, or allow it only for sale and use through a dispensary.

[5] The classification of the counties, so as to allow the sale of liquor in some of them, while it is prohibited in others, would not be violative of section 1, of the fourteenth amendment to the Constitution of the United States, which provides that no state shall deny to any person within its jurisdiction the equal protection of the laws.

The rule is thus stated in *Ohio v. Dollison*, 194 U. S. 445, 24 Sup. Ct. 708, 48 L. Ed. 1062: "Plaintiff in error * * * urges that to make an act a crime in certain territory and permit it outside of such territory is to deny to the citizens of the state the equal operation of the criminal laws, and this he charges against and makes a ground of objection to the Ohio statute. This objection goes to the power of the state to pass a local option law, which, we think, is not an open question. The power of the state over the liquor traffic we have had occasion very recently to decide. We said, affirming prior cases, the sale of liquor by retail may be absolutely prohibited by a state. * * * That being so, the power to prohibit it conditionally was asserted, and the local option law of * * * Texas was sustained."

These conclusions render unnecessary the consideration of the question whether the Webb Act is constitutional.

It is the judgment of this court that the petitioner is entitled to the order of injunction for which he prays.

WOODS, HYDRICK, and WATTS, JJ., concur.

FRASER, J. I concede that the above statement so strongly made is correct, but I dissent from the judgment. The regulation complained of in the petition refers exclusively to interstate commerce, and I think this court has no jurisdiction to interfere.

(94 S. C. 457)

ATKINSON v. SOUTHERN EXPRESS CO.
(Supreme Court of South Carolina. May 14, 1913.)

Application by W. W. Atkinson to the Supreme Court, in the exercise of its original jurisdiction, for an injunction against the Southern Express Company. Injunction granted.

John J. Earle, of Columbia, for appellant. Barron, Moore, Barron & McKay, of Columbia, for respondent.

GARY, C. J. The facts in this case are in all respects similar to those in the case of *W. W. Atkinson v. Southern Express Company*, 78 S. E. 516 (in which the opinion has just been filed), except that in the present case the action arose in Kershaw county where under the local option laws the sale of liquor is prohibited, while the other case arose in Richland county where the sale of liquor is not prohibited.

Under the principles announced in the opinion which has just been filed, this defense is immaterial.

It is the judgment of this court that the petitioner is entitled to the order of injunction for which he prays.

WOODS, HYDRICK, and WATTS, JJ., concur.

FRASER, J. I dissent. See Atkinson opinion.

(95 S. C. 32)

BROWNING et al. v. HOOVER.

(Supreme Court of South Carolina. May 29, 1913.)

DEEDS (§ 124*)—CONSTRUCTION—ESTATES CONVEYED.

A conveyance to one for his natural life and at his death to his heirs living at that time, in fee, not subject to the debts, contracts, and liabilities of the first taker, vests in him the fee and not a mere life estate.

[Ed. Note.—For other cases, see Deeds, Cent. Dig. §§ 345-355, 416-428, 434, 435, 439, 452; Dec. Dig. § 124.*]

Appeal from Common Pleas Circuit Court of Hampton County; John S. Wilson, Judge.

Action by F. W. Browning and others against J. R. Hoover. From a judgment for plaintiffs, defendant appeals. Affirmed.

W. S. Tillinghast, of Beaufort, for appellant. J. W. Vincent, of Hampton, for respondents.

WOODS, J. In this action to compel specific performance of a contract for the sale of land, the defendant relied on the allegation that the plaintiff had only a life estate, and therefore could not make a good title. This contention rests on the fact that the conveyance from Belle M. Goethe, under which the plaintiff claimed was "to F. W. Browning for and during the term of his natural life and at his death to his heirs living at that time, in fee, and not to be subject to the debts, contracts and liabilities of the said F. W. Browning." There can be no doubt of the correctness of the circuit court holding that F. W. Browning took a fee simple. *Davenport v. Eskew*, 69 S. C. 292, 48 S. E. 223, 104 Am. St. Rep. 798; *Clinkscales v. Clinkscales*, 91 S. C. 59, 74 S. E. 121; *Egan v. Touchberry*, 93 S. C. 569, 77 S. E. 706.

Affirmed.

GARY, C. J., and HYDRICK, WATTS, and FRASER, JJ., concur.

(95 S. C. 53)

STATE ex rel. LINDSEY v. TOLLISON.

(Supreme Court of South Carolina. May 30, 1913.)

1. QUO WARRANTO (§ 28*)—PROCEEDINGS—RULE TO SHOW CAUSE.

Under Code Civ. Proc. 1912, §§ 462, 466, abolishing the writ of quo warranto and declaring that the remedy obtainable therein may be obtained by civil action, and providing that an action may be brought by the Attorney General in the name of the state or on the complaint of any private party, or by a private party on leave granted by the circuit judge, where any person unlawfully holds any public office, a proceeding by the state on the relation of a private individual with the consent of the Attorney General to settle a controversy as to a public office is an action and the law relating to actions applies to it, and it cannot be commenced by a rule to show cause.

[Ed. Note.—For other cases, see Quo Warranto, Cent. Dig. § 30; Dec. Dig. § 28.*]

2. QUO WARRANTO (§ 47*)—PROCEEDINGS—PROCESS.

The defect in a rule to show cause why the prayer of a petition in a suit by the state on the relation of a private individual praying the court to settle a right to a public office arising from the fact that it requires defendant to answer in less than 20 days, while Code Civ. Proc. 1912, § 173, provides that the summons shall require defendant to answer in 20 days, is a fatal jurisdictional defect, though it be assumed that a rule to show cause is in substance a summons within section 177 requiring civil actions to be commenced by service of summons.

[Ed. Note.—For other cases, see Quo Warranto, Cent. Dig. § 48; Dec. Dig. § 47.*]

Gary, C. J., dissenting.

Action by the State of South Carolina, on the relation of P. N. Lindsey, against E. T. Tollison to settle a controversy as to a public office. Petition dismissed.

Kurtz P. Smith, of Anderson, for appellant. Bonham & Watkins, of Anderson, for respondent.

WOODS, J. The court regrets that it cannot, without a violation of the statute law of the state, settle the controversy as to the office of supervisor of registration in this proceeding. But the defendant has interposed a ground of demurrer which seems fatal to the proceeding.

The plaintiff, Lindsey, filed his petition in this court in the name of the state by leave of the Attorney General, claiming to be one of the supervisors of registration of Anderson county, and alleging that the defendant, Tollison, without authority of law is holding the office, and refuses to surrender it. The relief asked was as follows: "The plaintiff prays that this court in the exercise of its original jurisdiction issue its order to the said E. T. Tollison, defendant above named, requiring him to answer and show by what authority he claims to hold and exercise the duties as a member of the board of registration of Anderson county. That it be adjudged that the said E. T. Tollison is unlawfully exercising the said office, and that he be excluded therefrom, and that it be adjudged that the said P. N. Lindsey is entitled to hold and enjoy said office. That the said E. T. Tollison be required to pay the cost of this action, together with a fine, not to exceed two thousand (\$2,000.00) dollars, as the court may adjudge."

On this verified petition the Chief Justice made an order requiring the defendant to show cause before this court on May 19, 1913, why the prayer of the petition should not be granted, and requiring him to serve on the plaintiff's attorney a copy of his answer on or before May 17, 1913. The order was not served on the defendant until May 14, 1913. The defendant appeared and demurred to the jurisdiction; the ground being that the relief sought by the plaintiff could be obtained only by a civil action under sec-

tions 462 and 466 of Code of Procedure, and that a civil action could be commenced only by the service of summons in the form prescribed by the Code, requiring an answer to be served in 20 days.

[1] Section 462, and so much of section 466 of Code of Procedure as is germane, read as follows:

"462. The writ of scire facias, the writ of quo warranto, and proceedings by information in the nature of quo warranto, are abolished; and the remedies heretofore obtainable in those forms may be obtained by civil action under the provisions of this chapter. But any proceeding heretofore commenced, or judgment rendered, or right acquired, shall not be affected by such abolition."

"466. An action may be brought by the Attorney General in the name of the state, upon his own information, or upon the complaint of any private party, or by a private party interested, on leave granted by a circuit judge, against the parties offending, in the following cases: (1) When any person shall usurp, intrude into, or unlawfully hold or exercise any public office, civil or military, or any franchise within this state, or any office in a corporation created by the authority of this state."

It thus appears that a proceeding of this sort is an action, and that the provisions of law relating to actions apply to it. It has been held, accordingly, that such a proceeding should not be commenced by a rule to show cause. *Alexander v. McKenzie*, 2 S. C. 81; *State ex rel. Parrott v. Evans*, 33 S. C. 612, 12 S. E. 816; *State ex rel. Bruce v. Rice*, 66 S. C. 1, 44 S. E. 80.

[2] Section 177 requires that a civil action shall be commenced by the service of a summons, and section 178 prescribes its requisites, one of which is that the defendant be required to answer in 20 days. It might be said that the rule to show cause issued by the Chief Justice was, in substance, a summons, except that it required the defendant to answer in less than 20 days. But the requirement that he should answer in less time was a fatal jurisdictional defect, and for that reason it is inevitable that the proceeding be dismissed.

The judgment is that the petition be dismissed without prejudice to the plaintiff to bring his action in the manner prescribed by law.

Petition dismissed.

FRASER, J., concurs.

HYDRICK, J. I concur in dismissing the petition for the reasons stated by Mr. Justice WOODS, and for the additional reasons that this case is not of such importance, nor does it present such emergency as to call for the exercise of the original jurisdiction of this court. I think, under the rule hereto-

fore adopted by this court, it should have been first presented to and heard by a circuit judge.

WATTS, J., concurs.

GARY, C. J. I dissent. The Attorney General has given his consent for the proceedings to be brought in the name of the state, and the respondent's attorney stated in open court that, if the demurrer was overruled, he did not desire further time, but was willing for an order of reference to be granted as to the issues of fact.

The respondent has not been deprived of any substantial right, and it will subserve no useful purpose to dismiss the proceedings.

(95 S. C. 23)

HARBY v. BYERS LUMBER CO.

(Supreme Court of South Carolina. May 29, 1913.)

1. REPLEVIN (§ 11*)—DEMAND.

Where defendant purchased property in the open market for value from a person having control thereof, without notice of plaintiff's claim, a demand was necessary in order to support claim and delivery.

[Ed. Note.—For other cases, see *Replevin*, Cent. Dig. §§ 85-97; Dec. Dig. § 11.*]

2. REPLEVIN (§ 88*)—DEMAND—QUESTION FOR JURY.

Where, in claim and delivery, the complaint alleged a wrongful detention after demand, and the answer alleged that defendant was a purchaser in the open market for value without notice, and a witness testified that plaintiff authorized the sale, the issue of demand was properly submitted to the jury.

[Ed. Note.—For other cases, see *Replevin*, Cent. Dig. §§ 343-348; Dec. Dig. § 88.*]

Appeal from Common Pleas Circuit Court of Hampton County; T. H. Spain, Judge.

"To be officially reported."

Action by H. J. Harby, trading as Harby & Co., against the Byers Lumber Company, From a judgment for defendant, plaintiff appeals. Affirmed.

J. W. Vincent, of Hampton, and Bates & Simms, of Barnwell, for appellant. Warren & Warren, of Hampton, for respondent.

GARY, C. J. The record contains the following statement of facts: "This is an action in claim and delivery brought by the plaintiff by the service of a summons, complaint, affidavit, and bond, in the usual form, to recover possession of certain chattels from the defendants. The plaintiff claims the property under a chattel mortgage given by the Osceola Lumber Company to plaintiff, to secure the purchase money of the property, which chattel mortgage was duly recorded in the office of clerk of court for Barnwell county within the time allowed by law. The case came on for trial before Judge T. H. Spain and a jury,

which trial resulted in a verdict for the defendants. Before adjournment of court, counsel for plaintiff made a motion for a new trial, on the grounds that his honor had erred in submitting to the jury an issue as to whether a demand had been made or not, the plaintiff's counsel taking the position that no demand was necessary in this case, and also on the ground that the jury had disregarded the charge given them by the court. This motion was refused, and judgment was duly entered on the verdict. From this judgment notice of intention to appeal to this court was duly served and filed."

[1] We will first consider the exceptions raising the question whether his honor, the presiding judge, erred in submitting to the jury the issue as to a demand; appellant's counsel taking the position that no demand was necessary.

[2] The complaint alleges "that the defendants are in possession of the said personal property, and wrongfully detain the same from the plaintiff, although demand has been duly made upon the defendants for the return of the said property."

The defendant set up as a defense "that a part of the property described in the complaint, or some property answering the description therein contained, is in possession of these defendants, having been purchased in the open market for value from the person having control of the same, without notice of the plaintiff's claim thereto, or any part thereof." It was admitted upon the trial of the case that if John Hart, former secretary of the Osceola Lumber Company, and a witness for the defendant, had been present, he would have testified that the plaintiff, H. J. Harby & Co., authorized him to sell the property in question for \$400. It will be observed that the complaint does not allege that the defendant took wrongful possession of the property, but that the defendant wrongfully detained it, although demand was made by the plaintiff for the return thereof. It will also be observed that the testimony of John Hart tends to show that the possession of the property by the defendant in the first instance was not wrongful. Under these circumstances, his honor, the presiding judge, properly submitted to the jury the issue as to a demand for the return of the property. *Ladson v. Mostowitz*, 45 S. C. 388, 23 S. E. 49, concurring opinion in *Holliday v. Poston*, 60 S. C. 103, 38 S. E. 449, cited with approval in *Bingham v. Harby & Co.*, 91 S. C. 121, 74 S. E. 369.

These views also show that the exceptions raising the question whether the jury disregarded the charge of his honor, the presiding judge, cannot be sustained.

Judgment affirmed.

WOODS, HYDRICK, WATTS, and FRA-SER, JJ., concur.

(95 S. C. 25)

MCLESTER v. BARLOW.

(Supreme Court of South Carolina. May 28, 1913.)

1. APPEAL AND ERROR (§ 1051*)—ADMISSION OF EVIDENCE—REVIEW—NECESSITY OF OBJECTIONS AT TRIAL.

Alleged errors in the admission of parol evidence of a second or substituted agreement would not be reviewed, on the ground that the testimony contradicted the terms of a receipt embodying the original contract, where testimony of the original and substituted agreements was introduced without objection.

[Ed. Note.—For other cases, see *Criminal Law*, Cent. Dig. §§ 4161-4170; Dec. Dig. § 1051.*]

2. APPEAL AND ERROR (§ 1066*)—REVIEW—PREJUDICE.

Where, in an action to recover money paid on a contract for the sale of stock, the main issue was not the amount involved, but whether there was a substituted contract rescinding the original, defendant was not prejudiced by the refusal of the court, after stating the issues satisfactorily to counsel for both parties, to construe a receipt embodying the original contract, and to charge that, if that contract was made for the purchase of the stock itself, the equitable title thereto immediately passed to plaintiff.

[Ed. Note.—For other cases, see *Criminal Law*, Cent. Dig. § 4220; Dec. Dig. § 1066.*]

Appeal from Common Pleas Circuit Court of Dillon County; C. J. Ramage, Special Judge.

"To be officially reported."

Action by S. P. McLester against G. D. Barlow. Judgment for plaintiff, and defendant appeals. Affirmed.

Gibson & Muller, of Dillon, for appellant. T. D. Maness, of Concord, N. C., and J. K. Owens, of Bennettsville, for respondent.

GARY, C. J. The appellant's attorneys preface their argument with the following statement of the facts, which we adopt:

"The above-entitled case was brought by the plaintiff to recover of the defendant the sum of \$1,365, with interest from the dates of payment on certain cotton mill stock, purchased by the plaintiff from the defendant. The complaint alleges payments of the amount in small items, running from February 20, 1909, to July 10th. The stock purchased was 40 shares of the Dillon Cotton Mills, at the price of \$4,200, represented by the defendant, according to complaint, to be worth \$140 a share. Plaintiff alleges that it was absolutely worthless, and he (plaintiff) received nothing from the money so paid. He alleges also that on the ——— day of August, 1910, the contract of purchase was rescinded, and defendant agreed to return the money paid. The defendant denied the contract of rescission, and alleged that the contract of sale was entered into in good faith, and was still binding, and that he was ready and willing to transfer the stock, upon the balance of the purchase money being paid. He also, by way of affirmative relief,

asked for specific performance of the contract, and, in case plaintiff refused to comply, that then the stock be sold at public auction, and the proceeds be applied to the purchase price thereof, and that defendant have judgment against the plaintiff for any deficiency. The case came on to be heard at the fall term, 1912, in the court of common pleas, before Judge Ramage and a jury, and resulted in a verdict for the plaintiff in the full amount asked.

"The exceptions raise practically two questions: (1) Whether or not there was error on the part of the court in admitting oral testimony to vary and contradict the terms of a receipt, which was in evidence, and which defendant contended was a memorandum under the statute of frauds. (2) Whether or not it was error for the court to refuse to construe the said receipt or memorandum, and charge the jury that under the contract of sale the equitable title to the stock vested in McLester and became his property; the defendant holding it only as security for the balance of the purchase money."

[1] We proceed to consider the exceptions raising the first of said questions. Testimony in behalf of the plaintiff, for the purpose of proving the original as well as the second or substituted agreement, was introduced without objection. These exceptions must therefore be overruled.

[2] We will next consider the exceptions raising the second question. The receipt therein mentioned was as follows:

"1,000.00. Dillon, S. C. Feb. 20, '09.

"Received of S. P. McLester ten hundred and 00/100 dollars, part payment on forty (40) shares Dillon Cotton Mills; balance due me is thirty-two hundred (\$3,200) dollars. Said stock to be transferred to S. P. McLester soon as paid for. G. D. Barlow."

His honor, the presiding judge, thus stated the issues to the jury, which were admitted by the respective attorneys to be correct:

"Now, gentlemen, I am going to endeavor in a few words to state what the issues are, as I conceive them. As I understand, the plaintiff claims that there was a substitute agreement; in other words, that he was to get back his money under certain conditions set out in the complaint. That, as I understand it, is the main issue here to-day, that substitute agreement; or, in other words, the second agreement that is claimed took the place of the first. Now, the defendant comes into court, and denies that substitute agreement, and sets up a counterclaim. He asks, not only that the plaintiff be denied the relief that he asks for, but that he have judgment against the plaintiff for the balance of the purchase money.

"The Court (addressing counsel): I believe, gentlemen, those are the issues?

"Mr. Owens: Yes, sir.

"Mr. Gibson: Yes, sir."

After his honor, the presiding judge, had charged the jury, the record shows that the following took place:

"The Court (addressing counsel): Is there anything further either side wishes charged?

"Mr. Muller: I would like for the court to construe that receipt, and to charge that, if this contract was made for the purchase of this cotton mill stock, the equitable title to that stock immediately passed to the plaintiff.

"The Court: I don't want to go into that, Mr. Muller."

After the verdict was rendered, the following agreement was stated in open court:

"Mr. Rogers, it is agreed that the verdict shall stand as it is, and that the interest be calculated by the clerk of court, as demanded in the complaint."

As the main issue was, not as to the amount involved, but whether there was a substituted agreement, we fail to see wherein the ruling of his honor, the circuit judge, was prejudicial to the rights of the appellant.

Judgment affirmed.

WOODS, HYDRICK, WATTS, and FRASER, JJ., concur.

(% S. C. 23)

LOGAN v. STANLEY et al.

(Supreme Court of South Carolina. May 28, 1913.)

ELECTIONS (§ 97*)—SPECIAL MUNICIPAL ELECTION—REGISTRATION—RIGHT TO VOTE.

Civ. Code 1912, § 220, provides that every male citizen 21 years of age and upwards having qualifications prescribed by section 200, and who has resided within the corporate limits of any incorporated city or town for four months previous to any municipal election, and has paid all taxes due and collectible for the preceding fiscal year, and who has been registered as hereinafter required, shall be entitled to vote at all municipal elections in his city or town. Section 221 provides that 90 days before the holding of a regular election in any corporate city or town in the state the mayor shall appoint a supervisor of registration, who shall register all qualified electors within the limit of the city or town, that the names of all qualified electors shall be entered in a book of registration which at least one week before the election and immediately after holding the same shall be filed in the office of the clerk or recorder and shall be a public record provided that 20 days prior to any special election the registration book shall be open for the registration of names of qualified electors therein and shall remain open for 10 days, etc. *Held*, that the special registration for special elections provided for was intended to supplement the regular registration, so that, where electors having qualifications of section 200 had been registered under general municipal registration, they were entitled to vote at a special election without further registration.

[Ed. Note.—For other cases, see Elections, Cent. Dig. § 92; Dec. Dig. § 97.*]

Petition by George P. Logan against Charles C. Stanley and others. Granted.

R. H. Welch, of Columbia, for appellant. H. N. Edmunds, of Columbia, for respondents.

WOODS, J. The petition states the facts, and the sole question of law involved is whether the qualified electors of the city of Columbia and the town of Shandon are entitled to vote under the general municipal registration at the special election, mentioned in the petition, to be held on June 3, 1913, or whether they should be excluded from voting unless they register under the statutory provision for registration for special municipal elections.

The question arises under the following sections of the Code of 1912:

"220. Every male citizen of this state and of the United States of the age of twenty-one years and upwards, having all the qualifications mentioned in section 200, and who has resided within the incorporate limits of any incorporated city or town in this state for four months previous to any municipal election, and has paid all taxes due and collectible for the preceding fiscal year, and who has been registered as hereinafter required, shall be entitled to vote in all municipal elections of his city or town.

"221. Ninety days before the holding of a regular election in any incorporated city or town in this state the mayor or intendant thereof shall appoint one discreet individual, who is a qualified elector of such municipality, as supervisor of registration for such city or town, who shall hold office for the term of two years and until his successor has been appointed and qualified, and who shall receive as compensation for his service one dollar per day for each day actually engaged in the discharge of his duties, to be paid by the town or city, whose duty it shall be to register all qualified electors within the limit of the incorporated city or town. The names of all qualified electors of such municipality shall be entered in a book of registration, which at least one week before the election, and immediately after the holding of the election, shall be filed in the office of the clerk or recorder of such city or town, and shall be a public record open to the inspection of any citizen at all times: Provided, that twenty days prior to any special election to be held as aforesaid the books of registration shall be opened for the registration of the names of the qualified electors therein, and shall remain open for a period of ten days: Provided, that in the cities of over fifty thousand inhabitants there shall be appointed three supervisors, who shall represent different political parties or factions of parties. Immediately preceding any municipal election to be held in any incorporated city or town in this state, the supervisor or supervisors * * * (as the case may be) shall prepare for the use of the managers of election of each polling precinct in such city or town a registration book or books for each polling precinct in such city or town, containing the names of all electors

entitled to vote at such polling precinct at said election."

In *Bray v. Florence*, 62 S. C. 57, 89 S. E. 810, the court held that the requirements of the Constitution that "the General Assembly shall provide for the registration of all voters before each election in municipalities" refers to general and not to special municipal elections.

The meaning of the statute is obscure and the point is not free from difficulty. The statute gives two opportunities for registration: One, the general municipal registration first provided for in section 221; and, the other, a special registration to be opened 20 days before any special election for 10 days. We think the better construction is that the special registration for special elections was intended to supplement the regular registration in order that those who are qualified but not duly registered since the last general election may not be deprived of the right to vote at special elections. There is nothing in the statute clearly indicating a purpose to deny the right to vote at special elections under the general municipal registration; but, on the contrary, section 220 confers on every citizen otherwise qualified, "who has been registered as hereinafter required," the right to vote "at all municipal elections of his city or town." It follows that when a citizen avails himself of either of the opportunities of registration "hereinafter provided for" he has complied with the law. These considerations are controlling against the mere form of the certificate in section 225, which contains the statement that the person named therein "is entitled to vote in the municipal election on the ____ day of ____, 1____." The expression of the right to vote at one time standing alone might imply an intention to exclude the right at another, but it has little weight when opposed to the more direct purposes and provisions of the statute, especially when it is found only in the form of the certificate.

The judgment of the court is that the prayer of the petition be granted.

GARY, C. J., and HYDRICK, WATTS, and FRASER, JJ., concur.

(35 S. C. 9)

DODD v. SPARTANBURG RY., GAS & ELECTRIC CO.

(Supreme Court of South Carolina. May 28, 1913.)

1. EVIDENCE (§ 474½*)—OPINION EVIDENCE—ADMISSIBILITY.

In an action by one run down by a street car at a public crossing which was adjacent to the tracks of a steam railway, opinion evidence as to whether the gong announcing the approach of the street car could be heard when a freight train was passing along the railway tracks is admissible, for the surroundings could not be

reproduced so as to afford the jury the same opportunity of forming a correct opinion as when viewed by the witness, and therefore such evidence was not an invasion of the province of the jury.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 2220-2233; Dec. Dig. § 474½.*]

2. APPEAL AND ERROR (§ 1050*)—REVIEW—HARMLESS ERROR.

A party cannot complain of the error in the admission of evidence, where similar evidence was admitted without objection by him.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1068, 1069, 4153-4157, 4166; Dec. Dig. § 1050.*]

3. NEGLIGENCE (§ 85*)—CONTRIBUTORY NEGLIGENCE—CHILDREN.

A child under seven years of age cannot be guilty of contributory negligence.

[Ed. Note.—For other cases, see Negligence, Cent. Dig. §§ 121-128; Dec. Dig. § 85.*]

4. STREET RAILROADS (§ 115*) — INJURY TO PERSONS ON TRACK — DAMAGES — PUNITIVE DAMAGES.

Where servants of a street car company, in charge of a car, ran at a high rate of speed past a crossing before which they were required to stop, and which was used by school children, being at the intersection of three streets, punitive damages are properly allowed in an action by a child injured.

[Ed. Note.—For other cases, see Street Railroads, Dec. Dig. § 115.*]

Appeal from Common Pleas Circuit Court of Spartanburg County; Frank B. Gary, Judge.

Action by Willie Dodd, by her guardian ad litem E. F. Dodd, against the Spartanburg Railway, Gas & Electric Company. From a judgment for plaintiff, defendant appeals. Affirmed.

The exceptions were as follows:

"(1) In allowing the witness W. C. Gash, against the objection of the defendant, to testify as to a matter of opinion and to answer the following question: 'Q. With a freight train going right down by there, and those children standing there looking at the freight train, do you think they could have heard the gong?' The error being, as it is respectfully submitted, that this was altogether a matter of opinion, and allowed the witness to give his opinion on one of the material points in the case.

"(2) In refusing to grant the motion of the defendant for a nonsuit as to the cause of action for punitive damages. The error being, as is respectfully submitted, that there was no evidence tending to prove any willfulness or wantonness or such recklessness as would warrant a jury in concluding that the defendant was willful or wanton.

"(3) In refusing the defendant's motion to direct a verdict to be rendered in favor of the defendant as to the cause of action for punitive damages. The error being, as is respectfully submitted, that there was no evidence tending to prove any willfulness or wantonness or such recklessness on the part of the defendant as warrants the submission of this issue to the jury.

"(4) In charging and instructing the jury in reference to the cause of action for punitive damages as follows: 'I charge you, furthermore, in determining whether or not this defendant was willful or reckless or guilty of such negligence as amounted to that, it is your duty to consider what the circumstances were. As "negligence" is a relative term, what would be negligence under one set of circumstances might not be under another.' The error being, as it is respectfully submitted, that by this charge his honor in effect instructed the jury that they could render a verdict against the defendant for punitive damages, even though the defendant might have been guilty only of negligence. Further, that by this charge his honor in effect instructed the jury that the same act might be willful, or wanton, or negligent. Whereas, it is respectfully submitted, the same act cannot be both willful or wanton or at the same time negligent.

"(5) In charging and instructing the jury at the request of the plaintiff as follows: 'A driver or motorman, when operating his car on a street where he has reason to expect the presence of children, must exercise a high degree of watchfulness, and if he sees, or by the exercise of ordinary care could see, a child of tender years on or near the track, he is not entitled to act on the assumption that such child will get off or stay off the track, but must at once use all reasonable efforts to avoid injuring him, and, if necessary, use all reasonable means to stop it in time to avoid injury, and, if he fails to do so, the company is liable for resulting damages.' The error being, as it is respectfully submitted, that in so charging his honor eliminated from consideration of the jury the question of the capacity and intelligence of the child, and also eliminated the question as to whether or not a reasonable man would have thought that the child was not near enough to the track to be in danger, and allowed the jury to find a verdict against the defendant, even though the evidence might disclose that the child was of sufficient capacity and intelligence to understand and appreciate danger, and even though a reasonable man might have thought that the child was not in a place of danger. The error further being, as is respectfully submitted, that this was a charge upon the facts, contrary to the provisions of section 26, art. 5, of the Constitution, and instructed the jury, as matter of fact, what degree of care a motorman should exercise and what his duty was in case he saw a child of tender years on or near the track. The error further being that by this charge his honor placed upon the defendant the duty of exercising a high degree of care, whereas, it is respectfully submitted, a defendant under the circumstances supposed is only called upon to exercise reasonable care.

"(6) Because his honor erred in charging as follows: 'If the employé sees an infant of very tender years on its track, it is its duty to do what it should do, and if necessary, to stop. That does not mean when he sees an infant at some distance he must stop. He is obliged to commence at once to give warning, it may be by ringing the bell, or by putting on brakes to avoid injuring that child, and, if it is necessary, he must stop.' The error being, as is respectfully submitted, that his honor in so charging charged upon the facts contrary to the provisions of section 26, art. 5, of the Constitution, and instructed the jury as to what acts the motorman should have done under the supposed circumstances to prevent an injury, whereas, it is respectfully submitted that it was a question entirely for the jury to say whether or not any act or acts of the defendant or its motorman was a negligent act.

"(7) Because it is respectfully submitted that his honor erred in refusing to charge the defendant's fourth request, to wit: 'The evidence in this case does not warrant a verdict to be rendered against the defendant company for punitive damages.' The error being, as is respectfully submitted, that there was no evidence in the case showing any conscious act, or failure to act, on the part of the agents of the defendant which brought about the injury; on the contrary, the evidence shows that the agents of the defendant company began to take precautions to prevent the alleged injury as soon as the motorman saw the child was in danger, and that the injury was not caused by any willfulness, wantonness, or recklessness on the part of the defendant.

"(8) Because his honor erred in instructing the jury in substance that they could find a verdict for actual damages, provided they concluded the defendant was guilty of negligence, and could also at the same time and for the same act find a verdict for punitive damages if they find the defendant was guilty of willfulness or wantonness. The error being, as is respectfully submitted, that the same act cannot be both negligent and willful and wanton, and his honor should have instructed the jury that if the act of the defendant was negligent a verdict for punitive damages could not be rendered, and that if the conduct of the defendant was willful or wanton a verdict for negligence could not be rendered."

Sanders & De Pass, of Spartanburg, for appellant. John Gary Evans and Nicholls & Nicholls, all of Spartanburg, for respondent.

GARY, C. J. The allegations of the complaint, material to the questions presented by the exceptions, are as follows: "That on or about the — day of October, A. D. 1911, the plaintiff, with other school children, were on their way from school, and it became necessary to cross the tracks of the de-

fendant company to reach plaintiff's home in said city, and that while plaintiff was on said track the defendant caused its trolley car to approach the crossing and the place where plaintiff was standing at an unlawful high rate of speed and without notifying the plaintiff, although she was in full view of the motorman running said car, he willfully, wantonly, recklessly, negligently, and in utter disregard of the rights of plaintiff, caused the said car to run into and collide with the body of plaintiff, knocking her violently to the ground, bruising her body, filling her with intense fright, and shocking her nervous system to her great damage in the sum of \$5,000." The defendant denied the allegations of negligence and recklessness, and set up the defenses of contributory negligence and assumption of risk. The jury rendered a verdict in favor of the plaintiff for \$200 actual damages, and for \$200 punitive damages. The defendant appealed upon exceptions which will be reported.

[1] First Exception. The record shows that the question raised by this exception thus arose, during the examination of W. C. Gash, a witness for the plaintiff: "By John Gary Evans, Esq.: Would it be possible for any one, standing where those children were, with a freight train running on that track to hear that little gong, if a locomotive was pulling the freight train? A. I could hear the train going down rumbling. Q. What kind of train was that? A. Just a freight train. Judge Gary: I think it is a matter of common knowledge that all freight trains are noisy. Q. Will you state, under the circumstances there, whether it would have been possible, under those conditions, for those children to have heard the gong? Judge Gary: I rule that, having given the facts to the jury, he can then express his opinion as to whether or not it could have been heard. (Objection by C. P. Sanders, Esq., on the ground of opinion evidence.) Q. With a freight train going down right by there, and those children standing there, looking at the freight train, do you think they could have heard the gong? A. I don't think they could have heard it."

The sole objection to the testimony was on the ground that it was opinion evidence. The exception, however, assigns error in "that this was altogether a matter of opinion, and allowed the witness to give his opinion, on one of the material points of the case." Waiving the objection that the first ground was too general, and that the second ground is not properly before this court for consideration, as it was not urged upon the trial in the circuit court, the exception cannot, however, be sustained. The surroundings could not be reproduced, so as to afford the jury the same opportunity of forming a correct opinion as when viewed by the witness. The ruling of his honor the presiding judge is fully sustained by the case of *Easler v. Railway*, 59 S. C. 311, 37 S. E. 938.

[2] There is still another reason why the exception cannot be sustained, to wit, when a similar question was propounded to the witness, it was answered without objection.

[3] The next question that will be determined is whether the plaintiff, who was an infant under seven years of age at the time of the injury, was subject to the defense of contributory negligence. In the case of *Tucker v. Buffalo Mills*, 76 S. C. 539, 57 S. E. 626, 121 Am. St. Rep. 957, cited with approval in *Goodwin v. Columbia Mills Co.*, 90 S. C. 349, 61 S. E. 390, the court held that an infant between 7 and 14 years of age is presumed to be incapable of committing contributory negligence or trespass, and that it was incumbent on the party alleging such negligence or trespass to overcome the presumption of incapacity; and that, if the facts were susceptible of only one inference, it was to be drawn by the court, otherwise by the jury. In that case the court said: "The charge was based upon the well-known rule in reference to the capacity of infants to commit crime, a rule founded in deep knowledge and experience with reference to the power of infants to discern between right and wrong, and has the support of a number of cases in other jurisdictions." The rule as to the capacity of a child to commit crime is thus stated in 1 Bishop on Criminal Law, § 368: "The period of life at which a capacity for crime commences is not susceptible of being established by an exact rule, which shall operate justly in every possible case. But, on the whole, justice seems best promoted by the existence of some rule. Therefore, at the common law, a child under seven years is conclusively presumed incapable of committing any crime. Between seven and fourteen, the law also deems the child incapable; but only prima facie so; and evidence may be received to show a criminal capacity. The question is whether there was a guilty knowledge of wrongdoing. Over fourteen, infants, like all others, are prima facie capable; and he who would set up their incapacity must prove it." This rule is recognized in 16 Enc. of Law, 312, and 22 Cyc. 623-626.

[4] The next question for consideration is whether there was any testimony tending to show that the plaintiff was entitled to punitive damages. Without going into details, it is sufficient to state that there was a sign-board at the crossing, upon which was written, "Cars Stop Here;" this crossing was used by the school children; it was at the junction of three streets; conductors had been instructed to stop their cars at that crossing; witnesses testified that the crossing was very dangerous. It therefore cannot be successfully contended that there was no testimony tending to show that the plaintiff was entitled to punitive damages.

When the other question presented by the exceptions are considered in connection with

the entire charge, it will be seen that they cannot be sustained.

Judgment affirmed.

WOODS, HYDRICK, WATTS, and FRASER, JJ., concur.

(94 S. C. 487)

MITCHELL et al., Board of Sup'rs of Registration of Cherokee County, v. JONES, State Comptroller General, et al.

(Supreme Court of South Carolina. May 26, 1913.)

1. TRIAL (§ 368*) — AGREED STATEMENT OF FACTS—SIGNATURE.

An agreed statement of facts, submitted in open court, need not be signed by either side.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 880; Dec. Dig. § 368.*]

2. ELECTIONS (§ 102*) — APPOINTMENT OF SUPERVISORS—ADVICE BY SENATE—TERM OF OFFICE—COMPENSATION.

Under Code Civ. Proc. 1912, § 202, providing that the Governor shall appoint, by and with the advice of the Senate if in session, and, if not in session, subject to its approval at its next session, three supervisors to be known as the board of supervisors of registration, the Governor may appoint such members while the Senate is not in session, and they will hold office from the time of appointment till the end of the term for which appointed, or, if not confirmed by the Senate, when next in session until that time, and hence members appointed in vacation and not confirmed by the Senate when in session are entitled to compensation as against the old members who refused to give up their office from the time of appointment to non-confirmation.

[Ed. Note.—For other cases, see Elections, Cent. Dig. § 100; Dec. Dig. § 102.*]

3. OFFICERS (§§ 30, 55*)—INCOMPATIBILITY.

A member of the board of registration of election forfeits his office on acceptance of the office of commissioner of election.

[Ed. Note.—For other cases, see Officers, Cent. Dig. §§ 20, 32, 47, 48; Dec. Dig. §§ 30, 55.*]

4. OFFICERS (§ 55*)—INCOMPATIBILITY.

A member of the board of trustees of a school district forfeits his office on acceptance of appointment to the office of the supervisor of elections, but is eligible to the latter office.

[Ed. Note.—For other cases, see Officers, Cent. Dig. §§ 76-84; Dec. Dig. § 55.*]

Proceedings in the Supreme Court by R. H. Mitchell and others, Board of Supervisors of Registration of Cherokee County, against A. W. Jones, State Comptroller General, and others. Judgment for defendants.

W. S. Hall, of Gaffney, for appellants. Tom Peeples, Atty. Gen., for respondents.

FRASER, J. [1] This is a proceeding in the original jurisdiction of this court. The following is an agreed statement of facts submitted in open court. The statement is not signed by either side, but that is not necessary where the paper is submitted in open court.

[2] "In order to facilitate the trial of the foregoing case, the attorneys representing the plaintiffs and the defendants agree upon the following statement of facts:

"(1) That on February 16, 1910, Governor Martin F. Ansel appointed the plaintiffs, J. A. Harris, R. H. Mitchell, and W. I. Jones, as members of the board of supervisors of registration for Cherokee county, S. C.

"(2) That on February 19, 1910, the Governor transmitted the names of the plaintiffs to the Senate for action upon his appointment; and that on the same day the Senate, being then in executive session, confirmed the said appointments.

"(3) That on the 19th day of February, 1910, a commission was issued to R. H. Mitchell, as supervisor of registration for Cherokee county, signed by Governor M. F. Ansel and by R. M. McCown, Secretary of State, said commission being under the great seal of the state of South Carolina; that on the 24th day of February, 1910, commissions were issued to W. I. Jones and J. A. Harris, as supervisors of registration for Cherokee county, under the signature of M. F. Ansel, Governor, R. M. McCown, Secretary of State, and under the great seal of the state of South Carolina for the term prescribed by law.

"(4) That by virtue of said appointment and commission R. H. Mitchell, W. I. Jones, and J. A. Harris took possession of the office of supervisors of registration for Cherokee county, together with all books and properties belonging to the office and continued in said office and discharged the duties thereof up to and including the 14th day of March, 1912.

"(5) That on February 15, 1912, the Senate then being in session, the Senator from Cherokee county recommended to Governor Cole L. Blaise the names of R. H. Mitchell, J. A. Harris, and W. I. Jones for appointment as supervisors of registration for Cherokee county, and that the Governor failed and refused to appoint the said parties and made no appointment to that office during the session of the General Assembly for 1912.

"(6) That the General Assembly for the state of South Carolina adjourned sine die on February 29, 1912.

"(7) That on March 12, 1912, the Governor appointed the defendants, W. L. Settlemeyer, B. L. Hoke, and O. D. Hancock, supervisors of registration for Cherokee county, and commissions were issued to them signed by the Governor, the Secretary of State, and under the great seal of the state of South Carolina on the 14th day of March, 1912.

"(8) That on the first Monday in April, 1912, and the first Monday in May, 1912, days fixed by law for the opening of the books of registration for the registration of electors, the said W. L. Settlemeyer, B. L. Hoke, and O. D. Hancock made demand upon the clerk of court of Cherokee county for the books and other records of registration and for the possession of said books and records in order that they might perform the duties

of the said office to which they had been appointed and commissioned.

"(9) That the said clerk of court refused to deliver the books and other records of registration to the defendants, stating that he had already delivered on demand to the old board of supervisors of registration, to wit, R. H. Mitchell, J. A. Harris, and W. I. Jones, the said books and records.

"(10) That thereafter no further demand was made by the defendants for the possession of said office or for its books and records, but it is admitted that the defendants remained ready and willing to perform the duties of said office.

"(11) That the plaintiffs denied the right of the defendants to the possession of said office or of its books and records, and denied their right to perform any of the duties pertaining to said office, but themselves continued in the possession of the said office and of its books and records, and discharged the duties of the same up to the commencement of this action, but have received no salary or remuneration for their services for the year 1912, or for so much of the year 1913 as has already expired, and that the defendant A. W. Jones, as Comptroller General, refuses to issue his warrant upon the State Treasurer for the salary of the plaintiffs upon the ground that the defendants had been appointed to the office claimed by the plaintiffs.

"(12) That on January 29th, during the session of the Senate and General Assembly in 1913, the Governor transmitted to the Senate the names of W. L. Settlemeyer, B. L. Hoke, and O. D. Hancock, as appointees to the office of supervisors of registration for Cherokee county, and that during said session, being in executive session, the Senate acted upon said appointments and refused to approve and confirm the same.

"(13) That, at the time of the appointment of the defendant, B. L. Hoke, he was a member of the board of trustees of Blacksburg school district in Cherokee county, having been elected to that office under the act of the General Assembly establishing said school district before his appointment as supervisor of registration for Cherokee county; that 30 days before the general election in 1912 the defendant W. L. Settlemeyer was appointed to the office of commissioner of election for Cherokee county, S. C., and performed the duties of said office, and that on the 1st day of April, 1913, the said W. L. Settlemeyer was appointed as one of the board of regents of the State Hospital for the Insane, and entered upon the discharge of said duties.

"(14) That the salary due to the legally constituted board of supervisors of registration for Cherokee county for 1912 is the sum of \$100 each, and for the year 1913 \$50 each.

"(15) That the plaintiffs have, since February 19, 1910, been in possession of said office, performing the duties thereof. This

admission is not to be construed as an admission by the defense that their possession of said office and the performance of the duties thereof was and is lawful since March 12, 1912.

"(16) It is further admitted that the plaintiffs had knowledge of the appointments of the defendants as supervisors of registration a few days after the said appointment, and before the first Monday in April, 1912; and they further had knowledge of the demand made upon the clerk of court, as custodian of the books and records, by the defendants on the first Monday in April and May, 1912."

These appointments were made under the following statute (Code 1912, § 202): "Between the first day of January and the fifteenth day of March, eighteen hundred and ninety-eight, and between said dates in every second year thereafter, the Governor shall appoint, by and with the advice and consent of the Senate, if in session, and if not in session subject to its approval at its next session, subject to removal by the Governor for incapacity, misconduct or neglect of duty, three competent and discreet persons in each county, who shall be citizens and qualified electors thereof, and who shall be known as the board of registration of ——— county, whose duty it shall be to register and to conduct the registration of the electors who shall apply for registration in such county as herein required. Their office shall be at the county seat, and they shall keep record of all their official acts and proceedings. Their term of office shall be for two years from the date of their appointment, and they shall continue in office until their successors shall have been appointed and shall qualify: Provided, that in case of a vacancy from any cause in the office of board of registration, the Governor shall fill such vacancy, by and with the consent of the Senate as aforesaid: Provided, that in the county of Pickens the said board of registration shall be elected at the general election of 1912, and every two years thereafter."

[3, 4] This section manifestly gave the Governor the right to appoint when the Senate was not in session, and his appointees could hold under that appointment until it was confirmed by the Senate for two years from the date of the appointment, or the holding terminated by the Senate's failure to approve. This distinguishes this case from the magistrate's cases. The respondents had title to the office from the day of their appointment until the Senate refused to approve their appointment, except that the defendant Settlemeyer forfeited his office on his acceptance of the office of commissioner of election. The defendant Hoke forfeited his office of trustee, but was eligible to the office of supervisor of registration.

The right to compensation follows the title to office, and it is ordered that the warrants

do issue according to the time the parties held the office.

GARY, C. J., and WOODS, HYDRICK, and WATTS, JJ., concur.

(35 S. C. 4)

COLCLOUGH v. BRIGGS et al.

(Supreme Court of South Carolina. May 28, 1913.)

1. COVENANTS (§ 114*)—WARRANTY—ACTION FOR BREACH—COMPLAINT.

In an action for breach of a warranty in a deed executed by B. as trustee, an allegation that under and by virtue of the conveyance B., as aforesaid, and as such trustee the owner in fee, bound himself and his heirs, etc., to warrant and forever defend the premises against his heirs and all other persons lawfully claiming any part thereof, etc., was indefinite and uncertain in that it failed to clearly allege whether B. intended to bind himself individually or the trust estate by the covenant of warranty.

[Ed. Note.—For other cases, see Covenants, Cent. Dig. §§ 189-202, 263; Dec. Dig. § 114.*]

2. PLEADING (§§ 192, 367*)—INDEFINITENESS—REMEDY.

The remedy for indefiniteness in a pleading is by motion to make more definite and certain and not by demurrer.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 64, 408-427, 1173-1193; Dec. Dig. §§ 192, 367.*]

3. COVENANTS (§ 84*)—WARRANTY—INDIVIDUAL OBLIGATION—LIABILITY OF GRANTOR'S ESTATE.

Where a trustee in executing a deed containing a warranty of title intended to bind himself individually, his estate was liable after his death for damages from the breach.

[Ed. Note.—For other cases, see Covenants, Cent. Dig. §§ 90-92; Dec. Dig. § 84.*]

4. APPEAL AND ERROR (§ 500*)—QUESTIONS REVIEWABLE—RULING BY TRIAL COURT.

An assignment that the court erred in making a specified ruling will not be reviewed where there is nothing in the record showing that the court made the ruling mentioned in the assignment.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2295-2298; Dec. Dig. § 500.*]

Appeal from Common Pleas Circuit Court of Clarendon County.

Action by S. M. Colclough against A. J. Briggs and others, as executors of the estate of R. R. Briggs, deceased. From an order overruling the demurrer to the complaint, defendants appeal. Affirmed.

The following is the complaint and demurrer and exceptions:

"Complaint.

"The above plaintiff complaining of the above defendants alleges:

"(1) That the plaintiff is a resident of Ridge Springs, Saluda county, state aforesaid.

"(2) That the defendants are the duly qualified executors of the estate of R. R. Briggs, deceased, late of the county and state

aforesaid; that A. J. Briggs resides at Summerton, county and state aforesaid; that Mike Powell resides at Newnan, state of Georgia; that E. A. Smyth resides at Blacksburg, state of Virginia; that R. B. Smyth is insane and is confined in some sanitarium beyond the limits of this state.

"(3) That during the year 1904 R. R. Briggs, as the trustee for E. M. Briggs, and as such trustee, the owner in fee, conveyed by warranty deed a lot of land in the town of Summerton, county and state aforesaid, to the plaintiff herein; that the description of said lot of land is as follows, to wit: Situate on the east side of Cantey street, measuring thereon 120 feet, and measuring in depth on its southern line 313 feet, on its northern line 242 feet, and having a width on its back line of 78 feet; bounded on the north by lot of W. H. Shlrer, east by the right of way of the Northwestern Railroad, south by land of E. M. Briggs, and on the west by Cantey street.

"(4) That, under and by virtue of the conveyance and title to plaintiff as aforesaid, R. R. Briggs, as trustee as aforesaid, and as such trustee the owner in fee, bound himself and his heirs, executors, and administrators to warrant and forever defend all and singular the premises aforesaid unto the said plaintiff against his heirs and all other persons lawfully claiming or to claim the same, or any part thereof.

"(5) That during the year 1908 the Northwestern Railroad Company of South Carolina commenced an action in the court of common pleas for the county and state aforesaid, the legal object and purpose of said action being to oust and recover of plaintiff herein a part or portion of the lot of land aforesaid; that said action was determined by a decision rendered by the Supreme Court of the state aforesaid in the month of October, 1911; that under and by virtue of said action the aforesaid railroad company ousted and recovered of this plaintiff a part or portion of the lot of land sold to the said plaintiff by R. R. Briggs, as trustee, and as such trustee the owner in fee as aforesaid; that under and by virtue of said action the legal title of plaintiff to the lot of land as aforesaid was put in issue.

"(6) That R. R. Briggs, as trustee, and as such trustee the owner in fee as aforesaid, was duly and legally and properly vouched and notified of the aforesaid action, and required to come in and defend said action; that said R. R. Briggs, as trustee and owner in fee as aforesaid, refused to expend any money in the direction of defending the title of the plaintiff to the lot of land as aforesaid, the title to said lot having been brought into issue by reason of the above action.

"(7) That during the month of April, 1910, E. M. Briggs died, and R. R. Briggs, as aforesaid, as heir and devisee, became the owner in fee of all the property, real and personal,

of the said E. M. Briggs; that R. R. Briggs died in the month of October, 1910, and thereafter the above defendants duly qualified as the executors of the estate of the said R. R. Briggs and are now the duly qualified executors as aforesaid.

"(8) That for the purpose of defending the title to the lot as aforesaid, in the action as aforesaid, the plaintiff has expended the sum of \$457.20; that on the 5th day of September, 1911, plaintiff filed a duly sworn to claim with the above defendants for the said sum of \$457.20, said claim having been filed within the 12 months allowed by statute to representatives of the estate of deceased persons to settle claims against said estate; that although more than 12 months have elapsed since the defendants qualified as executors of the estate of R. R. Briggs, defendants refuse to pay the claim aforesaid.

"Wherefore plaintiff demands judgment against the defendants for the sum of \$457.20 and the costs of this action.

"Demurrer.

"The defendants above named, not waiving their right to move the court to correct the complaint on the ground of it being so indefinite or uncertain that the precise nature of the charge is not apparent, demur to the complaint upon the ground that it appears upon the face thereof:

"(1) That the alleged warranty was given by R. R. Briggs, as trustee, his cestui que trust being the real party in interest and for whom the alleged warranty was given, and the estate of the latter is therefore liable, if any one, and there is a defect of parties defendant.

"(2) That if plaintiff has any cause of action it is for breach of an alleged warranty, to be measured in damages, and there are no facts stated upon which any damages could be based.

"(3) In that the complaint seems to be for money expended by plaintiff in defending a certain lawsuit, for which plaintiff has no legal claim against defendants' testator, but the measure of his damages, if any, is the value of the property lost at the time of the sale to plaintiff, with legal interest thereon from time of the ouster.

"Exceptions.

"First. That his honor erred, it is respectfully submitted, in overruling the demurrer when it appears upon the face of the complaint that the alleged warranty was given by R. R. Briggs, as trustee, his cestui que trust being the real party in interest and for whom the alleged warranty was given, and the estate of the latter is therefore liable, if any one, and there is a defect of parties defendant.

"Second. That his honor erred, it is respectfully submitted, in not holding that if the plaintiff has any cause of action it is

for the breach of an alleged warranty of covenant, to be measured in damages, and there are no facts stated upon which any damages could be based.

"Third. That his honor erred, it is respectfully submitted, in holding that the defendants are liable for money expended by plaintiff in defending a certain lawsuit, when, as a matter of law, if the plaintiff has any claim against defendants' testator, the measure of damages is the value of the property lost at the time of alienation, with legal interest from the time of eviction, and it is respectfully submitted that there are no facts alleged for the recovery of any such damages."

Davis & Weinberg, of Manning, for appellants. J. J. Cantey, of Summerton, for respondent.

GARY, C. J. This is an action for damages, alleged to have been sustained by the plaintiff on account of a breach of the warranty in the deed described in the complaint. The defendants demurred to the complaint on the ground that it did not state facts sufficient to constitute a cause of action. His honor, the circuit judge, overruled the demurrer, and the defendants appealed.

In order to understand the questions involved, it will be necessary to set out the complaint and the exceptions, in the report of the case. We will consider the exceptions in regular order.

[1] First exception. Paragraph 4 of the complaint is indefinite and uncertain in that it fails to allege clearly whether R. R. Briggs intended to bind himself individually or the trust estate by the covenant of warranty therein mentioned. The said section on the one hand alleges that he bound himself, his heirs, executors, and administrators, to warrant and forever defend the premises against his heirs, etc., while on the other hand it alleges that he was acting as trustee in warranting the title.

[2] In such a case the remedy is not by demurrer, but by a motion to make the complaint definite and certain.

[3] Second exception. The complaint alleges a breach of the covenant of warranty. If R. R. Briggs intended to warrant the title individually (and, as we have shown, there are allegations to that effect), then his estate is liable for damages arising from such breach.

[4] Third exception. This exception cannot be sustained, for the reason that there is nothing in the record showing that his honor made the ruling mentioned in the exception.

Judgment affirmed.

WOODS, HYDRICK, WATTS, and FRASER, JJ., concur.

(95 S. C. 36)

SANDERS et al. v. AETNA LIFE INS. CO. et al.

FRENCH et al. v. SAME.

(Supreme Court of South Carolina. April 29, 1913.)

1. STATUTES (§ 181*)—CONSTRUCTION—OBJECT.

In construing a statute the court will endeavor to ascertain the object which it was the intention of the Legislature to accomplish.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. §§ 259, 263; Dec. Dig. § 181.*]

2. BANKRUPTCY (§ 143*)—INSURANCE POLICY—SURRENDER VALUE—TITLE OF TRUSTEE.

Under Bankr. Act July 1, 1898, c. 541, § 70a, 30 Stat. 565, 566 (U. S. Comp. St. 1901, p. 3451), providing that when a bankrupt shall have an insurance policy which has a cash surrender value payable to himself, his estate, or personal representative, he may within 30 days after the cash surrender value has been ascertained pay to the trustee such sum and carry the policy free from the claims of creditors, otherwise the policy shall pass to the trustee as assets, a policy of insurance admittedly having no surrender value at the time of the adjudication, which fact was stated to the trustee, who stated that he would look into it later, does not become assets of the estate on the death of the bankrupt before settlement of the estate, and before any cash surrender value has been ascertained.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 194, 201, 202, 213-217, 223, 224; Dec. Dig. § 143.*]

3. BANKRUPTCY (§ 143*)—ASSETS OF ESTATE—POWERS EXERCISED FOR BENEFIT OF THIRD PERSON.

Under Bankr. Act July 1, 1898, c. 541, § 70a, 30 Stat. 565, 566 (U. S. Comp. St. 1901, p. 3451), providing that powers which the bankrupt might have exercised for his own benefit, but not those which he might have exercised for some other person, are exempt, an insurance policy having no surrender value, providing that insured might change the beneficiary without consent, is not assets of the estate as giving a power to be exercised by the bankrupt for the benefit of a third person, since the policy having no surrender value never became vested in the trustee.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 194, 201, 202, 213-217, 223, 224; Dec. Dig. § 143.*]

4. BANKRUPTCY (§ 143*)—ASSETS OF ESTATE—TRANSFERABLE PROPERTY—INSURANCE POLICY.

Under Bankr. Act July 1, 1898, c. 541, § 70a, 30 Stat. 565, 566 (U. S. Comp. St. 1901, p. 3451), providing that property, which prior to the filing of the petition the bankrupt could by any means have transferred, vests in the trustee, an insurance policy having no surrender value, which gave insured the right to change the beneficiary without consent, did not pass to the trustee as property which the bankrupt could transfer, since the policy having no surrender value never vested in the trustee.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 194, 201, 202, 213-217, 223, 224; Dec. Dig. § 143.*]

5. BANKRUPTCY (§ 143*)—ASSETS OF ESTATE—INSURANCE POLICY—PARTNERSHIP—DEATH OF PARTNER.

Where a husband and wife as copartners and as individuals went into bankruptcy, a policy of insurance payable to the wife is not assets of the estate vesting in the trustee on the death of the husband, before settlement of

the estate, as her interest in the policy must be determined with reference to the filing of the petition, and whatever interest she may have had at that time was subject to be defeated by action of insured in changing the beneficiary, as permitted by the policy, which he had actually done before his death.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 194, 201, 202, 213-217, 223, 224; Dec. Dig. § 143.*]

6. BANKRUPTCY (§ 143*)—INSURANCE POLICY—FRAUD—CHANGE IN BENEFICIARY—OBJECTION BY TRUSTEE.

A trustee in bankruptcy may not complain that a husband by fraudulent statements changed the beneficiary in an insurance policy claimed as assets of the estate where the original beneficiary does not object.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 194, 201, 202, 213-217, 223, 224; Dec. Dig. § 143.*]

Woods, J., dissenting.

Appeal from Common Pleas Circuit Court of Greenwood County; R. W. Memminger, Judge.

Actions by Marshall F. Sanders and others and Mrs. Anna Belle French and others against the Aetna Life Insurance Company and others. From a judgment for plaintiffs, defendants appeal. Affirmed.

Giles & Outze and C. C. Featherstone, all of Greenwood, for appellants. Grier, Park & Nicholson, of Greenwood, for respondents:

GARY, C. J. This is an action on two policies of insurance by the beneficiaries therein named. His honor, the circuit judge, rendered judgment in their favor, and the defendant appealed.

It appears from the agreed statement of facts, upon which the case was heard in the circuit court: That M. F. Sanders and Bessie W. Sanders, his wife, were copartners in trade as M. F. Sanders & Co., and both as partners and as individuals were adjudged bankrupts on the 30th of June, 1911, in pursuance of a petition filed on the 26th of June, 1911. That M. F. Sanders informed the trustee that he had certain policies of insurance on his life which were in the Bank of Greenwood, where they could be seen by him. That the trustee said he would take the matter up some other time. That the said policies were never scheduled by the bankrupts. That M. F. Sanders carried the policies to his attorney, who advised him that they had no cash surrender value, and that he should communicate this fact to the referee and trustee, which he did. On the 1st of November, 1911, Bessie W. Sanders was discharged as a bankrupt, but M. F. Sanders was never discharged. On the 12th of January, 1912, M. F. Sanders committed suicide and left surviving him his wife and three children, who are plaintiffs in this action. On the 22d of November, 1911, upon the application of M. F. Sanders, the beneficiaries in the two policies were changed in favor of his three

children. The policies provided that the insured should have the right to change the beneficiary without his or her consent. In the application for the change of beneficiary, M. F. Sanders made this statement: "I am not now adjudged insolvent, nor have I made a general assignment, for the benefit of creditors, that remain unsatisfied." The two policies were originally payable to Bessie W. Sanders, if she survived the insured, otherwise to his executors, administrators, or assigns. "Neither of the policies had any cash surrender value, prior to the death of the insured, and no loan value, until the end of the third premium year, to wit, 29th of July, 1912, nor until the payment of the third premium of 29th of July, 1912; and the company would have paid no money, prior to or at the date of the adjudication in bankruptcy, or prior to Sanders' death. The cash surrender value of neither of said policies has been ascertained and stated to the trustee by the company issuing the same, and the trustee made no effort to ascertain the same from the company, or to communicate the same to M. F. Sanders or Bessie W. Sanders." The bankrupt estate has never been settled.

The question to be determined is whether the policies were vested in the trustee by operation of law when it is admitted that at the time M. F. Sanders and Bessie W. Sanders were adjudged to be bankrupts, the said policies had no cash surrender value, and the company would have paid no money therefor, prior to the date of the adjudication in bankruptcy or prior to Sanders' death.

Section 70a of the bankrupt act (Act July 1, 1898, c. 541, 80 Stat. 565, 566 [U. S. Comp. St. 1901, p. 3451]) is as follows: "The trustee of the estate of a bankrupt, upon his appointment and qualification, * * * shall * * * be vested by operation of law, with the title of the bankrupt, as of the day he was adjudged a bankrupt, except in so far as it is to property which is exempt to all (1) documents relating to his property; * * * (3) powers which he might have exercised for his own benefit, but not those which he might have exercised for some other person; (4) property transferred by him in fraud of his creditors; (5) property which prior to the filing of the petition he could by any means have transferred or which might have been levied upon and sold under judicial process levied against him: Provided, that when any bankrupt shall have any insurance policy which has a cash surrender value payable to himself, his estate, or personal representative, he may, within thirty days, after the cash surrender value has been ascertained and stated to the trustee by the company issuing the same, pay or secure to the trustee the sum so ascertained and stated, and continue to hold, own, and carry such policy free from the claims of the creditors, partic-

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

ipating in the distribution of his estate under the bankruptcy proceedings, otherwise the policy shall pass to the trustee as assets."

[1, 2] The proviso in section 70a, when analyzed, shows: First, that the said section had in contemplation policies that had some cash surrender value at the time the insured was adjudged a bankrupt; second, that when such value has been ascertained and stated to the trustee, by the company issuing the policy, the bankrupt may pay or secure to the trustee the sum so ascertained; third, that the payment must be made or security given to the trustee within 30 days after said value has been ascertained; fourth, that upon complying with these requirements the bankrupt shall continue to hold and own such policy, free from the claims of creditors; and, fifth, that if the bankrupt complies with said requirements the policy shall not pass to the trustee as assets. In order to place a proper construction on said section, we naturally endeavor to ascertain the object which it was the intention of Congress to accomplish.

It will be observed that policies of insurance are placed upon different footing from all other property vested in the trustee, and that it was not intended that the policies, but only their cash surrender value, should become assets, unless the insured failed or refused to comply with certain prescribed conditions. It is true the proviso contemplates a benefit to the bankrupt estate, and, when the policies have a cash surrender value, they are vested in the trustee by operation of law in order that said value may be added to the assets. But the main object was to enable the bankrupt to hold and own the policy free from the claims of his existing creditors; and the only effect of holding that the title to the policies was vested in the trustee, even when they were without cash surrender value, would be to defeat the principal aim of the statute without increasing the assets. The law never intends that an act should be done, when its effect would be wholly nugatory.

If it had been ascertained that the policies had a cash surrender value of \$100, and the insured had paid that sum, the trustee would no longer have any interest in them. Do the admitted facts show that the bankrupt forfeited his right to pay the cash surrender value and to continue to hold the policies? Let us consider the bankrupt's rights, in view of the fact that the cash surrender of the policies has not been ascertained and stated to the trustee by the company issuing the same. It is admitted that the trustee made no effort to ascertain the same from the company or to communicate the same to M. F. Sanders or Bessie W. Sanders; that M. F. Sanders notified both the referee and the trustee of the existence of the policies, and that he and his attorney regarded them as having no cash surrender value; that the trustee said he would take

them up at some other time; that the bankrupt died on the 12th of January, 1912; and that the bankrupt estate has not been settled. The only difference to be drawn from these facts is that if the bankrupt were alive he would still have the right to pay the cash surrender value of the policies and hold them free from his existing creditors upon complying with the requirements of said section, but that as he is dead this privilege could be exercised by the representative of his estate. In re Judson, 192 Fed. 834, 113 C. C. A. 158.

Under our interpretation of the said section, this, however, is an immaterial question, as the fact that the policies had no cash surrender value shows that the title to them did not become vested in the trustee; there being no failure to perform a condition where the nonperformance thereof would have caused the title to the policies to become assets of the bankrupt estate.

In the case of *Hiscock v. Mertens*, 205 U. S. 202, 27 Sup. Ct. 488, 51 L. Ed. 771, the court had under consideration the question whether the cash surrender value of a policy of insurance under section 70a of the bankruptcy act must be provided for in the policy, or whether it is sufficient if the policy have such value, by the concession or practice of the company. In discussing this question, the court thus states the object of the foregoing provision: "It was an actual benefit for which the statute provided, and not the manner in which it should be evidenced. * * * What possible difference could it make whether the surrender value was stipulated in a policy or universally recognized by the companies? In either case the purpose of the act would be subserved which was to secure to the trustee the sum of such value and to enable the bankrupt to 'continue to hold, own and carry such policy free from the claims of the creditors participating in the distribution of the estate under the bankruptcy proceedings.'"

The statute is thus explained in the case of *Morris v. Dodd*, 110 Ga. 606, 36 S. E. 83, 50 L. R. A. 33, 78 Am. St. Rep. 129: "The purpose of the bankruptcy act is to take the property owned by the bankrupt when the petition is filed and apply it toward the payment of his then existing debts, discharging him in due course from any further liability; his after-acquired property not being subject to such debts. This being true, it is apparent that the creditors represented by the trustee, whose debts cannot continue against the bankrupt, can have no insurable interest in his life for the purpose of indemnifying themselves against loss. In view, therefore, of the authorities cited and the language of the act itself, it seems that a policy of insurance on the life of a bankrupt, though payable to his legal representatives, does not vest in the trustee as assets of the bankrupt's estate, if the policy has no cash surrender value."

To the same effect is the case of *In re Judson*, 192 Fed. 834, 113 C. C. A. 158, in which the court says: "We think that the statute in question clearly indicates an intention upon the part of Congress to permit bankrupts to retain the advantages of existing life insurance policies, provided they will pay to their trustees all that could be obtained by surrendering such policies at the commencement of the proceedings. In the case of policies having a cash surrender value, the proviso covers the case. In the case of policies having no cash surrender value, the proviso does not apply expressly, but, reading it in connection with the other provisions, we think that such policies are not 'property' within the meaning of the statute, but are in the nature of personal rights. True, they are 'property' within technical definitions of that term. But they represent nothing more than the right to pay future premiums at a fixed rate. Their value is altogether speculative, and in our opinion it was not the intention of Congress that bankrupts should be deprived of their policies to enable trustees of bankrupt estates to use their funds to speculate with."

[3, 4] The first and second propositions upon which the appellants rely are: (1) "That the bankrupt (the insured) had a 'power which he might have exercised for his own benefit,' viz., the power to change the beneficiary, and that that power passed to the trustee." (2) "That the power to change the beneficiary was property, within the meaning of the act, which he could have transferred or assigned, and that that right passed to the trustee." These propositions are unsound for the reason they presuppose that the policies were vested in the trustee, which we have shown is not the fact.

[5, 6] The third proposition is as follows: "That Mrs. Sanders, the beneficiary, being also a bankrupt, and the insured having died before the estate was wound up, the fund belongs to the trustee."

In the first place, the value of Bessie W. Sanders' interest in the policies, as an asset in the hands of the trustee, must be determined with reference to the filing of the petition, and not, as contended, at the time her husband died. And in the second place, whatever interest she may have had at that time was subject to be defeated by the action of the insured in changing the beneficiary, which was actually done. The appellant, however, contends that the statements upon which the change was made were false. If there was fraud in this respect, it did not affect the rights of the trustee, and he has no cause to complain. *Morris v. Dodd*, 110 Ga. 606, 36 S. E. 83, 50 L. R. A. 33, 78 Am. St. Rep. 129.

Judgment affirmed.

HYDRICK, J., concurs. WATTS, J., disqualified.

WOODS, J., I dissent. The right of the insured to change the beneficiary of the policies, being a power which he could exercise for his own benefit, was property both under the general principles of law and under the express terms of the bankrupt act, and it passed to the trustee in bankruptcy under the statute expressly providing that all property not exempt, including such a power, should pass to the trustee. *Earle v. Maxwell*, 86 S. C. 1, 67 S. E. 962, 138 Am. St. Rep. 1012; *In re Hettling*, 175 Fed. 65, 99 C. C. A. 87; *In re Dolan* (D. C.) 182 Fed. 949; *Clark v. Equitable Life Ins. Society* (C. C.) 143 Fed. 175; *In re Whelpley* (D. C.) 169 Fed. 1019; *In re Wright*, 157 Fed. 544, 85 C. C. A. 206, 18 L. R. A. (N. S.) 193; *In re Slingluff* (D. C.) 106 Fed. 154; *In re White*, 174 Fed. 333, 98 C. C. A. 205, 26 L. R. A. (N. S.) 451; *In re Orear*, 178 Fed. 632, 102 C. C. A. 78, 30 L. R. A. (N. S.) 990; *Partridge v. Andrews*, 191 Fed. 325, 112 C. C. A. 69, 41 L. R. A. (N. S.) 123.

It is argued that it did not pass in this instance, however, for the reason that the policy was payable to the wife of the insured and so stood at the date of the petition and adjudication in bankruptcy, and such a policy is expressly exempted from the claims of creditors of the insured by section 2721 of Civil Code of the state. This argument would be sound if the Constitution of this state did not expressly forbid that the constitutional exemption to the husband and wife jointly should not exceed the \$1,000 real estate and \$500 personal property, which exemption was claimed and allowed. But for this provision of the Constitution it would have been within the legislative power to extend the constitutional exemption to include life insurance policies. *Holden v. Stratton*, 198 U. S. 202, 25 Sup. Ct. 656, 49 L. Ed. 1018.

The bankrupt statute did not permit Sanders to retain the policies by tendering to the trustee the cash surrender value, because it is admitted in the agreed statement of facts that they had no cash surrender value, and that the insurance company would not have paid any money for them at the date of the adjudication in bankruptcy or at any time prior to the death of Sanders. The admission excludes the case from the provision of the bankrupt act allowing the bankrupt to retain an insurance policy on payment of the cash surrender value, and takes it out of the rule laid down in *Hiscock v. Mertens*, 205 U. S. 202, 27 Sup. Ct. 488, 51 L. Ed. 771, that policies having a cash surrender value within the meaning of the act embrace those which either by their terms or by the practice or concession of the company issuing them have such value.

FRASER, J. I concur with the Chief Justice for the reason that the statute provides that the trustee in bankruptcy shall take "(3) powers which he (the bankrupt) might have exercised for his own benefit, but not those

which he might have exercised for some other person." It is beyond question that the bankrupt might have exercised this right for some other person. He did. The rule of statutory construction is that, where there is a conflict between two provisions of a statute, the last shall govern as the last expression of the legislative will. So it seems to me that, where circumstances throw a case under the last clause, then the last clause must govern. Inasmuch as the statute distinctly says that the power which he might have exercised for some other person shall not go to the trustee, the courts have no right to award these policies to the trustee. If we do, we violate the term of the act. If Congress had intended to confine the exemption to those powers that the bankrupt might have exercised exclusively for others, it was easy to have said so. The proviso to item 6 treats of policies payable to the bankrupt or to his estate, and made no other provision as though it had exhausted the subject. It is difficult to see how a policy which has no cash surrender value and not payable to the bankrupt or his estate passes to the trustee. The intention is to save the insurance, not to destroy it. Item 5 does not control item 3, however, as item 3 is a special provision and item 5 is a general provision.

State ex rel. Lyon v. Bowden, 92 S. C. 401, 75 S. E. 873: "But, even if the two provisions were inconsistent, no principle of construction is better settled, both by authority and reason, than this: Where, in a legislative enactment, a special provision is made as to a subject which would otherwise be embraced in a general provision on the same subject, the special provision is held to be an exception and not intended to be embraced in the general provision."

Whatever we may now think of the propriety of allowing a debtor to take money that ought to go to his creditors and with it buy life insurance for the benefit of his family, and allow the family to collect and enjoy the proceeds of the policy to the entire exclusion of the creditors, even from that portion represented by the premiums paid, still the law is too well settled to doubt its existence or escape its consequences, except by statutory enactment. Here the enactment is the other way. Again the trustee must take the required steps to change the beneficiary before he can claim the proceeds of the policy.

In Deal v. Deal, 87 S. C. 395, 69 S. E. 886, Ann. Cas. 1912B, 1142, it was held that a strict compliance with terms of the policy are necessary before a change in the beneficiary can be enforced. Here there was no effort to change the beneficiary during the life of the insured, and, now that the rights of the beneficiaries have become absolute by the death of the insured, the trustee asks that

without a change of beneficiary, even now, the proceeds be paid to him, and I do not think it can be done. Under the law of South Carolina these policies are payable to the beneficiaries named in the policies, and I do not see that the federal statute is in conflict. If these policies had cash surrender value, say \$150, the trustee would have been entitled to the \$150; but, as they had no value, the trustee claims to be entitled to \$15,000. I cannot think the claim can be allowed, and concur with the Chief Justice.

GARY, O. J. The defendant-appellant S. H. McGhee, as trustee, having determined not to sue out writ of error from the Supreme Court of the United States in the above-entitled causes, on motion of the attorneys for the said defendant-appellant, it is ordered that the order heretofore granted by this court, staying the remittitur in said causes, be, and the same is hereby, revoked.

(95 S. C. 90)

GILL v. RUGGLES.

(Supreme Court of South Carolina. May 20, 1913. On Rehearing, June 11, 1913.)

1. LIBEL AND SLANDER (§ 104*)—ACTIONS FOR SLANDER—EVIDENCE—ADMISSIBILITY.

In an action for slander, evidence of the uttering by defendant of the slanderous words at times other than those alleged in the complaint is admissible to prove malice.

[Ed. Note.—For other cases, see Libel and Slander, Cent. Dig. §§ 284-291; Dec. Dig. § 104.*]

2. EVIDENCE (§ 474*)—CONCLUSION OF WITNESS—ADMISSIBILITY.

A witness, who in an action for slander testified to the remarks of defendant, may express his opinion that defendant never seemed to be very friendly toward plaintiff for a time back.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 2196-2219; Dec. Dig. § 474.*]

3. TRIAL (§ 267*)—INSTRUCTIONS—ASSUMPTION OF FACTS.

A requested instruction, which states that a fact appears from the evidence and which applies the law thereto, is properly modified by applying the law to the fact if it appears.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 668-672, 674; Dec. Dig. § 267.*]

4. LIBEL AND SLANDER (§ 64*)—MITIGATION OF DAMAGES.

The jury may consider in mitigation of damages for a slander that what defendant said of plaintiff was based on information given by others and believed to be true, but the jury is not required to do so.

[Ed. Note.—For other cases, see Libel and Slander, Cent. Dig. § 165; Dec. Dig. § 64.*]

5. APPEAL AND ERROR (§ 171*)—QUESTIONS REVIEWABLE—THEORY OF CASE IN TRIAL COURT.

Where, in an action for slander, the court and plaintiff's counsel understood that an ambiguous answer was an unqualified plea in justification and the court charged the jury on that issue, defendant failing to call the court's

attention to its mistake in construing the answer, could not complain on appeal.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1053-1063, 1066, 1067, 1161-1165; Dec. Dig. § 171.*]

6. LIBEL AND SLANDER (§ 10*) — WORDS IMPUTING CRIME—"GRAFTING."

To falsely charge one with "grafting" is to falsely charge him with the statutory crime of breach of trust with a fraudulent intent; the term "grafting" being understood to mean the fraudulent acquisition of property by using official position either public or private for a personal gain at the expense of those to whom the official duty is owing.

[Ed. Note.—For other cases, see Libel and Slander, Cent. Dig. §§ 41, 91-96; Dec. Dig. § 10.*]

Gary, C. J., and Fraser, J., dissenting in part.

Appeal from Common Pleas Circuit Court of Marion County; J. W. De Vore, Judge.

Action by Charles E. Gill against Charles F. Ruggles. From a judgment for plaintiff, defendant appeals. Affirmed.

Washburn, Bailey & Mitchell, of Duluth, Minn., and W. F. Stackhouse and L. D. Lide, both of Marion, for appellant. Willcox & Willcox, of Florence, and Henry Buck, of Marion, for respondent.

FRASER, J. This is an action for slander. The complaint set forth three causes of action; but, inasmuch as the trial judge withdrew the third cause of action from the jury and there is no appeal from his ruling, we will consider only the first and second.

The material allegations of these causes of action are as follows:

For a first cause of action: "Third. That, as plaintiff is informed and believes, at Marion, in the county of Marion and state of South Carolina, on the 6th day of March, A. D. 1911, the defendant herein in the presence of and to Robert Kickbusch and F. S. Swinbank willfully, wantonly, falsely, and maliciously slandered this plaintiff, in that in the presence of said persons and to them he openly and falsely charged this plaintiff with having grafted and stolen from the Southern Carolina Lumber Company, a corporation chartered and organized under the laws of the state of South Carolina, large sums of money in the sale of lumber for the said Southern Carolina Lumber Company to others and in otherwise robbing said company in numerous ways; that the defendant then and there to said persons falsely charged that said grafting and stealing was done by plaintiff while acting as president of said Southern Carolina Lumber Company, as manager and director thereof, and further falsely accused this plaintiff, as such president, manager, and director, of appropriating to his own use large sums of money belonging to the said Southern Carolina Lumber Company, in the following words, to wit: 'Gill has been grafting from the company in the sale of lumber to Sterling Lumber Company, which is Gill & Son, and has been robbing the

company in various other ways, and I can furnish the evidence to put him behind the bars if you want to use it.' To plaintiff's damage in the sum of fifty thousand dollars."

For a second cause of action: "Third. That at Marion, in the county of Marion, in the state of South Carolina, on the 7th day of August, A. D. 1911, in the presence of H. S. Wunderlich, J. H. Rademaker, Joseph Wightman, and L. D. Lide, the defendant, Charles F. Ruggles, openly, wantonly, willfully, falsely, and maliciously slandered this plaintiff by then and there and in the presence of said persons charging this plaintiff with having fraudulently grafted and stolen from Southern Carolina Lumber Company, a corporation chartered and organized under the laws of the state of South Carolina, large sums of money in the purchase of certain machinery for said company, in the following words, to wit: 'This man, Gill, has grafted from this company in his purchase for the company. No one believes that he paid three thousand dollars for the skidder that he bought, and no one believes that he paid eighteen hundred dollars for the steam loader that he bought, and the same way through all his purchases. You, Gill, are so crooked you have been asked not to sit in any more games of cards at the Carmichael Hotel; you have been grafting and stealing from this company all the way through.' To plaintiff's damage fifty thousand dollars."

The answer denied these allegations and set up that, while he had made statements in regard to the plaintiff, yet that the statements which he did make were privileged communications, and he believed them to be true, and that they were made without malice. The trial resulted in a verdict for plaintiff for \$7,500, judgment entered thereon, and the defendant appealed on the following exceptions:

[1] "I. Because his honor erred, it is respectfully submitted, in allowing plaintiff's witness H. S. Wunderlich to testify, over defendant's objection, as to remarks made by the defendant concerning the plaintiff at times other than those alleged in the complaint, on the ground that such testimony was incompetent and not responsive to the allegations of the complaint, and was prejudicial to the defendant."

This exception does not direct the attention of this court to the exact evidence complained of. As a general proposition it cannot be sustained. In *Morgan v. Livingston*, 2 Rich. 585, it is said: "The action of slander is intended not only to recompense a plaintiff for an injury done to his character, but also to punish the defendant for his malice. Any evidence which shows that the slander has been again and again repeated is competent to prove malice. The greater length of time in which the defendant has repeated his publications evidences that his words

have not been the result of passion, and shows a deliberate purpose to injure the plaintiff."

[2] "II. Because his honor erred, it is respectfully submitted, in refusing to strike out the testimony of plaintiff's witness H. S. Wunderlich, to the effect that defendant never seemed to be very friendly towards the plaintiff 'for a time back,' in that such testimony was incompetent, not responsive to the allegations of the complaint, was a mere expression of the opinion of the witness, and was prejudicial to the defendant."

There were two statements by this witness in which he gave his opinion. The motion to strike out applied only to the second statement. At that time the witness had stated the remarks of the appellant, and it was not error to allow him to express his opinion. There are numerous cases that hold this. *Douglass v. Railway*, 82 S. C. 71, 62 S. E. 15, 63 S. E. 5, among them. This exception is overruled.

"III. Because his honor erred, it is respectfully submitted, in charging the jury as follows: "Where the truth is pleaded in justification, failure to sustain the plea by proof may be construed by a jury as an aggravating circumstance in estimating damages." I charge you that, where a person said he was justified in speaking the words because they were true, and he fails to establish the truth of them on the trial by evidence, the jury may take that into consideration as an aggravating circumstance in estimating the damages. "While the defendant, under his plea of justification for the slander, must prove his charge to make the defense complete, the jury, in fixing their verdict, may take into consideration circumstances of aggravation or of mitigation." I charge you that, as I have already done. "In action of slander of words imputing a crime to the plaintiff, the defendant, to support a plea of justification, must produce a record of conviction of the crime so imputed, or else show the plaintiff's guilt by evidence sufficient to convict him if on trial for such crime; otherwise, the jury must find for plaintiff. A mere preponderance of evidence is not sufficient to sustain the plea." I so charge you. That means this: It is alleged in the plaintiff's complaint that the defendant charged him with stealing and grafting. Those two things amount to crime in South Carolina. Now, when the defendant undertakes to justify by saying that it is true, then the defendant must prove the truthfulness of that statement, and the evidence to establish the truthfulness of that statement must be such as would enable a jury to convict the person of the crime charged if he was on trial for it. That is, the defendant must prove the charge beyond a reasonable doubt, instead of by the greater weight or preponderance of the evidence. In other words, if I were to say to you, Mr. Foreman, that you stole my horse, and said it

willfully, falsely, and maliciously, and you were to sue me for slander, and I would undertake to justify, my defense would be a justification; that is, that I told the truth when I said it. When I undertook to prove my defense, I would have to prove your guilt. I would have to prove the charge against you by evidence that would warrant a jury in convicting you if I was on trial for it. That is, I would have to prove it beyond a reasonable doubt. "Where the plea of justification falls because unsupported by evidence, the jury, in estimating the damages, may consider this as a circumstance of aggravation, and of continued and express malice." You may do that.' The above-quoted portions of the charge were erroneous, in that, the defendant did not plead generally or specifically the truth of the alleged statements set forth in the complaint, and did not offer any evidence tending to show the truth of such alleged statements, and the said portions of the charge were highly prejudicial to the defendant, in that, the jury naturally inferred therefrom that the burden of proof was upon the defendant to prove the truth of the slanderous words alleged in the complaint to the satisfaction of the jury beyond a reasonable doubt, in order to escape liability, and that the failure so to prove the truth of the said alleged slanderous words would, as charged by the presiding judge, be a circumstance of aggravation; whereas, the defendant submits: (a) That he did not in his answer admit the use of the slanderous words alleged in the complaint, but, on the contrary, denied the use thereof; (b) that he did not plead the truth of the slanderous words alleged in the complaint as justification; (c) that upon the trial the testimony of the defense tended to disprove the use of the slanderous words alleged in the complaint, and defendant did not attempt in any way to prove the truth of the said alleged slanderous words."

This exception is sustained. The appellant denied the words alleged. He did not allege that the words were true and did not undertake to prove them. The defendant said in his answer, "I did not say what you charged me with saying," and put up a witness to attempt to prove that he did not say the things charged. Therefore, to charge the law as to justification was misleading. The respondent says that if the judge misstated the issue the appellant ought to have called his attention to the error, and, having failed to do so, has waived his right to object. His honor stated the issue correctly and stated that the defendant claimed that the words he did speak were true, to wit, "Whatever words I used on that occasion were true." That differs very widely from justification. Justification is, "Yes, I said you stole, and you did steal." When his honor then charged the law as to justification, it was misleading. It is but fair to his honor, the trial judge, to say that this answer cov-

ers 31½ pages of the printed brief, and it is not surprising that some confusion crept in.

"IV. Because his honor erred, it is respectfully submitted, in charging the jury that 'grafting' is a crime in this state, and that the words charging one with grafting are actionable per se, in that the word 'grafting' does not necessarily impute a crime."

"Grafting" is not necessarily a crime and is not a synonym of "stealing." "Stealing" is the popular word for the technical word "larceny." The Century Dictionary defines "graft": "(2) Figuratively, something inserted in or incorporated with another thing to which it did not originally belong; an extraneous addition." The word as applied to officials either public or private would therefore indicate some advantage derived by the officer that was not contemplated or provided for by the appointing power. The advantage may be forbidden by law and therefore a crime. It may not be forbidden by law and therefore not a crime, however improper from an ethical view of the matter. To illustrate, in former days certain officers were entitled to free ferriage by virtue of their offices. Free ferriage was not then graft for these officers, because it was theirs by law and the right to free ferriage was conferred with the office. The Legislature might then repeal the law requiring free ferriage. The owners of the ferry might think it to their advantage to continue free ferriage to these same officers for some hoped for advantage to themselves to be derived from a lax enforcement of the law or in the hope of securing new privileges. Free ferriage would then come to the officer as graft. Whatever view one may hold as to the moral of accepting free ferriage, it would not be a crime. The Legislature might then seek to destroy the evil effect of allowing the ferry companies to put public officers under obligations to them and forbid the giving and acceptance of free ferriage and affix a penalty to it. The acceptance of free ferriage (graft) would then become a crime. It was the province of the jury to say in what sense the word was used and not a matter of judicial construction. *Morgan v. Livingston*, 2 Rich. 283: "If words are susceptible of two meanings, one imputing a crime, and the other innocent, the latter is not to be adopted, and the other rejected, as a matter of course. In such a case, it must be left to the jury to decide in what sense the defendant used them." The converse is equally true, that the court cannot adopt, as a matter of course, that meaning that imputes a crime. It is a question for the jury, and his honor invaded the province of the jury when he said, in this connection, that if the defendant used the word "grafting" he intended to charge a crime. There is a presumption that where two words are used they represent two ideas. It is true that some men use all the synonyms their vocabularies will afford in the effort to express an idea; but they al-

ways fall in exactness, and these men are exceptions. This exception is sustained.

[3] "V. Because his honor erred, it is respectfully submitted, in modifying defendant's first request to charge, which read as follows: 'It appearing from the evidence that whatever was spoken by the defendant of the plaintiff, so far as the second cause of action set forth in the complaint is concerned, was said at a meeting of the board of directors of the Southern Carolina Lumber Company, of which board both plaintiff and defendant were members, in the presence only of the officers and directors of the said company, in the course of discussions relating to the business and affairs of the said company, such communications were privileged, and the presumption is that there was no malice on the part of the defendant, and, in order to recover on this cause of action, plaintiff must show by the preponderance of the evidence that the defendant was actuated by malice towards him in making these said statements.' The said request was modified by striking out the words 'it appearing,' at the commencement of the said request, and inserting in lieu thereof the words, 'if it appears,'—it being submitted that the entire testimony showed without contradiction that the facts set forth in said request were true."

The point here is that his honor substituted "if it appears" for "it appearing." This exception is overruled. The substitution was proper.

[4] "VI. Because his honor erred, it is respectfully submitted, in modifying defendant's fifth request, which is as follows: 'If you find from the evidence that whatever was said by the defendant of the plaintiff was based upon information given him by others, and was said in the belief that such statements were true, these facts should be considered by you in mitigation of damages, if you find that plaintiff is entitled to recover at all.' Said request was modified by the addition of the following words: 'You may do it, or you may not do it, just as you view the evidence,'—it being respectfully submitted that it was the duty of the jury to consider the facts set forth in the said request in mitigation of damages, if they found such facts to be true."

This exception is overruled. The cases say "may." A rule of law ought never to require the impossible. The jury had limits of one cent and a hundred thousand dollars, and the court had no right to control their estimate.

I think the judgment of this court should be that the judgment appealed from be reversed and the cause remanded for a new trial.

GARY, C. J., concurs.

WOODS, J. (concurring in part). I concur in the opinion of Mr. Justice FRASER,

except that I think that the third and fourth exceptions should be overruled, along with the others.

[5] The third exception is very long, and being fully set out in the opinion of Justice FRASER, need not be repeated. It is true the defendant denied in his answer the slanderous words attributed to him in the complaint; but, after stating his differences with the plaintiff, he uses this language: "All the matters and things above set forth are pleaded, not only in justification of such statements as defendant did make, but in mitigation of any damages to which plaintiff might otherwise appear entitled." It is conceded by appellant's counsel that if this could be construed into an allegation that there was justification for the statements attributed to the defendant in the complaint because they were true, then the portion of the charge set out in this exception would be correct. I agree with Mr. Justice FRASER that the better construction was that, while the defendant denied using the words imputed to him, yet he was justified in using whatever language he did use. But the allegation was not clear, and it was manifestly understood by the counsel for plaintiff and the circuit judge as an unqualified plea in justification. This is clear from plaintiff's request to charge, as well as the charge itself. Seeing that the judge misunderstood the pleading and was charging on an issue not made by the answer, it was incumbent on defendant's counsel to call the court's attention to its mistake. This was not done, and it is well settled that new trials will not be granted in such circumstances.

[6] I cannot agree to the proposition contained in the fourth exception that the court erred in charging that "grafting" is a crime in this state. It is true that grafting is not mentioned under that name as a crime in the statutes of the state, but the term is always understood to mean the fraudulent acquisition of property by using official position, either public or private, for personal gain, at the expense of those to whom the official duty is owing. This is the statutory crime of breach of trust with fraudulent intent in its worst form.

I think all the exceptions should be overruled and the judgment affirmed.

The majority of the court having concurred in overruling all the exceptions, the judgment of the circuit court is affirmed.

HYDRICK and WATTS, JJ., concur.

On Rehearing.

PER CURIAM. After a careful consideration of the matters alleged in the within petition, this court is satisfied that it has not overlooked any matter of law or disregarded any evidence contained in this case.

It is therefore ordered that the order heretofore made staying the remittitur be revoked, and the petition herein refused.

(95 S. C. 47)

GRANITE BRICK CO. v. TITUS.

(Supreme Court of South Carolina. June 6, 1913.)

COURTS (§ 874*) — PROCESS IN FEDERAL COURTS — SERVICE — EXEMPTIONS — STATE STATUTES.

Service of summons on a nonresident coming into the state to attend a trial in a federal court as a party and witness, made while in the federal court and while his case is on trial and a witness is on the stand, will be set aside; the state statute governing exemptions from service of process applying to state courts only.

[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 981, 982; Dec. Dig. § 374.*]

Appeal from Common Pleas Circuit Court of Richland County; Ernest Gary, Judge.

Action by the Granite Brick Company against Edward H. Titus. From an order setting aside service of summons on defendant, plaintiff appeals. Affirmed.

Lyles & Lyles, of Columbia, for appellant. Shand & Shand and B. L. Abney, all of Columbia, for respondent.

FRASER, J. This is an appeal from an order of Judge Ernest Gary, setting aside the service of a summons on the defendant. The defendant was and is a nonresident of this state and came into this state for the sole purpose of attending a trial in the United States court as a party and witness. The summons was served in the federal court while his case was on trial and a witness was on the stand.

The appellant frankly admitted, unless this court would overrule the case of Breon v. Miller Lumber Co., 83 S. C. 221, 65 S. E. 214, 24 L. R. A. (N. S.) 276, 137 Am. St. Rep. 803, he has no case. This court would not overrule that case, even if it were germane to this issue, but it is not. Whatever may be the right of the legislative department to hinder the due administration of justice in the courts of this state by the service of a summons merely, and thereby distract the attention of parties and witnesses from the cause then being tried, we cannot so construe the act as to hold that it applied to a court over which the Legislature of this state has no jurisdiction. This doctrine is not new. When the stamp act was passed by the federal government, and it was provided that an unstamped contract should not be received as evidence in "any court," it was held that "any court" meant any federal court. The reason was that, in as much as the federal government had no right to prescribe rules of evidence for the state courts "any court" meant any federal court. The converse is equally true; and, when the

state statute says any court, it must be taken to mean any state court. The appellant relies upon the state statute for the right to make this service of process upon the defendant. At common law it was not allowed; and, inasmuch as we have held that it does not apply, the other exceptions do not arise.

The judgment of the circuit court is affirmed.

GARY, C. J., and WOODS, HYDRICK, and WATTS, J.J., concur.

(115 Va. 1)

BRAGG v. TINKLING LAND & IMPROVEMENT CO., Inc., et al.

(Supreme Court of Appeals of Virginia. June 12, 1913.)

DOWER (§ 76*)—ADMEASUREMENT—PARTIES.

Where, in a suit for admeasurement of dower out of land which had been conveyed in the lifetime of complainant's husband without her jointure, she admitted that her husband died seised of sufficient lands to satisfy her dower rights, which lands were in the possession of his heirs, it was error to dismiss the bill, which stated a prima facie case entitling complainant to dower, but the court should have required that the heirs be made parties and then determine whether complainant was entitled to dower out of the lands sought or those of which her husband died seised.

[Ed. Note.—For other cases, see Dower, Cent. Dig. §§ 287-276; Dec. Dig. § 76.*]

Appeal from Circuit Court, Lunenburg County.

Suit by the widow of W. J. Bragg to obtain dower out of certain lands owned by her husband in his lifetime. From a decree denying the relief sought, complainant appeals. Reversed and remanded.

Geo. E. Allen, of Victoria, and R. Grayson Dashiell, of Richmond, for appellant. Turnbull & Turnbull, of Lawrenceville, Thorp & Thorp, of Norfolk, and McNeill, Hudgins & Ozlin, of Richmond, for appellees.

HARRISON, J. W. J. Bragg died in February, 1909, and in August of that year his widow, the appellant, brought this suit to obtain dower out of certain lands described in her bill. The decree complained of denied the relief sought, and this appeal was taken.

A demurrer was sustained to the original bill filed by the appellant, and thereupon she filed an amended bill in which she states the following case: That during his lifetime her husband was seised and possessed in fee simple of a tract of land in Lunenburg county, containing 423¼ acres; that by deed of trust, in which she did not unite, dated in September, 1866, her husband conveyed the tract of land mentioned to a trustee to secure debts; that subsequently her husband was adjudged a bankrupt, and the land was sold by authority of the bankrupt court, subject to her contingent right of dower there-

in, and conveyed to the purchaser; that since this sale by the bankrupt court the land has passed into other hands, a large part of it having been subdivided into small town lots, which are now owned by numerous alienees who have improved the same; that she has never been assigned her dower in any part of the land or received the commuted value thereof; and that her right to dower in such land has never been relinquished, except in a small portion thereof acquired by the Virginian Railway for railroad purposes. The bill charges that in view of the construction and operation of the Virginian Railway and the rapid growth and development of the town of Kenbridge, a portion of which is located on part of the land in which she is entitled to dower, and for other reasons, the land has become very valuable, and that it is now impracticable, if not impossible, to assign her dower in kind in at least a part of the land; that about 350 acres of the original tract of 423¼ acres is valuable farm land, in which her dower might be assigned in kind, though with great injustice to her, and almost equal injustice to the other owners; that as to that portion of the land which has been laid off into town lots, and on which are standing residences, stores, warehouses, churches, etc., complainant says that it is impossible to assign her dower therein in kind without great injustice to her and equal injustice to the present owners. She does not, therefore, ask to have her dower assigned in kind but insists that she is entitled to have the same ascertained and paid to her in a lump sum according to the annuity tables provided by section 2281 of the Code. The numerous alienees of the land are made parties defendant, and the prayer of the bill is that a commissioner be directed to report to the court the value of the farming land mentioned in the bill, and also the value of the town lots mentioned therein, and what damages, if any, the complainant has sustained by the detention of her dower, and whether the farm lands can be divided so as to assign the complainant her dower therein without injustice to her or the present owners, and likewise to report whether it is practicable or possible to assign dower in kind in the lots mentioned, and for such general relief as the complainant may be entitled to.

A number of the defendants filed a joint and separate answer in which they admit that the husband of the complainant was seised and possessed of the 423¼ acres of land mentioned in the bill; that such land was sold and conveyed as alleged; and that it is now owned in part as set out in the bill. Further answering, respondents aver that the husband of complainant died seised and possessed of certain other lands in Lunenburg county, one tract containing 361½ acres, and an undivided half interest in another tract containing 178½ acres, and

they insist that the dower of the complainant can be assigned her out of these lands, and that under the law such dower must be assigned her out of the lands of which her husband died seised, if they be sufficient for that purpose, in exoneration of the lands held by the respondents. But, say respondents, if the lands mentioned in the bill are not to be exonerated as claimed, then they ask that under section 2278 of the Code the court will ascertain the values of the respective parcels of land in the bill mentioned, deducting the value of all permanent improvements made since the alienation to J. T. Tisdale (the purchaser at the bankrupt sale), and will permit the defendants to pay legal interest to the complainant annually on one-third of the value of their respective parcels of land during the lifetime of the complainant.

The case was heard upon the bill and answer alone; the decree appealed from deciding that the dower of the complainant must be assigned her in the lands of which her husband, W. J. Bragg, died seised, in exoneration of the lands mentioned in the bill. The decree then states that no inquiry is directed, because the complainant admits that her husband left sufficient lands to satisfy her dower rights, and it is therefore ordered that the cause be removed from the docket.

It is conceded at bar that the lands left by W. J. Bragg are in the possession of his heirs. This being so, we are of opinion that it was error to enter any decree in the cause upon the merits until the heirs were made parties. The bill states a prima facie case entitling the complainant to the relief asked, and the answer admits the facts alleged, so far as necessary to establish her primary right to dower in the lands held by the respondents, but seeks to avoid such liability by transferring the burden to the land in the possession of the heirs.

We are of opinion that the heirs are necessary parties and entitled to be heard before any proper or binding decree can be made in the premises. The lands bought by the defendants were, as alleged in the bill, sold subject to the complainant's contingent dower rights therein; and, inasmuch as the defendants now seek to be exonerated from that burden by having the same transferred to the lands held by the heirs, it was incumbent upon them to file a cross-bill alleging the facts entitling them to such exoneration, and making the heirs parties defendant, so that, when a decree was entered disposing of the controversy on its merits, all parties in interest would be concluded thereby.

The decree appealed from must be reversed, and the cause remanded for further proceedings in accordance with the views expressed in this opinion.

Reversed.

(115 Va. 272)

UNITED STATES v. WILLIAM R. TRIGG CO.

(Supreme Court of Appeals of Virginia. June 13, 1912. On Rehearing, June 12, 1913.)

1. JUDGMENT (§ 744*)—CONCLUSIVENESS.

A judgment deciding that supply lien creditors were entitled to priority over contractual liens of the United States against vessels, not because the government failed to record its liens, but because the contracts contemplated that the government liens should be inferior, is not res judicata of the question whether such liens are invalid because not recorded.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 1278-1281; Dec. Dig. § 744.*]

2. UNITED STATES (§ 76*)—PRIORITIES—VESSELS—LIENS—RECORD—NECESSITY.

The United States need not comply with state registry laws in order to obtain priority under contractual liens against vessels under construction for the government, on account of advances, to obtain priority over the contractor's general creditors.

[Ed. Note.—For other cases, see United States, Cent. Dig. § 59; Dec. Dig. § 76.*]

Appeal from Chancery Court of Richmond.

Insolvency proceedings against the William R. Trigg Company. From a judgment denying the United States a preference over general creditors, the United States appeals. Reversed.

L. L. Lewis, of Richmond, for the United States. Munford, Hunton, Williams & Anderson, of Richmond, A. T. C. Gordon, of Pittsburgh, Pa., and Jordan Leake, of Richmond, for appellee.

HARRISON, J. This case has several times been before this court, the last time under the style of Hawes & Co. v. Wm. R. Trigg Co., 110 Va. 165, 65 S. E. 538, which was on appeal reviewed by the Supreme Court of the United States under the style of United States v. Ansonia Brass & Copper Co., 218 U. S. 452, 31 Sup. Ct. 49, 54 L. Ed. 1107.

At the time these insolvency proceedings were instituted against the appellee company, there were three vessels, for the United States, in process of construction at its shipyard at Richmond, Va., namely, a sea-going suction dredge for the War Department, called the Benyuard, a revenue cutter for the Treasury Department, called the Mohawk, and a cruiser for the Navy Department, called the Galveston. In the progress of this litigation it has been finally decided by the Supreme Court that the Benyuard belonged to the United States, and that it was not liable for the debts of the appellee. All controversy as to this vessel is therefore at an end, and it is no longer involved in this suit.

It has also been finally settled by this court in Hawes & Co. v. Trigg Co., supra, and affirmed by the Supreme Court in United States v. Ansonia Brass & Copper Co., supra, that, as between the United States and the supply lien creditors of the Wm. R. Trigg

Company, the latter had priority of lien upon the Mohawk and the Galveston. Since the final settlement of that question, the supply lien creditors have all been satisfied.

The present controversy involves the right of the United States to preference over the general creditors of the Wm. R. Trigg Company in favor of certain contractual liens held by them against the Mohawk and the Galveston.

These two vessels were built by the Trigg Company under contracts with the United States, which provided for a lien upon each vessel in favor of the government for all moneys advanced by it on account thereof during the progress of the work. At the time of the appointment of the receiver, these vessels were in course of construction, and the government had made large payments upon each, and it is for the satisfaction of these contractual liens that the appellants now insist that they are entitled to priority over the claims of the general creditors of the William R. Trigg Company. The existence of these contractual liens in favor of the government has been recognized throughout this litigation. It is, however, contended by the appellees that these liens cannot be given preference over the general creditors of the Trigg Company, because the United States has failed to comply with the Virginia registry laws by having the contracts reserving such liens recorded. It is further insisted that this court has held, in *Hawes & Co. v. Trigg Co.*, *supra*, which decision has been affirmed in that respect by the Supreme Court in *United States v. Ansonia Brass, etc., Co.*, *supra*, that these contractual liens in favor of the appellants against the Mohawk and the Galveston are invalid and cannot be enforced as against the appellees, because unrecorded, and that, therefore, the question of the validity of such liens, so far as the general creditors are concerned, is *res judicata*, and, further, that if the question of the validity of such liens has not been already finally decided in this litigation adversely to the United States, it must now be so decided.

[1] An examination of the record and the opinion of this court on the former appeal in the case of *Hawes & Co. v. Trigg Co.*, *supra*, shows very clearly that the question now raised between the United States and the general creditors of the Trigg Company was not considered or intended to be dealt with at that time. The only questions then under consideration were those dealt with in determining the controversy between the supply lien creditors of the Trigg Company and the United States. Nowhere in the elaborate petition for appeal in that case is there mention of any creditors save the supply lien creditors. It is true that one of the grounds relied on in support of the priority of claim in favor of the supply liens was that the contractual liens in favor of the United States

were void as to creditors under the recordation statute of the state, but that question was not even mentioned in the decision of the case. The court very clearly and succinctly states the question to be determined by it in these words:

"The question decided by the lower court and presented on this appeal is whether title to these several vessels was in the government or the Trigg Company, and, if in the latter, have its creditors who have sued out and caused to be recorded, in accordance with the labor and supply lien statute of the state, claims for supplies furnished the Trigg Company above referred to, priority of right to satisfaction over the rights of the government in the said vessels."

After carefully considering the case as stated, the court announced its conclusion that the supply lien creditors were entitled to priority over the contractual liens of the government, not because the United States had failed to record their contractual liens, but because, as clearly shown by the provisions of the contracts reserving those liens, it was intended that they should be inferior to the supply liens. On appeal the Supreme Court took this view; and affirmed the decision of this court as to the Mohawk and the Galveston.

The Virginia recording acts were not mentioned in the opinion of this court, or in that of the Supreme Court, and it cannot be presumed that either court intended to decide such a far-reaching and important question as that the contracts of the United States are subject to state registry statutes, without even mentioning the subject, especially when it is clear that the decision of so vital a question was not necessary to a disposition of the controversy then before the court.

Certain expressions in the opinion of this court are relied on as tending to show that the intention was to hold that the contractual liens in favor of the United States were not superior to the claims of the general creditors. The expressions relied on are wholly insufficient to justify the use that is sought to be made of them. It is manifest from the whole opinion that the court at no time had any such question in its mind.

As said by Mr. Justice Field in *Barney v. Winona, etc., R. Co.*, 117 U. S. 228, 6 Sup. Ct. 654, 29 L. Ed. 858: "We recognize the rule that what was decided in a case pending before us on appeal is not open to reconsideration in the same case on a second appeal upon similar facts. The first decision is the law of the case and must control its disposition; but the rule does not apply to expressions of opinion on matters the disposition of which was not required for the decision."

Looking to the whole record, including the decision of this court and that of the Supreme Court on the former appeal, we are of opinion that the lower court erred in holding

the question presented by this appeal to be res judicata.

[2] That question, which will now, for the first time, be considered and decided by this court in this litigation, involves the right of the United States, by virtue of its contractual liens upon the Mohawk and the Galveston, to priority, as to those vessels, over the general creditors of the Wm. R. Trigg Company. In other words, are the United States bound to comply with the state registry laws and have their contracts recorded, in order to make effective and available the liens reserved in such contracts, as against those who have no liens?

In the light of the decisions of the Supreme Court of the United States, it is clear that this question must be answered in the negative.

In *United States v. Maurice*, 2 Brock. 96, Fed. Cas. No. 15,747, Chief Justice Marshall decided, as the Supreme Court of the United States in subsequent cases has repeatedly held, that the power of the federal government to contract is one of the means necessary to accomplish the objects for which the government was established, and that this capacity to contract is coextensive with the duties and the powers of government. No power, indeed, is more essential to the maintenance of the government. A different principle would involve a denial of the ordinary rights of sovereignty. *United States v. Tingey*, 5 Pet. 115, 8 L. Ed. 66; *United States v. Bradley*, 10 Pet. 343, 9 L. Ed. 448; *Van Brocklin v. State of Tennessee*, 117 U. S. 151, 6 Sup. Ct. 670, 29 L. Ed. 845; *Moses v. United States*, 166 U. S. 571-586, 17 Sup. Ct. 682, 41 L. Ed. 1119.

This power to contract, which is an incident of the sovereignty of the United States, and is, as stated by Judge Marshall, coextensive with the duties and powers of government, carries with it complete exemption of the government from all obligation to comply with state registry laws, for the reason that it would grievously retard, impede, and burden the sovereign right of the government to subject it to the operation of such laws. *Dollar Savings Bank v. United States*, 19 Wall. 227, 22 L. Ed. 80; *Stanley v. Schwalby*, 147 U. S. 508, 13 Sup. Ct. 418, 37 L. Ed. 259; *United States v. Snyder*, 149 U. S. 210, 13 Sup. Ct. 846, 37 L. Ed. 705.

If the states had the power to interfere with the operations of the federal government by compelling compliance on its part with state laws, such as the registry statutes, then, in the language of the Supreme Court, the potential existence of the government would be at the mercy of state legislation. *United States v. Snyder*, supra.

Both the Supreme Court of the United States and this court have recognized these liens asserted by the United States against the Mohawk and the Galveston as valid contractual liens. As such they are superior to the claims of all creditors of the Trigg Com-

pany not having prior liens, since, as seen, they are not affected by the fact that the contracts reserving them were not recorded; the United States being under no obligation to comply with the state registry laws.

The decree complained of must be reversed, and the cause remanded for further proceedings not in conflict with this opinion.

Reversed.

On Rehearing.

R. H. Talley, of Richmond, and D. Lawrence Groner, of Norfolk, for the United States. Munford, Hutton, Williams & Anderson, of Richmond, for appellees.

HARRISON, J. This petition for rehearing was granted solely for the purpose of having further argument upon the question whether or not the present controversy between the federal government and the general creditors of the Wm. R. Trigg Company with respect to the vessels Mohawk and Galveston had been previously decided adversely to the government and in favor of the general creditors, and was, therefore, as to this appeal res judicata.

This court, by its opinion rendered on the 13th day of June, 1912, held that this question was not res judicata. In the opinion then handed down we said: "An examination of the record and the opinion of this court on the former appeal in the case of *Hawes & Co. v. Trigg Co.*, supra, shows very clearly that the question now raised between the United States and the general creditors of the Trigg Company was not considered or intended to be dealt with at that time. The only questions then under consideration were those dealt with in determining the controversy between the supply lien creditors of the Trigg Company and the United States."

The present argument, which has been given due consideration, has confirmed us in the conclusion that neither the opinion of this court in *Hawes & Co. v. Trigg Co.*, 110 Va. 165, 65 S. E. 538, nor that of the Supreme Court in *United States v. Ansonia Brass & Copper Co.*, 218 U. S. 452, 31 Sup. Ct. 49, 54 L. Ed. 1107, decided or intended to decide any question between the United States and the general creditors of the Wm. R. Trigg Company. The rights of such general creditors were not in issue in the case of *Hawes & Co. v. Trigg Co.*, supra, were not presented on that appeal, were not necessarily involved therein, and were in no way considered or affected by that decision, or by the decision affirming the same, of the Supreme Court in *United States v. Brass & Copper Co.*, supra. The questions involved in the present appeal have been fully dealt with in the opinion of this court handed down June 13, 1912, and the decree then pronounced by this court must, for the reasons there given, be adhered to.

(115 Va. 169)

NORFOLK & P. TRACTION CO. v. CITY OF NORFOLK.

(Supreme Court of Appeals of Virginia. Jan. 16, 1912. On Petition to Rehear, June 12, 1913.)

1. STREET RAILROADS (§ 37*)—CONSTRUCTION—REPAIR OF STREETS.

The charter of a street railway company, incorporated by the state, provided that it should keep that portion of the city streets occupied by its tracks well paved and in good repair without expense to the municipality. Code 1904, § 1294i (3), authorized street railway companies to lay their tracks in the streets with the consent of municipalities, but required them to restore the pavements and to maintain them in good condition. *Held* that, in view of the strict construction against the charter, the company was required to keep pace with the growth and progress of the city and to conform its pavements to the policy of the municipality in the matter of street improvements.

[Ed. Note.—For other cases, see Street Railroads, Cent. Dig. §§ 103, 105; Dec. Dig. § 37.*]

2. STREET RAILROADS (§ 37*)—CONSTRUCTION—MAINTENANCE OF STREET.

In paving a street where an extra concrete base was necessary under the tracks of a street railway company, required to repair and keep in good condition the pavements between its tracks because of the weight of the company's vehicles, it was liable for the extra expense.

[Ed. Note.—For other cases, see Street Railroads, Cent. Dig. §§ 103, 105; Dec. Dig. § 37.*]

3. STREET RAILROADS (§ 37*)—ORDINANCES—POWERS.

Where the charter of a street railway company, incorporated by the state, provided that it should keep that portion of the street occupied by its tracks well paved and in good repair without expense to the municipality, those provisions were mandatory, and the city council could not shift any burden from the company to the municipality; any attempt to do so being ultra vires.

[Ed. Note.—For other cases, see Street Railroads, Cent. Dig. §§ 103, 105; Dec. Dig. § 37.*]

4. STREET RAILROADS (§ 37*)—EQUITABLE ESTOPPEL.

Where the charter of a street railway company obligated it to pave and keep in repair, without expense to the city, that portion of the street within its tracks, an ultra vires ordinance shifting the burden from the railroad to the city will not estop the city from requiring a compliance with the charter.

[Ed. Note.—For other cases, see Street Railroads, Cent. Dig. §§ 103, 105; Dec. Dig. § 37.*]

On Petition to Rehear.

5. APPEAL AND ERROR (§ 173*)—PRESENTATION OF GROUNDS OF REVIEW BELOW—NECESSITY.

In an action by a city against a street railway company for the recovery of sums expended in paving that part of the street which the company was required to maintain, the contention that the company was not liable because notice to pave was not given before the city laid the pavement, cannot for the first time be raised on appeal, particularly where the agreed statement of facts did not mention it, and the omission might have been supplied below.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1079-1089, 1091-1093, 1095-1098, 1101-1120; Dec. Dig. § 173.*]

Error to Law and Chancery Court of City of Norfolk.

Assumpsit by the City of Norfolk against the Norfolk & Portsmouth Traction Company. There was a judgment for plaintiff, and defendant brings error. Affirmed.

H. W. Anderson, of Richmond, and Walter H. Taylor, of Norfolk, for plaintiff in error. Geo. C. Cabell, of Norfolk, for defendant in error.

WHITTLE, J. This is an action of assumpsit brought by the defendant in error, the city of Norfolk, against the plaintiff in error, the Norfolk & Portsmouth Traction Company, to recover by way of damages the cost of materials and labor furnished and done by the plaintiff in laying wood block paving, in repaving between and for two feet beyond the outer rails of the defendant's tracks on Granby street, and for similar repaving with wood block and bitulithic paving on Botetourt street, also for furnishing materials and laying extra concrete base under the defendant's tracks in connection with such repaving. The defendant paid the cost of labor for the work, but denied liability for the cost of materials. There was a verdict and judgment for the plaintiff for \$22,060.93, to which judgment this writ of error was awarded.

The question for our determination is whether the defendant is responsible for the cost of materials furnished by the plaintiff.

[1] On January 4, 1866, the General Assembly incorporated the Norfolk City Railroad Company, the predecessor of the plaintiff in error, granting the company the privilege of laying its tracks in the streets of the city of Norfolk, but upon condition that the consent of the council of the city should be first obtained. Clause 3 of the charter provides: "That said company shall keep that portion of the street occupied by its track or tracks, embracing the space between said tracks and a distance of at least two feet beyond the outer rails thereof, well paved and in good repair, without expense to the corporation of the city of Norfolk; and the rails used for said tracks shall be of the most approved pattern for such purposes, and shall be laid at the distance of five feet five inches between the outer ridges or flanges thereof, so as to form as little obstruction as practicable to the passage of carriages or other vehicles along or over said tracks."

This controversy arises not so much over the interpretation of the foregoing clause (the language of which is free from ambiguity) as it does with respect to the attempted modification of the obligations thereby imposed upon the company by section 9 of an ordinance passed by the city council December 14, 1887.

Section 9 is as follows: "The said railway shall be so made and laid down as to conform to the established, or proposed, grades of the several streets to be occupied by it, as given by the city engineer; and in case the

several streets occupied by it shall, in the future, be paved, or repaved, the city of Norfolk shall furnish and deliver the material therefor upon said streets and have the work done; but the proprietors, or lessees, of said railway shall pay the said city for the cost of labor for paving the same between the tracks and two feet on each side thereof, such amount, in case of nonpayment by the company for a period of thirty days after the work is done, to be recoverable by legal proceedings in the name of the city. And in case the grade of said streets, or any of them, or any part thereof, shall be changed hereafter, the proprietors or lessees of the said railway, at their own expense, shall make corresponding alterations of the said tracks; and the owners, proprietors or lessees of the said railway, shall keep the streets covered by said tracks, and extending two feet on the outer limits of each side of said tracks, in thorough repair at their own expense."

We have no difficulty in reaching the conclusion that, as an original proposition, the predecessor of the defendant was under charter obligation to keep its portion of the streets, as therein defined, well paved and in good repair and at its own expense. The charter so declares in language too plain to call for construction or to admit of controversy. See, also, Va. Code 1904, § 12941 (3), which authorizes a street railway company, with the consent of the municipal authorities, to lay its tracks in the streets, but likewise imposes upon such company the duty to restore the pavements of the streets and to maintain them in good condition.

The apparent conflict among the authorities on the subject of the extent of the liability of these companies is due to differences in the language of their charters.

For example, in the case of *Chicago v. Sheldon*, 9 Wall. 54, 19 L. Ed. 594, so much relied on by the plaintiff in error, the charter there construed was quite different from this charter. It required the company to keep its portion of the street "in good repair," while the language here employed is to keep it "well paved and in good repair."

In construing language similar to that found in the present charter, in cases arising in some of the most progressive and important cities of the country, the trend of the more recent and best considered decisions is to hold street railway companies to a high degree of responsibility and strict compliance with their charter duties in relation to their occupancy of streets. The courts proceed upon the theory that franchises granted to such companies are in derogation of common right, and are considered an encroachment upon the primary use of the streets by the public, and the principle is fundamental that such grants are to be construed most strongly against the grantee. Hence it is said: "A charter, having the elements of a contract, granted to a street

railway company, is to be strictly construed against the company, and it has no doubtful rights under such charter, for, when there are doubts, they are construed against the grantee and in favor of the city." *Western Paving & Supply Co. v. Citizens' St. R. Co.*, 128 Ind. 525, 26 N. E. 188, 28 N. E. 88, 10 L. R. A. 770, 25 Am. St. Rep. 462. The decisions of the Supreme Court of the United States are especially pronounced in maintaining this construction. *St. Clair, etc., v. Illinois*, 96 U. S. 63, 24 L. Ed. 651; *Oregon R. & N. Co. v. Oregonian R. Co.*, 130 U. S. 1, 26, 9 Sup. Ct. 409, 32 L. Ed. 837; *Knoxville Water Co. v. Knoxville*, 200 U. S. 22, 26 Sup. Ct. 224, 50 L. Ed. 353.

As corollary to this canon of construction, it is the accepted doctrine that the obligation resting upon a street railway company to keep its portion of the streets "well paved and in good repair" (or language of like import) necessarily involves the duty to keep pace with the growth and progress of the city, and to conform its work to the policy of the municipality in the matter of street improvement. Hence for a company to pave with cobblestones could not be regarded as a compliance with its duty to keep its part of the street "well paved and in good repair," where the rest of the street is laid with wood block or bitulithic pavement.

In *District of Columbia v. Washington R. R. Co.*, 4 Mackey (D. C.) 214, it was held: "That, where a street railway company's charter required it to keep its tracks and the space between the rails and two feet outside well paved and in good repair, it could be required to construct a pavement where one did not exist before its road was built, and to construct such kind of pavement as the authorities should direct."

So in the case of *Mayor of the City of New York v. Harlem Bridge M. & F. Ry. Co.*, 186 N. Y. 304, 78 N. E. 1072, the clause of the charter provided: "The said grantees or their successors shall keep the surface of the street inside the rails and for one foot outside thereof, in good and proper order and repair, and conform the tracks to the grades of the streets or avenues as they now are or may hereafter be changed by the authorities of the aforesaid towns." The court construing this clause says: "While this statute does not itself specify, as in the case of the railroad law, that this shall be done under the supervision of the municipal authorities and in accordance with their specifications, that necessarily follows from the general duties and powers conferred upon such authorities by law. Therefore, when the proper authorities, in view of the condition of the street as shown to exist, decided that a granite block pavement should be laid, we think that the requirement for repairing and keeping in good order compelled the defendant to co-operate with the city, and put the space between its rails in the same condition as the rest of the

street, even though that necessitated the laying of a new pavement. It has been held elsewhere by this court that an obligation, couched in substantially similar language, resting upon a railroad company, will compel it under proper conditions to lay a new kind of pavement. * * * The question of what shall constitute keeping a pavement in the tracks of a railroad company in good order and repair is to be determined, somewhat at least, by reference to existing and surrounding conditions, and in our judgment it would be altogether too narrow a view to hold that, where a municipality had for sufficient reason decided to pave a street with asphalt or other new pavement, a railroad might discharge its obligations to keep its part of the street in good order and repair by merely patching up a dirt road or some species of pavement which had become antiquated and out of condition, and which was entirely different from that adopted in the remainder of the street." *Columbus St. Ry. Co. v. City of Columbus*, 43 Ind. App. 265, 86 N. E. 83; *City of Reading v. United Traction Co.*, 215 Pa. 250, 64 Atl. 446; *City of Philadelphia v. Thirteenth, etc., Street Pass. Ry. Co.*, 169 Pa. 269, 33 Atl. 126; 2 *Elliott, Roads & Streets*, § 987.

[2] It is conceded that the materials furnished and work done on the extra concrete base were rendered necessary by the increased size and weight of the defendant's rails and rolling stock, and was of no benefit to the city, except to prevent damage to the surface of the street from inadequate foundation.

The case, in that aspect, is controlled by the case of *Washington & Georgetown Ry. Co. v. District of Columbia*, 108 U. S. 522, 2 Sup. Ct. 865, 27 L. Ed. 807. The court there held: "Where a street railway company is by law bound to keep the space within its tracks and for two feet beyond them well paved, which part of the paving is more costly than that of the rest of the street, the extra and separable expense of such part of the paving should be assessed exclusively to the company, and such company is not entitled to be relieved from a tax for paving the street by paying the proportion thereof which the width which it is obliged to pave bears to the width of the whole street."

[3] We shall next consider the contention of the plaintiff in error that, whatever may have been its original charter obligations, it has been released by the city ordinance from all responsibility in the matter of paving its part of the streets, except only the liability to pay the city the cost of labor in doing the work.

We are of opinion that the paving and repairing clause of the charter is mandatory, and that the city ordinance which undertakes to repeal it, in whole or in part, is ultra vires and void. The General Assembly, in granting the charter, saw fit to impose up-

on the company the duty of keeping the part of the streets occupied by its tracks, as therein defined, "paved and in good repair, without expense to the corporation of the city of Norfolk," and the city council had no power to shift that burden from the company to the municipality.

[4] It is said, however, that this controversy is only between the city and the company, and therefore that the state is not interested in the result, and that the city is estopped to question the validity of its own ordinance. The question is not one of policy as to whether the expense shall be borne by the city or the company, but of power. If the city has power to relieve the company from one of its mandatory charter obligations, it has power to relieve it from all; and any argument that leads to such a result cannot be sound. If the ordinance be ultra vires and void, it cannot, of course, operate as an estoppel.

In *Roanoke Gas Co. v. Roanoke*, 88 Va. 810, 14 S. E. 665, it was held that the powers of a municipal corporation with respect to its streets are continuing and inalienable.

So in *Basic City v. Bell*, 114 Va. 187, 76 S. E. 336, it was doubted whether the doctrine of equitable estoppel exists in this state as regards the powers and obligations of a municipal corporation over its streets.

In *City of Reading v. United Traction Co.*, 215 Pa. 250, 64 Atl. 446, 7 Ann. Cas. 380 (see, also, notes to the principal case), it was held that a street railway company, in the absence of express contract or statutory direction, is bound to keep the portions of the streets occupied by its right of way in proper repair. The court also observes: "That the streets of a city belong to the state for the use of the people at large. To the municipality, as its agent, it commits the duty of at all times keeping them in proper repair for the convenience and safety of the public. This duty of the municipality does not shift, except when it is expressly or impliedly imposed upon another." *City of Richmond v. Smith*, 101 Va. 161, 43 S. E. 345; *Bellenot v. City of Richmond*, 108 Va. 314, 61 S. E. 785; *White Oak Coal Co. v. City of Manchester*, 109 Va. 749, 64 S. E. 944, 132 Am. St. Rep. 943.

These principles are grounded upon the general proposition that the Legislature, subject only to constitutional limitation, has supreme control over streets and highways, while, on the other hand, the power of a municipality is wholly dependent upon and measured by delegation from the government, and is held and exercised in subordination to its will. The one exerts sovereign power, the other granted power, and holds its streets as trustee for the general public.

The opinion handed down at the present term in the case of *Danville v. Danville Ry. & Elec. Co.*, 76 S. E. 913, is in harmony with the views herein expressed.

Upon the whole case, we are of opinion that the judgment is without error and should be affirmed.

Affirmed.

Upon Petition to Rehear.

PER CURIAM. The specific ground upon which a rehearing of this case is sought is because, it is said, the traction company was not called on in the first instance by the city to repave its portion of the streets. And granting that the company was under charter obligation to do such repaving, nevertheless until, after notice, it had refused to comply with such demand, the city had no authority to do the work at the company's expense, and therefore could not maintain an action to recover the cost of the work done.

It is said that this proposition is so plainly correct that it is unanswerable, and complaint is made that it was not noticed in the opinion of the court.

[5] The omission was not an inadvertence. The assignment was not discussed in the opinion, simply because no such question was properly raised by the record, and it was, therefore, not within the cognizance of an appellate court. So far as the record discloses, no such defense was relied on in the trial court, and no exception was taken on that ground. If the question had been raised in the lower court, non constat but that the city could readily have proved notice and demand. The company "was silent when it should have spoken, and it will not be heard to speak when it should be silent."

It affirmatively appears from the agreed statement of facts that "the question involved in this case is the liability of the Norfolk & Portsmouth Traction Company for the cost of the material used in laying wooden blocks on the portion of Granby street and Botetourt street lying between the tracks and two feet on each side thereof, in the year 1910, and for the cost of the material in an extra concrete foundation under the tracks."

It is a fundamental rule of practice that "exceptions of every kind, when necessary at all, should be taken in the court whose judgment is to be reviewed. Otherwise, the appellate court would be converted into one of original jurisdiction." See note to *Warren v. Warren*, 2 Va. L. Reg. 195, 196.

Burks, J., in *Redd v. Supervisors*, 31 Grat. (72 Va.) 695, at page 711, observes: "We can only review the case made, and as made, by the parties in the court below. We cannot go outside of the record and decide a case upon facts dehors. This would, in my judgment, be a palpable and flagrant abuse of appellate jurisdiction."

So, also, in *Camden v. Doremus*, 3 How. 515, 11 L. Ed. 705, it was said: "It would be more extraordinary still if, under the mask of such an objection, or mere hint at objection, a party should be permitted in an ap-

pellate court to spring upon his adversary defects which it did not appear he ever relied on, and which, if they" existed and "had been openly and specifically alleged, might have been easily cured." *Warren v. Warren*, 93 Va. 73, 24 S. E. 913; *Lambert v. Jenkins*, 112 Va. 376, 71 S. E. 718, Ann. Cas. 1913B, 778.

Authorities could be multiplied upon this obvious and settled rule of appellate practice, but the foregoing sufficiently illustrate it.

It was upon these considerations that the court did not feel called upon to notice in its opinion the assignment to which attention is now invited.

Rehearing denied.

(115 Va. 11)

BOYD v. SOUTHERN RY. CO.

(Supreme Court of Appeals of Virginia.
June 12, 1913.)

1. RAILROADS (§ 348*)—INJURIES TO PERSON AT CROSSING—NEGLIGENCE—EVIDENCE.

Where, in an action against a railroad company for injuries to a pedestrian, struck by an engine at a crossing over a spur track leading into the yard of a manufacturing plant, there was evidence that the engine, running backwards, gave no warning of its approach to the crossing, and that none of the train crew were on the lookout for the crossing, though they knew that persons crossed the track at all hours of the day, the negligence of the company was established.

[Ed. Note.—For other cases, see *Railroads*, Cent. Dig. §§ 1138-1150; Dec. Dig. § 348.*]

2. RAILROADS (§ 327*)—CROSSINGS—CARE REQUIRED OF TRAVELERS — CONTRIBUTORY NEGLIGENCE.

A person about to go on a railroad track, whether at a crossing or a licensed way, must look and listen for approaching trains; and where he failed to do so, and he crossed the track in front of a moving train, and was injured by it, his negligence so contributed to the injury that he cannot recover unless the railroad company, after it discovered or ought to have discovered his peril, might have avoided the injury by the exercise of ordinary care.

[Ed. Note.—For other cases, see *Railroads*, Cent. Dig. §§ 1043-1056; Dec. Dig. § 327.*]

3. RAILROADS (§ 327*) — CROSSINGS — CARE REQUIRED OF TRAVELERS — CONTRIBUTORY NEGLIGENCE.

Where a railroad company acquired a right of way through the property of a manufacturer for the location of a switch into the yard of the manufacturing plant, on condition that in the event it abandoned the use of the way for railroad purposes it should revert to the manufacturer, the manufacturer and employes, in passing over a crossing over the switch, were not relieved of the duty to look and listen for trains.

[Ed. Note.—For other cases, see *Railroads*, Cent. Dig. §§ 1043-1056; Dec. Dig. § 327.*]

4. RAILROADS (§ 327*) — CROSSINGS — CARE REQUIRED OF TRAVELERS — CONTRIBUTORY NEGLIGENCE.

Where a pedestrian, passing a train on a spur track 500 or 600 feet in length and chiefly used for the convenience of a mill of a manufacturer, knew, if giving any attention to his surroundings, that the train, whether

going to the mill to place a car or take one out, would go back in the direction from which it came and in which he was going, he was not relieved of the duty of looking and listening for trains when attempting to cross the track at a crossing.

[Ed. Note.—For other cases, see *Railroads*, Cent. Dig. §§ 1043-1056; Dec. Dig. § 327.*]

5. RAILROADS (§ 338*) — COLLISIONS AT CROSSINGS—NEGLIGENCE.

Where a pedestrian was not in peril until he started to cross a spur track at a crossing, and it was then too late for the engineer to stop his train approaching the crossing, though he had been on the lookout and had seen the pedestrian's danger, there could be no recovery on the theory of want of ordinary care by the trainmen after the discovery of the pedestrian's peril, created by his negligence.

[Ed. Note.—For other cases, see *Railroads*, Cent. Dig. §§ 1096-1099; Dec. Dig. § 338.*]

Error to Corporation Court of Danville. Action by one Boyd against the Southern Railway Company. There was a judgment sustaining a demurrer to the evidence and rendering judgment for defendant, and plaintiff brings error. **Affirmed.**

Scott & Buchanan, of Richmond, and B. H. Custer, of Danville, for plaintiff in error. Wm. Leigh, of Danville, for defendant in error.

BUCHANAN, J. This is an action to recover damages for personal injuries suffered by the plaintiff in error, caused as is alleged by the negligence of the defendant railway company. Upon the trial of the cause the defendant demurred to the evidence, in which the plaintiff was required to join. The court sustained the demurrer, and rendered judgment in favor of the defendant.

Error is assigned, not only to the judgment of the court in sustaining, but also to its action requiring the plaintiff to join in, the demurrer. This latter assignment of error does not seem to be much relied on, and, if it were, we see nothing in the record, nor is anything suggested by the plaintiff's counsel, to show that the court erred in requiring a joinder in the demurrer.

Upon the merits it appears that the plaintiff received the injuries complained of at a grade crossing over the defendant's spur track leading from its main line into the yard of one of the mills of the Riverside and Dan River Cotton Mills Company, located in or near the city of Danville. The road upon which the plaintiff, who was an employé of the Cotton Mills Company, was traveling, was upon the property of that company, and was used by its employés who lived in certain portions of the city in going to and from their work, by wagons and other vehicles, and by all persons who had business at the mill, including children who carried dinner to their parents or other relatives working there.

[1] The contention of the plaintiff is that the defendant was guilty of negligence in

the operation of its train at the time the plaintiff was injured. The evidence is conflicting, but upon a demurrer to it the negligence of the defendant must be considered as established, since there was evidence tending to show that the engine, which was running backwards, gave no warning or notice of its approach to the crossing by ringing the bell or otherwise; that none of the train crew were on the lookout for the crossing, although the defendant knew that persons crossed its track at that point at all hours of the day.

The negligence of the defendant having been established, the next question is: Did the plaintiff contribute to his own injury, as the defendant contends?

[2] It appears from the plaintiff's own testimony that as he approached and went upon the crossing he neither looked nor listened. There was nothing to obstruct his view in the direction from which the defendant's train came, or to interfere with his hearing. While advanced in years he was in full enjoyment of all his faculties. Unless, therefore, there be something in this case to take it out of the general rule, it is clear that the plaintiff must be held to have contributed to his own injury; for no general rule of law is better settled in this jurisdiction and generally, it is believed, than that while it is the duty of a railroad company to give notice of the approach of its train to a crossing the reciprocal duty is imposed upon a person about to go on its track to exercise ordinary care and caution, whether it be a highway crossing or a licensed way. The track itself is a proclamation of danger. It is his duty before going upon it to use his eyes and ears. If he fails to look and listen, as his duty requires him, and attempts to cross the track in front of a moving train, and is injured by it, his own act, his own negligence, so contributes to his injury that he is not entitled to recover, unless the railroad company after it discovered, or ought to have discovered his peril, might have avoided the injury by the exercise of ordinary care. *Johnson v. C. & O. Ry. Co.*, 91 Va. 171, 179, 21 S. E. 238; *Washington, etc., R. Co. v. Lacey*, 94 Va. 469, 475, 476, 26 S. E. 834; *Southern Ry. Co. v. Hansbrough*, 107 Va. 733, 741, 742, 60 S. E. 58; *Morton's Ex'r v. Southern Ry. Co.*, 112 Va. 398, 405, 406, 71 S. E. 561.

[3] One of the grounds relied on to take this case out of the general rule that the failure of the plaintiff to look and listen for the approach of trains before going upon the crossing was per se negligence is that "the plaintiff was not on the (railway) company's property, but in the yard, and on the private property of the cotton mill company for which he worked, and that he had as much right to be there en route to business as the railroad company did, if not more."

The defendant company had acquired a

right of way (20 feet in width) through the said property of the Cotton Mills Company by deed for the location of its switch, and there were no limitations imposed by the conveyance, except that in the event the defendant abandoned the use of the property for railroad purposes it should revert to the Cotton Mills Company. Clearly the Cotton Mills Company and its employes had no higher rights (if as high) in passing over that crossing than they would have had if it had been a public highway crossing.

[4] Another ground relied on to take this case out of the general rule that the failure of the plaintiff to look and listen for an approaching train before going upon the crossing was negligence as a matter of law is that he had been lulled into a sense of security and thrown off his guard by the conduct of the defendant and the circumstances surrounding him when injured.

The plaintiff that day had gone from his work at the Long Mills by permission to attend to some private matters, and was returning to his work between 1 and 2 o'clock. After getting off a North Main street car, he was proceeding along River street in the direction of Long Mills, the place of his work, when he passed the train which afterwards injured him. The train consisted of five cars and an engine. The engine was pushing the cars on a spur track which passed by Dan Valley Mills, also property of the Cotton Mills Company. That spur track leads from another spur track of the defendant company some 10 or 15 feet east of the fence which inclosed the yard in which the plaintiff was injured, and terminates 50 or 60 feet east of the Dan Valley Mills. The other spur track, which is known as Cotton Mills siding No. 2, runs out from the defendant's main line a few feet west of where the latter crosses North Main street of the city of Danville, and extends into the yard of the Cotton Mills Company by and beyond the Long Mills. The street or road upon which the plaintiff was traveling when he passed the defendant's train runs between these two spur tracks for a distance, as shown on the map filed with the record and a part thereof, between 300 and 400 feet, when it crosses the Dan Valley Mills spur track; thence it runs between 100 and 150 feet south of both spur tracks where it enters the cotton mills inclosure through a gate; thence about 170 feet near to and almost parallel with siding No. 2, when it crosses it obliquely; and thence by and beyond Long Mills, where the plaintiff was employed.

The plaintiff's contention is that he was excused from exercising the same degree of care in looking and listening before going upon the crossing when injured, because he had met the train going in an opposite direction, and there was nothing to suggest to him, or any other reasonable man, that it would immediately return without notice or warning of any kind.

There is a class of cases in which it is held that reasonable belief that no train is approaching a crossing relieves a traveler who fails to look and listen of the imputation of negligence as a matter of law.

In the case of *Kimball & Fink v. Friend*, 95 Va. 125, 27 S. E. 901, where there was a silent gong, and in *Southern Ry. Co. v. Aldridge*, 101 Va. 142, 43 S. E. 333, where the watchman failed to perform his duty, it was held that the question of negligence on the part of the travelers in going upon the crossing where injured was a question of fact for the jury under all the facts of those cases, and not a question of law for the court.

It has also been held that the traveler's negligence is a question for the jury where he attempts to cross a railway track immediately after one train has passed and another follows so quickly as to mislead or confuse him and he is injured. And in cases of flying switches, where the train has been severed and the traveler goes upon the crossing after the first section has passed, and is struck by the second, and also where a traveler sees a train pass on or towards the main line of the railroad, goes upon the track, and is injured by the train immediately returning. See cases cited in note to *Scott v. St. Louis Ry. Co.*, 9 Ann. Cas. 216.

The decision chiefly relied on by plaintiff's counsel in this case and the one most largely quoted from in his petition and brief is that of *Duane v. Chicago, etc., Ry. Co.*, 72 Wis. 523, 40 N. W. 394, 7 Am. St. Rep. 879. But that is a very different case from the one under consideration. In that case, after stating the general rule as to the duty of a traveler to look and listen before going on a crossing, the court said: "There is a most important fact in this case that materially modifies this strict rule and makes it inapplicable, and that is that this train had just passed this crossing, while the deceased was within a few rods (8) of it and driving upon a trot, and had passed on out of his sight, and he had reason to suppose that it would continue on, it being upon the main track, like any other train upon its regular route, and had no reason to suppose that it would immediately return. The presumption is that it would go on and not return. He was thus thrown off his guard. There was no reason to look or listen in that direction further, for it appeared impossible to him that any train from that direction would or could approach the crossing within so short a time. He was entrapped by this unexpected return of the train, for its sudden return over the crossing without warning was to him a trap. We know how it must have appeared to him, for it would have so appeared to any ordinary person with the same knowledge and (in the same) situation. Not knowing or supposing or having any reason to suppose that this train would immediately return, or that any train would come from that direction,

he did as any other reasonable person would have done and kept straight on without lessening his speed as if assured that the way was clear and there was no possible danger. To have stopped and looked and listened in that direction under such circumstances would have been unreasonable, and the law requires no such unreasonable thing as a duty and obligation."

In this case, when the plaintiff passed the defendant's train, it was not on or going towards the main line. It was on a spur track only 500 or 600 feet long, and which terminated 50 or 60 feet beyond Dan Valley Mills, for the convenience and benefit of which that spur track was chiefly used. When the plaintiff passed the train, he was at least as far from the crossing where injured as was the train from the end of the spur track. There was no spur track leaving the siding on which the train was running when the plaintiff met it. He therefore knew, if he was giving any attention to his surroundings, that the shifting train, whether going to Dan Valley Mills to place a car or to take out a car, would as soon as it had done that work in all probability—indeed, almost certainly—go back in the direction from which it came and in which he was going, for in no other way could it finish its shifting, if more was to be done, or go back on the main line from which it came. Not only would the shifting engine have to go back in that direction before doing shifting on siding No. 2, or in reaching the main line with its train, but it would be compelled to go back upon or over the crossing which the plaintiff was approaching and where he was injured. The engine which struck the plaintiff being used on those switches chiefly if not entirely for switching purposes, the plaintiff must have known that in doing its work it would necessarily run backwards and forwards over them. That it would do so was to be presumed, for otherwise it could not do that work.

Instead, therefore, of the facts and circumstances of this case relieving the plaintiff from the duty of looking and listening before going upon the crossing, they show, as it seems to us, that he not only did not have any reasonable ground to believe that the train would not return before he could pass over the crossing, but that it was highly probable that it would do so. Certainly there is nothing in the facts and circumstances of the case to take it out of the general rule that failure to look and listen before going upon a railway crossing is per se negligence.

[5] But it is insisted by the plaintiff that, even if he was guilty of contributory negligence, the court erred in sustaining the demurrer to the evidence, because the defendant could by the exercise of ordinary care have avoided injuring him after it saw or ought to have discovered his peril. It clear-

ly appears from the plaintiff's own evidence that he was struck by the corner of the tender of the engine, just as he entered upon the crossing, as he stepped on or over the rail nearest to him, and was thrown back on the side of the track from which he approached the crossing. He was not in peril until he started to cross the track, and it was then too late for the engineer to have stopped his train or avoided injuring the plaintiff if he had been on the lookout and had seen the plaintiff's danger.

Upon the whole case we are of opinion that there is no error in the judgment complained of, and that it should be affirmed.

Affirmed.

(115 Va. 66)

HOLLADAY v. MOORE

(Supreme Court of Appeals of Virginia. June 12, 1913.)

1. APPEAL AND ERROR (§ 690*)—BURDEN OF SHOWING ERROR.

Assignments of error to the exclusion of questions asked witnesses are not available on appeal, where the record fails to show what answers were or would have been given had the witness been permitted to answer.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2897-2899, 2902-2904, 2906, 2908; Dec. Dig. § 690.*]

2. EJECTMENT (§ 25*)—DEFENSES—OUTSTANDING TITLE.

While in ejectment the plaintiff must recover upon the strength of his own title and an outstanding legal title in another whether that other be a stranger, the commonwealth, or the defendant will defeat a recovery, the outstanding title must be a present subsisting and operative title, upon which the owner could recover in an action, and hence it was error to refuse an instruction to that effect.

[Ed. Note.—For other cases, see Ejectment, Cent. Dig. §§ 99-106; Dec. Dig. § 25.*]

3. EJECTMENT (§ 110*)—TRIAL—INSTRUCTIONS.

In ejectment, where there was evidence to show the prior peaceful possession of plaintiff or those under whom he claimed, it was error to refuse an instruction that prior peaceful possession by plaintiff or those under whom he held claiming to be the owner in fee was prima facie evidence of ownership and sufficient to authorize a recovery unless defendant should show a better title.

[Ed. Note.—For other cases, see Ejectment, Cent. Dig. §§ 319-326; Dec. Dig. § 110.*]

Error to Circuit Court, Prince Edward County.

Action by W. M. Holladay against W. R. Moore. Judgment for plaintiff for insufficient relief, and he brings error. Reversed.

Instructions 3 and 4, requested by plaintiff, were as follows:

"(3) The court instructs the jury that an outstanding title in another to defeat an action of ejectment must be present, outstanding, operative, and available legal title on which the owner could recover against the other contending party if asserting it by action.

"(4) The court instructs the jury that prior

peaceful possession by the plaintiff or those under whom he holds, claiming to be the owner in fee, if proved, is prima facie evidence of ownership and seisin, and is sufficient to authorize a recovery unless the defendant shall show a better title, and in the case at bar, if the jury shall believe from the evidence that R. L. Dabney conveyed to Richard McIlwaine the tract of land in the plaintiff's declaration mentioned on the 1st day of August, 1884, and admitted to record May 28, 1885, and that Richard McIlwaine was in possession of said tract of land up to the 22d day of December, 1908, and then conveyed the property to W. M. Holladay, the plaintiff, and that W. R. Moore did not receive title to his property until the day of September, 1891, and admitted to record January 21, 1892, and that there was no record evidence of the conveyance by R. L. Dabney to W. R. Moore or to Margarette V. Hannah, then they must find for the plaintiff."

But the court refused to give said instructions, and gave the following instructions to the jury, also asked for by plaintiff:

"No. 1. The court instructs the jury that in questions of boundary natural objects called for, marked lines, and reputed boundaries well established, visible monuments such as water courses and the like, between two tracts of land, should be preferred to calls and distances of the grant.

"No. 2. The court instructs the jury that the question in this case is not how would an accurate survey locate the lots in question, but how did the original survey and plat locate them. The only purpose of the evidence of the surveyors who have made the recent surveys is to enable the jury to locate the original boundary, if possible, and not for the purpose of determining where they ought to have been, or where they would have been by an accurate survey."

"No. 5. The court instructs the jury that if they believe from the evidence that the plaintiff has proven a good legal title to the land in controversy, either from the commonwealth or from a common source, to which the defendant traces his title or has proven either in himself or his grantors continuous, open, notorious, visible, peaceable, and adverse possession for 15 years under claims of title of said land here in controversy, then they must find for the plaintiff."

And the court also gave the following instructions asked for by the defendant:

"(1) The court instructs the jury that the burden in the case is upon the plaintiff, Holladay, to prove to the satisfaction of the jury that he had a complete legal title to the premises claimed by him, and the right to the possession thereof at the institution of this suit, before he can recover, and that he must recover, if at all, on the strength of his own title, and cannot rely on any weakness of the title of the defendant, and that, in order to recover, he cannot rely merely upon a comparison between himself

and the defendant, but must prove affirmatively that he is entitled to the premises, and that the defendant is not entitled before a recovery can be had.

"(2) The court instructs the jury that the plaintiff cannot recover by showing a conflict of claims between himself and the defendant, but he must show affirmatively by a preponderance of evidence that his claim to the premises is positive, valid, and complete, as the possession of the defendant of the premises claimed is valid against every one except a plaintiff proving a superior title.

"(3) The court further instructs the jury that adverse possession consists of a claim made by the party relying upon such claim accompanied by a denial of the rights of all other persons to said premises. That the cultivation of the land and paying taxes thereon and the use made of said property are only incidents in determining whether such adverse claim has been made in good faith by the party so claiming it, and that no specific acts of cultivation or use of said property is necessary to constitute said adverse claim, and if the jury believe from the evidence that the defendant Moore has made such adverse and continuous, open, visible, and notorious claim for a period of 15 years prior to the beginning of this suit to all or any part of the strip of land in controversy, under color of title, as occasion required, and has claimed the same as occasion required, that such acts are sufficient to constitute his right to the premises, so claimed under color of title.

"(4) The court instructs the jury that adverse possession for a period of 15 years under color of title confers a complete legal title upon the party possessing for that period, as if his title were derived by descent, will, or deed, and if they believe from the evidence in this case that the defendant Moore has held adverse, continuous, visible, open, and notorious possession of the premises claimed by Holladay or any part thereof, under color of title, for a period of 15 years, that such possession vests the title in Moore of the premises so held as effectively as would a deed to same.

"(5) The court instructs the jury that before the plaintiff Holladay can recover the premises claimed in this suit he must show by a preponderance of evidence the identity of the land claimed, accurately as to exterior boundaries, and that he can recover no part of the premises claimed until he proves affirmatively the specific boundary by metes and bounds of the part so claimed, and, if the jury believe from the evidence in this case that the plaintiff Holladay has failed to prove his full and legal title to any specific part of the premises claimed by accurate metes and bounds, they must find for the defendant.

"(6) The court instructs the jury that in arriving at their verdict in this case they

are to consider all maps and surveys introduced before them, as well as all parol evidence, and if they believe from the evidence and all circumstances of the case that the plaintiff, Holladay, has failed to prove a complete legal title with right of possession to all or any specific part of the premises claimed, to the satisfaction of the jury, that they must find for the defendant."

Watkins & Brock, of Farmville, for plaintiff in error. J. T. Thompson, of Farmville, and R. H. Mann, of Petersburg, for defendant in error.

KEITH, P. This was an action of ejectment brought to recover a parcel of land described. Upon the trial the jury found a verdict in favor of the plaintiff, and the court rendered judgment for about one-half of the premises claimed by the plaintiff, and thereupon the plaintiff applied for and obtained a writ of error.

[1] The first assignment of error is based upon bill of exceptions No. 1, from which it appears that the plaintiff, in order to prove the issue joined on his part, asked the defendant, a witness in his own behalf, on cross-examination, "How far do you trace your title back under those whom you claim?" and, "Did I understand you to say in your examination in chief that you claimed title under your deed from Mrs. Hannah and R. M. Venable, trustee?" These questions were objected to by counsel for the defendant, and the objection was sustained; but the bill of exceptions does not show what answer the witness gave to the questions, or would have given had he been permitted to answer by the court.

In *Taylor v. Commonwealth*, 90 Va. 109, 17 S. E. 812, it is said that an assignment of error in refusing to allow a witness to answer a certain question is unavailable in the appellate court where the record fails to show what the answer would have been.

In *Brock v. Bear*, 100 Va. 562, 42 S. E. 307, it is said: "Where a question is asked a witness which he is not permitted to answer, and exception thereto is taken, the bill of exception must show what the party asking the question expected to prove, else the appellate court cannot tell whether or not the witness had any knowledge on the subject, or the question was relevant or material."

In *American Bonding & Tr. Co. v. Milstead*, 102 Va. 683, 47 S. E. 853, this court held that, although counsel may explain the object of the question so far as to show its materiality, the ruling of the trial court refusing to permit the witness to answer will not be considered unless the bill of exceptions shows what was expected to be proved by the witness, and that the same rule applies to questions on cross-examination as to questions in chief.

The same ruling has been made in numerous other cases in this court, but the citations made are deemed sufficient.

The first assignment of error is overruled.

When all the evidence for the plaintiff and the defendant had been put before the jury, the plaintiff in error, who was the plaintiff in the court below, asked for five instructions, of which the court gave Nos. 1, 2, and 5, and refused to give Nos. 3 and 4. At the instance of the defendant the court gave six instructions, which were excepted to; but the plaintiff excepted to the refusal of the court to give instructions 3 and 4, and this ruling is set forth in bill of exceptions No. 3.

[2] It is true that an outstanding legal title in another, whether that other be a stranger or the commonwealth or the defendant, will defeat an action of ejectment; but a plaintiff in ejectment must recover upon the strength of his own title, and to this rule there are few exceptions, none of which appear in the case before us.

In *Reusens v. Lawson*, 91 Va. 226, 21 S. E. 347, this court said that an outstanding title sufficient to defeat a recovery in an action of ejectment must be a present subsisting and operative title upon which the owner could recover if asserting it by action.

In *Merryman v. Hoover*, 107 Va. 485, 59 S. E. 483, the same doctrine is thus stated: "An outstanding legal title in another than the plaintiff at the time of the institution of an action of ejectment breaks in upon and disrupts the plaintiff's paper title and bars his recovery. Nor can the plaintiff make good the defect by the subsequent purchase of such outstanding title."

"A defendant in ejectment may rely upon an outstanding legal title in the commonwealth at the time of the institution of the action, and thereby defeat the plaintiff."

We think the third instruction states a sound proposition of law, and that the evidence was such as to make it proper that it should have been given to the jury.

[3] The fourth instruction should also have been given. The jury might well have inferred from the evidence adduced on behalf of the plaintiff in error the prior peaceful possession of the plaintiff or those under whom he claims of the land in the declaration mentioned, unless the defendant could show a better title in himself or another such as is described in instruction No. 3.

We are therefore of opinion that the circuit court erred in refusing instructions Nos. 3 and 4.

We do not deem it proper to indicate any opinion upon the evidence further than it was necessary to do so in order to pass upon the propriety of the instructions.

The case must be reversed and remanded for a new trial not in conflict with the views expressed in this opinion, at which trial, if the evidence should be substantially suc-

as was adduced upon the former trial and instructions Nos. 3 and 4 are again offered, they should be granted.

Reversed.

(115 Va. 6)

BLUNT v. MERCANTILE RY. BUILDING & LOAN ASS'N et al.

(Supreme Court of Appeals of Virginia. June 12, 1913.)

BUILDING AND LOAN ASSOCIATIONS (§ 42*)—INSOLVENCY—NATURE OF INDEBTEDNESS—PURCHASE OF STOCK OR LOAN.

On a claim against the receiver of an insolvent building and loan association, evidence held to require a finding that deposits of \$300 and \$1,800, respectively, by the claimant were loans to the association, and not payments for stock, and hence that claimant was a creditor, and not a stockholder.

[Ed. Note.—For other cases, see Building and Loan Associations, Cent. Dig. §§ 63, 66, 86-88; Dec. Dig. § 42.*]

Appeal from Circuit Court of City of Alexandria.

Action by C. T. Blunt against the Mercantile Railway Building & Loan Association and others. Judgment for plaintiff for less than the relief demanded, and he appeals. Reversed.

Howard W. Smith and S. G. Brent, both of Alexandria, for appellant. J. K. M. Norton and Gardner L. Boothe, both of Alexandria, for appellees.

WHITTLE, J. On January 12, 1911, upon a bill filed by its board of directors, the appellee, the Mercantile Railway Building & Loan Association of Alexandria, Va. (hereinafter called the association), was placed in the hands of a receiver. Subsequently the appellant, C. T. Blunt, was admitted as a party to the litigation and asserted a demand as creditor against the association for two alleged loans aggregating \$2,100.

Appellant contended that on December 31, 1909, he deposited \$1,800 with Lewis Hooft, secretary of the association, upon written contract, for the term of three years, at 5½ per cent. interest, withdrawable on 90 days notice, and that on July 7, 1910, he made an additional deposit of \$300 upon precisely the same terms.

The receiver, on the contrary, maintained that these deposits represented the purchase price of eighteen shares and three shares, respectively, of paid-up stock.

The controversy was referred to a master commissioner in chancery, who sustained the receiver's contention with respect to the \$1,800 deposit, but overruled it as to the deposit of \$300. The circuit court confirmed the report, and from so much of the decree as applied to the \$1,800 this appeal was granted.

The issue is thus sharply drawn between the parties as to the status of the \$1,800 deposit. The appellant maintains that, being

in no respect distinguishable from that of the \$300, it should have been carried into the savings department of the association and appellant classed as a preferred creditor with regard to it, as was done in the case of the latter deposit.

The written evidence of the agreement between appellant and the association concerning these sums consists of two entries made by the secretary in a blank pocket deposit book of sales of stock on installments, as follows: "1909, Dec. 31st, \$1,800.00, paid in full, int. at 5½ per cent. for a term of three years, 90 days notice required on withdrawal. Lewis Hooft, Secty." And on the second page: "July 7, 1910, \$300.00 paid in full, int. at 5½ per cent. for a term of three years, 90 days required on withdrawal. Lewis Hooft, Secty." On the outside cover of this book (the name, date, figures, and "in full" written and the rest printed) is the following memorandum made, but not signed, by Lewis Hooft: "Name C. T. Blunt, Date of Certificate Dec. 31, 1909. No. 8706. No. of shares 18. Payment, \$1,800.00 in full."

Hooft and Blunt both gave their depositions, and the former testified that his understanding was that both amounts paid to him by Blunt were for the purchase of stock. He had no independent recollection on the subject, however, but considered a book of certificates showing "Stub No. 8706 for 18 shares of stock issued to C. T. Blunt, December 13, 1909," from which the certificates had been removed, "proof positive" so far as the \$1,800 deposit was concerned. Witness found no such memorandum with respect to the \$300 deposit; yet it is shown by the positive testimony of Hooft and Blunt that both sums were deposited upon absolutely the same terms, and their statements are verified by the contemporaneous written agreement of Hooft, secretary. Appellant, moreover, testified unequivocally that the payments were not made on account of stock transactions; that he did not intend to purchase stock, and in point of fact that no certificates of stock were ever delivered to him. Besides, it was shown from the by-laws of the association that a candidate for membership had first to sign a formal application in writing, that he wished to acquire stock, and also obligate himself to strictly observe the by-laws, rules, and regulations of the association. Though specifically called for, and though witness agreed to look it up, no such application was produced, nor was it shown that appellant's name appeared among the list of stockholders. If such had been the fact, it ought readily to have been shown by the records of the association, other than mere ex parte memoranda of Hooft, that Blunt was indeed a stockholder. Appellant testified explicitly, and there was no evidence to the contrary, that he never attended a meeting of stockholders, and never was notified of such meetings; nor did he

receive any dividends from surplus profits to which as a stockholder he would have been entitled. The dividends declared on stock were 5 per cent., which rate the commissioner erroneously reported that Blunt received; whereas the association paid him 5½ per cent. in accordance with the terms of his special agreement in writing with the secretary. Hooft testified that he had a special arrangement with Blunt by which he paid him interest at the rate of 5½ per cent. until the failure of the association. In that connection he explained that he agreed to pay 5½ per cent. because the money was worth it to the association, and was a cheaper rate than the banks charged. In reply to a letter addressed to the secretary by Blunt he employs this language: "Yes we can use \$300.00." He would hardly have so written in reply to an application to buy stock. Again, the by-laws prescribe that paid-up stock cannot be withdrawn until after six months from the date of issue; yet the special agreement in this case stipulated for the return of the money on 90 days' notice. Hooft also testified that he supposed they had stubs of checks covering interest paid on these deposits, and he was called on to look them up and file them with the commissioner, but they were never filed. Those stubs and corresponding checks, if produced, would probably have shown whether they were dividend or interest checks.

Upon careful consideration of the evidence as a whole, we are of opinion that it sustains the contention of appellant that the \$1,800 deposit was made upon the same terms as the \$300, and that for the first amount, as for the last, he was entitled to be classed as a creditor, and not as a stockholder of the association. The inference that Blunt was a stockholder, drawn from memoranda made by Hooft as secretary upon the stub of one of the stock books and upon the pocket deposit book of sales of stock on installments, is outweighed by the contemporaneous written agreement and other direct and circumstantial corroborating evidence bearing on the transaction.

For these reasons the decree of the circuit court must be reversed, and this court will make such decree, in accordance with the views expressed in this opinion, as the lower court ought to have made.

Reversed.

(115 Va. 144)

MATHEWS v. HICKMAN.

(Supreme Court of Appeals of Virginia. June 12, 1913.)

EASEMENTS (§ 61*)—RIGHT OF WAY—OBSTRUCTION—INJUNCTION.

Where the grantor agrees that the grantee shall have a road to the premises, and there is an existing road over land retained by the grantor, which is recognized by the parties as the road intended, the grantee may enjoin obstruction thereof by a subsequent

purchaser of the grantor's land over which the road passes.

[Ed. Note.—For other cases, see Easements, Cent. Dig. §§ 102, 130-144, 148; Dec. Dig. § 61.*]

Appeal from Circuit Court, Accomack County.

Suit by Tully J. Mathews against Samuel E. Hickman. From a decree in favor of defendant, complainant appeals. Reversed, and decree entered for complainant.

Stewart K. Powell, of Onanock, for appellant. L. Floyd Nock and Benj. T. Gunter, both of Accomack, for appellee.

HARRISON, J. In response to the prayer of the bill in this case, the circuit court granted an injunction restraining and prohibiting the defendant, Samuel E. Hickman, his agents and all others, from obstructing the road mentioned in the bill, or from in any manner interfering with the complainant, Tully J. Mathews, his agents or tenants, in the use and enjoyment of such road. Subsequently, on the 6th day of April, 1912, upon final hearing, the court entered a decree dissolving the injunction theretofore granted, holding that the plaintiff was not entitled to the road claimed in his bill. From that decree this appeal was taken.

The record shows that by deed dated October 4, 1887, Ephraim Wessells (of D.) conveyed to George T. Ewell and the complainant a tract of land containing 40 acres, more or less, it being part of a larger tract owned by the grantor, and that afterwards, by deed dated January 25, 1890, George T. Ewell conveyed his interest in the land to his copurchaser, the plaintiff. The deed of October, 1887, from Ephraim Wessells (of D.) conveying this 40 acres of land to the plaintiff and his copurchaser contains the following provision: "The said Ephraim Wessells (of D.) is to give to the said George T. Ewell and Tully J. Mathews a road fifteen feet wide running to the Cornelius Hickman Road and then to the land of Gillett Mason." It is clear from the evidence that the "Cornelius Hickman Road," referred to in this deed, is no other than that portion of the "Bloxom Road," which runs in front of the Cornelius Hickman premises. It appears that the 40 acres had no outlet and that the foregoing provision in the deed was intended to secure to the grantees a convenient outlet for their land to the Bloxom Road. It is shown that, at the time this deed to the 40 acres of land was made by Ephraim Wessells, the road now contended for by the plaintiff was in existence and extended across the northeast side of the land retained by Wessells, out to the Bloxom Road in front of Cornelius Hickman, and had been for many years prior thereto recognized as an open road. This road conforms to the description of the road mentioned in the deed. It runs to the Bloxom Road in front of Corne-

lius Hickman, and thence to the land of Gillett Mason.

It appears that, at the time of the conveyance of the 40 acres, it was understood between Ephraim Wessells and his grantees that the then existing road over the north-east side of the land retained by him was the road intended by the terms of the deed, and this construction of their rights has been continuously acted upon by the parties, without objection, until the defendant undertook to obstruct the plaintiff in his use of the road. Some time after the deed to the 40 acres was made and recorded, Ephraim Wessells sold to John E. Hickman, the father of the defendant, under whom the latter claims, that portion of the land reserved by him over which the road claimed by the plaintiff runs. The defendant does not deny that the plaintiff is entitled, under his deed, to a road 15 feet wide as an outlet from his 40 acres, but insists that the road intended by such deed is not located upon the land owned by him, but that its true location is about 676 yards west of that claimed by the plaintiff and upon the remaining land of Wessells after his sale to the defendant.

The evidence wholly fails to sustain this contention. The road as located by the defendant would not conform to the description of the road mentioned in the plaintiff's deed. Instead of having its exit on the "Bloxom Road" at the point named in the deed, it would come out into that road at a point 625 yards west thereof, where Cornelius Hickman, at the time, owned no land. There is nothing in the description of the road in controversy, as set forth in the deed, that could lead to the conclusion that it ran as the defendant contends; and, without prolonging this opinion with further details, it is enough to say that the evidence satisfactorily establishes that the true location of the road in controversy is that claimed by the plaintiff in his bill.

The decree complained of must therefore be reversed, and this court will enter such decree as the circuit court ought to have entered, perpetuating the injunction restraining and prohibiting the defendant, Samuel E. Hickman, his agents and all others, from obstructing the road claimed by the plaintiff in his bill, or from in any manner interfering with the complainant, his agents or tenants, in the use and enjoyment of such road.

Reversed.

(115 Va. 239)

VIRGINIA RY. & POWER CO. v. FEREBEE.†
(Supreme Court of Appeals of Virginia. June 12, 1913.)

1. LIMITATION OF ACTIONS (§ 195*)—DEFENSES—BURDEN OF PROOF.

Defendant has the burden of proof as to his plea of limitations.

[Ed. Note.—For other cases, see Limitation of Actions, Cent. Dig. §§ 711-716; Dec. Dig. § 195.*]

2. LIMITATION OF ACTIONS (§ 55*)—NUISANCES—CONTINUING INJURY.

Where repeated actions may be brought for a nuisance, plaintiff may recover for the injuries sustained for the five years next preceding the date of the action; but where but one action can be brought for the entire damages, past and future, the action is barred unless brought within five years from the accrual of the cause of action.

[Ed. Note.—For other cases, see Limitation of Actions, Cent. Dig. §§ 299-306; Dec. Dig. § 55.*]

3. NUISANCE (§ 48*)—PRIVATE NUISANCE—DECLARATION—RECOVERY.

A declaration which alleges a continuing nuisance does not prevent a recovery thereunder for an occasional nuisance caused in the manner alleged in the declaration.

[Ed. Note.—For other cases, see Nuisance, Cent. Dig. §§ 113, 114; Dec. Dig. § 48.*]

4. NUISANCE (§ 49*)—PRIVATE NUISANCE—CONTINUOUS NUISANCE—RECOVERY.

A plaintiff suing for present and future damages caused by a continuous nuisance may show permanent injuries.

[Ed. Note.—For other cases, see Nuisance, Cent. Dig. §§ 115-117; Dec. Dig. § 49.*]

5. APPEAL AND ERROR (§ 173*)—QUESTIONS REVIEWABLE—THEORY OF CASE IN TRIAL COURT.

Where the court and the parties in an action for a nuisance limited the recovery, if any, to the damages sustained prior to the commencement of the action, and the court without objection charged that no damages could be awarded unless suffered within five years, defendant was estopped on appeal to deny that plaintiff could maintain successive actions for the damages he might suffer from time to time, and he could not rely on limitations.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1079-1089, 1091-1093, 1095-1098, 1101-1120; Dec. Dig. § 173.*]

Error to Law and Chancery Court of City of Norfolk.

Action by G. Benson Ferebee against the Virginia Railway & Power Company. There was a judgment for plaintiff, and defendant brings error. Affirmed.

Williams, Tunstall & Thom, of Norfolk, and H. W. Anderson, of Richmond, for plaintiff in error. Braxton & Eggleston, of Richmond, Thos. W. Shelton and Claude M. Bain, both of Norfolk, for defendant in error.

HARRISON, J. It appears that the Virginia Railway & Power Company maintains and operates a large electric plant erected by it in a residential part of the city of Norfolk for the purpose of supplying electric power for its street railway and for general municipal lighting. The plaintiff, G. Benson Ferebee, alleges that he has been greatly damaged in the useful and comfortable enjoyment of his home by reason of the wrongful and negligent operation of this power plant by the defendant, and he brings this action to recover for such injuries.

The defendant company relied alone upon the plea of the statute of limitations, and demurred to the evidence of the plaintiff. The lower court overruled the demurrer to the evidence, and gave judgment in favor of

the plaintiff for the damages ascertained by the jury. To that judgment this writ of error was awarded.

As stated in the petition, the sole question to be determined by this court is whether the plaintiff's cause of action accrued within five years next prior to the bringing of this suit on the 22d day of April, 1912.

[1] The burden was upon the defendant company to sustain its plea of the statute of limitations. As said in *Goodell v. Gibbons*, 91 Va. 608, 612, 22 S. E. 504, 505: "It behooves the pleader of the statute to make out a case to which it clearly applies."

[2] It cannot be denied that, if this case belongs to that class where repeated actions may be brought, the plaintiff would have a right to recover for the injury sustained for the five years next preceding the date of the action, and the statute of limitations would have no application. The chief discussion has therefore been directed to the question whether this case belongs to the class mentioned, or to that class where but one action can be brought, in which a recovery must be had for the entire damage suffered, both past and future, in which case the action will be barred unless brought within five years from the time the cause of action arose.

The record shows that this case was conducted throughout in the lower court upon the theory that only such damage could be recovered as had been suffered prior to the institution of the suit. This theory admits the right and necessity for future actions for injuries subsequently occurring.

[3] It is contended by the defendant company that the declaration was drawn upon the theory that permanent damages might be recovered, and that it will not support a recovery for recurring damages. The language of the declaration, taken as a whole, does not justify this contention; but, if the declaration alleged a continuous nuisance, it would not prevent a recovery thereunder for an occasional nuisance.

In *Cohen v. Bellenot*, 32 S. E. 455, 457, 2 Va. Dec. 639, this court says: "We know of no good reason, nor of any rule of law, which would prevent a plaintiff from recovering for occasional nuisances under a declaration alleging a continuous nuisance if the occasional nuisances were caused in the manner alleged in the declaration."

[4, 5] In the case at bar, whether the nuisance was continuous or occasional, it was caused in the manner alleged in the declaration. If this was a suit, as contended, to recover future as well as present damages, then the plaintiff was entitled to introduce evidence to show the permanent injuries he had sustained, and yet when evidence to that effect was offered by the plaintiff it was promptly objected to by counsel for defendant as inadmissible. This view was acquiesced in by counsel for the plaintiff, and the

evidence was confined to the damages suffered prior to the institution of the action. After the evidence was all in, the court instructed the jury at the instance of the plaintiff, to which instruction there was no objection, that no damages could be assessed for the plaintiff "unless the same were suffered within five years prior to the institution of this suit." This instruction was in line with the defendant's objection to the introduction of any evidence of damage sustained after the suit was instituted, and would have been wholly erroneous if the contention now made was sound that the suit was for entire damages, past, present, and future.

In *C. & O. Ry. Co. v. Rison*, 99 Va. 18, 81, 37 S. E. 320, 324, this court said: "A party is forbidden to assume successive positions in the course of a suit or series of suits in reference to the same fact or state of facts, which are inconsistent with each other and mutually contradictory."

In view of the theory of the case adopted by both parties in the lower court, and of the evidence adduced, viewed from the standpoint of a demurrer to the evidence, we are of opinion that the defendant company is estopped to deny in this court that the case belongs to that class where the plaintiff is entitled to maintain successive actions for the damage he may from time to time suffer. The evidence having been confined at the instance of the defendant to showing only the damage sustained by the plaintiff for the five years prior to his action, and the jury having been instructed, without objection, to confine their ascertainment of damage to that period, it would be an injustice to the plaintiff for this court now to hold that the action was for permanent injuries, and therefore that the plaintiff's recovery was for all damages, past, present and future, growing out of the defendant's wrongful and negligent operation of its electric power plant.

The plaintiff's recovery not being for permanent injuries, but limited only to such damage as he had sustained within five years prior to the institution of his suit, the statute of limitations did not bar his claim.

The evidence was amply sufficient to warrant the verdict of the jury, and the judgment complained of must therefore be affirmed.

Affirmed.

CARDWELL, J., absent.

(115 Va. 281)

ROSENBERG v. UNITED STATES FIDELITY & GUARANTY CO. OF BALTIMORE, MD.

(Supreme Court of Appeals of Virginia. June 12, 1913.)

1. APPEARANCE (§ 24*)—EFFECT—DEFECTS IN SERVICE—"SUBMISSION TO JURISDICTION."

An appearance of defendant to the action or a general appearance waives all defects in

the process, and constitutes a submission by defendant to the jurisdiction of the court.

[Ed. Note.—For other cases, see Appearance, Cent. Dig. §§ 118-143; Dec. Dig. § 24.*]

2. APPEARANCE (§ 24*)—WHAT CONSTITUTES—MOTION TO DISMISS—WANT OF JURISDICTION.

Where defendant appeared and moved to dismiss the action for want of a declaration, the court having jurisdiction of the subject-matter, a subsequent objection to the jurisdiction for irregularities affecting the process merely was waived.

[Ed. Note.—For other cases, see Appearance, Cent. Dig. §§ 118-143; Dec. Dig. § 24.*]

Error to Circuit Court of City of Norfolk.

Action by Max Rosenberg against the United States Fidelity & Guaranty Company of Baltimore, Md. Judgment for defendant, and plaintiff brings error. Reversed and remanded.

Jeffries, Wolcott, Wolcott & Lankford, of Norfolk, for plaintiff in error. Baird, Swink & Moreland, of Norfolk, for defendant in error.

WHITTLE, J. This is an action of assumpsit brought by the plaintiff in error, Max Rosenberg, hereinafter called the plaintiff, against the defendant in error, the United States Fidelity & Guaranty Company, hereinafter termed the defendant.

The object of the action is to recover damages for the alleged breach of a contract of guaranty whereby the defendant undertook and promised to make good and reimburse the plaintiff (to the extent of \$1,000) for all pecuniary loss sustained by him for moneys, etc., in the possession of one B. S. Johnson, as manager for the plaintiff, for which he was responsible, by acts of dishonesty amounting to the larceny or embezzlement of such moneys, etc.

On motion of the defendant the court dismissed the action, being of opinion "that the plaintiff has proceeded in the wrong forum," and to that order this writ of error was granted.

There is no question but that the case stated in the declaration is one within the general jurisdiction of the circuit court of the city of Norfolk, but the contention of the defendant is that upon the facts the court has no jurisdiction of the particular case, because the defendant is a Maryland corporation, and it does not appear that the cause of action or any part thereof arose in the city of Norfolk, and therefore the process could not lawfully be sent to the city of Richmond and served on the statutory agent of the defendant, as was done in the instant case. *Deatrick v. State Life Insurance Co.*, 107 Va. 602, 59 S. E. 489.

[1, 2] If, however (as we apprehend the situation to be), the record shows an appearance to the action, or a general appearance, on the part of the defendant, it is unnecessary to consider any of the questions raised with respect to the direction and service of

process. Because it is a well-settled rule of practice that by such appearance the defendant waives all defects in the manner and service of process and submits himself to the jurisdiction of the court. The defendant appeared and moved the court to dismiss the action for want of a declaration; and, the court having jurisdiction of the subject-matter, subsequent objection to the jurisdiction on the ground of irregularities affecting the process merely must be treated as having been waived.

In *Frank v. Zeigler*, 46 W. Va. 614, at page 618, 33 S. E. 761, at page 762, the court says: "The object of service of process is only to notify persons of the suit, and bring them under the power of the court. Appearance answers the same purpose. By it the party submits himself to the jurisdiction of the court. Any appearance, except to object to the jurisdiction—as, for instance, to take advantage of defect in process or return—is a general appearance, not special, and will dispense with its service. Any motion in the case will do so."

Here the motion of the defendant was in no sense founded on lack of jurisdiction of the court, or of defective process or return. On the contrary, it distinctly recognized the jurisdiction of the court, and invoked the exercise of that jurisdiction to dismiss the action because of noncompliance on the part of the plaintiff with the statute in the matter of filing the declaration. This was obviously a general and not a special appearance, though designated as such, and by it the defendant submitted itself to the jurisdiction of the court.

In *New River Mineral Co. v. Painter*, 100 Va. 507, 42 S. E. 300, the court held that "appearing to an action even for the purpose of taking or accepting a continuance is a waiver of all defects in the service of the writ." *Lane Bros & Co. v. Bauserman*, 103 Va. 146, 48 S. E. 857, 106 Am. St. Rep. 872; *Norfolk & W. Ry. Co. v. Sutherland*, 105 Va. 545, 54 S. E. 465.

In *Norfolk & O. V. Ry. Co. v. Turnpike Co.*, 111 Va. 131, 68 S. E. 346, Ann. Cas. 1912 A, 239, the rule is stated thus: "An appearance for any other purpose than questioning the jurisdiction of the court because there was no service of process, or the process was defective, or the service thereof was defective, or the action was commenced in the wrong county, or the like, is general and not special, although accompanied by the claim that the appearance is only special. A motion to vacate proceedings in a cause, or to dismiss or discontinue it, because the plaintiff's pleading does not state a cause of action, is equivalent or analogous to a demurrer, and amounts to a general appearance."

The rule is similarly stated in the valuable newly published work, *Burks' Pleading and Practice*, 326.

Upon these authorities, it is plain that the

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

court acquired jurisdiction of the defendant, and, having general jurisdiction of that class of cases, should have overruled the motion to dismiss the action, and proceeded with the trial on the merits.

For these reasons, the judgment must be reversed, and the case remanded for further proceedings in conformity with the views expressed in this opinion.

Reversed.

(115 Va. 60)

HILL et al. v. SAUNDERS et al.

(Supreme Court of Appeals of Virginia. June 12, 1913.)

1. MORTGAGES (§ 38*)—DEED AS MORTGAGE—PRESUMPTION—EVIDENCE.

The presumption that a deed absolute on its face is what it purports to be must be overcome by clear, unequivocal, and convincing evidence.

[Ed. Note.—For other cases, see Mortgages, Cent. Dig. §§ 108-111; Dec. Dig. § 38.*]

2. MORTGAGES (§ 608½*) — DEED AS MORTGAGE—SUIT TO DECLARE—LACHES—LOSS OF EVIDENCE.

Suit to have a deed declared a mortgage is barred by laches; complainants having, with conscious knowledge of the situation, waited till after death of all the principal actors in the transaction, loss of whose testimony would make any conclusion reached by the court necessarily conjectural and founded on random guess.

[Ed. Note.—For other cases, see Mortgages, Cent. Dig. § 1815; Dec. Dig. § 608½.*]

Appeal from Circuit Court, Culpeper County.

Suit by the widow and heirs of Edward B. Hill, deceased, against the personal representatives and devisees of C. A. Saunders, deceased. Bill dismissed, and complainants appeal. Affirmed.

Grimsley & Miller, of Culpeper, for appellants. J. L. Jeffries, of Norfolk, Rixey & Hiden and Waite & Perry, all of Culpeper, and Thos. E. Blakey, of Tappahannock, for appellees.

WHITTLE, J. The bill in this case was filed by the widow and heirs of Edward B. Hill, deceased (who was the former claimant of two farms in Culpeper county, known, respectively, as the Petty farm, containing 630 acres, and the Lightfoot farm of 378½ acres), against the personal representatives and devisees of C. A. Saunders, deceased. The object of the suit was to have certain deeds absolute on their face, conveying these properties to Saunders, declared to be mortgages, also for an account of indebtedness of the estate of Hill to the estate of Saunders, and upon such settlement that complainants should be allowed to redeem the farms, or that they should be sold and the balance of the purchase money, after discharging the indebtedness, paid over to them. From a decree dismissing the bill this appeal was granted.

Stated generally the history of the case is as follows: Edward B. Hill resided with his family, consisting of his wife and four children, at Culpeper, Va., and shortly after the Civil War he engaged in the mercantile business at that place as a member of the firm of Hill, Burdette & Co. C. A. Saunders married Hill's sister and lived in the city of New York, where he was engaged in business. He was a man of the highest integrity, of exceptional business ability and large means. His brother-in-law, Major Hill, was, on the contrary, a poor business man, and in straitened financial circumstances. The social relations between the two families were extremely intimate and cordial; and the personal relations between Saunders and Hill were as close and affectionate as if they had been brothers. A room was reserved at the Hill home for Saunders and his wife, and they annually spent their summer vacations in Culpeper as boarders in the household. The mercantile venture of Hill, Burdette & Co. proved unsuccessful and ultimately resulted in disastrous failure. During the continuance of the business, Hill frequently called upon Saunders for financial assistance, and, when the collapse finally came in 1875, Saunders had loaned him and the concern large sums of money without security.

In the year 1860 Hill purchased at a judicial sale the Petty farm at \$12.65 per acre; the entire price being \$8,526.10. He made the cash payment of \$252.11, but when he was called on after the War to pay the balance of the purchase money he was wholly unable to do so. In that emergency he again appealed to his benefactor for help. Saunders, in reply to Hill's letter, wrote under date of June 1, 1875, among other things: "I said before I do not want the property and will redeem it as soon as my debt is paid, and will give my obligation to that effect, and will at once try to buy the other interests in it and get the court title perfect, so that it can be sold if an opportunity offers." At that time the place was supposed to contain valuable iron ore deposits, which in point of fact was afterwards discovered to be unfounded.

These negotiations resulted in Saunders becoming the substituted purchaser of the Petty farm. On August 10, 1875, Hill and wife conveyed to him all their interest in the land by deed with general warranty of title; but several years elapsed before Saunders acquired the outstanding interests in the property referred to in his letter and received a deed from the commissioners.

From time to time Hill made other calls on Saunders, as his necessities required, which amounted in the aggregate, including the purchase price of the Petty farm, to over \$20,000, or nearly three times the value of the land at the date of Saunders' purchase. In other letters exhibited with the record he iterated his position with respect to these

transactions, emphasizing the fact that he had no desire at that time to own the land and was willing to reconvey it to Hill upon his returning the money advanced.

In 1859 Hill purchased from Edward Lightfoot the tract known as the Lightfoot farm, and executed six bonds for \$1,250 each for the purchase money, secured by a deed of trust upon the land. Hill was unable to meet this liability; and, in response to his earnest appeal, Saunders on July 30, 1889, paid the purchase money, amounting to \$13,351.56, and D. A. Grimsley, substituted trustee, and E. B. Hill united in a deed conveying to Saunders the Lightfoot farm; the deed reciting that the consideration was the payment of the amount of the lien thereon, and that Hill was "anxious to pay off and discharge the whole of said debt so due to Saunders, * * * and for this purpose has agreed to sell and convey" the land to him. The amount paid was more than the value of the property at that date.

Throughout these dealings Hill was hopelessly and continuously insolvent, and at no time ever paid, or offered to pay, the large sums of money advanced by Saunders at his request. Saunders, in the meantime, paid the taxes on both farms, leaving Hill in full possession and pernaney of the profits (which, indeed, constituted his only means of support), and this arrangement continued until Hill's death in February, 1890; his widow receiving the rents for that year. At the close of the year 1890 the family had become dispersed; the two sons were living and in business out of the state; both daughters were married and residing in Baltimore; and their mother spent much of her time with them. Mr. Saunders, as the recognized owner, took possession of the farms without suggestion of objection from any quarter. His possession and absolute claim of ownership was well known to appellants and continued without challenge or adverse claim on their part until after his death in 1905. During the 15 years of his actual occupancy he spent large sums of money in the cultivation and improvement of these properties, increasing their value 50 per cent., without taking into account the general advance in the price of land. He bought 50 odd acres adjoining the Lightfoot farm to straighten his boundaries, and moreover farmed and erected permanent improvements upon both properties upon an extravagant scale, using tile for draining, and inclosing the farm with wire fences on locust posts. Among other improvements, he erected five large elegantly built barns on the Lightfoot place and a six-room dwelling on the Petty farm. In fine, his expenditures and betterments were of a class that no prudent man would have made upon property other than his own.

Year after year these outlays continued, with full knowledge on the part of appellants, all of whom were adults and one

a practicing lawyer; yet they never paid, or offered to pay, a dollar to redeem the lands, nor intimated by word or act their ultimate purpose to lay claim to the estate, until they filed this bill 18 years after the death of their father, 30 years after the deed to the Petty farm, 19 years after the deed to the Lightfoot farm, and 8 years after the death of C. A. Saunders.

[1] It is sometimes difficult to determine whether a deed absolute on its face is in reality a conditional sale or a mortgage, but in all such cases the settled doctrine in this jurisdiction is that the presumption that the deed is what it purports to be must be overcome by clear, unequivocal, and convincing evidence. *Holladay v. Willis*, 101 Va. 274, 278, 43 S. E. 616; *Bachrach v. Bachrach*, 111 Va. 232, 234, 68 S. E. 985.

[2] Without regard, however, to what may have been the original merits of this controversy, and without discussing any of the other matters of defense, the decree of the circuit court is obviously right and must be affirmed on the ground of gross laches on the part of the appellants in asserting their claim. With conscious knowledge of the situation, they have chosen to sleep on their rights until all of the principal actors in the transactions have passed away. Hill and wife, Saunders and wife, and Grimsley, trustee, are all dead, and from the loss of their evidence any conclusion that the court might reach would necessarily be conjectural and founded upon random guess rather than upon any just ground of belief based upon sufficient proof. In such case a court of equity invariably denies relief for the reason that a just determination of the controversy or settlement between the parties is impossible, and therefore leaves the complainants where their inexcusable negligence has placed them. *Nelson v. Triplett*, 99 Va. 421, 39 S. E. 150; *Doyle v. Beasley*, 99 Va. 428, 39 S. E. 152; *Redford v. Clark*, 100 Va. 115, 40 S. E. 630.

For these reasons the decree of the circuit court must be affirmed.

Affirmed.

(115 Va. 206)

CITY OF RICHMOND v. BURTON.

(Supreme Court of Appeals of Virginia. June 12, 1913.)

1. MUNICIPAL CORPORATIONS (§ 360*)—SEWER CONSTRUCTION—EXTRA EXCAVATION—KNOWLEDGE OF CITY.

Where during the excavation of a sewer trench under a city contract, it was found that the sides of the trench would give way, and to prevent this it was necessary to put in timber and fill in the sloughing places with bricks, whereupon the contractor suggested a remedy by excavating the ditch wider than provided by the profiles, which suggestion was adopted with the consent of the city's assistant engineer, and was advantageous to the city, and it also appeared that new and wider stakes were set after the contractor's suggestion was adopted, it sufficiently appeared that the city had knowledge of the alteration in the plans, and

that it was done with the approval of the city's assistant engineer.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. §§ 892, 892½; Dec. Dig. § 360.*]

2. MUNICIPAL CORPORATIONS (§ 360*)—PUBLIC IMPROVEMENTS—CITY ENGINEER—AUTHORITY—"EXTRA."

A sewer construction contract provided that, before commencing any part of the work, the city engineer might make such changes in the lines, grades and dimensions which do not entail any extra expense to the contractor, and in the prosecution of the work, should there be any change in the lines, grades and dimensions of the work to be done which may entail cost to the contractor, it was agreed that the amount of the extra cost should be ascertained before the commencement of the work, and the agreement as to the amount to be paid should be final. *Held*, that the word "extra," as used in such provision, was equivalent to additional work which was required in the performance of the contract, and not necessary to such performance in the sense that the contract could not have been carried out without it, but necessary in the sense that by means of it the contract could be more conveniently and beneficially performed in the interest of both parties thereto, and did not include work arising out of and entirely independent of the contract, something not required in its performance, and hence did not take from the city engineer authority to agree to pay for extra excavation during the performance of the contract made necessary by the character of the soil in which the improvement was constructed.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. §§ 892, 892½; Dec. Dig. § 360.*]

For other definitions, see *Words and Phrases*, vol. 3, p. 2624.]

3. MUNICIPAL CORPORATIONS (§ 360*)—SEWER CONTRACT—CONSTRUCTION—EXTRA WORK.

A municipal sewer contract provided that the size and form of the sewer, its location and grade, etc., should conform to the plans and specifications of a city engineer subject to such modification as he might deem necessary during the execution of the work; that the trenches were to be dug in accordance with the lines, grades, depths, and widths which would be given by the engineer or his assistant from time to time, and should it be necessary to increase the dimensions greater than shown on the plans, there should be no extra charge, but the contractor should be paid at the same rate per cubic yard as given in the original proposal, that all directions necessary to complete any of the provisions of the specifications would be given by the city engineer or his assistant in charge whenever requested, and that the contractor would be required to protect such stakes or marks and conform his work accurately thereto. *Held*, that where, by reason of the character of the soil, it was found necessary to timber loose places and fill slides of earth, and to avoid this the contractor suggested wider excavation which was beneficial to the city and to which the engineer agreed, the contractor was entitled to recover compensation therefor in addition to his contract price.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. §§ 892, 892½; Dec. Dig. § 360.*]

4. JUDGMENT (§ 180*)—MOTION FOR JUDGMENT—"MONEY DUE ON CONTRACT."

Where plaintiff contracted to construct a sewer for a city during the progress of the work, it was found necessary to widen the excavation because of the character of the soil, and it was agreed between plaintiff and the city engineer that plaintiff should be allowed

the same contract price for the extra excavation required which the city subsequently refused to pay, the amount due therefore was "money due on contract," and hence recoverable by motion for judgment as authorized by Code, § 3211.

[Ed. Note.—For other cases, see *Judgment*, Cent. Dig. § 842; Dec. Dig. § 180.*]

For other definitions, see *Words and Phrases*, vol. 3, pp. 2213-2220, vol. 8, p. 7643.]

Error to Circuit Court of City of Richmond.

Action by Hunter Burton against the City of Richmond. Judgment for plaintiff and defendant brings error. Affirmed.

H. R. Pollard, of Richmond, for plaintiff in error. C. V. Meredith, of Richmond, for defendant in error.

KEITH, P. Burton brought suit against the city of Richmond to recover a balance alleged to be due for the excavation of a sewer, and recovered a judgment, which is now before us upon the petition of the city of Richmond to review certain rulings made during the trial of the case.

There appears to be no dispute as to the amount of excavation done, or the price charged. The payment of the demand was resisted by the city upon the ground that the additional work for which the claim is made was never authorized by the city or its agents, and that the officers of the city under whose supervision the work is alleged to have been done had no authority to make any change in or departure from the plans and specifications set out in the contract between the city and Burton.

In the early stages of the work the contractor seems to have conformed substantially to the plans and specifications set out in the contract, and to the profile furnished him by the city engineer, but as the work progressed it was found that the material was of such a nature that the sides of the trench would give way and slough off into the ditch, and that to prevent this it was necessary to put in ribs of timber and fill in the place where the sloughing had taken place with bricks, and for the material and work thus made necessary the city made payment without objection. In consequence of this condition of things Burton approached the assistant city engineer in charge of the work for the city, and called his attention to the trouble and expressed the opinion that, if the trench were made wider and the weight taken off the sides by giving the banks a slope instead of having them perpendicular, it would be to the advantage of all parties concerned. The assistant city engineer acquiesced in this suggestion, and in consequence thereof the lines of the ditch were staked off much wider than the original plans, specifications, and profile called for, and the inspector under whose supervision the stakes were set kept a measurement of

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

the additional excavation thus rendered necessary.

These are the facts which the evidence tends to prove on behalf of the defendant in error. They are controverted by the plaintiff in error, but must be accepted by us, the verdict of the jury having found them to be true.

The view of the plaintiff in error is that the change was made and the additional work done as a matter of convenience to the contractors, as they were thereby enabled to use machinery to a greater advantage in the excavation of the trench; but there is evidence tending to show that by the method adopted the city was saved a considerable sum of money as the ribbing with timber was no longer necessary and the use of so many brick was not required.

After the evidence was introduced to the jury the court gave certain instructions. The first to which we shall call attention was asked for by the defendant, and is predicated upon that provision in the contract which declares that the city engineer shall decide all questions and disputes of every nature relative to the construction, prosecution, and fulfillment of the contracts, and as to the character, quality, amount, and value of the work done and materials furnished, and that his decision upon all such points was to be final and conclusive upon both parties, and they must abide by his decision although it be erroneous, unless it be clearly proved by a preponderance of the evidence that such decision was fraudulently made, or that such a gross mistake was made thereby as necessarily to imply bad faith on his part or a plain failure to exercise an honest judgment.

To the giving of this instruction the plaintiff excepted, but we are of opinion that it correctly states the law as it prevails in this court and in other jurisdictions, and could not be the subject of an assignment of error in any event as the judgment of the circuit court was for the plaintiff, and we therefore mention the instruction merely as tending to show that the case was properly submitted to the jury.

The city of Richmond offered two instructions which were refused, in which the court was asked to construe the contract between Burton and the city, and tell the jury that no one of the assistants of the city engineer or inspectors upon the work had any right to make any change or departure from the plans and specifications set out in the contract, even though the jury believed from the evidence that one of the assistant engineers or inspectors laid off the line of the ditch to be dug, and increased the dimensions thereof, which caused the cutting of the trench for the sewers of larger dimensions than those prescribed in the plans and specifications, yet such act on their part did not bind the defendant, the city of Richmond, and as a

consequence the plaintiff is not entitled to recover in this action for the excess of excavation outside of that called for by the specifications.

The court also gave an instruction of its own motion, the first branch of which pertains to the duty of the city engineer under the contract to settle all questions of dispute as to the character, quality, amount and value of the work to be done and material furnished, and which declares his decision on all such points to be final and conclusive. It is conceded to be substantially a reiteration of the instruction upon the same subject already referred to as having been given at the instance of the plaintiff in error, and need not be further noticed. The second branch of the court's instruction is the converse of the principle announcement in the instructions asked for by the city and refused by the court, and tells the jury that if it was found necessary in the excavation to increase the dimensions greater than those shown upon the plans and that the line of the trench was widened by the city engineer or his assistant and that as so widened the plaintiff dug the trench as directed, then they should find for the plaintiff for such extra amount of excavation as they believed from the evidence was dug, and assess his damages at the same rate per cubic yard as was agreed upon in the proposal; the contention of the city being that the contract between the city and Burton constitutes the law of the case, that there could be no departure from it except as authorized by the contract itself, and that in all cases where a claim is made under a contract for extra work it is incumbent upon the contractor to show that the amount of such extra expense had been ascertained and the price and cost thereof agreed upon in writing between the city engineer and the contractor before the commencement of the work, while upon the part of the contractor the contention is that, reading the contract as a whole, the officers of the city in charge of the work were authorized to deviate from the plans and specifications set out in the contract, and that for the additional work authorized by the assistant engineer the city was responsible. Upon the decision of this question the determination of this controversy must depend.

[1] We do not think that it can be successfully contended that the work here sued for was not done with the knowledge and approbation of the assistant engineer for the city. The evidence is full and complete that the attention of the city engineer was called to the trouble, the remedy suggested by the contractor and approved by the assistant engineer, and that as a consequence stakes were set which departed from the original profile furnished by the engineer's department to the contractors, and that the excavation was made in accordance with the new arrangement, that an account of the work

so done was kept by the city's inspectors by direction of the assistant city engineer, and that as to the amount of work so done and the prices charged there is no dispute.

As to the contention of the city that the change was made to meet the interest and convenience of the contractors, there is evidence strongly tending to show that the city was benefited as well as the contractors, and that by the change a sum of money amounting to \$4,000 or \$5,000 was saved to the plaintiff in error.

The contract between the city and the contractor is to be considered as a whole so as to give effect to all of its parts. This rule of construction is elementary, is not questioned, and needs no citation of authorities in its support.

The second clause of the specifications provides that "the size and form of the sewer, its location and grade, the catch basins, stacks, manholes, or any other connections must conform with the plans on file in the office of the city engineer, subject to such modifications, additions or omissions as the city engineer may deem necessary during the execution of the work." And just here it may be well to observe that it is conceded that within the line of his duty the powers of the city engineer and his assistant are identical.

In clause 4 of the specifications it was provided: "Trenches to be dug in accordance with the lines, grades, depths and widths which will be given by the city engineer or his assistant from time to time. * * * Should it be found necessary in the excavation to increase the dimensions and depths greater than shown on the plans, there shall be no extra charge for such changes, but the contractor will be paid at the same rate per cubic yard as given in the original proposal."

In section 21 of the specifications it is provided that all directions, etc., necessary to complete any of the provisions of these, etc., specifications and give them due effect will be given by the city engineer or his assistant in charge, whenever requested by the contractor. "All lines and grades will be given by the city engineer or his assistant, and the contractor will be required to protect such stakes or marks and conform his work accurately thereto."

And in section 22: "The city engineer or his assistant and inspectors shall have access at all times to any and all parts of any work being done, for the purpose of inspection, measurement and establishment of lines and grades."

[2] In answer to all this the city contends that the authority of the city engineer and his assistant is limited and controlled by the 23d section of the specifications, which is as follows: "Before commencing any part of the work herein specified and described, the city engineer is authorized to make such changes in the lines and grades and dimen-

sions which may not entail any extra expense to the contractor. And in the prosecution of the work, should there be any change in the lines, grades, or dimensions of the work to be done under the contract, which may entail cost to the contractor, it is understood and agreed that the amount of such extra cost and expense the contractor shall be subjected to shall be ascertained before the commencement of the work, and this agreement as to the amount to be paid shall be final."

We are satisfied that this section is not susceptible of the construction claimed for it by the plaintiff in error. The word "extra," as here used, has no reference to "work arising out of and entirely independent of the contract, something not required in its performance," but is the equivalent, we think, of additional work which was required in the performance of the contract—not necessary to the performance of the contract, in the sense that the contract could not have been carried out without it, but necessary in the sense that by means of it the contract could be more conveniently and beneficially performed in the interest of both parties to it.

That the work here sued for was not of the character contemplated in the twenty-third section further appears from the fact that there was no occasion to agree upon the price of the work, for that had already been agreed upon as so much per yard, and the compensation demanded here is the price per yard of excavation as stated in the contract. That such is the definition to be given to the term "extra" as employed in the twenty-third section will more plainly appear by reference to the concluding portion of clause 4 of the specifications already quoted, as follows: "Should it be found necessary, in the excavation, to increase the dimensions and depths greater than shown on the plans, there shall be no extra charge for such changes, but the contractor will be paid at the same rate per cubic yard as given in the original proposal."

[3] We cannot say as a matter of law, looking to the entire contract, that the assistant engineer had no power to authorize the excavation of a trench wider than that set out in the contract and the specifications and the original profile, and we therefore are of opinion that the circuit court did not err in refusing to give the instruction asked for by the plaintiff in error.

It is proper for us to state that there is no suggestion in this record that there was any fraudulent act or intent upon the part of any of the agents or officers of the city, and we entertain no doubt that the city engineer acted throughout with no other purpose or motive than to render exact justice to all concerned; but we are further of opinion that the jury having been properly instructed, and the evidence being sufficient to sustain their verdict, there is no error in the judge

ment of the circuit court upon the questions thus far considered.

[4] The point is made in the petition for the writ of error that a motion for judgment was not the proper remedy in this case; that such demand, if due at all, was for damages resulting from the breach of the contract in the notice mentioned, and was recoverable only in an action sounding in damages, and is not money which the plaintiff is entitled to recover by action on any contract.

Granting that as the law stood at the time this suit was brought the proposition as stated in the petition is sound, this case does not come within its terms, and the case of *Wilson v. Dawson*, 96 Va. 687, 32 S. E. 461, so far from sustaining the contention of plaintiff in error, is decisive to the contrary. It is true that it was held in that case that "damages for an injury resulting from a breach of contract, recoverable only in an action 'sounding in damages' can in no sense be considered money due upon contract, and hence a motion under section 3211 of the Code, as it stood when this motion was made, * * * in any case where a person was 'entitled to recover money by action on any contract,' cannot be maintained to recover damages for a breach of contract, or the profits which the plaintiff would have made if he had been permitted to fulfill his contract." In that case the plaintiff filed a bill of particulars which consisted originally of 31 items, all of which except 1 to 7, inclusive, and 27 and 28, were abandoned. Items 1 to 7, inclusive, it seems, were for masonry, excavation, and concrete work done and stone quarried and delivered, while 27 and 28 were for profits claimed by Mrs. Dawson upon concrete and masonry work which she would have made had she been permitted to complete her contract. The claims in that bill of particulars illustrate what could be done and what could not be done under the law as it then stood. The case before us is plainly of like nature with the claims in that case for masonry, excavation, concrete work done and stone quarried, for which a recovery was permitted, while items 27 and 28 were for causes of action strictly "sounding in damages" for which a recovery was not allowed. As said in the opinion in the case cited: "The utmost that the plaintiff had a right to recover in this mode of proceeding is the amount of the first seven items of the account filed with the notice, and therefore the verdict and judgment, including damages for the breach of the contract, embraced in items 27 and 28 of the account, is, we think, clearly erroneous, and should be reversed and annulled."

Upon the whole case, we are of opinion that there is no error in the judgment before us which is affirmed.

Affirmed.

(115 Va. 294)

WARDELL v. BIRDSONG et al†

(Supreme Court of Appeals of Virginia. June 12, 1913.)

1. VENDOR AND PURCHASER (§ 34*)—RESCISSION—DEFICIENCY IN ACREAGE.

Where all the parties to a sale of land described in the deed as 200 acres more or less believed that the tract conveyed contained about 200 acres, when in fact it contained only 94½ acres, the purchaser who was guilty of no inexcusable delay in ascertaining the deficiency was entitled to have the conveyance annulled and to recover the purchase price paid by him, where the parties could be placed in status quo, and no rights of innocent third parties had intervened, although the deed recited that it was understood that the land was sold by the lump and not by the acre; the mistake being so gross as to amount to and be equivalent to a fraud on the purchaser.

[Ed. Note.—For other cases, see *Vendor and Purchaser*, Cent. Dig. § 39; Dec. Dig. § 34.*]

2. VENDOR AND PURCHASER (§ 44*)—CONSTRUCTION OF CONTRACT — AMOUNT OF LAND.

While contracts of hazard in the sale of land are valid when clearly established and fair and reasonable, they are not favorably regarded by courts of equity, the presumption being where parties contract for the payment of a gross sum for a parcel of land upon an estimate of a given quantity that the quantity influences the price and that the agreement is not one of hazard, which presumption can be overcome only by clear and cogent proof.

[Ed. Note.—For other cases, see *Vendor and Purchaser*, Cent. Dig. §§ 69-76; Dec. Dig. § 44.*]

Appeal from Circuit Court, Sussex County.

Action by A. J. Wardell against M. L. Birdsong and others. Judgment for defendants, and plaintiff appeals. Reversed and remanded.

Thos. H. Howerton, of Waverly, and Wm. B. Cocke, of Sussex, for appellant. R. H. Mann, of Petersburg, for appellees.

CARDWELL, J. M. L. Birdsong on July 2, 1904, conveyed to B. R. Birdsong, by the general description, "a tract of parcel of land in Sussex county containing 700 acres, more or less, and adjoins the land of E. C. Land and R. L. Doble and others," which deed, though absolute on its face, was in reality a mortgage given to secure certain indebtedness of the said M. L. Birdsong to B. R. Birdsong, E. T. Birdsong, and F. L. Birdsong, and whereby said M. L. Birdsong remained the owner of the property conveyed, subject to the said mortgage. A certain portion of this tract of 700 acres of land was separated from the main body of the tract by a county road, and this separate portion of the land was by all concerned supposed to contain about 200 acres.

On December 1, 1907, M. L. Birdsong agreed to sell and convey unto John G. Hawley "200 acres of land, more or less, lying, being and situate in * * * magisterial district, Sussex county, Virginia, bounded by

*For other cases see same topic and section NUMBER 'n Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

† Rehearing denied September 11, 1913.

the lands of Gray Lumber Company, the main run on Assamasic Swamp and the main county road leading from Waverly to Sussex county courthouse," at the purchase price of \$1,250, but with a provision for abatement if the acreage fell below 185 acres, and providing for a subdivision and survey, if desired, of which purchase price Hawley paid \$100, and the contract was to run for one year, with a right to declare it forfeited after that year, which right was not exercised.

A short while before March 11, 1909, A. J. Wardell, who had theretofore resided in the state of Ohio, came to the town of Waverly, Sussex county, where he met Hawley, who was doing business in said town as a real estate agent, and with Hawley Wardell looked at certain lands, including the tract supposed to contain 200 acres just mentioned, the boundaries of which they went partially over, with the view of a sale thereof to Wardell; and on March 11, 1909, Hawley and Wardell entered into an option contract giving to Wardell the right to purchase, within a stated time, certain lands which Hawley had for sale, including the so-called 200-acre tract. By the terms of this option contract Wardell had the right to purchase said 200-acre tract "at \$1,700.00, if taken in lump, or eleven (\$11) dollars per acre, whatever the number of acres are shown to be by a careful survey thereof, the party of the second part (Wardell) to have the option of choosing whether by lump or by the acre at the time of closing the deal finally." At the time of the making of the option contract, Hawley showed to Wardell his contract with the said M. L. Birdsong for the purchase of said land. Wardell returned to his home in Ohio, and after the 20th of March, 1909, on which date his option contract expired, he came back to Waverly and indicated his intention to purchase the "200-acre tract," to which declared intention Hawley replied that the right to purchase this land had been forfeited, as the time had expired, but said that he would not be mean about it, and would arrange with Mr. Birdsong for the deed, which was necessary by reason of the fact that the title to the land was still outstanding in B. R. Birdsong's heirs by virtue of the said deed intended as a mortgage, and for the further reason of the nonpayment by Hawley of the balance of the purchase price for the land due to M. L. Birdsong. Hawley furnished Wardell with what purported to be an abstract of title to the 200 acres, but was in fact an abstract of title to the 700-acre tract which included the 200-acre parcel mostly in undergrowth and small trees, the lines of which were but partially pointed out to Wardell by Hawley, and in the meantime Wardell had asked both Hawley and M. L. Birdsong separately about the number of acres in the tract of land that he was proposing to buy as his future home, and each of them expressed the belief that

the tract contained about 200 acres. Just before and at the time the deed from the widow and heirs of B. R. Birdsong, of date April 1st, 1909, conveying to Wardell and his wife the said tract of 200 acres, was being written, Hawley asked Wardell whether he would take said land by the lump or by the acre, to which Wardell replied that he would take it by the lump, as he had intended to do so from the first. This deed when finally executed and delivered described the land conveyed as containing 200 acres, more or less, but also stated "and it is understood this land is being sold by the lump and not by the acre." Settlement was made for the land by Wardell and wife with Hawley by paying \$1,500 in cash and executing their note for the balance of the purchase money, \$200, secured by trust deed on the land, the money and the note being received by M. L. Birdsong. Later, to wit, on April 26, 1909, Wardell had the land surveyed by a competent surveyor, who reported that the tract contained but 94½ acres, and that there was a difference of a few acres in the real boundaries thereof and the boundaries pointed out by Hawley to Wardell prior to the option contract, and upon which space between the lines as indicated by the survey, and as pointed out by Hawley to Wardell, the latter had built a modest dwelling.

Upon the fact of such difference in the boundaries being brought to the attention of Hawley, he immediately purchased sufficient land from the Gray Lumber Company, the owners of the adjoining lands, to make the lines accord with the boundaries pointed out by him to Wardell, and forwarded a deed for this additional land—0½ acres—to Wardell on June 23, 1909, which deed was retained by the latter, as he claims, simply as an evidence that a mistake had been made.

On the 30th day of August following Wardell and wife filed their bill in this cause making Hawley, M. L. Birdsong, and the widow and heirs of B. R. Birdsong, deceased, parties defendant thereto, and alleging that the land in question was purchased by complainants, relying on the statements and representations of Hawley and M. L. Birdsong that it contained about 200 acres, and on the recital in the deed of conveyance of the land to complainants that the tract contained 200 acres, more or less, and that, if they had not believed said statements and representations to be true, they would never have purchased the said land; that they never purchased this tract of land as a contract of hazard, but believing it contained about 200 acres; that the widow and heirs of B. R. Birdsong, deceased, made a mistake in conveying said land intending to convey 200 acres when in fact the conveyance was of only 94½ acres; and that there was a material mistake made by the grantors in said deed and the complainants in selling and buying said tract of land. The bill then charges that the statements and representations made

by Hawley and M. L. Birdsong that the tract of land contained 200 acres were false, and were made to deceive and induce the complainants to purchase said tract of land for 200 acres, when they knew that the tract did not contain that number of acres or anything like that amount of land. The prayer of the bill, in substance, is that the said option contract with Hawley and said deed from B. R. Birdsong's widow and heirs to complainants be rescinded and declared null and void; that the purchase money paid by complainants for the said land be refunded to them, with interest; that the deed of trust and note for the deferred payment be canceled; and that damages be awarded complainants for building the house on the land of the Gray Lumber Company, etc.

The defendants demurred to and answered the said bill, taking the ground in their answer that no false statements or representations had been made inducing complainants to buy the land in question; that complainants understood that the deed for the land to them was to be a contract of hazard; that while Hawley did state to complainants that he bought the land for 200 acres conditionally, and believed it did contain 200 acres, as old surveys in the neighborhood generally overran, and did furnish Wardell an abstract of the 700 acres of land which purported to be an abstract of 200 acres, and did make a mistake in representing its boundary lines, he, Hawley, never stated that the tract contained 200 acres as a matter of fact, and no mistake had been made in conveying the land as 200 acres to complainants, as it was intended that the conveyance should be for the land irrespective of the number of acres it contained. While M. L. Birdsong denies that he falsely represented the number of acres in the tract or attempted to mislead the complainants, he admits that upon being asked by Wardell as to the number of acres he "told him that he thought or reckoned it contained 200 acres."

Upon the hearing of the cause on the pleadings and the depositions of witnesses taken and filed by the respective parties, the court overruled the demurrer to the bill and the motion to strike out certain portions of the deposition of said A. J. Wardell, but was of opinion that the complainants had purchased the land in question under a contract of hazard, and were therefore not entitled to the relief prayed for in their bill, and accordingly dismissed the bill with costs to the defendants; and from the decree of the court so ruling the complainant, A. J. Wardell, survivor of himself and his wife, obtained this appeal.

[1] The material facts in the case are practically undisputed, and when analyzed they very clearly show that the appellant, who was a stranger in Sussex county when in search of a tract of land in Virginia for his future home he met appellees Hawley and

M. L. Birdsong, who had for sale the tract of land in question, and that they informed him that the tract contained, and that it always had been understood as containing 200 acres; that Hawley, when told by appellant that he was in search of a small farm, said, "I have a nice little 200-acre farm that is my own property, which I have purchased to make myself a home, and if it were not that I have to raise a little money you or no other man could purchase it;" that M. L. Birdsong in selling the land to Hawley believed, as did Hawley, that it contained 200 acres, "with slight variations in surveyors' instruments to cover which a clause was found in all deeds"; that appellant relied on the statements of Hawley and M. L. Birdsong that the land contained 200 acres and agreed to purchase it, believing that the tract contained 200 acres except to the extent that the number of acres might vary because of "any slight variations in surveyors' instruments"; and that the land intended to be sold and which was conveyed to appellant, instead of containing 200 acres, or approximately that number of acres, contained but 94½ acres.

It further appears, as is conceded in the argument, that Hawley and M. L. Birdsong not only believed the property in question contained 200 acres, more or less, but that M. L. Birdsong had derived the property from his father who always thought there were 200 acres in the tract, and on one occasion sold it for 200 acres; and that "the entire Birdsong family always thought that the field contained 200 acres, and referred to it as the 200-acre field."

The sole question, therefore, presented on this appeal is whether or not a court of equity, under the circumstances narrated, has the power and ought to decree the relief prayed in the bill of complaint.

It would seem to us shocking to the conscience of a court of equity to hold that a purchaser of a parcel of land sold and conveyed to him as 200 acres, more or less, when in fact the acreage is but 94½ should be required to keep and pay the purchase money for the land, although the sellers of the land, as well as the buyer, believed there were in the tract conveyed about 200 acres, and although the conveyance also contains the clause, "and it is understood this land is sold by the lump and not by the acre." There is no pretense made in the case that appellees have been prejudiced or even inconvenienced by delay on the part of appellant in the institution of this suit to have the transaction canceled and annulled and the purchase money paid by him refunded by appellees.

The authorities are not to the effect that the mistake in such a case shall be the result of intentional or willful fraud and deceit in order that the party wronged or injured by the mistake may be relieved from the strict terms of his otherwise binding con-

tract, but that, where the mistake complained of is so gross as to amount to a fraud upon the injured party's rights, he should not be required to abide by his contract, if executory, and if executed a court of equity has the power to and should relieve him of the consequences of the wrongdoing or mistake by rescinding the contract in toto, provided always that the parties thereto may be put in statu quo, and the rights of innocent third parties have not intervened.

In *Lee v. Laprade*, 106 Va. 594, 56 S. E. 719, 117 Am. St. Rep. 1021, 10 Ann. Cas. 308, the opinion of this court, quoting from 4 Min. Inst. 697, says: "In cases of plain mistake or misapprehension, though not the effect of fraud or contrivance, equity will rescind the conveyance, if the error goes essentially to the substance of the contract, so that the purchaser does not get what he bargained for, or the vendor sells that which he did not design to sell."

"Thus, if A. buys land of B. to which B. is supposed to have a good title, and it turns out, in consequence of facts unknown alike to both parties, he has no title at all, equity will cancel the transaction and cause the purchase money to be restored to A., putting both parties in statu quo." 4 Min. Inst. supra, at p. 700.

[2] Contracts of hazard, such as we are here considering, have not been discountenanced by the courts when they have been clearly established and are fair and reasonable, but courts of equity do not regard them with favor the presumption being against them, which presumption is to be overcome, if at all and effectually, by clear and cogent proof; and where the parties contract for the payment of a gross sum for a tract or parcel of land, upon an estimate of a given quantity, the presumption is that the quantity influences the price to be paid, and that the agreement is not one of hazard. *Blesing's Adm'r v. Beatty*, 40 Va. 287, in which case the court held that the appellant was entitled to compensation for the deficiency of $3\frac{1}{2}$ acres in a tract of 503 acres on the ground of mutual mistake.

The case just cited and other cases are referred to in *Boschen v. Jurgens*, 92 Va. 756, 24 S. E. 390, as affirming the rule of law stated above, and in the opinion by Keith, P., in speaking of the discrepancy in the depth of a town lot contracted for as being 138 feet, when in fact it was only 129 feet deep, says: "It seems to us that the appellant is in this dilemma: Either her testator made the representation as to quantity in the honest belief of the truth of what he said, in which case the court should grant the relief prayed for, on the ground of a mutual mistake of the parties as to a material term in their contract; or that he made the representation as to quantity, knowing, or having reason to know, that it was untrue, in which

case the appellee's claim for relief would rest upon even stronger ground. In justice, however, to the vendor, Mr. Boschen, it must be said that there is nothing in this record to suggest the suspicion that he contemplated or perpetrated fraud"—and the relief prayed was decreed.

In *Belknap v. Sealey*, 14 N. Y. 143, 67 Am. Dec. 120, involving a contract for the sale of a tract of land in gross, by reference as to quantity to a deed describing the land as containing "about nine acres, be the same more or less," from which one acre and six perches had been sold, but which proved to contain only about half as much as represented, and which was mainly valuable for division and sale as city lots, and its value therefore being precisely in proportion to quantity, the court said in its opinion: "A deed which describes the land and states the number of acres, although with the words 'more or less,' clearly imports that there is not a great deficiency or excess. If the deficiency is one-half, the instrument carries on its face a gross misrepresentation. And it is quite material to observe that such words do not import a special engagement that the purchaser takes the risk of the quantity. Their presence in a contract or deed may render it more difficult to prove such a mistake as will justify the interference of equity, but they are not equivalent to a stipulation that the mistake when ascertained shall not be a ground of relief."

As held in the opinion of this court in *Boschen v. Jurgens*, supra, though the seller of land made a false representation as to quantity in the honest belief of the truth of what he said, yet a court of equity should grant the relief prayed on the ground of mutual mistake as to the material terms of the contract between the parties. See, also, *Estes v. Odom*, 91 Ga. 600, 18 S. E. 355.

In the case at bar the mistake of the parties selling the land as to the number of acres it contained was so gross as to amount to, and in all respects to be the equivalent of, a fraud upon the rights of appellant, and this appears from the undisputed facts in the case as well as from the preponderance of the evidence, and therefore the mutual mistake charged has been established, and it is to be presumed that quantity influenced the price paid for the land, which presumption has not been overcome by any fact or facts proved; and, the very brief delay in ascertaining the deficiency in the land being satisfactorily accounted for, we are of opinion that the circuit court erred in denying the relief prayed in appellant's bill.

The decree appealed from is reversed, and the cause remanded for further proceedings therein not in conflict with the views expressed in this opinion.

KEITH, P., absent.

(115 Va. 45)

CITIZENS' BANK OF NORFOLK v. NORFOLK & W. RY. CO.

(Supreme Court of Appeals of Virginia. June 12, 1913.)

1. GUARANTY (§ 4*)—CONSTRUCTION OF CONTRACTS.

A railroad company in acknowledging receipt of assignments of coal by its line wrote to the shipper that they would deliver the coal on the order of a bank named with the "understanding and guarantee of the bank that all freight and demurrage charges accruing on such coal will be paid by the bank as presented," and requested that the necessary agreement be drawn up and executed by the bank, to which the bank replied that they wrote "to confirm our agreement to pay the just freights and demurrage charges on coal covered by this assignment." *Held*, that the letters constituted an agreement by the bank to itself pay freight and demurrage charges on the coal, and not merely to guarantee their payment.

[Ed. Note.—For other cases, see Guaranty, Cent. Dig. §§ 3-6; Dec. Dig. § 4*]

2. CARRIERS (§ 196*)—FREIGHT—ACTIONS FOR DEMURRAGE—SUFFICIENCY OF EVIDENCE.

Evidence in a proceeding by a railroad company to recover demurrage on coal shipments *held* to show that the railroad company did not waive its right to demand unpaid freight and demurrage, or do anything which would lead a reasonably prudent person to believe that it had waived such right.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 879-887; Dec. Dig. § 196*]

3. CARRIERS (§ 100*)—FREIGHT—PAYMENT OF DEMURRAGE CHARGES.

Where a bank which had agreed to pay the freight and demurrage charges on coal shipments stated in answer to a communication from the railroad company as to what kind of notification it desired of the consignments that notification of the shipments in transit was sufficient, the bank could not afterwards claim that demurrage could not be recovered unless it was notified of the arrival of the cars by a notice containing the point of shipment, initials, numbers, and contents.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 427-433; Dec. Dig. § 100*]

4. CARRIERS (§ 100*)—FREIGHT—DEMURRAGE.

The fact that terminal yards on which coal cars stood were six miles in length, so that the cars were not actually on the pier at their final destination, would not make them not subject to demurrage while standing in such yards awaiting the convenience of the consignee or the arrival of the vessel into which they were to be loaded; the leaving of the cars in the yards not having prejudiced the consignee.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 427-433; Dec. Dig. § 100*]

Error to Law and Chancery Court of City of Norfolk.

Proceedings by the Norfolk & Western Railway Company against the Citizens' Bank of Norfolk. Judgment for plaintiff, and defendant brings error. Affirmed.

J. G. Martin, of Norfolk, for plaintiff in error. Hughes, Little & Seawell, of Norfolk, for defendant in error.

BUCHANAN, J. The Norfolk & Western Railway Company proceeded by notice and

motion, under section 3211 of the Code, against the Citizens' Bank of Norfolk to recover freight charges and demurrage on coal. There was a verdict and judgment in favor of the railway company. To that judgment this writ of error was awarded.

The court gave two instructions to the jury upon motion of the railway company, and declined to give three instructions asked for by the bank. This action in giving and refusing instructions is assigned as error.

By instruction No. 1 given for the railway company, the jury were told that the bank in agreeing to pay all just freight and demurrage charges on coal covered by the McRae assignment became primarily responsible for all such charges, and was liable to the railway company for so much thereof as might be shown to remain unpaid.

It appears that for some time prior to the year 1910 C. J. McRae had been doing business in Norfolk as a coal dealer, handling coal in car load lots consigned to him in various consigning names from mines in the state of West Virginia, and carried by the railway company for transshipment from its piers at Lambert's Point. On the 5th of May, 1910, McRae executed an assignment to the bank as agent of the Consolidated Coal Company, and on the 15th day of June following he executed two assignments to the bank individually of all coal that was then or that might be consigned thereafter to him under his consigning names. These assignments, so far as they involve questions for decision in this case, are substantially the same, and by them McRae, for value received, assigned to the bank all cars of coal that were then on the tracks of the railway company, either en route to or at Lambert's Point. On the 12th of July following the railway company acknowledged the receipt of the McRae assignments, and wrote: "We will accept this assignment and deliver such coal on the order of the Citizens' National Bank of Norfolk with the understanding and guarantee of the bank that all freight and demurrage charges accruing on such coal will be paid by the bank as presented. Please have the necessary agreement drawn up and executed by the bank."

On the 15th of the same month the bank wrote to the railway company as follows: "Referring to conversation of yesterday regarding letter from Mr. Spangler accepting the assignment from C. J. McRae to this bank, we write to confirm our agreement to pay the just freights and demurrage charges on coal covered by this assignment and authorize delivery to Mr. C. J. McRae as agent for the bank until notice is given to the contrary."

Pursuant to this agreement, the bank paid freight and demurrage charges on coal shipments covered by the said assignments until October 10, 1910, when it wrote to the railway company terminating the said agree-

ment, to take effect as of the 12th of that month.

[1] There can be no question that by the terms of the letter of the railway company of July 12th, and the bank's letter of July 16th, the bank expressly undertook and agreed to pay all such freight and demurrage charges on the coal covered by McRae's assignments to it, and did not as the bank insists merely guarantee such payments. While there had been conversations and communications between the agents of the railway company and the agents of the bank in reference to the matter prior to the letters of July 12 and 16, 1910, those letters evidence the undertaking and agreement of the parties. Whether the bank was primarily liable for such charges or had merely guaranteed their payment as claimed in instruction "A" offered by it was a question for the court, and not for the jury. The court did not, therefore, err in giving instruction No. 1 offered by the railway company, or in refusing to give instruction A asked for by the bank.

Neither do we think the court erred in giving instruction No. 2 offered by the railway company, nor in declining to give instruction C asked for by the bank, which was in conflict with the former.

By the instruction given the jury were told that the delay of the railway company in presenting its final accounts did not constitute a waiver by it of its demand against the bank. That demand consisted of freight and demurrage charges on coal shipped on or before October 12, 1910, at which time the bank by letter terminated, as it had the right to do, its agreement to pay freight and demurrage charges on shipments made thereafter to McRae. That letter is as follows:

"This will notify you that the relations existing between Mr. C. J. McRae and ourselves under an assignment from him to us, a copy of which has been filed with you, by which he assigned all his interest in all coal shipped to him, will be terminated on and after Wednesday, October 12th, 1910, and from that date you will please look to Mr. McRae for the payment of all charges due on coal consigned to him. For coal shipped to Mr. McRae covered by said assignment prior to that date we will be responsible for the freight and demurrage charges as heretofore, and will notify your local agent what disposition to make of this coal.

"In order to avoid confusion, we would thank you to send us a statement of the car numbers and their weight, if any, which may be consigned to Mr. McRae before the 12th inst."

In that letter the bank recognizes that it is liable to pay all freight and demurrage charges on coal shipped to McRae prior to that date. In it the bank asked for a statement of the car numbers and weights of coal that were shipped to McRae before the

12th of October, 1910. This letter was received by the agent of the company to whom it was written, and referred to the comptroller of the railway company. On the same day the comptroller, without reference to that letter (and perhaps before it had been received by him), wrote the bank advising of a draft for June demurrage, and calling attention to the fact that the bank had not taken it up with the railway company as suggested in its letter of August 13th. On October 13th the bank returned the draft with the statement that the matter "is now in dispute," and asked the comptroller to telegraph exactly how much freight the bank was responsible for. This was not done because, as the bank knew, the railway company did not have and could not obtain the information desired until the coal was actually delivered at Lambert's Point. On October 18th the railway company drew on the bank for certain freight charges on coal shipped prior to the 12th of that month, and two days later the bank wrote that it had paid the drafts, and concluded its letter with the statement that: "On the basis of our letters of October 10th and your reply of October 11th, we assume that you have no other charges against us for any coal shipped during the life of the assignment." Upon the receipt of that letter, and on the next day after it was written, the comptroller of the railway company wrote: "I will look into the matter, and if there are any additional cars for which drafts should have been made will see that they are drawn for immediately, and will also endeavor to render you formal account as soon as cars covered by these drafts above mentioned are finally disposed of and deliveries made to vessels." On the 2d of November following the railway company rendered what purported to be the final account and the total amount due to it from the bank for freight and demurrage. On the 7th of that month the bank wrote to the railway company in reply to its letter of the 2d instant as follows:

"Your letter of the 2d comes to us as a distinct surprise.

"In regard to the demurrage charge, if it proves to be just, this bank is liable for it, but Mr. McRae declines to admit its correctness, and we feel justified in withholding settlement for same until it is adjusted to his satisfaction, so please take up the matter with McRae and get his 'O. K.' to the claim.

"As to the additional charge of \$2,066.56 we cannot admit any responsibility for the reason that it was understood that weekly drafts (which have been promptly paid), covered the freight on all coal as shipped.

"To prevent any misunderstanding, however, after our notice of October 10th that arrangement would terminate on the 12th we wrote October the 13th requesting you to telegraph us exactly how much freight

we are responsible for,' to which no reply was received, hence we assumed, as stated in our letter of October 20th, that drafts paid that day of \$553.00 and \$225.00 covered all outstanding freight charges for which we were liable under the assignment, and therefore released to Mr. McRae the coal then on the tracks amounting to over 5,000 tons, which was duly shipped by him, and we now have no security for any additional freight, but we think, if you are able to satisfy Mr. McRae that freight now claimed is due, he will arrange to settle with you."

On the 11th of the month the railway company wrote the bank that, in addition to the account rendered on the 2d instant, there was another item of \$633 for demurrage accruing during the month of October. This last item ought to have been included in what purported to be the final account rendered by the railway company November 2d, but no prejudice, so far as the record shows, resulted to the bank by reason of its omission, for it appears from the bank's statement in its letter of November 7th and from other evidence in the case that it had on and prior to the 20th of October preceding released to McRae the coal then on the tracks amounting to over 5,000 tons.

[2] It clearly appears from the correspondence quoted and referred to above, and from the other evidence in the cause, that nothing done or said by the railway company was intended to waive, or could have misled any reasonably prudent person into believing that it had waived its right to demand and recover from the bank all the unpaid freight and demurrage charges which the bank undertook and agreed to pay under its agreement with the railway company.

[3] By instruction B offered by the bank the court was asked to instruct the jury that demurrage could not be recovered, unless the jury believed from the evidence that the railway company notified the bank in writing, or as otherwise agreed by the railway company and the bank (if they believed that there was any other agreement) of the arrivals of the cars, and that such notification contained the point of shipment, car initials and numbers, and contents. This action of the court in refusing to give that instruction is assigned as error.

On March 12, 1909, Spangler, superintendent of transportation of the railway company, wrote McRae, calling his attention to the fact that some shippers or consignees desired daily notices of arrival of coal by car numbers, while others preferred a notice showing the number of cars on hand at Norfolk and the number in transit between Bluefield and Norfolk, and requested him to inform the railway company which of these methods of notice he preferred, and to what address notices should be sent. On the 15th of the same month McRae replied to that letter, and stated that giving notice of tonnage already arrived at Lambert's Point and that en route

there was preferable, and that such notice to him at Norfolk would be sufficient. This form of notice was thereafter used by the railway company in all its dealings with him, including the period in controversy. By the assignment of McRae to the bank, the railroad company was directed to deliver the coal so assigned to McRae as the bank's agent, which was done. The bank never raised any question or made any objection to the method of giving notice indicated by McRae until after its letter terminating its agreement to pay freight and demurrage charges, but recognized in its letter of November 7, 1910, and otherwise, as appears from the evidence, its liability for the demurrage charge if it proved to be just. The bank through its agent, McRae, had notice of the manner in which notice of coal shipments were given and acquiesced therein during the period the assignments were in force. The court therefore properly refused to give the bank's instruction B, which declared that the demurrage sued for could not be recovered unless notice of shipments of coal was given as indicated in the instruction.

The remaining assignment of error to be considered is the refusal of the court to set aside the verdict of the jury.

The case having been, as we have seen, submitted to the jury without error on the part of the court, the only question upon this assignment of error is: Is the verdict sustained by the evidence?

[4] It is contended by the bank that the railway company had no right to charge demurrage until the cars of coal were at Lambert's Point for delivery of the coal into vessels. It appears that the terminal yards of the railway company extend from Lambert's Point piers to Portlock, a distance of six miles. All coal intended for Lambert's Point piers comes in at the Portlock end of the terminal and is then sent through to the piers as vessels are ready to receive it. Until coal is called for by the consignee, it remains on the terminal yards at any convenient point and demurrage is charged upon interstate shipments (as the coal in this case was) in the manner prescribed by the Interstate Commerce Commission. By rule 1 of that Commission, in force at that point, it is provided that "cars containing coal shipped to Norfolk or Lambert's Point, Virginia, or transshipment direct to vessels or to be stored for shipment by vessels, when held for or by consignors or consignees for unloading, forwarding directions, or for any other purpose, shall be subject to these rules." By rule 3 it is provided that the date of arrival of car at Norfolk terminals shall be subtracted from the date of the arrival of vessel into which it is unloaded, or from the date the car is otherwise released, and the difference between those dates will constitute the total days detention, and this difference less the free time provided for by another rule con-

stitutes the demurrage time for which \$1 per car is to be charged for the number of days detention beyond the free time. The evidence showed that the demurrage sued for was based upon these rules. The cars were upon the terminal yards of the railway company at Norfolk. The fact that those yards were six miles in length and the cars were located at various points on them and not actually on the pier at Lambert's Point furnishes no reason why demurrage should not be paid on those cars for their detention while awaiting the convenience of the consignee or the arrival of the vessel into which they were to be loaded; for under the rules of the Interstate Commerce Commission demurrage charges ceased upon the arrival of the vessel. There is no evidence tending to show that placing the cars at various points on the terminal yards and not at Lambert's Point during the time demurrage was charged in any way prejudiced the bank.

Upon the whole case the court is of opinion that there is no error in the judgment complained of, and that it should be affirmed.

Affirmed.

(115 Va. 250)

SPRIGGS et al. v. JAMERSON.

(Supreme Court of Appeals of Virginia. June 12, 1913.)

1. APPEAL AND ERROR (§ 843*)—REVIEW—MATTERS NOT NECESSARY TO DECISION.

The court will not construe Code 1904, § 3392, providing that not more than two new trials shall be granted to the same party in the same cause, where the motion for a third new trial was properly overruled by the trial court.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3331-3341; Dec. Dig. § 843.*]

2. EJECTMENT (§ 94*)—EVIDENCE—IDENTITY OF LAND.

In an action of ejectment, evidence held not sufficient to identify the land occupied by the defendant as the land claimed by the plaintiffs.

[Ed. Note.—For other cases, see Ejectment, Cent. Dig. § 279; Dec. Dig. § 94.*]

3. EJECTMENT (§ 9*)—DEFENSE—FAILURE TO CLAIM TITLE—EFFECT.

The failure of the defendant to claim title or right to the premises sued for in ejectment cannot be considered in determining the identity of the land, where the plaintiffs' evidence fails to make a prima facie case on that point.

[Ed. Note.—For other cases, see Ejectment, Cent. Dig. §§ 16-29; Dec. Dig. § 9.*]

4. APPEAL AND ERROR (§ 837*)—SUBSEQUENT APPEALS—RECORD ON FORMER APPEAL.

In passing upon the sufficiency of evidence to support a verdict of the jury, the court cannot look to the record of the evidence introduced at a former trial of the same case.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3262-3272, 3274-3277, 3289; Dec. Dig. § 837.*]

5. EJECTMENT (§ 9*)—TITLE OF PLAINTIFF.

As a general rule a plaintiff, to recover in an action of ejectment, must derive title

from the commonwealth by a proved or presumed grant or establish title by adverse possession.

[Ed. Note.—For other cases, see Ejectment, Cent. Dig. §§ 16-29; Dec. Dig. § 9.*]

6. EJECTMENT (§ 9*)—PRIOR POSSESSION OF PLAINTIFF.

Where the defendant in ejectment entered upon the peaceable possession of the plaintiff without title or authority, the plaintiff may recover without proof of title.

[Ed. Note.—For other cases, see Ejectment, Cent. Dig. §§ 16-29; Dec. Dig. § 9.*]

Error to Circuit Court, Buckingham County.

Action by one Spriggs and others against J. D. Jamerson. Judgment for the defendant, and plaintiffs bring error. **Affirmed.**

Harrison & Long, of Lynchburg, for plaintiffs in error. A. B. Dickinson, of Richmond, for defendant in error.

BUCHANAN, J. This is an action of ejectment in which there have been three trials. In each of them there was a verdict for the defendant. The first verdict was set aside, upon the motion of the plaintiffs, by the trial court; whether for errors of law in submitting the case to the jury or because the verdict was not sustained by the evidence does not appear. The trial court refused, upon motion of the plaintiffs, to set aside the verdict on the second trial, but upon a writ of error to this court its judgment was reversed for errors of law, the verdict set aside, and the cause remanded for a new trial. *Coles' Heirs, etc., v. Jamerson*, 112 Va. 311, 317, 71 S. E. 618. Upon such new trial there was a verdict again for the defendant, which the plaintiffs moved to set aside, but the court overruled the motion and entered judgment thereon. To that judgment this writ of error was awarded.

[1] The defendant insists that the trial court had no power to set aside the verdict rendered on the last trial, and that even if it had there was no error in the proceedings for which it could have done so.

By section 3392 of the Code it is provided that "not more than two new trials shall be granted to the same party in the same cause." Although the provision quoted has been in force in this state for more than a century (Statutes at Large [New Series] vol. 1, c. 16, § 33), it has never been passed upon or construed by this court in any reported case. The same, or substantially the same, provision is in force in a number of the states, and there is much diversity of opinion among them as to its effect. See 2 Thompson on Trials (2d Ed.) § 2727, and notes; 29 Cyc. 729-732; 3 Cyc. 457; 14 Ency. Pl. & Pr. 992-995. In some jurisdictions it is held not to restrict the common-law right of the courts to grant new trials for errors of law, but only from granting new trials upon the ground that the verdict is not sustained by the evidence. See *Silsbo Lucas*, 53 Ill. 479; *Trott v. West*, 10 Yerg. (Tenn.) 499; *Knox*

ville Iron Co. v. Dodson, 83 Tenn. (15 Lea) 409, 410, 416, 417; Burton v. Brashear, 3 A. K. Marsh. (Ky.) 1130, 1133; Wildy v. Bonney's Adm'r, 35 Miss. 77; Shirts v. Irons, 47 Ind. 445, 450; Harrison v. Cachelin, 23 Mo. 117.

In West Virginia it is held that not more than two new trials can be granted to the same party in the same cause, although one or both the verdicts was set aside for misdirection of the court or for errors of law (Watterson v. Moore, 23 W. Va. 404; Williams v. Ewart, 29 W. Va. 659, 2 S. E. 881); and to the same effect were the earlier decisions in the state of Indiana. Roberts v. Robeson, 22 Ind. 456; Judah v. Trustees, 23 Ind. 272. There is a like diversity of opinion as to whether the provision in question applies to the trial court alone or to both the trial and appellate courts. That such statutes do not apply to new trials granted in the appellate court was held in Ill. Cent. Ry. Co. v. Patterson, 93 Ill. 290; Wildy v. Bonney's Adm'r, 35 Miss. 77; Shirts v. Irons, 47 Ind. 445. In Tennessee, Kentucky, and Indiana it is held that it applies to appellate courts as well as to the trial court, where the new trial is granted by the appellate court upon the merits of the facts of the case, but not where the judgment is reversed for erroneous rulings of the lower court in the trial of the cause. Knoxville Iron Co. v. Dobson, 83 Tenn. (15 Lea) 409, 416-418; Burton v. Brashear, 3 A. K. Marsh. (Ky.) 1130, 1133; Shirts v. Irons, 47 Ind. 445, 450.

The constitutionality of the Tennessee statute (which is identical with ours) was attacked in Louisville, etc., Ry. Co. v. Woodson, 134 U. S. 614, 10 Sup. Ct. 628, 33 L. Ed. 1032, upon the ground that it violated the provisions of the fourteenth amendment to the Constitution of the United States, but its validity was sustained upon the ground that as construed in that state it did not deprive the courts of the right to set aside more than two verdicts where the ground for setting aside a later verdict was for erroneous rulings of the court in the submission of the case to the jury and not upon the merits. No opinion is expressed in that case as to whether or not the statute would have been held valid if it had been construed to deprive the courts of the right to set aside a third verdict for erroneous rulings of the court as well as upon the merits.

Since there is such a diversity of opinion in other jurisdictions as to the proper interpretation of the statute in question, and as its construction is not absolutely necessary to a disposition of this case, because the action of the trial court in refusing to set aside the third verdict was clearly right upon the merits, this court ought not to undertake to declare the meaning or effect of the statute until a case arises in which its construction is required in order to dispose of the case.

[2] The verdict of the jury in favor of the

defendant was based upon the ground, as stated therein, that the evidence failed to identify the land sued for. The will, codicils thereto, and conveyances introduced in evidence and relied on by the plaintiffs to show that they had title to the land sued for do not describe the land by metes and bounds, or otherwise, so as to show that it is the land described in the declaration.

The plaintiffs introduced a witness named Hays, who testified: "That he was 34 years old, and had been acquainted with the land occupied by the defendant for 20 years or more; that he had lived there for about 4 years with his parents; that they rented the land of J. Monroe Coles; that he had accompanied his father when he went to pay rent; that it was the very same land now occupied by the defendant; that the defendant had been in possession of the land he believed for 8 or 9 years; that he knew of no other lands in Buckingham county owned by J. Monroe Coles; that he did not know whether Monroe Coles had any deeds to the land or not, or whether Mr. Meem, of Lynchburg, had ever owned the land, nor did he know how many acres were in the tract." This witness (and he was the only witness who testified as to the identity of the land) does not show that the land sued for was the same land as that occupied by the defendant. While he states that his father rented the land which the defendant was in possession of from Monroe Coles, through whom the plaintiffs claim, he testifies that he does not know that Monroe Coles had any conveyance for it, or that Mr. Meem, through whom the plaintiffs claim, ever owned the land in the possession of the defendant. The witness' statement that he knew of no other lands in Buckingham county owned by Monroe Coles does not show that Coles did not own other lands in the county. Neither does the fact agreed, that Monroe Coles did not by his will devise any land in Buckingham county, show that the land sued for is the same land as that in the possession of the defendant.

Giving the evidence, written and oral, introduced by the plaintiffs all the weight that it is entitled to, it cannot be said that it satisfactorily shows that the land which the plaintiffs sued to recover was the same land that was in possession of the defendant.

[3] It is suggested in argument that the failure of the defendant to state in his grounds of defense under what title he claimed, or that he claimed under any title or claim of right, and his failure to introduce any evidence whatever, shows that he was a mere intruder on the land in his possession, and that these facts should be considered in passing upon the question of the identity of the land.

[4] Until the plaintiffs had made out a prima facie case for recovery by showing their right to the possession of the land sued for and identifying the same, the defendant

was not required to show in what manner or by what title he obtained or held possession, and his failure to do what he was under no obligation to do could not strengthen the plaintiffs' case. If the evidence in the case, as shown by the record upon the former writ of error, had been before the jury, it may be it would have been sufficient to have identified the land, as the plaintiffs' counsel insists; but, while this court may look to that record for some purposes, the question of whether or not the verdict of the jury upon the last trial should be set aside because contrary to the evidence can only be determined by a consideration of such evidence as was before the jury.

[8] But even if the evidence had been sufficient to identify the land in the possession of the defendant as the land described in the declaration, the jury could not rightly have found a verdict in favor of the plaintiffs. The general rule is that the plaintiff in an action of ejectment must recover solely upon the strength of his own title, and not on the weakness of that of the defendant, and the plaintiff's title must be a legal title. The title to be proved by the plaintiff in order to entitle him to recover, as a general rule, must either be a grant from the commonwealth, with which he connects himself by a regular chain of title, or he must prove such a state of facts as will warrant the jury in presuming a grant, or as will show adversary possession for the statutory period under a claim or color of title. *Sulphur Mines Co. v. Thompson's Heirs*, 93 Va. 293, 309, 310, 25 S. E. 232; *Tapscott v. Cobbs*, 11 Grat. (52 Va.) 172, 174; *Va. Mid. R. Co. v. Barbour*, Rec'r, 97 Va. 118, 122, 33 S. E. 554.

The plaintiffs made no effort to connect themselves with the commonwealth, nor did they show such a state of facts as would have justified the jury in finding that they had legal title to the land.

[8] But there are exceptions to the rule as well settled as the rule itself. The exception relied on in this case to take it out of the general rule is that the defendant, without title or authority, intruded upon the plaintiffs or their ancestor, who was in peaceable possession of the land when the defendant entered and took possession. *Tapscott v. Cobbs*, supra. This contention is not sustained by the record. The evidence does not show that the plaintiffs' ancestor, Monroe Coles, was in the possession of the land when he died; neither does it show that the plaintiffs were ever in possession of it, nor that the defendant had tortiously entered upon it.

Upon the whole case the court is of opinion that there is no error in the judgment complained of and that it should be affirmed.

Affirmed.

CARDWELL, J., absent.

(115 Va. 74)

HUFF et al. v. WELCH.

(Supreme Court of Appeals of Virginia. June 12, 1913.)

1. WILLS (§ 330*)—TESTAMENTARY INCAPACITY—EVIDENCE—INSTRUCTIONS.

Where, in a suit to contest a will on the ground of mental incapacity of testator about 78 years old at the time of the execution of the will, the testimony of the attesting witnesses and neighbors showed testamentary capacity, instructions correctly defining mental capacity to execute a will by one enfeebled by age and placing the burden of proof on proponent sufficiently submitted the issues, so that the refusal of requested instructions was not erroneous.

[Ed. Note.—For other cases, see *Wills*, Cent. Dig. §§ 779-781; Dec. Dig. § 330.*]

2. WILLS (§ 50*)—TESTAMENTARY CAPACITY.

One who has sufficient capacity to understand the nature of the business in which he is engaged in the execution of his will to comprehend generally the extent of his estate and to recollect the objects of his bounty, and to assent to the provisions of the will, possesses testamentary capacity.

[Ed. Note.—For other cases, see *Wills*, Cent. Dig. §§ 96-100; Dec. Dig. § 50.*]

For other definitions, see *Words and Phrases*, vol. 8, pp. 6929-6931.]

3. APPEAL AND ERROR (§ 1002*)—REVIEW—CONFLICTING EVIDENCE.

Opinions of witnesses that testator was not competent to make a will based on facts not sustaining the opinions do not conflict with evidence of witnesses to facts showing testamentary capacity at the time of the execution of the will, and who unite in stating that testator's mind was then clear and good, and he knew what he was doing.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 3935-3937; Dec. Dig. § 1002.*]

4. APPEAL AND ERROR (§ 1005*)—VERDICT—CONCLUSIVENESS.

Though the jury are the judges of the weight and credibility of the testimony, and though a verdict approved by the trial court is entitled to the highest respect in the appellate court, the appellate court will set aside a verdict clearly wrong.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 3860-3876, 3948-3950; Dec. Dig. § 1005.*]

5. WILLS (§ 55*)—TESTAMENTARY CAPACITY—EVIDENCE.

Where, in a suit attacking the validity of a will on the ground of testamentary incapacity, the testimony of the attesting witnesses and of reliable neighbors showing the capacity of testator to make a will was not contradicted, and there was other unconflicting evidence showing memory and capacity to understand business affairs at the time of the execution of the will and subsequently, a verdict of testamentary incapacity was contrary to the evidence, and must be set aside.

[Ed. Note.—For other cases, see *Wills*, Cent. Dig. §§ 137-158, 161; Dec. Dig. § 55.*]

Appeal from Circuit Court, Rappahannock County.

Suit by M. J. Welch against W. J. Huff, executor of Edward H. Huff, deceased, and others attacking the validity of the will of the deceased. There was a decree invalidating the will, and defendants appeal. Reversed.

Plaintiff's instructions refused by the court were as follows:

"(E) The court instructs the jury that every person who is capable of recollecting the property he is disposing of, the manner of disposing of it, and the objects of his bounty has sufficient mental capacity to make a will. And, further, that the true test of testamentary capacity is whether the testator had at the time of the execution of the instrument sufficient mental capacity to understand the nature of the transaction he was entering into, and to assent to its provisions.

"(F) The court instructs the jury that all men are presumed to be of sound mind and competent to make a will, and the person who alleges insanity or unsoundness of mind in the testator in order to invalidate a will must prove the insanity or unsoundness of mind by a preponderance of the evidence.

"(G) The court instructs the jury that as a matter of law the testimony of the witnesses who were present when the will was executed is entitled to far more weight and importance than the opinion of witnesses based upon the erratic conduct and eccentricities of the testator, or based upon facts which may be proved and yet not be the result of unsoundness of mind.

"(H) The court instructs the jury that they cannot measure the testator's capacity nor inquire into the wisdom and prudence of the disposition of his property, if the jury believe from the evidence that he be legally compos mentis, be he wise or be he unwise, he is the disposer of his own property, and his will stands as a reason for his action.

"(I) The court instructs the jury that the fact that the testator gave the instructions for the drawing of the will, or his act of reading it over after it was drawn, is the most satisfactory proofs of the testamentary capacity of the testator.

"(J) The court instructs the jury that personal affection on account of relationship does not necessarily mean that the relationship must be legitimate, or that the testator and the beneficiaries under his will must belong to the same race.

"(K) The court instructs the jury that the evidence of witnesses who were present at the execution of the will is entitled to peculiar weight on the question of testamentary capacity, and especially is this the case with attesting witnesses.

"(L) The court instructs the jury that the subscribing witnesses to a will are safeguards which the law places around the testator to guard against fraud and to ascertain and judge of his mental capacity at the time of the execution of the will.

"(M) The court instructs the jury that the owner of property who has sufficient mental capacity to attend to ordinary business affairs of life, knows what property he owns, and how he wishes to dispose of the same,

has the right to dispose of his property by will or by deed as he may choose, and that it requires less mental capacity to make a valid will than to make a valid deed. The court further instructs the jury that a person competent to make a will may dispose of his property thereby in any manner he may choose, and that he is under no legal obligation to devise it to his relatives, but that he may cut off one or all of his relatives and give it to a stranger, if he so desires, and that the justice or propriety of the will is not a question for the jury to pass on because the law puts no restriction on a man's right to dispose of his property in any way in which his partiality, or pride, or even caprice may prompt him.

"(N) The court instructs the jury that when the due execution, according to all the requirements of law, of a will is proved, including soundness of mind and memory on the part of the testator, by the testimony of two or more subscribing witnesses to said will, and unsoundness of mind is alleged as a ground for setting the will aside, the fact of insanity, or of unsoundness of mind, must be established with reasonable certainty; the evidence of insanity or unsoundness should preponderate or the will must be taken as valid. If there is only a bare balance of evidence or a mere doubt only, of the sanity of the testator, the presumption is in favor of sanity, and if proved as above stated, must turn the scale in favor of the sanity of the testator, and the will must be sustained."

The court gave the following instructions:

"(6) The court instructs the jury that there is no evidence in this case to support the issue of undue influence, and in reaching their conclusion they are to eliminate the question of undue influence, and to consider only the issues of the due execution of the will and the testamentary capacity of Edward H. Huff at the time of the execution of the paper writing dated January 31, 1910.

"(A) The jury are instructed that neither sickness, old age, nor impaired intellect nor all of them combined are sufficient, standing alone, to render invalid a will and even if the jury believe from the evidence that any one or more or all of these conditions existed in the case of the testator Edward H. Huff when he executed the will in question, and even though the jury shall believe from the evidence that the testator at the time of executing the said will was of advanced age or was infirm in health, and even though they may believe from the evidence that his intellect was impaired to some extent, nevertheless if they shall further believe and find from the evidence that at the time of executing the said will the said Edward H. Huff was capable of recollecting the property he was about to dispose of, the persons who were the objects of his bounty and the manner in which he wished his property distributed among them, and had an

understanding of the nature of the business in which he was engaged, then the jury must find that he had legal capacity to make a valid disposition of his estate.

"(B) The court instructs the jury that although Edward H. Huff may have made oral declarations prior to the execution of his will to parties who were in no way interested in his property or affairs that he would leave his property to M. J. Welch or the children of M. J. Welch, or other parties than the parties named in said will, the said Edward H. Huff was in no way bound by such declarations, and he had the right to change his mind at any time prior to the execution of said will, and, if the jury believe from the evidence that the said Edward H. Huff at the time of the execution of the said will knew what property he had and to whom he wished to leave it, they must sustain the will of the said Edward H. Huff.

"(C) The court instructs the jury that it is not necessary that a person should possess the highest qualities of mind in order to make a will, nor that he should have the same strength of mind which he formerly may have had; the mind may be in some degree debilitated, the memory may be enfeebled, the understanding may be weak, and the testator may be wanting in capacity to transact many of the ordinary affairs of life, but it is sufficient if he possesses mind enough to understand the nature of the business in which he is engaged in making his will, has a recollection of the property he wishes to dispose of thereby, knows and recalls the objects of his bounty, and the manner in which he wishes to distribute his property among them.

"(D) The court instructs the jury that every person over 21 years of age and of sound mind is entitled under the law to make a will and to dispose of his property as he pleases and to dispose against or among his next of kin as he may choose, or if he choose he may even leave his property to strangers.

"(O) While the burden of proof is upon those offering a will for probate to show testamentary capacity on the part of the testator at the time the will was executed to the satisfaction of the jury, yet the court tells the jury that there is in all cases an existing presumption in favor of the testator's sanity and capacity, which is to be taken into consideration by the jury in determining the question of competency.

"(P) The court instructs the jury that the testimony of credible witnesses present at the execution of the will is entitled to peculiar weight on the question of testamentary capacity, and that this is especially true of attesting witnesses whose duty it is to ascertain and judge of the testator's mental capacity at the time.

"(H) The court instructs the jury that they cannot measure the testator's capacity nor inquire into the wisdom and prudence

of his disposition of the property if the jury believe from the evidence that he is legally compos mentis, be he wise or unwise, he is the disposer of his own property, and his will stands as a reason for his action. He is under no legal obligation to will his property to his relations, the justice or propriety of the will is not a question for the jury except that they may consider that matter as a circumstance bearing upon the testator's mental capacity. If he is a capable testator, he can will his property as he chooses.

"(Q) The court instructs the jury that for the testator to be mentally capable of making a valid will, or to be of testamentary capacity, it is sufficient if at the time of executing said will the testator had an understanding of the nature of the business in which he was engaged, a recollection of the property he meant to dispose of, of the persons who were the objects of his bounty, and the manner in which his property was to be distributed among them. It is not necessary, however, that the testator should actually recall or recollect all of his property; it is sufficient if he was at the time of executing the will mentally capable of doing so; it is not necessary that he should have comprehended the provisions of his will in their legal form; it is sufficient if he fully comprehended it and understood at the time of execution of said will the actual disposition which he was thereby making or intended to make of his property.

"The jury are further instructed if they shall believe from the evidence that at the time of executing said will the mind and memory of the testator was sufficiently sound to enable him to know and understand the extent and amount of his property and his relations to the objects of his bounty, and the business in which he was engaged, then he was of sound mind and memory within the meaning of the law and they must find for said will.

"(R) The court instructs the jury that a testator must have testamentary capacity to make a will at the time at which such will is executed; and, if the jury shall believe from the evidence that Edwd. H. Huff was mentally capable of making a will upon the date of its execution, the same is valid whatever may have been his condition mentally either prior or after the time of executing said will.

"The court instructs the jury that the burden is upon the proponents of the will in this case to establish that the paper writing in question offered as the last will and testament of Edward H. Huff, deceased, is the true last will and testament of the said Edward H. Huff; and to do so they must establish to your satisfaction the following facts:

"First. That the paper offered in evidence and the whole paper was thoroughly understood by the said Huff and intended by him to be his last will and testament.

"Second. At the time of the writing and signing thereof the said Huff was of sound and disposing mind and memory.

"Third. That the said paper writing was signed or acknowledged by the said Huff in the presence of John H. Updike and C. H. Keyser, the subscribing witnesses thereto, who were both present, and in the presence of the said E. H. Huff at the same time, and that said subscribing witnesses subscribed the will in the presence of the testator Edward H. Huff."

"(2) The court further instructs the jury that one of the issues involved in this contest is whether the decedent Edward H. Huff possessed sufficient mental capacity to make a will on the 31st day of January, 1910, at the time the paper writing offered in evidence in this case was executed; and the jury are now told that the test of testamentary capacity is that the testator must have had sufficient mind and intelligence at the time the paper writing was executed to understand.

"First. The nature of the business in which he was engaged.

"Second. To recollect the property he was attempting to dispose of, to know and understand his relation to his blood kin or to others who might have claims upon him, and to determine the objects of his bounty, and the manner in which he wished to dispose of his estate with sense and judgment.

"And, if the jury believe that the decedent did not at the time the alleged will was executed possess mental capacity to know and understand these things, then they must find against the will."

"(3) The court further instructs the jury that in determining whether or not the paper writing in question is the true last will and testament of the decedent Edward H. Huff the jury has the right to consider the nature and character of the will, and, if they find from the evidence that it is contrary to natural justice, they should take that fact into consideration along with the other facts and circumstances in the case, and the testimony of the witnesses in determining the question of capacity."

"(4) The jury are further instructed that testamentary incapacity does not necessarily require that a person shall actually be insane. Weakness of intellect, regardless of how it may arise, may render the testator incapable of making a valid will, provided such weakness really disqualifies him from knowing or appreciating the nature, effect, and consequences of the act he is engaged in."

"(5) The court further instructs the jury that direct proof is not necessary to overthrow a will, but any facts and circumstances are sufficient as evidence that will satisfy the jury of the incapacity of the testator to make testamentary disposition of his property at the time of the execution of his will."

J. F. Strother, of Washington, and Hiden & Thurlow, of Culpeper, for appellants. Keith & Richards, of Warrenton, Grimsley & Miller, of Culpeper, and H. G. Moffett, of Washington, for appellee.

CARDWELL, J. The purpose of this suit is to contest the will of Edward H. Huff, deceased, which had been admitted to probate in the circuit court of Rappahannock county, the bill attacking the validity of the will being filed by M. J. Welch, a nephew of the testator, and the grounds upon which it is claimed that the paper writing in question is not the last will and testament of the deceased are: (1) It was not executed and witnessed as required by law; (2) the said Edward H. Huff did not have testamentary capacity sufficient to execute said paper purporting to be his last will; and (3) undue and improper influence exercised over the said Edward H. Huff by Lucy Phillips and some of her adult children, beneficiaries named in the paper writing purporting to be his last will.

There was an issue out of chancery to determine the questions raised by the pleadings, and the first trial thereof resulted in a mistrial, and at the second trial the jury rendered a verdict finding that the paper writing in question was not the true last will and testament of the said Edward H. Huff, deceased, which verdict the trial court refused to set aside and entered its decree ratifying and confirming the finding of the jury, from which decree the plaintiffs in the issue obtained this appeal.

The objection of the appellee to the sufficiency of the record with respect to the certification by the trial court of the evidence, founded upon an error in copying the record, has been met by the certification of the clerk of an addendum to bill of exceptions No. 2, purporting to set forth the evidence, and therefore said objection will not be further considered.

It appears that Edward H. Huff died in Rappahannock county on the 10th day of February, 1910, after nine or ten days of illness, at the age of 78 years, and that the paper writing in question was executed by him on the date therein stated, to wit, the 31st day of January, 1910, and was afterwards duly probated as his last will and testament, whereby he bequeathed all of his personal property to his brother W. J. Huff (spoken of in this record as John Huff), and devised his real estate, consisting of an undivided half interest in a tract of land known as the "Huff place," to said John Huff for life, and then to the 10 living children of Lucy Phillips and to the children of Anna Robinson deceased, each of the 10 living children of Lucy Phillips (all of whom are named by the testator), "to take one-eleventh of my said undivided interest in said real estate and the children of Anna Robinson, deceased, one-eleventh part; I

leave the said children of Lucy Phillips and the children of Anna Robinson, deceased, my interest in the said real estate after the death of my said brother, W. J. Huff, because they the said Lucy Phillips and her children have been faithful servants to me; having heretofore deeded to my nephew, Mortimer Welch, my interest in the Holtzman place, it is my desire that he have no part of my estate."

The fact that the children of Lucy Phillips are John Huff's children is not questioned. Neither the said testator nor John Huff ever married, and their only sister, Columbianna Welch, died some years ago, leaving surviving her a husband, Aldrich Welch, and a son, M. J. Welch, spoken of in this record as "Malt" Welch, and who is the contestant of said will in this litigation. It further appears from the record that some time before the Civil War Edward and John Huff and their sister, Columbianna Welch, inherited the "Huff place," subject to an incumbrance securing a debt of about \$1,800, and that they lived upon and held the said property in common for many years; that during this time Edward Huff, a skilled stone mason, followed his vocation, while John Huff was engaged in the huckstering trade about the country, their earnings going into the common or partnership fund; that Aldrich Welch and the boys of John Huff and Lucy Phillips ran the place, and the grown girls, also the children of John Huff and Lucy Phillips, together with the latter, attended to the housework; that by these united efforts the debt of \$1,800 on the "Huff place" was paid off and later another piece of property, known as the "Holtzman tract" was purchased, and that in 1892 Edward and John Huff had a division with Columbianna Welch whereby the "Holtzman tract" was deeded to her as her share of the joint estate, and she and her husband moved over to the "Holtzman tract," while Edward and John Huff never had a division between themselves, but continued to live upon the "Huff place" and to hold it and all of their property as joint owners.

It further appears that Lucy Phillips and her children, or some of them, lived on the "Huff place" with Edward and John Huff for at least 50 years, during which time neither Lucy Phillips nor any of her children ever received any compensation for their labor and service; that Lucy Phillips and her children always deported themselves kindly and attentively towards Edward and John Huff, nursing them in sickness and looking after their welfare and comfort when they grew old and feeble, Lucy Phillips and three of her children being with Edward Huff continuously during his last illness, while a fourth came from the state of Ohio to see him before his death. It further appears that all of these children of John Huff

and Lucy Phillips are of good character and were at all times attached—in fact devoted—to both Edward and John Huff and they to them, as evidenced in part by the fact that Edward and John Huff gave to each of the boys a horse and to each girl a cow when they left the "Huff place," and gave dances and marriage parties for them, "Malt" Welch being also tendered and accepted a "home bringing" at the "Huff place" on the occasion of his marriage, and in these environments the said testator, Edward Huff, as seems to be conceded, lived his life out, satisfied with his surroundings, of which he, of course, had full knowledge, yet made no protest against them. On the other hand it appears, and equally as clearly, that between Edward and John Huff and "Malt" Welch and his family in later years there was but little intercourse, and that during the last illness of Edward Huff "Malt" Welch, who had not been at the "Huff place" for several years, visited him but two or three times, rendering little or no service in looking after the welfare or comfort of the sick man, but this duty, so far as he was concerned, was left to devolve upon Lucy Phillips and her children, which was faithfully performed. While Edward Huff, according to "Malt" Welch's own statement, was able to and did attend church regularly and to visit neighbors as late as November or December next before his death, he had not visited the home of "Malt" Welch for more than two years.

The will which is here attacked was written by Charles H. Keyser, a practicing and reputable lawyer of good standing, as seems not to be questioned, and he testified in this case that, when he arrived at the home of the testator, the latter told witness that he wanted him to draw his will; that the testator ate dinner with witness and others at the table and went outdoors at least once that day; that no one was present during the drawing of the will except witness and the testator; that testator gave the necessary instructions, dictated the names of the beneficiaries, and detected an error in the will as first drawn; that the will was then redrawn, and the error which the testator detected eliminated; that in the meantime Wade Maszie and John Updike were sent for to witness the will, but after learning the disposition of the property Maszie requested to be excused from becoming a witness to the will, because he thought it likely there would be a contest over it, and he did not want to get mixed up in a lawsuit; that testator then signed the will in the presence of Keyser, the draughtsman of it, and John Updike, who subscribed the same as witnesses; that testator was then sitting in an invalid's chair, reclining slightly, and again when referring to the disposition he had made of his property stated that that was the way he wanted it to go, and that if he had paid Lucy Phil

lips' children for the work they had done it would amount to much more than he was giving them in his will.

Keyser, Updike, and Massie, the witnesses of the factum, all testified, being the only witnesses in the case who could speak of the testator's condition immediately at the time of the execution of the paper in question, and they unite in stating, without qualification, that when the will was executed the testator's mind was clear and good, that he fully understood the transaction and all about what he was doing, Massie stating not only that the testator was fully capable of making his will, but that he told witness then and there "that that was his will, that that was the way he wanted his property to go," and urged him (Massie) to witness the will, and Massie's only reason for not doing so was that "he feared there would be contest by the Welches" and he "did not want to be bothered with having to testify in a quit."

Will Rowles, another white neighbor of the testator, and also of high standing, who talked with the testator shortly after dark on the day his will was written and executed, testifies that the testator was fully capable of making a will on that day if he had thought it over before, and stated certain facts gathered from the testator as to the reasons which had prompted him in preferring to dispose of his property as he had done; and that he recognized witness and "talked intelligently."

The trial court gave to the jury an instruction, not objected to, that there was no evidence in the case to support the issue of undue influence, and in reaching their conclusion they should eliminate that question, and the charge that the paper writing in question was not executed and witnessed as required by law has been practically abandoned in this court; so that the real issue presented is whether or not the evidence warranted the finding of the jury with respect to the testamentary capacity of the testator.

The testimony offered to sustain the charge of mental incapacity is that of a number of witnesses who claimed to have known the testator well and who express the opinion that he was not competent to make a will, which evidence when analyzed discloses that the opinions of the witnesses are based only on the circumstances that the testator was old (78 years of age), rather feeble, and his memory not as good as formerly, as evidenced by his being at times unable to recall the names of persons whom he had known for years, or the name of a place or places with which he had been familiar, or on eccentric acts or expressions gathered at different times from testator's whole life. None of the witnesses say that the testator had abandoned his former and usual interest in his business affairs, or was incapable of understanding and looking after them, or did not have knowledge of his property, or was

incapable of selecting the objects of his bounty when he came to determine to whom he would prefer to will his property; in fact, the unconflicting testimony in the case is that the testator attended to his ordinary business affairs up to the time of the execution of his will and later, and was at the time his will was executed of sufficient intelligence to understand the nature of the business in which he was engaged, recollect the property that he wished to dispose of, know and recall the objects of his bounty, and the manner in which he wished to distribute his property among them.

The plaintiffs in the issue (appellants here) asked for 10 instructions to the jury, all of which were refused, and in lieu thereof the court gave 14 instructions, designated, respectively, as A, B, C, D, O, P, H, Q, R, 1, 2, 3, 4, and 5, to which refusal to give appellants' instructions and the giving of the instructions of the court marked 1, 2, 3, 4, 5, O, H, and P the appellants excepted.

[1] The instructions given by the court, all of which will appear with the official report of this opinion, were ample to submit to the jury fully and fairly the case which the evidence adduced tended to prove, and we are therefore of opinion that the court committed no reversible error in its rulings with respect to the instructions refused or to those given.

[2] "The law requires, in determining mental capacity, not so much of any particular character or intellect as the ability to make certain efforts of the mind and memory. The rule of testamentary capacity is that the testator must have sufficient mind and memory to intelligently understand the nature of the business in which he is engaged, to comprehend generally the nature and extent of the property which constitutes his estate, and which he intends to dispose of, and to recollect the objects of his bounty. If he possesses these attributes, he has testamentary capacity. The testator need not have the same perfect and complete understanding and appreciation of these matters in all their bearings as a person in sound and vigorous health of mind and body would have; nor is he required to know the precise legal effect of every provision made in his will. Absent-mindedness or mere intellectual feebleness does not disqualify a person to make a will, as the feeble have as much right to dispose of their property as the strong, but something short of insanity is sufficient to invalidate it. One capable of transacting ordinary business is presumed capable of making a will although not of sound mind." 40 Cyc. 1004, and authorities cited.

At page 1108 the same authority says: "If the testamentary requisites are found, the will may be valid, although executed by one of great age whose mind is enfeebled, whose body is debilitated, whose memory is failing, and whose judgment is vacillating,

especially where the will is fairly made and apparently emanating from a free will, or where testator was a good business man; but not where an aged person is so enfeebled mentally as not to understand what he is doing, as when he is suffering from hallucinations or paralysis or softening of the brain."

"The law prescribes no limit in point of age beyond which a person cannot dispose of his property. A man 89 years of age is often as capable of making a deed or will as at any other period of his life. The greatness of his age is not proof of mental incapacity." *Howard v. Howard*, 112 Va. 566, 72 S. E. 133.

The authorities have not undertaken to prescribe any particular degree of mental acumen as the measure of one's capacity to execute deeds or wills, but all agree that the test is whether the party had at the time of the execution of the instrument sufficient capacity to understand the nature of the transaction he was entering into, and to assent to its provisions. *Wampler v. Harrell*, 112 Va. 635, 72 S. E. 135.

In *Jarrett v. Jarrett*, 11 W. Va. 584, the court, in discussing whether or not a grantor in a deed had mental capacity at the time of its execution, said, with respect to the weight to be given evidence upon the question of mental capacity, that the evidence of witnesses present at the execution of the deed is entitled to peculiar weight, and that the mere opinions of witnesses not experts are entitled to little or no regard, unless they are supported by good reasons founded on facts which warrant them; and, if the reasons and facts upon which they are founded are frivolous, the opinions of such witnesses are worth but little or nothing.

In the recent case decided by this court—*Woody et al. v. Taylor et al.*, 114 Va. 737, 77 S. E. 498—the opinion by Harrison, J., in disposing of strikingly similar testimony to that offered in this case to sustain the charge of mental incapacity of the testator to make a will, says: "They (the witnesses) express the opinion that he was not competent to make a will, but, as was said in *Beverley v. Walden*, 61 Va. 147, this is their opinion; but, when we come to analyze their evidence, we find that their opinions are not justified by the facts upon which they are based."

In *Beverley v. Walden*, 61 Va. 147, the opinion by Christian, J., says: In such case "the testimony of witnesses * * * pres-

ent at the factum," and the written acts of the party attesting his capacity, are "more to be relied on than the" mere "opinion of other witnesses based upon facts which may be true, and yet not be the result of unsoundness of mind." *Porter v. Porter*, 89 Va. 118, 15 S. E. 500.

[3] Expressions of opinions by witnesses that the testator was not competent to make a will based upon facts which do not sustain the opinions are not to be considered as conflicting with the evidence of the witnesses of the factum who speak of the testator's condition immediately at the time of the execution of the paper in question and unite in the unqualified statement to the effect that when the paper was executed by the testator his mind was clear and good, and that he knew all about what he was doing. *Woody v. Taylor*, supra.

[4] It is very true that in such cases as this the proper judges of the weight and credit due to the testimony of the witnesses are the jury, and their verdict, when sanctioned, as in this case, by the trial court, is entitled to the highest respect in the appellate court; but, when there has been a plain and palpable deviation from the proof, interference on the part of the appellate court is warranted. *Young v. Barner*, 68 Va. 96.

[5] We have here the clear and positive testimony of not only the two attesting witnesses of the will, but that of Wade Massie and of Will Rowles, two reliable neighbors, as well as that of Hugh Phillips who lived with the testator up to the time of his death, as to the capacity of the testator to make a will, none of which testimony conflicts with any evidence introduced by the contestant of the will; moreover, there is other unconflicting evidence adduced by appellants, the proponents of the will, plainly showing a memory consistent with the testator's age, and a capacity to understand his business affairs and to direct their management, not only up to the date of his will, but after and practically to the last of his life.

We are of opinion that the verdict of the jury complained of is a plain and palpable deviation from the proof in the case, and therefore the decree of the circuit court appealed from has to be reversed, the verdict of the jury set aside, and the cause remanded for further proceedings therein not in conflict with the views expressed in this opinion.

Reversed.

(115 Va. 201)

RECKER v. SOUTHERN RY. CO.

(Supreme Court of Appeals of Virginia. June 12, 1918.)

1. MASTER AND SERVANT (§ 258*)—INJURY TO SERVANT—ACTIONS—DECLARATIONS—SUFFICIENCY.

A declaration in an action for injuries to an employé operating a boring mill, which alleges that the employé was assigned to the work by the foreman with directions to hasten it, that he went to work on a dark and foggy morning, that the electric lights by which the shop was usually lighted were not burning, that the light over the boring mill was out of repair, that the absence of light made it necessary for the employé to use a hand torch provided by the employer for emergencies, that he held the torch in one hand while operating the mill with the other, and that while operating the mill it became necessary to lean over to observe the progress of the work, and that in holding the torch over the machine to obtain light his hand was drawn into the mill, but which does not allege improper construction of the mill, or that the defect in the electric light had existed for a time sufficient to have afforded the employer an opportunity to inspect and remedy it in the exercise of reasonable care, states no cause of action as against a demurrer, for, if the torchlight as used furnished enough light, the absence of the electric light was not the sole and proximate cause of the injury, and did not contribute thereto in any degree.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 816-836; Dec. Dig. § 258.*]

2. MASTER AND SERVANT (§ 258*)—INJURY TO SERVANT—CONTRIBUTORY NEGLIGENCE.

The declaration, though construed as alleging that the proximate cause of the accident was the absence of adequate light, is demurrable on the ground of the employé's contributory negligence.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 816-836; Dec. Dig. § 258.*]

3. MASTER AND SERVANT (§ 129*)—INJURY TO SERVANT—DEFECTIVE MACHINERY.

An employé sustaining a personal injury cannot recover on account of defective machinery, unless the defect was the proximate cause of the accident.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 257-263; Dec. Dig. § 129.*]

4. PLEADING (§ 214*)—DEMURRER—ADMISSIONS.

A demurrer to a pleading admits the facts alleged therein.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 525-534; Dec. Dig. § 214.*]

5. MASTER AND SERVANT (§ 289*)—INJURY TO SERVANT—CONTRIBUTORY NEGLIGENCE.

Where the facts are unchallenged, and such that reasonable minds can draw no other inference than that an employé suing for a personal injury was or was not at fault, the court must determine the question of contributory negligence.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 1089, 1090, 1092-1132; Dec. Dig. § 289.*]

6. MASTER AND SERVANT (§ 222*)—INJURY TO SERVANT—ASSUMPTION OF RISK.

An employé who operates a dangerous machine in the dark or without sufficient light

assumes an open and obvious risk, though he acts on the order of the employer.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 648-651; Dec. Dig. § 222.*]

Error to Corporation Court of City of Alexandria.

Action by one Recker against the Southern Railway Company. There was a judgment sustaining a demurrer to the original and amended declarations, and plaintiff brings error. Affirmed.

S. G. Brent and H. W. Smith, both of Alexandria, for plaintiff in error. Francis L. Smith, of Alexandria, for defendant in error.

HARRISON, J. This writ of error brings under review the action of the lower court in sustaining the defendant's demurrer to the plaintiff's original and amended declarations. The amended declaration contains all the averments of the original declaration, and need only be looked to in disposing of the questions to be considered.

[1] The action was brought to recover of the defendant railway company damages for personal injuries, and the case stated by the plaintiff in his declaration is that he was employed in the machine shops of the defendant company; that at the time of the injury complained of he was operating a boring mill, run with great force by steam, and was facing off a trailer box; that the work had been assigned him by a foreman of the defendant company, with directions to hasten its completion, and not to put it aside until finished; that the defendant did not provide reasonably safe and suitable machinery and appliances for the use of the plaintiff, but negligently failed to do so, in this, to wit, that on the morning of the accident at 7 o'clock, the day being dark and foggy, the plaintiff went to work on the boring mill; that the electric lights by which the shops were usually lighted were not burning, and that the light over the boring mill was out of repair, which the defendant knew or by the exercise of reasonable diligence could have known; that the absence of the light over the boring mill made it necessary for the plaintiff to use a hand torch provided by the defendant for use in emergencies caused by the absence of the electric lights; that the plaintiff held this torch in his right hand, while operating the boring mill with his left hand; that while thus operating the mill it became necessary for him to lean over to observe the progress of the work, and that in holding the torch over the machine, so as to obtain sufficient light, and without any negligence or want of care on his part, his right hand was struck, caught, drawn, and entangled in the boring mill, resulting in the injuries complained of.

The declaration does not allege that the

boring will was improperly constructed or in any way out of order. The thing complained of, and the only negligence alleged is the defect in the light over the machine that made it necessary for the plaintiff to use the torchlight provided for such emergencies. There is no allegation that the alleged defect in this electric light had existed for a sufficient time to have afforded the defendant in the exercise of reasonable diligence an opportunity to inspect and remedy the defect. There is no allegation that the torch was out of order, that it did not give sufficient light, that it was in any way inadequate for the purpose for which it was being used, or that the use of the torch caused the accident. The averment is that while operating the mill it was necessary to lean over to observe the progress of the work, and that in holding the torch over the machine so as to secure sufficient light the plaintiff's hand was injured. These allegations can only mean that the defendant provided a hand torch to be used when the electric light was out, and that the plaintiff was using the hand torch "so as to obtain sufficient light," and that thus used the hand torch furnished sufficient light, for the declaration does not suggest that while using it the plaintiff did not have adequate light. If the hand torch as used furnished enough light, it cannot be said that the absence of the electric light was the sole proximate cause of the injury or contributed in any degree thereto.

[2, 3] It is unnecessary to cite authorities to sustain the proposition that a plaintiff cannot recover on account of defective machinery or appliances, unless it affirmatively appears that the defect was the proximate cause of the accident of which he complains. *Williams v. Norton Coal Co.*, 108 Va. 608, 62 S. E. 342. If, however, the declaration were interpreted as alleging that the proximate cause of the accident was the absence of adequate light, then the demurrer was properly sustained upon the ground that the plaintiff was guilty of such contributory negligence as to preclude his right to recover.

[4] The contention is not tenable that the jury is the only tribunal in this case to pass upon the question of the plaintiff's contributory negligence. The demurrer admits the facts alleged to be true, and when the facts are undisputed and decisive of the case a question of law is raised, and the court should decide it. *Wise Terminal Co. v. McCormick*, 104 Va. 400, 412, 51 S. E. 731.

[5] In *Beach on Contributory Negligence* (2d Ed.) § 447, it is said: "When the facts are unchallenged and are such that reasonable minds could draw no other inference or conclusion from them than that the plaintiff was, or was not, at fault, then it is the province of the court to determine the question of contributory negligence as one of law."

[6] It does not appear from the declaration when the plaintiff was directed to do the work he was doing at the time he was injured, nor is it suggested that he was ordered to do the work in an unlighted shop, or that on the morning of the accident his superior was aware of the fact that the light over the machine was not burning. The plaintiff went to the shop in the early morning of a dark, foggy day. He found the electric lights all out and the place in darkness. His work consisted in the management of a complicated machine driven by steam. With full knowledge of the conditions, and especially of the fact that the usual electric light over the machine was not burning, the plaintiff attempted to do the work, with the result that in some way, not explained in the declaration, his hand was caught and the injury complained of sustained.

To attempt to operate a dangerous machine in the dark or without sufficient light is such an open and obvious risk that no prudent person would encounter the peril. When an employé is injured under such circumstances, he cannot escape the result of his own contributory negligence upon the ground that he was acting on the orders of the master, when obedience to those orders involves exposure to such apparent danger that no prudent person would incur the risk. *Mason v. Post*, 105 Va. 494, 54 S. E. 811, 11 L. R. A. (N. S.) 1038. If the work was attempted without sufficient light, it is clear that the plaintiff was confronted by an open and obvious danger, which he could and should have avoided in justice to himself as well as to his employer. *Crane's Nest C. Co. v. Mace*, 105 Va. 624, 54 S. E. 479.

We are of opinion that, if the facts stated in the declaration were proven as alleged, the plaintiff would not be entitled to recover. The demurrer to the declaration was therefore properly sustained, and the judgment complained of must be affirmed.

Affirmed.

KEITH, P., absent.

(115 Va. 306)

WHITE v. AMERICAN NAT. LIFE INS. CO.

(Supreme Court of Appeals of Virginia. June 12, 1913.)

1. TRIAL (§ 156*)—DEMURRER TO EVIDENCE—ADMISSIONS.

A party who demurs to the evidence of the adverse party thereby admits the truth of the evidence of the adverse party and all just inferences that the jury may properly draw therefrom, and waives all of his own evidence in conflict therewith, and all inferences, though not in conflict, which do not necessarily result therefrom.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 354-356; Dec. Dig. § 156.*]

2. CONTRACTS (§ 141*)—RATIFICATION OF FRAUDULENT ACTS—BURDEN OF PROOF.

A party admitting that the adverse party was induced by fraud to make a contract has the burden of establishing by clear evidence that the adverse party, after the discovery of the fraud, waived it and ratified the contract, to defeat a rescission.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. §§ 461, 1760, 1761, 1785; Dec. Dig. § 141.*]

3. EVIDENCE (§ 67*)—PRESUMPTIONS—CONTINUANCE OF CONDITION—PRINCIPAL AND AGENT.

The relation of principal and agent once established presumptively continues, in the absence of proof to the contrary.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 87, 88, 103; Dec. Dig. § 67.*]

4. CORPORATIONS (§ 80*)—FRAUD INDUCING PURCHASE OF CORPORATE STOCK—RESCISSI—ON—DELAY.

Mere delay of a purchaser of corporate stock to rescind after the discovery of the fraud, inducing the purchase resulting from reasonable expectation on his part that the corporation will grant him proper relief, will not estop him from rescinding on the ground of the fraud, rights of creditors or innocent third persons not intervening, and the position of the corporation not being injuriously affected by the delay.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 244, 246-264, 1407, 1407½; Dec. Dig. § 80.*]

5. CORPORATIONS (§ 80*)—PURCHASE OF STOCK INDUCED BY FRAUD—WAIVER.

A purchaser of corporate stock who before the discovery of the fraud inducing the purchase gives to the president of the corporation a proxy to represent him at a stockholders' meeting does not thereby waive his right to rescind for the fraud.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 244, 246-264, 1407, 1407½; Dec. Dig. § 80.*]

6. CORPORATIONS (§ 90*)—PURCHASE OF CORPORATE STOCK—FRAUDULENT REPRESENTATIONS—RATIFICATION.

Evidence held not to show that one induced by fraud to purchase corporate stock ratified the purchase or acquiesced therein after the discovery of the fraud.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 245, 383-419; Dec. Dig. § 90.*]

Error to Circuit Court, Mathews County.

Action by the American National Life Insurance Company against C. C. White. There was a judgment for plaintiff, and defendant brings error. Reversed.

Buford, Lewis & Peterson, of Lawrenceville, and J. Boyd Sears, of Mathews, for plaintiff in error. Harper & Goodman, of Lynchburg, for defendant in error.

WHITTLE, J. This is a motion by the American National Life Insurance Company (hereinafter designated as the plaintiff) against C. C. White (hereinafter designated as the defendant) to recover the amount of two promissory notes evidencing the deferred installments of the purchase price for 75 shares of the plaintiff's stock, sold by its agent to the defendant.

The defendant by special pleas of set-off under Va. Code 1904, § 3299, interposed the defense that he had been induced to purchase the stock by certain false and fraudulent representations made to him by the plaintiff's agent, that consequently he was entitled to a rescission of the contract and to recover the cash payments made by him on the stock, and also to be relieved from liability on the notes upon which this motion was brought.

The plaintiff demurred to the defendant's evidence; and to the ruling of the court sustaining the demurrer to the evidence, and rendering judgment against the defendant for the sum demanded, this writ of error was awarded.

The allegation that the defendant was induced to buy the stock by false representations is admitted. Adopting the language of the brief of the plaintiff's counsel: "The case before the court presents this simple, concrete question: *Did the defendant below, who had been induced by the false representations of the plaintiff's agent to enter into a contract for the purchase of * * * the stock, waive the fraud after its discovery by him, and by his conduct estop himself from interposing that fraud as a defense to an action upon the contract?*"

[1, 2] The foregoing question is to be considered and answered in light of the familiar and oft-repeated rule applicable to a demurrer to the evidence, namely, that the demurrant admits the truth of the demurree's evidence, and all just inferences that a jury might properly draw therefrom, and waives all of its own evidence in conflict with that of the demurree; and all inferences from its own evidence, although not in conflict with the demurree's evidence, which do not necessarily result therefrom. And, moreover, the burden of proof rests upon the plaintiff to show by clear evidence that the defendant after the fraud became known to him waived the same and ratified the contract. *Virginia Land Co. v. Haupt*, 90 Va. 533, 19 S. E. 168, 44 Am. St. Rep. 939; *Wilson v. Carpenter*, 91 Va. 183, 21 S. E. 243, 50 Am. St. Rep. 824; *West End Co. v. Claiborne*, 97 Va. 734, 34 S. E. 900.

In *Cumberland Coal, etc., Co. v. Sherman*, 20 Md. 117, 149, 150, the court says: "Confirmation according to the books must be a

solemn and deliberate act, * * * and, particularly where the original transaction was infected with fraud, the confirmation of it is so inconsistent with justice and so likely to be accompanied with imposition that the courts will watch it with the utmost strictness, and not allow it to stand but on the clearest evidence."

In *Wilson v. Carpenter*, supra, 91 Va. at page 192, 21 S. E. at page 246, 50 Am. St. Rep. 824, the court says: "No man can be bound by a waiver of his rights, unless such waiver is distinctly made, with full knowledge of the rights which he intends to waive; and the fact that he knows his rights, and intends to waive them, must plainly appear." Citing *Montague's Adm'r v. Massey*, 76 Va. 307.

In the light of these well-settled principles, we shall briefly review the salient facts in relation to this transaction.

In December, 1907, the defendant subscribed to 50 shares of the stock, and in January following bought the remaining 25 shares, making the cash payments and giving his two promissory notes for the deferred installments of the purchase money. At the time of the sale and as an inducement to the defendant to buy, Kulp, the agent of the plaintiff, represented that his principal would at any time upon request repurchase the stock of any stockholder who might choose to dispose of the same.

[3] In the fall of 1908, the defendant having heard rumors affecting the financial condition of the company addressed a letter of inquiry to the president on that subject, and likewise offering his stock for sale in accordance with the promissory representation of the agent. The president replying to that letter did not repudiate the agent's representation, nor did he in terms decline to repurchase the stock for the company, but said: "Personally, I am loaded up with all that I can carry, and cannot at this time purchase any more." At a still later date the defendant had a conversation with the secretary of the plaintiff by long distance telephone, and was informed by him that the company would not pay a dividend for the year 1908 as promised by Kulp. In January, 1909, the defendant, who resided in Mathews county, in company with a fellow countyman, Dr. Vaden, who had also bought stock of Kulp, went to Lynchburg to attend the annual stockholders' meeting. However, though present, he did not vote or participate otherwise in the proceedings; but his investigations convinced him of the falsity of the original representations of the agent which induced him to subscribe to the stock. He straightway, in company with Dr. Vaden, sought out Kulp, and they both insisted that he redeem the promise made by him on behalf of the company to repurchase their stock. In response to this demand Kulp agreed that he would either place their stock elsewhere or take it off their hands. In

point of fact he kept faith with Dr. Vaden, and the company adjusted the matter to his satisfaction; but with respect to the defendant the plaintiff ultimately repudiated Kulp's agreement to repurchase the stock, on the ground that at that time he had ceased to be its agent, and was representing the defendant. There was no evidence as to the termination of the agency, and the relation having been once established it will be presumed to have continued, in the absence of proof to the contrary. 19 Am. & Eng. Ency. L. (1st Ed.) 75c; 31 Cyc. 1305; 4 Wigmore on Ev. § 2530.

In April, 1909, the defendant wrote to the secretary and called his attention to the representations of the agent which had involved him in the transaction, and on August 30, 1909, he wrote a letter of earnest supplication to Kulp informing him of his inability longer to carry the burden and beseeching him to fulfill his promises; and, finally, after persistently, but in vain, seeking relief in accordance with the stipulations of his agreement with the agent, on July 14, 1910, he caused a letter to be addressed to the plaintiff, denying all liability on account of his stock subscription.

[4] From the discovery of the fraud by the defendant until his final abandonment of the contract, the relations of the parties had remained in statu quo. No further payments had been made by the defendant on the subscription, and no dividend or other benefit had been received by him from the plaintiff; and neither the rights of creditors nor of any other innocent third party had intervened, nor had the position of the plaintiff itself been injuriously affected by the delay. It thus appears that the delay of the defendant in rescinding the contract after discovering the fraud was the result of a reasonable expectation on his part that the plaintiff would live up to the repeated assurances of its agent and grant him the relief to which he was entitled. In these circumstances mere delay will not estop a purchaser from interposing the defense that the contract was procured by fraud.

"Acquiescence or affirmance does not bind the stockholder, if induced by a reasonable expectation on his part that the fraud would be remedied." 1 Cook on Corporations, p. 435, par. 161, citing *West End Land Co. v. Clalborne*, 97 Va. 734, 34 S. E. 900.

In *Grosh v. Ivanhoe, etc., Co.*, 95 Va. 171, 27 S. E. 844, it is said: "Whether a party seeking a rescission of his contract has forfeited his right to it by laches or misconduct depends upon the facts and circumstances of the particular case. If the rights of creditors have intervened, or an innocent third party has acquired an interest in the property, or if, in consequence of his delay, the position even of the wrongdoer is affected, a party seeking a rescission of his contract on the ground of fraud will be deemed to have waived his right to rescind (*Martin*

v. South Salem, etc., Co., 94 Va. 28 [26 S. E. 591]; Add. on Conts. 772; Hurt v. Miller, 95 Va. 32 [27 S. E. 831], but there is nothing of the sort in this case. It is admitted that the defendant company has no creditors to be affected by a rescission of the contract. No attempt is made to show that the defendant company could have resold the lots had the appellant repudiated his contract sooner."

[8] The fact that the defendant gave the president of the company a proxy to represent him in a meeting of the stockholders is also relied on as evidence of ratification of the contract. The meeting referred to was in January, 1908, only a few days after the subscription by the defendant to the first block of stock, and, of course, long before the fraud was discovered. In such case giving the proxy did not operate as a waiver of his right to rescind the contract for fraud. Va. Land Co. v. Haupt, 90 Va. 533, 19 S. E. 168, 44 Am. St. Rep. 939.

[9] In conclusion we are of opinion that the evidence does not show a ratification of the contract by the defendant or such acquiescence therein as should estop him from relying upon the defense that the contract was procured by the fraudulent representations of the plaintiff's agent.

For these reasons, the judgment of the circuit court must be reversed, and this court will enter such judgment as the trial court ought to have rendered, overruling the demurrer to the evidence and awarding the plaintiff in error the damages provisionally assessed by the jury.

Reversed.

(115 Va. 230)

SMITH'S ADM'R v. HATKE.

(Supreme Court of Appeals of Virginia. June 12, 1913.)

1. EXECUTORS AND ADMINISTRATORS (§ 46*)—ASSETS—DEATH BENEFIT—INSURABLE INTEREST.

Where an unincorporated association organized wholly for eleemosynary purposes provided for a death benefit fund to be voluntarily donated by members, the contract providing that the total amount of the subscription was to be paid to such beneficiary as the member should designate, and that he might change the beneficiary on notice to the district agent of the association, such benefit formed no part of the member's estate, and hence was not recoverable by his administrator from the beneficiary on the theory that the latter had no insurable interest in the member's life.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. § 297; Dec. Dig. § 46.*]

2. INSURANCE (§§ 767, 777, 778, 785*)—INTEREST IN FUND.

Neither the estate of a member of a beneficial association nor his next of kin has any interest in a death benefit fund where the member fails to designate a beneficiary, or where the beneficiary designated predeceases the member, has no insurable interest in his life, or for any other reason is not entitled to the

fund, which thereupon reverts to the association.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 1929-1931, 1942-1944, 1945, 1974; Dec. Dig. §§ 767, 777, 778, 785.*]

Error to Circuit Court of City of Richmond.

Action by Thomas Smith Jr.'s administrator against Louis B. Hatke. Judgment for defendant, and plaintiff brings error. Affirmed.

Edward L. Ryan and O'Flaherty & Fulton, all of Richmond, for plaintiff in error. Sands & Swartwout and Leon M. Bazile, all of Richmond, for defendant in error.

WHITTLE, J.: The plaintiff in error, as administrator de bonis non of Thomas Smith, Jr., deceased, brought this action of assumpsit against the defendant in error, Louis B. Hatke, to recover \$1,297.80, which sum was paid to the defendant in the following circumstances: On November 25, 1907, Thomas Smith, Jr., who was a subscriber to an association entitled the "Voluntary Subscription Fund of Pullman Conductors and Office Men," in accordance with the contract, rules, and regulations of the association, designated the defendant as his beneficiary in case of his death. Smith died March 6, 1909, and thereupon the association paid the fund to the defendant.

Upon the trial of the case the defendant demurred to the plaintiff's evidence, and to the action of the circuit court sustaining the demurrer and rendering judgment thereon for the defendant in error, Hatke, this writ of error was granted.

The following is the form of the contract out of which the transaction arose:

"Whereas, it has been deemed advisable that a mutual and voluntary agreement be entered into by the subscribers of these presents and all other like subscribers, that an association be formed to be entitled—

"Voluntary Subscription Fund of Pullman Conductors and Office Men.

"Therefore, be it agreed, that in the event of the death from any cause whatsoever of a subscriber to this fund each and every other subscriber shall give and donate the sum of one dollar. The total amount of such subscription to be paid to such beneficiary as may be designated by said subscribers; it being understood that subscriber can at any time change the name of beneficiary upon due notice to district agent. It is further agreed, that if any subscriber default in any single call for subscription, that his name be stricken from the list of subscribers, and that he shall forfeit any claims for benefits under the terms of this agreement."

Rule 6: "All subscriptions must be paid within thirty days after notice of death is received, and when subscriptions are completed

in each district a personal check or draft will be made out in the name of the beneficiary and sent to general agent, who will forward same to home station of deceased."

The association is not a party to this litigation, and the plaintiff in error asserts no demand against it.

The entire fabric of plaintiff's case rests upon the propositions (1) that the contract between the association and his intestate is to be regarded as an ordinary life insurance policy upon the life of the latter, which upon his death constituted an asset of his estate; and (2) that the title of the estate to the fund was not affected by Smith's designation of Hatke as his beneficiary, since, it is said, Hatke had no insurable interest in Smith's life, either as creditor or in any other capacity. Therefore, that his designation as a beneficiary was a mere wager contract on the life of Smith and was void as contrary to public policy. Unless the first proposition can be maintained, there will be no occasion to concern ourselves about the second. In other words, unless the fund is an asset of Smith's estate, the action cannot be maintained by his administrator for its recovery, whatever may be the infirmities in Hatke's title.

The case of the *Cosmopolitan Life Insurance Company v. Koegel*, 104 Va. 619, 52 S. E. 166, is relied on for the contention that this is an ordinary life insurance policy, and that upon the death of the insured title to the fund, by operation of law, devolved upon his personal representative. An examination of the record in that case shows that the "Royal Tribe of Joseph" (in which order Koegel held a benefit certificate or policy of insurance on his life for \$2,000 for the benefit of his wife) was an incorporated organization by the laws of the state of Missouri, under the supervision of the insurance department, with a written constitution, general laws, by-laws, and rules for its government. It had a full corps of trustees, bonded officers, medical examiners, and such other agents as are usually found on the rolls of other mutual life insurance companies; and also prescribed a membership age limit, with graduated scale of premium rates, payable periodically. In short, it was a regularly equipped mutual benefit insurance company, with supreme, grand, and subordinate lodges, and was carrying on that sort of life insurance business throughout the United States. The authorities are generally agreed in classifying such organizations as mutual life insurance companies.

[1] On the other hand, the association in the instant case is unincorporated, and, as its name imports, is a mere "voluntary subscription fund of Pullman conductors and office men," organized wholly for eleemosynary purposes, and containing no provision, under any contingency, for payment of the fund voluntarily donated, in whole or in part, to the subscriber while living or to his estate after death. On the contrary, the contract expressly stipulates in language too plain to be misunderstood that the total amount of the subscription is to be paid to such beneficiary as may be designated by the subscriber; and moreover, that the subscriber can at any time change the name of the beneficiary upon notice to the district agent.

[2] It has been repeatedly held by courts of high authority that under similar certificates neither the estate of the subscriber nor his next of kin has any interest whatsoever in the fund where he fails to designate a beneficiary, or where the beneficiary designated predeceases the subscriber, or has no insurable interest in his life, or for any other reason is not entitled to the fund. In all such cases the donation reverts to the association.

In *Leftwich v. Wells*, 101 Va. 255, 48 S. E. 364, 99 Am. St. Rep. 865, this court held that under a similar policy the subscriber had no property rights therein, but only the power to appoint a beneficiary. To the same effect are the following decisions from other states: *Hellenberg v. Dist. No. 1 of I. O. of B. B.*, 94 N. Y. 580; *Taylor v. Hair* (C. C.) 112 Fed. 913; *Warner v. Modern Woodmen of America*, 67 Neb. 233, 98 N. W. 397, 61 L. R. A. 606, 108 Am. St. Rep. 634, 2 Ann. Cas. 660; *Cook v. Improved Order Heptasophs*, 202 Mass. 85, 88 N. E. 584; *Swift v. S. F. S. & E. Board*, 67 Cal. 567, 8 Pac. 94. Other authorities to the same point could be cited, but those given sufficiently sustain and illustrate the principle involved.

As corollary to the proposition that decedent's estate has no property rights in the fund, it follows that his personal representative cannot question Hatke's title thereto. *Maguire v. Maguire*, 59 App. Div. 143, 69 N. Y. Supp. 61; *Munhall v. Daly*, 37 Ill. App. 628; *Johnson v. Van Epps*, 110 Ill. 551; *Meyers v. Schumann*, 54 N. J. Eq. 414, 34 Atl. 1066; *Stoelker v. Thornton*, 88 Ala. 241, 6 South. 680, 6 L. R. A. 140.

Upon these considerations we find no error in the judgment of the circuit court, and it is affirmed.

Affirmed.

(115 Va. 186)

LAMBERT v. BARRETT.

(Supreme Court of Appeals of Virginia. June 12, 1913.)

1. STATUTES (§ 158*)—REPEALS BY IMPLICATION.

Repeals by implication are not favored by the courts, and the presumption is always against the intention to repeal when express terms are not used.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. § 228; Dec. Dig. § 158.*]

2. STATUTES (§ 159*)—REPEAL—PRESUMPTION.

To justify the presumption of intention to repeal one statute by another, the two statutes must be irreconcilable, and, if by a fair and reasonable construction they can be reconciled, both must stand.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. § 229; Dec. Dig. § 159.*]

3. MUNICIPAL CORPORATIONS (§ 124*)—COUNCIL—VACANCY—REPEAL OF STATUTE—"MUNICIPAL OFFICERS."

Under Act Feb. 17, 1906 (Laws 1906, c. 24), authorizing the several cities and towns of the commonwealth to appoint officers and employes, and providing for the filling of vacancies in all municipal offices for the unexpired term, members of the city council are not municipal officers in view of other statutes and in view of their powers not being confined exclusively to local affairs, and hence such act does not repeal Code 1904, § 1015e, providing that when any vacancy shall occur in the council of a city the council shall elect a qualified person to fill the vacancy for the unexpired term, and vacancies of the common council are governed by the latter act and not the former.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 290-297; Dec. Dig. § 124.*]

For other definitions, see Words and Phrases, vol. 5, pp. 4628, 4229; vol. 8, p. 7726.]

Error to Corporation Court of City of Alexandria.

Quo warranto proceedings by Urban S. Lambert against Robert S. Barrett. From a judgment for defendant, plaintiff brings error. Reversed.

J. K. M. Norton, of Alexandria, for plaintiff in error. C. E. Nicol, of Alexandria, for defendant in error.

BUCHANAN, J. This is a quo warranto proceeding in which it was determined that the defendant in error, Robert S. Barrett, and not the plaintiff in error, Urban S. Lambert, was entitled to the office of member of the common council from the first ward of the city of Alexandria, made vacant by the death of Hubert Snowden, who was elected a member of the common council at the regular election held on the second Tuesday in June, 1910.

On the 23d day of April, 1912, the common council, acting under section 1015e of the Code of 1904, elected Mr. Lambert to fill the unexpired term of Mr. Snowden. At the general election in June following, Mr. Barrett was elected by the qualified voters of the city to fill the vacancy caused by the death of Mr. Snowden, in accordance with

an act of assembly approved February 17, 1906. Acts of Assembly 1906, pp. 17, 18.

The contention of the defendant in error is, and the trial court so held, that section 1015e of the Code was repealed by the act of February 17, 1906, and that the vacancy was to be filled in the manner prescribed by the latter statute.

By section 1015e of the Code it is provided that: "When any vacancy shall occur in the council of a city having one branch, or in either branch of the council of any city having two branches, by death, resignation, removal from the ward, failure to qualify, or from any other cause, the council, or the branch, as the case may be, in which such vacancy occurs, shall elect a qualified person to supply the vacancy for the unexpired term."

The act of February 17, 1906, is as follows:

"An act to authorize the several cities and towns of this commonwealth to appoint officers and employes in addition to those expressly authorized in their respective charters and provide for the filling of vacancies in all municipal offices for the unexpired term.

"1. Be it enacted by the General Assembly of Virginia, that the council of every city or town of this commonwealth having in their several charters the power to appoint certain municipal officers shall, in addition to such power, have power to appoint such other officers and employes as the council may deem proper, or any committee of such council, or any municipal board, or the mayor of the city or town, or any head of a department of such city or town government, may also appoint such officers and employes as the council may determine, the duties and compensation of which officers and employes shall be fixed by the council of the city or town, except so far as the council may authorize such duties to be fixed by such committee or other appointing power, and may require of any of the officers and employes so appointed bonds, with sureties in proper penalties, payable to the city or town in its corporate name, with condition for the faithful performance of said duties. All officers so appointed may be removed from office at their pleasure by joint resolution of the two branches, and where the appointment is by a committee or board, by a vote of such committee or board, or where such appointment is by the mayor or head of a department, such removal may be by order of the mayor or head of department. In case of vacancies occurring in any municipal position so authorized to be filled, a qualified person may be appointed to fill such position for the unexpired term by the proper appointing power; and in case of vacancy in any municipal office which is elective by the people, if there be no general election during the unexpired

term at which such vacancy can be legally filled, the city or town council may elect a qualified person to fill such vacancy until a qualified person can be elected by the people and shall have qualified for the next succeeding term, or when such general election does occur during the unexpired term at which such vacancy can be filled, such city or town council shall elect a qualified person to fill such vacancy until a qualified person is elected to fill such vacancy at such general election and shall have qualified."

The act of February 17, 1906, does not expressly repeal section 1015e of the Code. Does it do so by implication?

[1, 2] It is well settled that the repeal of a statute by implication is not favored by the courts. The presumption is always against the intention to repeal where express terms are not used. To justify the presumption of an intention to repeal one statute by another, the two statutes must be irreconcilable. If by a fair and reasonable construction they can be reconciled, both must stand. *Fulkerson v. Bristol*, 95 Va. 1, 5, 27 S. E. 815, and authorities cited.

If members of the city council of Alexandria are municipal officers within the meaning of the act of February 17, 1906, there can be no question that the provisions of that act and the provisions of section 1015e of the Code are in irreconcilable conflict, and that section of the Code must be regarded as repealed by the act of February 17, 1906. The question, therefore, to be determined is whether they are municipal officers within the meaning of the last named statute.

It is not easy, as was said in *Burch v. Hardwicke*, 80 Grat. (71 Va.) 24, 33, 34, 32 Am. Rep. 640, to define them (city officers or municipal officers) in all cases; but there are many such provided in the charters of many of the cities of the state. Among these are, perhaps, city engineers and surveyors, officers having superintendence and control of streets, parks, water works, gas works, hospitals, sewers, cemeteries, city inspectors and no doubt many others well known in large cities. Their duties and functions relate exclusively to the local affairs of the city, and the city alone is interested in their conduct and administration. On the other hand, there are many officers, such as city judge, sergeant, clerk, commonwealth's attorney, treasurer, sheriff, high constable, and the like, some of whom are recognized by the Constitution while others are not. All these are generally mentioned as city officers, and they are even so designated in the Constitution, but they are not removable by the mayor. The reason is that while they are elected or appointed for the city, and while their jurisdiction is confined to the local limits, their duties and functions, in a measure, concern the state. They are state agencies or instrumentalities, operating

to some extent through the medium of city charters in the preservation of the public peace and good government. However elected or appointed, however paid, they are as much state officers as constables, justices of the peace, and commonwealth's attorneys, whose jurisdiction is confined to particular counties. See, also, *Mitchell v. Witt*, Judge, 98 Va. 459, 36 S. E. 528; *Smith v. Bryan*, Mayor, 100 Va. 199, 40 S. E. 652; 1 Dillon, *Mun. Corp.* (5th Ed.) § 97; 1 *McQuillan*, *Mun. Corp.* § 178.

Tested by the rule laid down in the case of *Burch v. Hardwicke*, supra, it cannot be said that the duties and functions of a city council relate exclusively to the local affairs of the city. While many, perhaps the great body, of the powers and duties of a city council relate exclusively to the local affairs of the city and to matters in which the city alone is interested, they exercise powers and perform duties in which the public at large, or the state, is interested directly. Under the provisions of section 1038 of the Code, city councils have the power to lay off, control, and keep in order streets, which become state highways and belong to the public or the state. *White Oak Coal Co. v. Manchester*, 109 Va. 749, 64 S. E. 944, 132 Am. St. Rep. 943. Their jurisdiction for certain purposes extends beyond the corporate limits. In criminal cases it extends one mile beyond the corporate limits. They have the right to erect waterworks outside of the city limits, and, in order to protect the water from pollution and the works from injury, their jurisdiction extends five miles beyond the works; and, for the purpose of carrying into effect these and other powers, they can enact ordinances and prescribe fines and other punishments for their violation. While these powers and others do not relate exclusively to the local affairs of the cities, they are in a certain sense municipal officers (*Mitchell v. Witt*, Judge, supra), and, if there were no other legislation on the subject, the broad language of the act of February 17, 1906, might be sufficient to include them. But, as there is other legislation on the subject, all the statutes in pari materia must be considered and harmonized if it can be done by any fair and reasonable construction. *Mitchell v. Witt*, Judge supra; *Fulkerson v. Bristol*, supra.

[3] If members of a city council be held to be municipal officers, within the meaning of the act of February 17, 1906, that act would be in irreconcilable conflict not only with section 1015e of the Code, but also with that portion of section 1015a of the Code which provides: "That all elections to fill vacancies in any (city) council shall be for the unexpired term." If they are municipal officers, then under section 1033 of the Code the mayor would have the power to suspend and remove members of the city council, for that section provides that the mayor shall see that the various city officers and mem-

bers of the police and fire departments, whether elected or appointed, faithfully perform their duties, and gives him the power to suspend such officers and to remove them for misconduct in office or neglect of duty.

Section 1015e provides that vacancies in either branch of the council shall be filled by the branch in which the vacancy exists, but if that section has been repealed by the act of February 17, 1906, a vacancy in either branch would have to be filled by the joint action of both branches of the council, for it is clear, we think, that every vacancy which the last-named act authorizes the city council to fill must be filled by the joint action of both branches of the council, where it consists of two branches.

If the members of a city council be municipal officers, within the meaning of the act of February 17, 1906, then it seems to us clear that the mayor is also a municipal officer, within its meaning. If this be so, then it will bring that act in irreconcilable conflict with section 1033 of the Code. That section provides that, upon the death, resignation, or removal of the mayor, his place shall be filled and his duties discharged by the president of the board of aldermen, or the president of the council, according as the city council has or has not two branches, until another mayor is elected and qualified. That section further provides that, within ten days after such death, resignation, or removal of the mayor, the corporation or hustings court shall order a special election to be held within 30 days after the order is entered to fill such vacancy, provided the unexpired term remaining after such election is as much as one year, while the act of February 17, 1906, provides that in case of a vacancy in any municipal office which is elected by the people, if there be no general election during the unexpired term at which such vacancy can be legally filled, the city council may elect a qualified person to fill such vacancy until a qualified person can be elected by the people, and shall have qualified for the next succeeding term, or, when such vacancy can be filled, such city council shall elect a qualified person to fill such vacancy until a qualified person is elected to fill such vacancy at such general election and shall have qualified.

If the members of a city council are held not to be municipal officers within the meaning of the act of February 17, 1906, as we think they may be, that act does not repeal section 1015e of the Code and the other statutes referred to. By such a construction the apparently conflicting laws can be harmonized and all stand.

We are of opinion, therefore, that the trial court erred in not so holding and in declaring that the plaintiff in error, Lambert, was not entitled to fill the vacancy made vacant by the death of Hubert Snowden until the end of

the term for which the latter was elected. Its judgment must therefore be reversed, and this court will enter such judgment as it ought to have entered.

Reversed.

KEITH, P., absent.

(115 Va. 148)

MIDDLE ATLANTIC IMMIGRATION CO.
v. ARDAN.

(Supreme Court of Appeals of Virginia. June 12, 1913.)

1. BROKERS (§ 54*) — COMMISSIONS — WHEN EARNED.

A broker authorized to sell a tract of land who sells it to a purchaser ready, able, and willing to complete the purchase is entitled to the agreed commissions on the sale.

[Ed. Note.—For other cases, see Brokers, Cent. Dig. §§ 75-81; Dec. Dig. § 54.*]

2. TRIAL (§ 260*) — INSTRUCTIONS — CURE BY OTHER INSTRUCTIONS.

In a broker's action for commissions, an instruction that if defendant authorized plaintiff to sell a tract of land, and if sold to pay plaintiff a specified commission, and if plaintiff sold the land to C., and C. was ready, able, and willing to complete the purchase, to find for plaintiff, was sufficiently covered by an instruction that, before the jury could find for plaintiff, they must believe that C. was ready, willing, and able in good faith to comply with his contract, and that in determining his willingness, readiness, and ability they might consider all the facts proven in the case, and hence its refusal was not prejudicial.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 651-659; Dec. Dig. § 260.*]

3. BROKERS (§ 88*) — ACTIONS FOR COMMISSIONS — INSTRUCTIONS.

In a broker's action for commissions, where there was evidence that a purchaser was found who professed himself ready, able, and willing to complete the purchase, but who subsequently failed to do so, and that the owner in entering into a contract of sale with the purchaser relied on the broker's statements as to the purchaser's readiness, ability, and willingness, it was proper to refuse an instruction to find for plaintiff if the failure to carry out the contract was due either to the fault of the owner or of the purchaser, and not to the broker's fault; since if the failure was due wholly to the fault of the purchaser, and there was no default or misconduct on the part of the owner, the broker was not entitled to recover.

[Ed. Note.—For other cases, see Brokers, Cent. Dig. §§ 121, 123-130; Dec. Dig. § 88.*]

4. BROKERS (§ 88*) — ACTIONS FOR COMMISSIONS — INSTRUCTIONS.

In a broker's action for commissions, where there was evidence tending to show that a purchaser procured by the broker, and who professed himself ready, able, and willing to complete the purchase, was not financially able to respond in damages for his failure to carry out the contract, and that in entering into the contract the owner relied upon the statements of the broker as to the purchaser's readiness, ability, and willingness, instructions that if a valid, binding, and enforceable contract was made between the purchaser and the owner through the broker, and if the purchaser was financially able to carry out the contract, the broker fully performed its duty, and was entitled to its commissions, if the failure to carry out the contract was due to no fault of its, that if the purchaser was financially able to perform the contract, and

refused to do so, the owner could have brought suit against him and recovered the amount that the purchaser agreed to pay, that the broker could not have instituted a suit nor done anything further to enforce completion of the sale, that it was the duty of the owner to force the purchaser to comply with the contract, and that unless the broker consented to the owner's abandoning the contract to find for plaintiff, were properly refused.

[Ed. Note.—For other cases, see *Brokers*, Cent. Dig. §§ 121, 123-130; Dec. Dig. § 88.*]

5. BROKERS (§ 88*)—ACTIONS FOR COMMISSIONS—INSTRUCTIONS.

In a broker's action for commissions on a sale of land which the purchaser procured failed to complete after entering into a contract, an instruction that if the owner after investigation as to whether a suit against the purchaser would be available to compel him to comply with the contract was advised by his counsel that a suit would be expensive and useless, and would avail him nothing, he was not bound to bring such suit, was improper, since it left it entirely to the discretion of the owner's counsel to determine whether or not it was his client's duty to sue, whereas an investigation should have been made as to the facts bearing upon the advisability of suing and all the facts obtained submitted to the jury for their determination as to whether a suit would have been unavailing.

[Ed. Note.—For other cases, see *Brokers*, Cent. Dig. §§ 121, 123-130; Dec. Dig. § 88.*]

Error to Circuit Court, Cumberland County.

Action by the Middle Atlantic Immigration Company against John J. Ardan. Judgment for defendant, and plaintiff brings error. Reversed and remanded.

The following instructions were requested by plaintiff:

"(1) The court instructs the jury that if they believe from the evidence in this case that the defendant authorized the plaintiff to sell the tract of land mentioned in the declaration at \$10,000, and if so sold by plaintiff to pay plaintiff a commission of \$400, and the plaintiff sold said property to M. F. Casto, of Deerhead, Kan., and said Casto was ready, able, and willing to complete said purchase, then they must find for the plaintiff.

"(2) The court instructs the jury that if they believe from the evidence in this case that the defendant personally entered into a valid, binding, and enforceable written contract with M. F. Casto for the sale to said Casto of the defendant's property at the price of \$10,000, and that at the time of entering into such contract said Casto was able to comply with the terms of same, and that the failure to carry out said contract was due either to the fault of the defendant or of said Casto, but was in no wise due to any fault of plaintiff, and said failure was without the consent and contrary to the wishes of said plaintiff, then they must find for the plaintiff to the extent of his commissions.

"(3) The court instructs the jury that if they believe from the evidence that a valid, binding, and enforceable contract was made

between said Casto and the defendant through the plaintiff as his agent, and that said Casto was financially able to carry out his part of said contract, the plaintiff fully performed its duty towards the defendant, and, having fully performed its duty, it is entitled to its commissions, provided the failure to carry out said contract was due to no fault of the plaintiff.

"(4) The court instructs the jury that if Casto was financially able to perform his said contract and refused to do so, and the defendant's title to the property was good, then the defendant could have brought suit against him and have recovered the amount that Casto agreed to pay for said property under his contract with the defendant; that the plaintiff in this case could not have instituted said suit, nor have done anything further to enforce the completing of said sale; and that it was the duty of the defendant to force said Casto to comply with said contract, and, unless they shall believe from the evidence that the plaintiff consented to the defendant's abandoning said contract, they must find for the plaintiff."

But the court refused to give the said instructions or any of them to the jury, and gave the following instructions:

"(1) If the jury believe from the evidence in this case that the defendant after the investigation as to whether a suit against Casto would be available to compel him to comply with his contract and was advised by his counsel that a suit would be expensive and useless and would avail him nothing, then he was not bound to bring suit against Casto, as the law does not compel a man to do a vain and useless thing.

"(2) The court instructs the jury that before they can find for the plaintiff they must believe that Casto was ready, willing, and able in good faith to comply with his contract, and that in determining his willingness, readiness, and ability to do so they may consider all the facts proven in this case.

"(3) The court instructs the jury that, before they can find for the plaintiff, they must believe from the evidence that the failure of Casto to complete his purchase was due either to a defect in the title or some default on the part of the defendant.

"(4) The court instructs the jury that if they believe from the evidence in this case that the defendant was ready, willing, and able to comply with the contract on his part, and did all that was necessary to do this, but that Casto arbitrarily and without good cause refused to accept the deed tendered him by the defendant, they must find for the defendant.

"(5) The jury are to determine from all the evidence in this case whether or not the plaintiffs have made a sale of the defendant's farm as under their contract they were bound to do, and the jury are the judges of

the weight of the evidence and the credibility of the witnesses."

Gregory & Boulware, and Meredith & Cocke, all of Richmond, for plaintiff in error. A. B. Percy, of Lynchburg, and Wm. Justis, Jr., for defendant in error.

KEITH, P. The Middle Atlantic Immigration Company brought its action in assumpsit against Ardan to recover the sum of \$400 alleged to be due it as commissions for negotiating a sale of certain real estate owned by the defendant. The defendant pleaded nonassumpsit, and a jury was impaneled, which found for the defendant, and from the judgment rendered by the court upon that verdict the Middle Atlantic Immigration Company obtained a writ of error.

On the part of the plaintiff there was evidence which proved or tended to prove that Ardan had listed with the Immigration Company a certain parcel of land owned by him in the county of Cumberland, and was to pay the plaintiff in error the sum of \$500 upon the agreed price, if a purchaser was found by it. Subsequently the contract was so changed by agreement between the parties that the purchase price of the land was to be \$10,000, and the plaintiff in error, if it negotiated a sale, was to receive \$400 in commissions. The plaintiff in error produced a man from Kansas named Casto, who professed himself as ready, able, and willing to purchase the property in question, and was accepted as a purchaser by Ardan at the agreed price, and a written contract was signed by both Ardan and Casto, which states that in consideration of \$10,000, \$5,000 of which had been paid by check, Ardan agreed to sell to M. F. Casto 470 acres of land known as "Melrose," lying in Cumberland county, together with all live stock, implements, and household goods. The balance of the purchase money was to be paid by the assumption on the part of Casto of a deed of trust then upon the land for \$3,500, and the residue of \$1,500 was to be paid one year from date, with 6 per cent. annual interest, and to be secured by deed of trust on the property. Ardan agreed to give Casto a good and sufficient warranty deed, together with abstract of title and plat of the property, and to give possession of the farm and personal property immediately on acceptance of the deed.

It further appears that the check for the cash payment was placed by Ardan in a local bank, by which it was prematurely forwarded to a Kansas bank for collection without having a deed and abstract of title attached thereto, as had been agreed upon. When the check was presented, it was protested for nonpayment and returned, and thereupon an abstract of title and deed were prepared and attached to a draft, which when presented Casto refused to pay and alleged certain objections to the title. There is evidence which tends to prove that when

the contract was entered into Casto was ready, able, and willing to buy and pay for the land.

On behalf of the defendant in error, Ardan, the testimony proves or tends to prove that he was wholly unacquainted with Casto, that he accepted Casto as a purchaser upon the faith of representations made by the agent of the Immigration Company as to Casto's financial responsibility, and that he signed the contract only upon the assurance of the company that Casto was anxious to buy and would pay the check for the cash payment as soon as Judge Smith, of Cumberland county, had approved the deed and abstract of title; that fearing the check might be lost or destroyed he deposited it in the Bank of Cartersville to be kept there until the papers could be prepared and attached to it, but by mistake the cashier sent it on before this was done, so that the check reached the bank in Kansas in advance of the other papers which should have accompanied it, and the check was protested for nonpayment; that in the meantime Mr. Percy, a Virginia attorney, had prepared a deed and abstract of title and sent them to Judge Smith for verification, and Judge Smith sent them to the Immigration Company with the statement that they were all right; and that these were attached to a sight draft and sent to Casto's bank, but he declined to accept upon the ground that the abstract of title was not satisfactory to his lawyers in Kansas, because the first abstract was not signed by any one, although it was accompanied by Judge Smith's O. K. To cure this objection, Ardan had another abstract made out by Mr. Percy, and caused him also to cure certain defects alleged by the lawyers in Kansas to exist in the title, and these papers were again sent to Mr. Casto's bank, and were again returned without payment; that a third abstract was made by Mr. Percy, which was equally unavailing; that Ardan was always anxious to complete the purchase.

The evidence further tends to prove that, when it was found that Casto would not take the property, Ardan set on foot inquiries through his council, Mr. Percy, as to the advisability of bringing suit against Casto; that Percy reported that from such information as he could obtain he thought a suit against Casto would be useless. Mr. Percy in his testimony, after stating in detail what had been done with reference to the abstract of title, the preparation of the deed and the removal of the objections to the title, was interrupted by counsel for the plaintiff, who admitted that the objections referred to in a memorandum prepared and sent to Ardan by Casto's counsel were not worthy of consideration, and did not affect the validity of the title. Mr. Percy then goes on to say that, after he found that Casto would not take the property in accordance with the terms of the contract, he investigat-

ed Mr. Casto's condition with a view of bringing suit, and after a most exhaustive investigation advised Ardan that a suit against Casto would not result in securing the specific enforcement of the contract, or damages for its breach, as his financial condition was not of such a character as would warrant the bringing of a suit, or enable Ardan to collect the judgment if he obtained one, should Casto desire to evade the enforcement; that he gave this advice reluctantly, because he knew it was important to Ardan to have the contract enforced if it could be; and that it was upon the advice of Mr. Percy that he desisted from bringing action.

[1] When the evidence was before the jury, the plaintiff asked for certain instructions, which were rejected.

In *Bankers Loan, etc., Co. v. Spindle*, 108 Va. 426, 62 S. E. 266, it is said: "If a real estate agent or broker, in pursuance of his contract with a landowner, has found a purchaser ready and willing to comply with the vendor's terms, and has brought the parties together, and they have entered into a valid contract of sale which the vendor can enforce, and the sale has been completed so far as the agent is concerned, he cannot be deprived of his compensation by the voluntary release of the vendee and the refusal of the vendor to consummate the sale, without the assent of the agent." And the same doctrine is maintained in *Crockett v. Grayson*, 98 Va. 354, 36 S. E. 477, and in *Paschall & Gresham v. Gilliss*, 113 Va. 643, 75 S. E. 220.

In *Coleman v. Meade*, 13 Bush (Ky.) 358, it is said: "The true doctrine we take to be this: The broker undertakes to furnish a purchaser, and is bound to act in good faith in presenting a person as such, and when one is presented the employer is not bound to accept him or to pay the commission, unless he is ready and able to perform the contract on his part according to the terms proposed; but if the principal accepts him, either upon the terms previously proposed, or upon modified terms then agreed upon, and a valid contract is entered into between the principal and the person presented by the broker, the commission is earned." See, also, *Arents v. Casselman*, 110 Va. 509, 66 S. E. 820.

In *Parker v. Walker*, 86 Tenn. 566, 8 S. W. 391, it was held that "a broker who agrees for compensation 'to procure a purchaser' for lands has earned his commissions when he effects a valid written contract for the sale of the lands upon terms and with a purchaser acceptable to the owner. Neither the purchaser's refusal to perform his contract upon grounds not imputable to the broker's fault, nor the voluntary failure of the vendor to compel him to do so, will defeat the broker's claim for commissions." In the course of the opinion Mr. Justice Lurton said: "The broker in such case has done all he can do, and all he undertook to do.

He has produced a purchaser able to comply or one satisfactory to the seller, for he has accepted him as a purchaser and willing to purchase; for he has freely bound himself by a valid agreement to buy the property. The subsequent unwillingness to carry out his purchase cannot affect the validity of the agreement by which he has bound himself to take the property. This assent of the contracting parties, and this valid agreement, having been brought about through the intervention of the agent, completes his obligation, and is all he undertook to do, and just what his principal employed him to do. If such a purchaser, being thus bound, undertakes to avoid his agreement upon insufficient legal grounds, the vendor may, if he choose, compel a specific performance; but if he elect to release him rather than to incur the expense, or annoyance, or delay of a litigation, he ought not in equity and justice make such election at the expense of his broker."

[2] While the authorities we have cited show that the first instruction correctly states the law as established in this commonwealth, we are of opinion that instruction No. 2, given to the jury by the court, sufficiently states the principle which it announced, and therefore that the refusal to give instruction No. 1 asked for by the plaintiff in error was not prejudicial, and this assignment of error is therefore overruled.

[3] We think the second instruction was properly refused, for it renders the seller liable for commissions whether "the failure to carry out the contract was due to the fault of the defendant or of Casto," provided there was no fault upon the part of the plaintiff. In a case where there is no fault upon the part of the agent nor upon the part of the seller, but the whole fault of the miscarriage lay with the purchaser, we cannot agree that the plaintiff is entitled to his commissions. His claim rests upon his having presented a purchaser ready, willing, and able to complete the purchase. It is true that in this case a purchaser was found who professed himself ready, able, and willing to complete the purchase. As to the truth of these representations, the evidence tends to prove that Ardan relied solely upon the statements of the agents of plaintiff in error, he himself having no acquaintance with or knowledge of Casto, except what he derived from them.

If the plaintiff is entitled to recover, it must be for a breach of contract upon the part of the defendant by reason of his having omitted to do that which by his contract he ought to have done, or having done that which by the terms of his contract he should have refrained from doing. The recovery must be based upon some default or misconduct on the part of the defendant.

In *Parker v. Walker*, supra, after stating that the broker is entitled to his compensation if he has produced a purchaser able to

comply, the opinion proceeds as follows: "If such a purchaser, being thus bound, undertakes to avoid his agreement upon insufficient legal grounds, the vendor may, if he choose, compel a specific performance; but if he elect to release him rather than to incur the expense, or annoyance, or delay of a litigation, he ought not, in equity and justice, to make such election at the expense of his broker." To all of which we give our unqualified assent.

As is said in Walker on the Law of Real Estate Agency, § 464: "Where a broker, under a general contract of employment to sell real estate, obtained a purchaser satisfactory to his principal, who made an enforceable contract of sale, without being induced to do so by any representations of the broker as to the purchaser's responsibility, and without any bad faith on the broker's part, the latter was entitled to commissions, though, without the principal's fault, the vendee failed to perform the contract solely because of the lack of financial responsibility at the time the contract was executed."

It will be observed that the case just stated was one in which the contract was made between the vendor and the purchaser without any representations on the part of the broker as to the purchaser's responsibility; while in the case before us the proof is that representations as to the purchaser's responsibility were made by the broker and were relied on by the seller. In the same section it is said that, "where a vendor of land is not influenced by misrepresentations of his broker as to the financial condition of his vendee, such misrepresentations do not constitute a ground for refusing to pay the broker's commissions"—citing *Irwin v. Moubray* (City Ct.) 5 N. Y. Supp. 430.

When we speak of misrepresentation, we do not mean to any that there is any evidence proving or tending to prove that the plaintiff in error knowingly deceived the defendant in error, but merely that the evidence tends to prove that the plaintiff in error represented to its principal that Casto was a purchaser ready, able, and willing to buy, and financially responsible for his contracts.

[4] We are of opinion that the third and fourth instructions were also properly refused.

[5] This brings us to the consideration of a question of grave importance to a proper decision of this case. Ardan having accepted Casto as a purchaser upon the faith of the representations of his financial responsibility made to him by plaintiff in error, and Casto having refused to comply with his contract, was it the duty of Ardan, under the facts disclosed by this record, to bring suit against Casto, either to compel him to perform his contract or to recover damages for its breach, and was that question properly submitted to the jury?

The instruction bearing upon this point which was given by the court is as follows:

"If the jury believe from the evidence in this case that the defendant, after the investigation as to whether a suit against Casto would be available to compel him to comply with his contract, and was advised by his counsel that a suit would be expensive and useless and would avail him nothing, then he was not bound to bring a suit against Casto as the law does not compel a man to do a vain and useless thing."

The effect of this instruction was to leave it to the discretion of Ardan's counsel to determine whether or not it was the duty of his client to bring a suit against Casto to compel a compliance with his contract, and this we think was improper. In order to excuse himself from the duty of bringing the suit, an investigation should have been made as to the facts bearing upon the advisability of instituting such an action, and all the facts obtainable upon that question should have been submitted to the jury; and, if as a result it should have been made to appear that a suit would have been unavailing, Ardan would have been excused for declining to institute it, for the law does not compel a man to do a vain and useless thing.

We are of opinion that for the error committed with respect to instruction No. 1 given by the court the judgment should be reversed and the cause remanded for a new trial to be had not in conflict with the views stated in this opinion.

Reversed.

(115 Va. 235)

SOUTHERN RY. CO. v. RICE'S ADM'X.
(Supreme Court of Appeals of Virginia. June 12, 1913.)

1. NEGLIGENCE (§ 76*)—CONTRIBUTORY NEGLIGENCE—VIOLATION OF ORDINANCE.

As a general rule a person negligently injured cannot recover if he was at the time of the injury doing some act in violation of a statute or ordinance which contributed to his injury.

[Ed. Note.—For other cases, see Negligence, Cent. Dig. §§ 104-107; Dec. Dig. § 76.*]

2. NEGLIGENCE (§ 119*) — CONTRIBUTORY NEGLIGENCE—PLEADING—PROOF.

Contributory negligence may be shown under a plea of not guilty.

[Ed. Note.—For other cases, see Negligence, Cent. Dig. §§ 200-216; Dec. Dig. § 119.*]

3. DEATH (§ 57*) — CONTRIBUTORY NEGLIGENCE—PLEADING—PROOF.

Under an allegation of the plea in an action for intestate's negligent death that intestate "was guilty of contributory negligence," defendant could introduce any evidence showing that intestate was per se guilty of contributory negligence or circumstances tending to show contributory negligence.

[Ed. Note.—For other cases, see Death, Cent. Dig. § 74; Dec. Dig. § 57.*]

4. TRIAL (§ 260*)—REFUSAL OF INSTRUCTIONS.

The refusal to instruct that, while the jury were the judges of the facts, the court was the judge of the law and it was the jury's

duty to accept and act upon the law as stated in the instructions, the jury applying the facts as they might determine them thereto, was not error, where the court instructed that it was the judge of the law as applied to the case, and the jury were the judges of the facts and the weight of the testimony.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 651-659; Dec. Dig. § 260.*]

5. MASTER AND SERVANT (§ 274*)—INJURIES—ADMISSION OF EVIDENCE.

As a rule it is not permissible, in an action for a railroad employé's death, to show that deceased had the reputation among his fellow employes as a fast runner and had previous to the fatal accident disregarded speed ordinances, etc.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 939-949; Dec. Dig. § 274.*]

6. MASTER AND SERVANT (§ 274*)—INJURIES—ADMISSION OF EVIDENCE.

In an action for a railroad employé's death by derailment of his engine, evidence that decedent had the reputation of running fast and had exceeded the speed ordinances before the accident was not admissible, where the uncontradicted evidence showed that he was running his engine at 12 to 15 miles an hour instead of the maximum of 4 miles an hour permitted by the ordinances.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 939-949; Dec. Dig. § 274.*]

Error to Law and Equity Court of City of Richmond.

Action by Rice's Administratrix against the Southern Railway Company. From a judgment for plaintiff, defendant brings error. Reversed.

Munford, Hunton, Williams & Anderson, of Richmond, for plaintiff in error. Hunsdon Cary, and Wm. Crump Tucker, of Richmond, for defendant in error.

BUCHANAN, J. This is an action to recover damages for the alleged negligence of the Southern Railway Company, which resulted in the death of the plaintiff's intestate, James G. Rice.

The decedent was an engineman of the railway company in charge of one of its yard engines. His death was caused by the derailment and overturning of his engine at or near Fourteenth street, in the city of Richmond. Conceding that the evidence is sufficient to show that the defendant company was guilty of negligence in the construction and maintenance of its track where the engine was derailed, there was evidence tending to show that the deceased, when operating his train at the time he was injured, was violating a speed ordinance of the city of Richmond, and that, if he had been operating his engine within the speed limit, there would have been no accident, and he would have suffered no injury, notwithstanding the condition of the track.

The speed limit fixed by the ordinance for engines, etc., on a railroad track in a street was not to be in excess of four miles an hour,

and any one who propelled it at a greater rate of speed or caused it to be done, or assisted in doing it or causing it to be done, was subject to a fine of \$10.

There was evidence that the engine operated by the plaintiff's decedent was moving with 15 loaded and 5 empty cars from the eastern end of the city over or across Fourteenth street, on a slight upgrade, on its way to Manchester; that just before reaching the line of Fourteenth street, or while in the street, the engine was derailed, passed over the street, over the sidewalk, into the yard on the west side of the street, over or across a side track, thence to another side track on which was standing a box car, with which the engine collided and was overturned. The injuries causing the death of the plaintiff's intestate were from escaping steam, resulting from the overturning of the engine. The evidence further tended to show that the distance which the engine moved after it was derailed before it collided with the box car was some 130 feet or more, and that if the engine had been running within the speed limit it would not have gone after it was derailed with its train anything like that distance.

The principal question involved in this writ of error is as to giving and refusing instructions.

The contention of the defendant company is and was that the plaintiff was not entitled to recover if it appeared from the evidence that at the time her decedent was injured he was operating his engine in violation of the speed ordinance of the city, and that the excessive speed at which he was running his engine contributed to his injury. The plaintiff, on the other hand, insisted and insists that such violation of the ordinance did not bar her recovery unless the jury believed from the evidence that the plaintiff's intestate was operating his engine at a negligent rate of speed, and, if so, that such negligence contributed to his injury. In other words, the question involved is whether the violation of the ordinance, such violation contributing to the plaintiff's intestate's injury, amounted as a matter of law to contributory negligence, or was merely evidence tending to show contributory negligence.

The railway company insists that the case of *Atlantic & Danville R. Co. v. Reiger*, 95 Va. 418, 28 S. E. 590, and the cases in which it has been followed, sustain the railway company's contention, while, on the other hand, the plaintiff claims that the case of *Chesapeake & Ohio Ry. Co. v. Jennings*, 98 Va. 70, 34 S. E. 986, directly, and certain other of our cases indirectly, sustain her contention.

Without reviewing the cases relied on by either the plaintiff or defendant or attempting to harmonize the real or apparent con-

dict between them, if any, we will consider the question involved here as one of first impression in this state, since none of the cases relied on by either side present the question of the right of an engineman to recover damages from his employer for injuries suffered when running his engine in violation of a city ordinance and such violation directly contributed to his injury.

[1] The text-books seem to be agreed that the general rule is that, if the person injured was at the time he received the injury doing some act in violation of a statute or ordinance, he cannot recover, if such violation contributed to his injury.

Shearman & Redfield, in their work on Negligence (5th Ed.) vol. 1, § 104, lay it down as the general rule that: "If the plaintiff is acting in violation of a statute or ordinance at the time the accident occurred, and such violation proximately contributes to his injury, he is guilty of contributory negligence. But, if such violation does not contribute to the injury, it is no defense."

Labatt on Master & Servant, § 362, says: "There can be no question that where a servant's injury was proximately caused by the fact that he was violating a statutory or municipal ordinance, the meaning and effect of which are perfectly clear, he cannot recover damages."

In Cooley on Torts (3d Ed.) vol. 1, pp. 273, 274, it is said that the fact that a party injured was at the time violating the law does not put him out of the protection of the law; he is never put by the law at the mercy of others. If he is negligently injured on the highway, he may have redress, notwithstanding at the time he was upon the wrong side of the road, provided that act did not contribute to his injury.

29 Cyc. 525, in stating the general rule, says that: "If the person injured was at the time of receiving the injury doing some act in violation of a statute or ordinance, such person cannot recover if such violation contributed to the injury; the violation amounting to contributory negligence."

In 7 Am. & Eng. Enc. Law (2d Ed.) the general rule is stated as follows: "It is not contributory negligence *per se* for the injured person at the time of his injury to be engaged in a violation of law, either positive or negative in its character. Before an illegal act or omission can be held contributory negligence, it must appear that such act or omission was a proximate cause of the injury. It is usually held that the mere collateral wrongdoing of the plaintiff cannot of itself bar him of his action when it did not proximately contribute to his injury." Thompson on Neg. (2d Ed.) § 11; Beech on Contributory Neg. § 47; 4 Dillon, Mun. Corp. note, p. 3004, cases.

The general rule as laid down by the text-writers quoted and by others which might be cited seems to be fully sustained by reason and authority.

The reason why no recovery is permitted in such a case is based upon grounds of public policy. That principle of public policy is this (as stated by Lord Mansfield in *Holmes v. Johnson*, and quoted with approval in *Roller v. Murray*, 112 Va. 780, 783, 784, 72 S. E. 665, 38 L. R. A. [N. S.] 1202, Ann. Cas. 1913B, 1088): "Ex dolo malo non oritur actio—no court will lend its aid to a man who founds his cause of action upon an immoral or an illegal act; if from the plaintiff's own stating or otherwise the cause of action appears to arise *ex turpi causa*, or the transgression of a positive law of this country, there the court says he has no right to be assisted. It is upon that ground that the court goes; not for the sake of the defendant, but because they will not lend their aid to such a plaintiff."

While this rule finds its application more frequently in actions upon illegal contracts, it applies to cases in tort. It is immaterial, as was said by Judge Gray in *Hall v. Corcoran*, 107 Mass. 251, 253 (9 Am. Rep. 30): "Whether the form of the action is in contract or in tort, the test in each case is whether, when all the facts are disclosed, the action appears to be founded in a violation of law, in which the plaintiff has taken part." See, also, 1 Am. & Eng. Enc. Law & Pr. 1024; 38 Cyc. 529, 530, and cases cited in the notes to each; *Newcomb v. Boston Protection Dept.*, etc., 146 Mass. 596, 602, 16 N. E. 555, 4 Am. St. Rep. 354; *Broschart v. Tuttle*, 59 Conn. 1, 21 Atl. 925, 11 L. R. A. 33.

The case under consideration seems to come clearly within the general rule that although a person has sustained damages, if the damages arose out of an illegal act or transaction in which he was engaged, he cannot recover.

In *Newcomb v. Boston Protection Dept.*, supra, it was said in the opinion of the court that "no case has been brought to our attention, and upon careful examination we have found none, in which a plaintiff, whose violation of law contributed directly and proximately to cause him an injury, has been permitted to recover for it; and the decisions are numerous to the contrary."

It was held in *M., K. & T. Ry. Co. v. Roberts* (Tex.) 46 S. W. 270, that an employé (an engineman) could not recover damages from his employer for injuries suffered while running his engine within the limits of a city at a higher rate of speed than that fixed by ordinance, if such negligence proximately contributed to the injury.

Little v. Southern Ry. Co., 120 Ga. 347, 47 S. E. 953, 66 L. R. A. 509; 102 Am. St. Rep. 104, decides that an employé (engineman) of a railroad company cannot recover damages from his employer for injury suffered while running his engine in violation of a penal statute or a municipal ordinance, if such injury was proximately caused by such violation.

In each of the two cases last cited it was sought, as in this case, to escape the effect of the plaintiff's conduct in violating the ordinance, etc., upon the ground that the defendant itself was responsible for such violation; but in each it was held, and properly so, we think, that, if the railway knew that the ordinance was regularly violated by its employes, it would not relieve the violator of the law of the effects of such violation. It would be contrary to public policy for the courts to relieve a person of the effect or consequence of his violation of law upon the ground that the railroad company and its employes were in the habit of violating the particular law.

The plaintiff insists that even if the evidence showed that her intestate was violating the city speed ordinance when injured, and that such violation directly contributed to his injury, and was therefore negligence as a matter of law, instructions A, B, and E, which so told the jury, were properly rejected by the court, because such violation of the ordinance was not stated in the railway company's grounds of defense.

[2, 3] One of those grounds of defense (the fifth) states: "That the plaintiff's intestate was guilty of contributory negligence." In order to prove that the plaintiff's intestate was guilty of contributory negligence, no other than the plea of "not guilty" was necessary. On motion of the plaintiff, the court ordered the railway company to file the particulars of its defense, which was done. No objection was made to the statement filed. Under the fifth ground stated, the railway company clearly had the right to introduce any evidence which showed that the plaintiff's intestate was per se guilty of contributory negligence, or, being relevant, tended to show along with the other facts and circumstances of the case contributory negligence.

From what has been said, it follows that the court is of opinion that the trial court erred in refusing to give instructions A, B, and E offered by the railway company, and in giving instruction No. 7, which is in conflict with them.

[4] The refusal of the court to give the following instruction offered by the railway company is assigned as error: "The court instructs the jury that, while they are the judges of the facts, the court is the judge of the law, and it is the duty of the jury to accept and act upon the law as stated in the instructions; they applying the facts as they may determine them thereto."

While the instruction in question correctly stated the law, no prejudice resulted to the plaintiff in error from the court's refusal to give it, since the court stated to the jury, after reading to them the other instructions given, that the court was the judge of the law as applied to the case, and they were the judges of the facts and the weight of the testimony.

[5] The court refused to permit the railway company to introduce evidence tending to show that the plaintiff's decedent had the reputation among his fellow employes as a fast runner and had previous to the accident in which he was injured, and at the same point, disregarded the speed ordinance. This action of the court is assigned as error.

The general rule is that such evidence is not admissible.

Prof. Wigmore, in his work on Evidence, § 65, in discussing the admissibility of evidence of that character, says: "A few courts have shown an inclination to admit exceptionally the character of a person charged with a negligent act (contributory negligence if a plaintiff) as throwing light on the probability of his having acted carelessly on the occasion in question, provided that the other evidence leaves the matter in great doubt, or that the evidence is purely circumstantial, or (as sometimes put) that there are no eye-witnesses testifying. * * * Such evidence is no doubt likely to be of some probative value in such cases, and under the above limitations is hardly contrary to the ordinary policy of avoiding confusion of issues (ante 64). As a matter of law, however, the doctrine is maintained in a few jurisdictions only and has been expressly repudiated in many."

[6] Even in those jurisdictions where this exceptional rule prevails, as stated by Prof. Wigmore, the rejected evidence would not have been admissible under the facts of this case, since the uncontradicted evidence shows that the engineer was running his engine at a speed of from 12 to 15 miles an hour instead of 4 miles, the maximum speed permitted by the ordinance. The court properly rejected the evidence.

For refusing to give instructions A, B, and E offered by the railway company, and for giving instruction No. 7, the judgment complained of must be reversed, the verdict of the jury set aside, and the cause remanded for a new trial to be had not in conflict with the views expressed in this opinion.

Reversed.

(115 Va. 20)

CAMDEN v. VIRGINIA SAFE DEPOSIT & TRUST CORPORATION.

(Supreme Court of Appeals of Virginia. June 12, 1913.)

1. BANKS AND BANKING (§ 317*)—TRUST COMPANIES—DISTRIBUTION OF ASSETS—BILL BY DIRECTORS AND STOCKHOLDERS—JURISDICTION.

Where a safe deposit and trust corporation had large assets and liabilities, and not only conducted a bank with branches throughout the state, but acted as a bonding company, as executor and trustee, and had received a conveyance by its president, for the benefit of depositors and creditors, of real and personal property valued at \$200,000, and it appearing to its directors that it was doubtful whether it could be successfully continued after its president had been incapacitated by illness, they were authorized to file a bill for the administration of the corporation's assets in equity, so as to protect the interests of all concerned.

[Ed. Note.—For other cases, see Banks and Banking, Cent. Dig. § 1222; Dec. Dig. § 317.*]

2. CORPORATIONS (§ 310*)—DIRECTORS—DUTIES—PROPER PERFORMANCE.

What constitutes proper performance of the duties of a director of a corporation is a question of fact, which must be determined in each case in view of all the circumstances, the character of the company, the condition of its business, the usual method of managing such companies, and all other relevant facts.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 1352-1362; Dec. Dig. § 310.*]

3. BANKS AND BANKING (§ 54*)—DIRECTORS—NATURE OF DUTIES—TRUSTEES.

The directors of a bank are not only trustees for stockholders, but owe an even earlier duty to depositors, the law requiring a strict performance of those duties, it not being sufficient to exculpate a director that no actual dishonesty could be shown, or that it could not be proved that he had been influenced by interested motives; he being required to discharge the obligations of his trust with fidelity for the benefit of stockholders and depositors.

[Ed. Note.—For other cases, see Banks and Banking, Cent. Dig. §§ 92-98, 105-107; Dec. Dig. § 54.*]

4. BANKS AND BANKING (§ 317*) — TRUST COMPANIES—ADMINISTRATION OF ASSETS—BILL—MAJORITY OF DIRECTORS.

Since directors of a trust company are liable to stockholders and creditors for any damage that may accrue by reason of any negligence on their part in case the assets of the corporation are inadequate to satisfy its liabilities, they are authorized, in case of doubt, to file a bill for the administration of the company's assets in equity.

[Ed. Note.—For other cases, see Banks and Banking, Cent. Dig. § 1222; Dec. Dig. § 317.*]

5. RECEIVERS (§ 74*)—TRUST COMPANIES—PAYMENT OF ASSETS—INJUNCTION—CONTEMPT.

Where receivers were appointed for a trust company, and an order granted requiring surrender of all assets of the company, including funds in the hands of branch managers to the receivers, and one of such managers, with knowledge of the order, wrongfully paid the company's indebtedness to a depositor to her, he was guilty of contempt.

[Ed. Note.—For other cases, see Receivers, Cent. Dig. §§ 132-135; Dec. Dig. § 74.*]

6. CONTEMPT (§ 81*)—SATISFACTION OF JUDGMENT.

Where a branch manager of a trust company, with knowledge of the appointment of receivers therefor, and of an order requiring the surrender of the company's funds to the receivers, wrongfully paid a depositor's balance to her, for which he was convicted of contempt and ordered to be imprisoned until he paid over the amount or was discharged by order of court, his payment of the money, or his inability to do so on account of poverty, insolvency, or other cause not attributable to his fault, should be accepted as a satisfaction of the contempt.

[Ed. Note.—For other cases, see Contempt, Cent. Dig. § 272; Dec. Dig. § 81.*]

Appeal from Corporation Court of Alexandria.

Bill by Thomas J. Fannon and others, as directors and stockholders of the Virginia Safe Deposit & Trust Company, against such company for the administration of its affairs in equity. Receivers having been appointed, and R. Lee Camden, manager of the defendant's Lovington branch, having paid out money on deposit to the depositor with knowledge of the receivership, an application was made by them to recover the amount so paid from the payees and from Camden, and, from a judgment adjudging him guilty of contempt, he appeals. Affirmed.

Harrison & Long, of Lynchburg, for appellant. S. G. Brent, of Alexandria, for appellee.

KEITH, P. This suit originated in a bill filed by Thomas J. Fannon and others, as directors and stockholders of the Virginia Safe Deposit & Trust Corporation, in which it is stated that the defendant was incorporated under the laws of the state of Virginia, with its principal office and place of business in the city of Alexandria, Va., and had been for some years past engaged in the business of a trust and bonding company in said city; that it received deposits as a bank, and had numerous branches in various parts of Virginia where deposits of money were received, and that said company acted as a bonding company, executor, trustee, etc.; that there were deposits of large amounts of money with the company, and that it possessed large resources and assets, ample it was believed to meet all its obligations to depositors and creditors, and to all estates and trusts for which it was bound; that owing to the illness of the president of the defendant, and being without reasonable assurance that he would be able personally to conduct its affairs for some time to come, the complainants found themselves unable to carry on the business of the defendant; that while it was believed that the assets of the corporation would be ample to meet all of its obligations, yet as there would be calls, in the near future, for large sums of money, they doubted their ability to raise the same, deprived of the services of their president, nor could they hope successfully

to conduct the business of the defendant in the future; that because of these conditions the purposes for which the company was formed have failed, and it cannot be longer conducted either profitably or to serve any purpose of its creation or existence; that for the protection of its assets for the benefit of its depositors, for those for whom it had acted as executor, trustee, etc., and for those for whom it had given bond, it was necessary and imperative that its affairs be taken charge of by a court of equity, that a receiver or receivers be appointed, and that its assets and resources be collected and realized upon and distributed amongst those entitled thereto equitably as their interests might appear; that complainants are all of its directors, except its president, and have approved this application to the court, as appears by a resolution of the directors attached to and asked to be read as a part of the bill; that in order to secure all depositors and other creditors against any possibility of loss, in any event, the president of the defendant had conveyed to it large properties, mostly valuable real estate, of an estimated value of \$200,000. Wherefore the complainants pray that the Virginia Safe Deposit & Trust Corporation be made a party defendant to the bill and required to answer the same, an answer under oath being waived; that a receiver or receivers may be appointed for the said defendant; that its assets may be collected and distributed and its affairs wound up under orders of the court.

To this bill one of the plaintiffs made oath, and at a subsequent day the corporation appeared by its counsel and filed its answer, in which it says "that it admits all the allegations of the bill of complaint and joins with the complainants in the request that a receiver be appointed for it, and that its affairs may be wound up under orders of this court."

Thereupon receivers were appointed of the Virginia Safe Deposit & Trust Corporation and all the branches thereof, and were directed to take charge of all the assets of the defendant and its branches, and all property, real, personal, and mixed, to collect all debts, and hold the same subject to the orders of the court.

On June 10, 1911, the receivers reported that R. Lee Camden, the manager of the branch of the defendant company at Lovington, Va., had paid out to Mrs. F. H. Kidd on a certificate of deposit the sum of \$2,111.08, and divers sums to certain other parties, which need not be further referred to.

The cause coming on to be heard on the 15th day of June, 1911, upon the papers formerly read and the report of the receivers, a rule was directed to be issued against R. L. Kidd, Mrs. F. H. Kidd, his wife, and R. Lee Camden, the manager of the Lovington branch, returnable within 10 days, "to show cause, if any they can, why they should not

be proceeded against for contempt, and further why judgment should not be entered against them" for the amount of the payment.

Kidd and his wife, and Camden, filed their answers to this rule, and such proceedings were had as resulted in a decree of July 21, 1911, which recites that the sum of \$2,193.33 was turned over by Camden, manager of the branch of the corporation at Lovington, Va., after he had been notified that the receivers had been appointed, to R. L. Kidd as agent for his wife, Mrs. F. H. Kidd; that the said sum had not been returned to the receivers; and it was thereupon adjudged, ordered, and decreed that the said R. L. Kidd, Mrs. F. H. Kidd, and R. Lee Camden do restore, pay, and turn over forthwith to the receivers in the cause the said sum of \$2,193.33, with interest thereon from the 29th day of December, 1910, and a decree was entered in favor of the receivers against the said parties, jointly and severally, for the said sum, with interest thereon. It was further decreed "that, unless the said R. L. Kidd, Mrs. F. H. Kidd, and R. Lee Camden, or some one of them, shall, within thirty days from this date, restore, pay, and turn over to J. K. M. Norton and Howard W. Smith, receivers in this cause, the sum of \$2,193.33, with interest thereon from the 29th day of December, 1910, the clerk of this court is directed and ordered to issue an attachment directed to the sheriff of Nelson county, Virginia, requiring him to attach and take in custody the persons of the said R. L. Kidd, Mrs. F. H. Kidd, and R. Lee Camden, and deliver them to the sergeant of the city of Alexandria, * * * to be by the latter held and confined in the jail of the city of Alexandria, Virginia, until the said sum and interest and costs be paid as above directed, unless sooner released by order of this court or the judge thereof."

From that decree Kidd and wife obtained an appeal to this court, and the decree of the corporation court of Alexandria was reversed; the court being of opinion that "imprisonment for debt passed away in this state with the abolition of the *capias ad satisfaciendum* in 1849, and in a proceeding for contempt, where the contempt is not established, it is error to seek to enforce the return of money improperly paid by an order directing the imprisonment of the defendant, if the money be not paid." See *Kidd v. Va. Safe Dep. & Tr. Corp.*, 118 Va. 612, 75 S. E. 145. The court, in the course of its opinion, said, "We are of opinion that the evidence was not sufficient to find the appellants guilty of the contempt with which they were charged;" and the opinion concludes as follows: "The decree of July 21, 1911, so far as it affects the appellants, is erroneous, and must be reversed, and the contempt proceeding as to them dismissed."

The only appellants at that time were R.

L. Kidd and Mrs. F. H. Kidd. At a subsequent day R. Lee Camden filed his petition for an appeal from the same decree, which was awarded July 20, 1912.

The errors assigned by Camden in his petition are, first, that the court should have dismissed the rule on the ground that it was without jurisdiction.

[1] The bill was filed by certain individuals styling themselves directors and stockholders of the defendant corporation. The object of the bill plainly is to have all the assets of the corporation administered by a court of equity, so as to protect the rights and interests of all concerned. The bill states the case of the plaintiffs very briefly and succinctly, but from its averments no doubt is left that the affairs of the defendant were much complicated. It conducted not only a bank of deposit in Alexandria with branches in other parts of the state, but it acted as a bonding company, as executor, and as trustee. It had large liabilities and resources, including an assignment by its president, for the benefit of depositors and other creditors, of real and personal property of an estimated value, as stated in the bill, of \$200,000.

[2] In *Marshall v. F. & M. Savings Bank of Alexandria*, 85 Va. 676, 8 S. E. 586, 2 L. R. A. 534, 17 Am. St. Rep. 84, this court quotes with approval from Morawetz on Private Corporations, who, speaking with reference to the duties of directors, says (section 552) that "the plain and obvious rule is that directors impliedly undertake to use as much diligence and care as the proper performance of the duties of their office requires. What constitutes a proper performance of the duties of a director is a question of fact, which must be determined in each case in view of all the circumstances, the character of the company, the condition of its business, the usual methods of managing such companies, and all other relevant facts must be taken into consideration."

[3] In the course of its opinion in that case the court said: "The high decree of confidence and responsibility resting upon directors of corporations has often led the courts to regard them as trustees, and to declare the relationship existing between them and the stockholders to be that of trustees and cestui que trustent, respectively. If this can be asserted with regard to the generality of corporations, it is peculiarly and exceptionally true with regard to banking corporations. The directors of a bank are not trustees for the stockholders alone, but they owe an even earlier duty to the depositors. The law is, as it ought to be, very zealous in exacting the strict and thorough performance of these duties, and it is in the scrutiny of possible breaches of them that the rigid rules which govern trustees have been applied. It is not enough to exculpate a director that no actual dishonesty can be

shown; that he cannot be positively proved to have been influenced by interested motives."

Such being the relations that the directors occupy towards the corporation, the duties which they owe the creditors and depositors, and the obligations which they incur if those duties be not faithfully performed, it would seem to follow that in the faithful discharge of their duties it would be proper for them to apply to a court of equity so to administer the affairs of the embarrassed corporation as to diminish as far as possible the injury to all concerned, including creditors, depositors, and stockholders. Owing to the relation existing between the directors and the corporation, they must be presumed to have an intimate and intelligent acquaintance with its affairs, and to be able to direct and assist in realizing its assets and in ascertaining its obligations, and to that end to apply to a court of equity for its assistance.

[4] For another reason directors should be allowed to file such a bill as that before us. If the assets of the corporation prove inadequate to satisfy its liabilities, the directors are liable to stockholders and creditors for any damages which may accrue by reason of any negligence on their part, and it would seem to be nothing more than just that they should be allowed to come into court and defend themselves by anticipation against any possible charge of neglect of duty as directors, or if such neglect in fact existed use all the means at their disposal to repair the consequences of their default to themselves and to others.

This bill is in no sense one to wind up the corporation. Its sole object is to collect the corporation's assets and distribute them equitably among those entitled.

In *Thompson on Corporations* (2d Ed.) § 6485, it is said: "The mere insolvency of a corporation, however extreme, will not operate as a dissolution of the corporation. While this may be a ground for the appointment of a receiver or an assignment for the benefit of all creditors, still a corporation may exist as a legal entity without any property or assets, and that by unfortunate business transactions it has become totally bankrupt, or by some extraordinary disaster has been stripped of all its property, so that it is unable to continue its business or pay its existing indebtedness, still it is not dissolved."

Nor does the appointment of a receiver operate a dissolution of the corporation; and this is true though the receiver, in the discharge of his duties, may sell and dispose of all the corporation property. *Id.* § 6486.

We are of opinion that the court had jurisdiction to appoint receivers, and to collect and distribute the assets of the corporation.

As we have seen, the case of *Kidd v. Va. Safe. Dep. & Tr. Corp.*, *supra*, went off upon

want of proof to establish the contempt. Kidd and his wife had no relation to the corporation other than as depositors. They denied that when they collected the money due upon the certificate of deposit they had any knowledge of the appointment of receivers to take charge of the assets of the corporation, and the court held the proof to be insufficient to overcome that denial. With reference to the appellant, however, the case is different. He was the manager at the town of Lovington, Nelson county, Va., of a branch of the Virginia Safe Deposit & Trust Corporation. The trust company was itself in possession of the money deposited in that bank and stood towards its depositors in the relation of a debtor to creditors. Camden was the mere custodian and agent of the trust company, the manager of its affairs, and subject to its orders with respect to the business intrusted to him.

[5] In his answer to the rule he says that about 10 o'clock on the morning of the 29th of December, 1910, while he was waiting on a customer, he received a telegram as follows: "Receivers were appointed last evening for Virginia Safe Deposit & Trust Corporation. Close doors of your branch and transmit all funds on hand to the receivers by express. Receive no further deposits. [Signed] C. J. Rixey, Pres. John D. Barbour, J. K. M. Norton, Receivers." That he was greatly shocked by the news, and at the earnest solicitation of Kidd, who represented that the loss of the deposit made by his wife, which represented the savings of a lifetime and the fruits of hard work as a teacher, would result in her death, he yielded to his request and paid to him the sum of \$2,193.33, the amount of the said certificate of deposit held by Mrs. Kidd.

Testifying as a witness in his own behalf, in answer to a question propounded to him by the court, as to whether or not Kidd knew that the bank had been put into the hands of receivers, he said:

"I think so.

"Q. Can you be positive about that? A. I think so. I know that I recall the fact that Mr. Whitehead and Mr. Kidd—they promised not to give out the fact that I had paid them the money.

"Q. Was anything said if you should be called upon to make good the money that you paid Mr. Kidd and Mr. Whitehead at that time? A. I do not recall what Mr. Kidd said about that. I know that they both promised not to give out the fact that the money was paid them. At least I requested them not to do so. I know that."

So that it appears, not only that he received a telegram notifying him that the corporation had been put into the hands of receivers, and directing him to close the doors of the branch of which he was the manager and transmit all funds in his possession to the receivers by express, and receive no fur-

ther deposits, but that with full knowledge of all these facts, and with consciousness that he was doing that which he had not the lawful right to do, he wrongfully paid over the money, with an injunction that his act was to be kept secret.

In section 145 of High on Receivers it is said that courts are reluctant to interfere by receiver with property of third persons, and that the receiver should assert the claim by independent action; but in this case the court was not interfering with property of third persons through its receivers. It had required its receivers to take possession of all of the property of the corporation, and the receivers had duly notified the manager at Lovington of this order. All the property within his possession as manager was the property, not of a third person, but of the corporation.

In section 144 of the authority just quoted it is said that: "The receiver of an insolvent corporation may, by petition in the cause in which he was appointed and without the necessity of an independent suit, procure the transfer and delivery of a note held by officers of the corporation as a part of its assets, even though such officers are not parties to the cause. And when a receiver is appointed over real property, of which the owner is in possession, the proper course is to apply to the court to have the owner deliver possession to the receiver, since the latter cannot distrain upon the owner in possession, as he is not a tenant of the receiver. Such procedure does not conflict with the principle that no man shall be deprived of his property without due process of law, since the surrender to the receiver does not affect the ultimate question of the right to the property, any more than does the levy of an attachment; the purpose being merely to secure the property by getting it into the receiver's possession, so that it may be safely delivered to the party who shall be finally determined to be entitled thereto. And the order for the surrender of property to the receiver may, if necessary, be enforced by process of attachment."

In *Ames v. Trustees of Birkenhead Docks*, 20 Beav. 332, it was said: "There is no question but that this court will not permit a receiver, appointed by its authority, and who is, therefore, its officer, to be interfered with or dispossessed of the property he is directed to receive by any one, although the order appointing him may be perfectly erroneous; this court requires and insists that application should be made to the court for permission to take possession of any property of which the receiver either has taken or is directed to take possession, and it is an idle distinction that this rule only applies to property actually in the hands of the receiver. If a receiver be appointed to receive debts, rents, or tolls, the rule applies equally to all these cases, and no person will

be permitted, without the sanction or authority of the court, to intercept or prevent payment to the receiver of the debts, rents, or the tolls, which he has not actually received, but which he is appointed to receive."

In *Ex parte Cohen*, 5 Cal. 494, it is said: "Courts of equity * * * have the power to appoint receivers, and to order them to take possession of the property in controversy, whether in the immediate possession of the defendant or his agent, and in proper cases they can also order the defendant's agents or employés, although not parties to the record, to deliver the specific property to the receiver." And it was further said in that case that where the parties were served with a rule to show cause why they should not deliver certain property in their possession to the receiver, appointed in a case to which they were not parties, and in obedience to the rule they appeared and contested the matter before the court, that when they appeared and filed their answer to this rule the court acquired full jurisdiction over their persons as well as the subject-matter.

As far as we have proceeded in this case, we are of opinion, as we have already stated, that the bill was a proper one for the appointment of receivers; that they were ordered to take charge of all the assets of the corporation to be administered by the court; that the appellant was duly notified of the appointment of the receivers and their duties in the premises; and that in flagrant disregard of his duty he wrongfully paid over the funds of which he was the custodian, and in so doing was guilty of a contempt of court.

[8] We are further of opinion that the payment of the money in accordance with the terms of the decree, or inability upon the part of appellant to pay it on account of poverty, insolvency, or other cause not attributable to any fault of his, should be taken as a satisfaction, and all further proceedings for contempt should be discontinued.

Affirmed.

(115 Va. 160)

MURGUIONDO v. NOWLAN'S EX'R et al.
(Supreme Court of Appeals of Virginia. June 12, 1913.)

WILLS (§ 111*)—EXECUTION—PLACE OF SIGNING.

Signing of a will, required by Code 1904, § 2514, to be "in such manner as to make it manifest that the name is intended as a signature," need not necessarily be at the end, and so in case of an attested holographic will the signature of testator affixed in the presence of the witnesses, in the margin of the last page, nearly opposite the end, is sufficient.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 267-275; Dec. Dig. § 111.*]

Error to Chancery Court of Richmond.

Will of Bettie W. Nowlan, offered by Robert E. Macomber, executor, was admitted

to probate, and Mary de Murguiondo, one of the contestants, brings error. Affirmed.

R. R. Hicks, of Norfolk, and H. M. Smith, of Richmond, for plaintiff in error. Meredith & Cocke and Leake & Buford, all of Richmond, for defendants in error.

KEITH, P. Robert E. Macomber, named as executor in a certain paper writing dated March, 1910, offered it for probate in the chancery court of the city of Richmond as the last will and testament of Bettie W. Nowlan. All of the parties interested in the probate were summoned to appear before the court, a jury was asked for and impaneled, and, the testimony of the subscribing witnesses having been introduced, Mary de Murguiondo, one of the parties contesting the will, demurred to the evidence; but the court overruled the demurrer and entered a judgment declaring the said paper writing so offered to be the true last will and testament of Bettie W. Nowlan, deceased, and thereupon a writ of error was awarded the appellant.

The paper which was produced and probated as the will of Bettie W. Nowlan, deceased, is written upon several sheets, and upon the margin of each sheet appears the name of Bettie W. Nowlan. When the attesting witnesses were called upon to witness the execution of the will, each one of the sheets of paper upon which the will appears, except the last, had already been signed by the testatrix, who in the presence of the witnesses affixed her signature to the margin of the last sheet nearly opposite to the end of the will, which concludes as follows:

"Witness my hand and seal, which I have set to this my will consisting of six pages of paper, each of which bears my signature in the margin thereof, on this the — day of March, 1910, at Richmond, Virginia.

"[Seal.]"

Then follows the attestation of the witnesses as follows:

"Signed, sealed, published and declared by Bettie W. Nowlan, as and for her last will and testament in the presence of both of us, both being present at the same time, and both of us in her presence and at her request and in the presence of each other have hereunto subscribed our names as witnesses.

Hugh W. Jones.

"E. G. Thomas."

In their testimony before the jury, these witnesses to the will established every formality required by the statute law of this state with respect to the execution of a will, and the sole question for our determination is whether a signature of the testatrix upon the margin of the will is such a signature as is contemplated by our statute.

Our statute of wills, which is found in section 2514 of the Code, as originally passed, was, as is stated by Judge Allen in *Waller v.*

Waller, 1 Grat. (42 Va.) 465, 42 Am. Dec. 564, a transcript of 29 Car. 2 with the exception that it dispenses with subscribing witnesses in cases of wills wholly in the handwriting of the testator, while the English statute required the will to be attested and subscribed by three or more credible witnesses, in holographic as well as in other wills. In 1849 our statute was amended by the introduction of the words "in such manner as to make it manifest that the name is intended as a signature." There have been numerous cases before this court arising under that statute, but they were all cases of unattested holograph wills.

In *Ramsey v. Ramsey*, 13 Grat. (54 Va.) 664, 70 Am. Dec. 438, Roy v. Roy, 16 Grat. (57 Va.) 418, 84 Am. Dec. 696, and *Warwick v. Warwick*, 86 Va. 596, 10 S. E. 843, 6 L. R. A. 775, it was held that the name of the testator appearing in the will was not placed there "in such manner as to make it manifest that the name was intended as a signature," and the wills were rejected.

Dinning v. Dinning, 102 Va. 467, 46 S. E. 473, was also a holograph will, in which the name of the testator appeared as follows: "I, William Dinning, say this is my last will and testament"—and it was held to be sufficiently signed. Judge Harrison, delivering the opinion, said: "The signature is at the end of an apparently completed instrument, and followed by only eight words, which do not indicate a purpose to add anything more, or to take anything from what had been written, but, understood according to their usual acceptance, constitute an emphatic declaration, that the signature was intended to authenticate all that had preceded it, as the final consummation of the testator's purpose."

The will under consideration is an attested will, and the Virginia cases we have thus far referred to shed but little light upon the question to be decided.

Waller v. Waller, supra, was also a case of an unattested holograph will, but in the discussion of the case Judge Allen goes into the whole subject very fully and with his accustomed learning and ability, and his opinion sheds a flood of light upon the case under consideration, even though, strictly speaking, it may, with respect to attested wills, be considered in some degree obiter. The will in *Waller v. Waller* was a holograph will, in which the name of the testator appears only in the exordium: "In the name of God, amen, I, John Waller of the county of Henry and state of Virginia, * * * being desirous to dispose of all such worldly estate as it hath pleased God to bless me with, I give and bequeath the same in manner following." There was no end signature, it was unattested, and the will was rejected. Judge Allen in his opinion says: "The act of 1840 requires written wills, whether of real or personal estate, to be executed with the same solemnities. That law governs this

case and relieves us from many of the inconveniences growing out of the admission of parol testimony to prove the testamentary intent. The will, whether of realty or personalty, is a statutory disposition of the property. The very paper must have been intended as and for the last will. Where the legal formalities are complied with, it stands as the last will, unless canceled or revoked in the mode prescribed. If those formalities are wanting, parol testimony as to testamentary intent cannot supply the defect. It is the policy of the law to guard against setting up or destroying wills by such testimony. * * *

The inquiries now to be made in regard to a paper offered for probate relate to the connection of the instrument with the testator so as to guard against forgery, the presence of those formalities required to establish its finality, and the sanity and freedom of the testator to show his knowledge of the character of the act, his capacity to do it, and the absence of all improper constraint and influence.

"In attested wills the connection between the testator and instrument is shown by the signing. Where the attesting witnesses prove he signed the instrument, or another in his presence by his direction signed it for him, the fullest evidence is obtained that the very paper produced is the one executed.

"The force of this evidence was somewhat impaired when the courts held that it was not necessary the subscribing witnesses should see him sign, provided he acknowledged the signature to the paper they attested, as a mere acknowledgment was not so likely to be impressed on the mind as a formal execution in their presence.

"As the identity or connection of the instrument with the testator is the main fact to be determined by the proof of signing, there was not much danger to be apprehended in considering a signing of such a will at the top; the whole being in his handwriting as a sufficient signing. Proof of the handwriting of itself connected the testator with the instrument, and that proof was aided by the acknowledgment of the testator in the presence of the subscribing witnesses. * * *

"The connection of the testator with the instrument being thus ascertained in the various modes adverted to, the finality of an attested will is established by the publication and attestation. No man publishes an instrument as his last will and testament, and calls on witnesses to attest the fact, until he has completed the act. The attestation must be annexed or subscribed to a complete instrument, and to which, when so subscribed, no additions can be made. To the act itself the law attaches testamentary intent that it is a concluded instrument, and if the party is under no restraint, acts freely, and is of sane mind, no further proof is requisite to sustain the instrument as a will;

and no proof other than a revocation in the mode prescribed will be received to show a change of testamentary intent."

It would seem, therefore, from the opinion of Judge Allen that the main fact of the connection of the testator with the instrument may be established, not only by the signature of the testator in the presence of subscribing witnesses, but by the mere acknowledgment in their presence of his signature; that such proof has been deemed sufficient in all the later cases; and that the finality of an attested will is established by attestation and publication, for, to repeat a pregnant sentence in the opinion of Judge Allen, "no man publishes an instrument as his last will and testament and calls on witnesses to attest the fact until he has completed the act. The attestation must be annexed or subscribed to a complete instrument, and to which, when so subscribed, no additions can be made."

Meads v. Earle, 205 Mass. 553, 91 N. E. 916, 29 L. R. A. (N. S.) 63, was an appeal from a decree of the probate court disallowing an instrument as the last will of Sarah J. Armstrong. The appellee requested the judge to rule as matter of law that the instrument was not signed by the testatrix and attested and subscribed in her presence by three competent witnesses in accordance with the requirements of the statute. The judge declined so to rule, and found as facts that, so far as the will is in manuscript, the handwriting including her name or signature is that of Sarah J. Armstrong; that, although she did not sign at the end of the instrument, yet when she wrote her name at the beginning of the will it was with the intention that this act was a signing of the will; that independently of the attestation clause she by words and conduct acknowledged and declared the will before the subscribing witnesses; and that the subscribing witnesses signed the attestation clause in her presence at her request and upon her acknowledgment and declaration that it was her will, although neither of them saw her signature. Having so found he ruled that "the document was signed, attested, and subscribed within the meaning of the statute, and that it was a valid will." The Supreme Court said: "The case is before us upon his report. If the ruling requested by the appellee should have been given, a decree is to be entered affirming the decree of the probate court; otherwise a decree is to be entered reversing that decree, admitting the will to probate, and remanding the case to that court for further proceedings." In the course of the opinion it is said: "There can be no doubt that she intended to make, and supposed she had made, a valid will. The care she took in writing the paper, in seeing to its attestation, and in putting and keeping it in a safe place shows that. She does not appear to have been advised or assisted by

any one. She personally superintended the whole work. There was, however, no signature at the end; and it is contended by the contestants that the single justice was not warranted in finding that she wrote her name at the beginning *animo signandi*.

"The finding must be interpreted to mean not simply that after writing her whole will she adopted as her signature her name as written previously in the exordium, but that at the time she wrote her name there she intended that it should stand as her signature to the will when completed, and that this intent continued to the end. Such a finding is perfectly consistent with what she did, and is not inconsistent with any act of hers. It explains any apparent incongruity in the evidence. It welds all the circumstances into one harmonious whole and is supported by the evidence."

It is to be borne in mind that, when the attesting witnesses were called upon in this case, five sheets of the will had been identified by the signature of the testatrix upon the margin of each page, and that in the presence of the witnesses she affixed her name for the sixth and last time to the margin of the will as and for her signature, and declared it to be her last will and testament. The jury by their verdict have declared that the will was duly executed, the judge of the probate court has approved their verdict, and we have no choice but to affirm the decision, unless we are prepared to hold that a literal signing at the foot or end of the instrument is necessary in all cases, and this we are not prepared to do.

We gather from our statute, from the decisions of this and other courts, and especially from the opinion of Judge Allen in *Waller v. Waller*, that in holographic wills proof of the handwriting establishes the identity of the paper and the connection of the maker of the will with it; that the finality of such will depends upon the signature, which must be made "in such manner as to make it manifest that the name is intended as a signature"; that, in the case of attested wills not in the handwriting of the testator, the instrument is incomplete until attested by two witnesses in the mode prescribed by section 2514 of the Code; that when so attested it becomes a complete and final testamentary act, for, again to quote the language of Judge Allen: "The attestation must be annexed or subscribed to a complete instrument, and to which, when so subscribed, no additions can be made. To the act itself the law attaches testamentary intent that it is a concluded instrument, and if the party is under no restraint, acts freely, and is of sane mind, no further proof is requisite to sustain the instrument as a will."

We are of opinion that the judgment complained of should be affirmed.

Affirmed.

(115 Va. 119)

KINCHELOE et al. v. GIBSON'S EX'X.

(Supreme Court of Appeals of Virginia. June 12, 1913.)

1. APPEAL AND ERROR (§ 220*)—OBJECTIONS IN LOWER COURT—REPORT OF REFEREE.

Questions not raised by objections to commissioner's report stating an account in the lower court will not be noticed on appeal.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1325-1332; Dec. Dig. § 220.*]

2. EXECUTORS AND ADMINISTRATORS (§ 483*)—EXPENDITURES—TAXES.

Taxes accruing before the death of a testator, leaving practically all his realty to life tenants with the remainder over, are properly paid by the executrix, and she is entitled to credit therefor.

[Ed. Note.—For other cases, see Executors and Administrators, Dec. Dig. § 483.*]

3. EXECUTORS AND ADMINISTRATORS (§ 483*)—CREDITS—INTEREST ON INCUMBRANCES.

An objection that an executrix should not be credited with interest on incumbrances because a liability of the life tenant will be overruled, where it is shown that the profits of the estates in the hands of the executrix, in an amount equal to or greater than the interest paid, had been applied for the benefit of the estate in paying off incumbrances.

[Ed. Note.—For other cases, see Executors and Administrators, Dec. Dig. § 483.*]

4. LIFE ESTATES (§ 16*)—INTEREST ON INCUMBRANCES—LIABILITY OF TENANT.

The rule that a tenant for life of property subjected to incumbrances must keep down the interest accruing on such incumbrances during the continuance of his estate does not apply where the obvious purpose of the will was to make a general charge of all testator's debts on his real estate in event his personal estate proved insufficient.

[Ed. Note.—For other cases, see Life Estates, Cent. Dig. § 36; Dec. Dig. § 16.*]

5. LIFE ESTATES (§ 19*)—INSURANCE—DUTY OF LIFE TENANT.

Where a will gave practically all of testator's real estate to his sister for life, remainder to other collateral kin and all his personalty and made his debts, a charge on the whole estate, providing the order in which the realty should be sold, the life tenants will not be required to maintain insurance where it is probable that most of the realty will be sold to pay outstanding debts.

[Ed. Note.—For other cases, see Life Estates, Cent. Dig. § 40; Dec. Dig. § 19.*]

Appeal from Circuit Court, Fauquier County.

Suit for construction of will and for accounting by Gibson's executrix against Gibson and others. From the decree rendered J. Gibson Kincheloe and others appeal. Modified and affirmed.

Keith & Richards, of Warrenton, for appellants. Moore, Barbour, Keith & McCandlish and J. Stuart White, of Warrenton, for appellee.

CARDWELL, J. The appeal taken in this case is from two decrees of the circuit court of Fauquier county entered in the chancery cause pending in said court under the style of Gibson's Executrix v. Gibson et al., the

one entered on the 27th day of July, 1909, and the other on the 31st day of January, 1911, which chancery cause involved the construction of the last will and testament of Gilbert B. Gibson, a lawyer, late of Fauquier county, and a settlement of his estate.

The said testator died in the early part of the year 1907, and his will, bearing date December 18, 1906, was admitted to probate March 27, 1907, and Nellie R. Gibson, a sister of the testator, qualified as the sole executrix thereof, her sister, the other executrix named, declining to qualify as such. Said testator at the date of his will and at his death appeared to own considerable personal estate and several parcels of real estate, but was largely indebted, both primarily and as surety for others.

By his will the testator purposed to bestow his bounty, consisting of the personal and real estate owned by him, upon his collateral kin, but charged both his personal and real estate ultimately with the payment of his debts, endeavoring to designate the order in which the same should, if found to be necessary, be subjected to sale for that purpose. The first clause of the will devised a certain portion of testator's farm called Sunnyside, containing 170 acres, more or less, to his brothers, Joseph A. and Douglas Gibson, in trust for the sole and separate use of his sisters, Mary J., Margaret V., Fannie E., and Nellie R. Gibson, during their lives, with power to each to dispose absolutely by deed or by will of one-eleventh part of said land, to take effect at the death of the last surviving of the four sisters. The remaining seven-elevenths of this tract of land the testator devised by the second clause of his will, after the death of his said sisters, in equal shares to his other brothers and sisters named and their descendants; but it appears in the record in regard to this particular tract of land that by deed executed by said testator bearing date December 24, 1883, though only found among the papers of one of the deceased's grantees after his death and after the institution of this suit, the said testator, Gilbert B. Gibson, had conveyed this land (Sunnyside) to John M. Gibson, Joseph A. Gibson, and Douglas Gibson, as trustees, for the sole and separate use of the four sisters of the testator named in the first clause of his will, and Louisa Gibson, who died before the testator; and it further appears that throughout his life the testator managed this farm for the benefit of these sisters and accounted to them regularly for the rents, issues, and profits thereof, and that there stood on his ledger an account showing a balance due by him at the time of his death to these four sisters of \$517.64 arising from his operations of the Sunnyside farm during the year preceding his death, which indebtedness the executrix of his will paid to the sisters out of the assets of the testator's estate.

The third and fourth clauses of the will have no material bearing upon the controversy here. By the fifth clause the said four sisters of the testator are devised during their lives the residue of Sunnyside farm and the testator's land bought of Lucius, known as the Briar Patch, containing 230 acres, more or less, and "the residue of my personal property," and, further, "If my personal property other than that I have bequeathed specifically be not sufficient to pay my debts, the Lucius tract must be the first land to be sold for that purpose."

The sixth clause of the will provides that upon the death of testator's sisters Mary J. and Nellie R. Gibson the specific personal property willed them by the fourth clause, consisting of his household and kitchen furniture as well as testator's residence and adjacent land, should go to his niece, Anna W. Kincheloe, for her life, and upon her death to go to her daughter, Ada Kincheloe, with certain other provisions for the disposition of this property in the event that the said Ada Kincheloe should die without issue.

By the seventh clause of the will it is provided that upon the death of the four said sisters of the testator his 75-acre tract of land, being the residence of Sunnyside, "*or my part of same or proceeds thereof if sold, after the payment of my debts, that may remain,*" should go to his grandnephew, J. Gibson Kincheloe, and grandnieces, Orra Mason Kincheloe and Ada Kincheloe, and any children that might be born to James M. Kincheloe and Anna W. Kincheloe. This residence of Sunnyside, containing about 75 acres, together with other real estate of the testator, was at the time of his death subject to a specific lien, evidenced by deed of trust, to secure the payment of the sum of \$3,552, spoken of in this record as the Eliza N. Gibson dower fund, and by the same (seventh) clause the testator provided that upon the death of his said four sisters "I give and devise the Lucius tract, containing 230 acres, more or less, or any part thereof or proceeds thereof if sold, that may remain after the payment of my debts" to certain nieces and nephews therein mentioned.

The eighth clause of the will is: "I devise to my grandnephew, J. Gibson Kincheloe, my vacant lot in Upperville, Va., on which the house thereon was burned and my ground rent of nine dollars a year on T. S. Dunbar's lot with wheelwright and blacksmith shop thereon. My personal property bequeathed under the fifth (5) clause of this will, if not exhausted in the payment of my debts, or such as may remain, if any, after the payment of my debts, I give absolutely to my sisters, Mary J., Margaret V., Fannie E. and Nellie R. Gibson"—and the ninth or last clause of the will is: "The personal property in the fifth clause of this will is to be first applied to the payment of my debts, if not sufficient to pay all, then the Lucius

land is to be sold for that purpose and if the proceeds of sale are not sufficient, then the seventy-five acres of land or thereabouts referred to in said fifth clause is to be sold for that purpose."

It will thus be seen that the testator's four named sisters were by his will made life tenants practically of his whole real estate; his dwelling in the town of Upperville, with lot attached thereto; 170 acres a portion of Sunnyside farm; 230 acres, the Lucius tract; 75 acres, the residue of Sunnyside; and two lots of 25 and 5 acres; a total of over 500 acres of land; and also testator's personal property, with remainder, after the death of the last surviving of the four sisters, over to certain other persons named, including J. Gibson Kincheloe, Orra Mason Kincheloe, and Ada Kincheloe, nephew and nieces of the testator, and any other children that might be born to James M. Kincheloe and Annie W. Kincheloe, who were to take the remainder after the said life estate in the 75 acres, residue of the Sunnyside tract, but this, as well as the testator's other real estate and his personal property, was charged with the payment of his debts and was to be sold for that purpose, if found necessary, in certain specified order, the said 75 acres to be the last sold.

The real estate devised by the will was taken charge of by the devisees thereof for life, and after the estate had been managed and administered for practically two years from her qualification the executrix of the will in February, 1909, filed the bill in this cause, the object of which was to have the direction of the court in the further administration of the estate and the ex parte accounts settled by her as executrix and filed, approved, and confirmed by the court in this cause, filing with her bill the last of her said accounts as the basis of this suit.

Upon the cause being matured for hearing, the court referred it to a master commissioner to state and settle the accounts of the executrix, the fourth clause of this decree of reference specifically directing the master to state and settle the accounts of the executrix commencing from the date of her qualification up to and including the second year of her administration which was in effect to require a restatement of the ex parte account of the executrix covering that period, settled and returned to court of date February 10, 1909, and in response to said decree of reference Commissioner G. L. Fletcher on June 5, 1909, filed his report. This report and the accounts returned therewith showed that the testator's estate, after paying the expenses of administration and the current accounts, still had outstanding against it an indebtedness of \$15,492, and that there was in the hands of the executrix applicable to the payment of said indebtedness only the sum of \$6,179.49, thus leaving an indebtedness against the estate of about

\$9,000 over and above the assets in the hands of the executrix, and under the control of the court in this cause.

To this report the infant defendants J. Gibson Kincheloe, Orra Mason Kincheloe, and Ada Kincheloe, by their guardian ad litem, filed certain exceptions, which made the contention that the commissioner in stating the accounts erroneously charged against the estate all of the interest accrued and accruing on all the indebtedness of the estate remaining unpaid, taxes, running expenses, etc., and gave all the income from the estate—rents, issues, and profits—to the life tenants, and that the interest on said indebtedness and taxes alone for the years 1907, 1908, and 1909 amounted to \$1,811.60.

By its decree of July 27, 1909, the court, in effect, ruled that the method adopted by the commissioner in stating the accounts of the executrix complained of in said exceptions was proper, but recommitted the cause to the commissioner for the correction of certain minor errors in the accounts. Later the Lucius tract of land, in which said infant defendants had no interest, was decreed to be sold, was sold, and the proceeds of sale, together with other assets of the said testator's estate brought within the control of the court, produced a considerable reduction in the outstanding indebtedness of the estate, but not enough to pay all of its indebtedness, and then followed other decrees in the cause leading up to a report by Commissioner Fletcher, filed on August 15, 1910, showing an unpaid indebtedness of the estate amounting to \$9,947.88 and a balance in the hands of the executrix of \$3,352.

To this report the said infant defendants filed exceptions, the second of which related to an indebtedness reported as an outstanding liability against the estate and known as the "Cover debt," and made the contention that said debt had been paid, which exception the court sustained, and thus eliminated the "Cover debt." The other of said exceptions made again the contention that the interest on the testator's indebtedness, taxes, etc., credited to the executrix as against the estate, should have been paid by the life tenants of the testator's property who received the income therefrom under the will of the testator, so that the 75-acre tract of land, in which said infant defendants have an interest after the death of the life tenants, would be relieved from the payment of any of the unpaid debts of the testator; that, if the charges of interest, taxes, etc., placed upon these infant defendants were eliminated as a charge against the testator's estate and charged against the life tenants thereof, the estate would be about relieved of any further indebtedness, and it would be unnecessary to sell the said 75-acre tract of land, but the court again overruled this contention, and by its decree entered January 31, 1911, amended the commis-

sioner's report so as to conform it to the court's ruling with respect to the "Cover debt," and as amended confirmed the report, and directed a sale of the 75-acre tract of land for the purpose of paying the remaining outstanding indebtedness against said testator's estate, from which decree and that of the 27th of July, 1909, this appeal is taken by the guardian ad litem of said infant defendants.

As stated, the contention of appellants is that, according to the true and proper construction of said testator's will, there was placed upon the life tenants Mary Jane, Nellie R., Margaret V., and Fannie E. Gibson, the burden of paying the taxes, interest on the debts secured on the property occupied by them as life tenants, cost of repairs and running expenses; that the executrix should not have received credit, in her settled accounts, for taxes and interest accrued during the period of 1907, 1908, and 1909 and paid by her to the amount, as alleged, of \$1,811.60; and that, if these items of interest and taxes had not been allowed the executrix, it would have increased by that amount the apparent balance in her hands applicable to the payment of debts, and correspondingly decreased the excess of liabilities over assets, and might have avoided the necessity for a sale of the 75-acre tract of land in which the appellants are alone as remaindermen interested.

We consider it wholly unnecessary to review at length in this opinion the several accounts of the executrix, Nellie R. Gibson, stated and reported by Commissioner Fletcher and acted on by the circuit court, since it appears that there are further accounts to be taken in the cause in which minor errors, if any, in the former accounts may be corrected.

The decree of January 31, 1911, complained of, does not hold that the executrix was entitled to credit for taxes paid on the property in the possession and control of the life tenants; on the contrary, it expressly holds, and in accordance with the settled law in such cases (*Downey v. Strouse*, 101 Va. 226, 43 S. E. 348), "that the life tenants are chargeable with all taxes and necessary repairs to the property remaining in their possession, and are required to keep the buildings on the same insured against fire, the policies to be taken out in the name of the life tenants and remaindermen and in the name of the trustee, where buildings are on property devised to the trustee." The fact is, as shown by the record and practically conceded in the brief of counsel for appellants, that the only taxes paid by the executrix and taken credit for in her executorial accounts were the taxes assessed against the testator's estate for the year in which he died, 1907, amounting to \$152.22, which taxes were properly to be paid by the executrix, and the payment thereof was

rightly credited to her in her accounts. It also appears that, instead of the life tenants getting the income from the real estate for the first year of the testator's death, the estate got it, and it, along with other assets, was applied to the payment of his debts.

The controlling question, therefore, for determination on this appeal is whether or not the circuit court erred in not ruling that the life tenants of the property held and enjoyed by them under the will of the testator, Gilbert B. Gibson, were bound for the payment of all the accruing interest on existing incumbrances upon the property created by the testator, and that payments of interest upon such incumbrances made by his executrix were not properly to be allowed her in the settlement of her accounts as executrix.

[1] The gravamen of the complaint made by appellants in their petition for this appeal is that the circuit court in its rulings has not placed (as it should have done) the burden upon the four sisters of the testator of paying out of their own means, the taxes, interest on testator's debts, repairs and running expenses of the property they took as life tenants and held during the years 1907, 1908, and 1909, but instead the executrix was given credit on her settled accounts for taxes, interest accrued, and running expenses during that period and paid by her to the amount, as alleged, of \$1,811.60. In the brief of counsel for appellants, however, other objections are made to the method adopted in the settlement of the executrix's accounts, and to certain payments allowed to her as credits against the estate, based upon a statement of facts, but we cannot find in the record that these objections were, by exceptions to the commissioner's reports, raised in the lower court or brought to its attention; nor is it pointed out either in the objections made here or in the record when the several items of interest paid by the executrix and credited to her, of which complaint is made, accrued; that is, whether they accrued before or after the death of the testator. The case was heard on the report of the commissioner and the accounts filed therewith September 18, 1910, and the exceptions thereto, and no complaint is made of the court's ruling other than that overruling the third of appellants' exceptions and confirming the report as to the items referred to in the exception, viz.: "All charges of interest on the indebtedness of Gilbert B. Gibson at the time of his death, as set out in the master commissioner's reports of June 5, 1909, October 7, 1909, April 20, 1910, and September 18, 1910. * * *

[2] We have seen that in her settled accounts the executrix has taken no credit for any taxes for years other than the year 1907, and inasmuch as taxes accrue and become personal charges against the owner of real estate as of the first day of February

of each year, and as it is to be presumed from the facts appearing in the record that the testator, Gilbert B. Gibson died subsequent to the first day of February, 1907, the taxes for that year were a personal charge against him and a preferred charge against his executrix, and therefore were properly paid by her, and she was rightly allowed credit for their payment in her accounts.

[3] The record does not bear out the contention of counsel for appellants that the life tenants received all of the rents, issues, and profits from testator's estate, and have cast the entire burden of accruing interest on the estate and, in effect, on the remaindermen. It is true that the record shows that the executrix took credit in the settlement of her accounts for certain payments of interest in the years 1907, 1908, and 1909, but when all the facts appearing in the record are looked to there was no other fair and proper way to state the accounts of the executrix for those years than as they were stated and approved by the court. The entire residue of the personal estate remaining after the payment of debts, like the real estate, was bequeathed to the four sisters, who were plainly the principal objects of his bounty, for life, while this remainder in the personal estate after the payment of debts, unlike the remainder in the real estate, was bequeathed to these life tenants and not to others. In the first year after the qualification of the executrix, it appears that the personal estate converted and applied to the payment of debts against the testator's estate amounted to over \$13,000, the greater portion of which was paid out by the executrix at once, and as to the residue she was charged with and accounted for interest thereon. It further appears from the record that, instead of the life tenants getting the income from the real estate for the first year following the testator's death, the estate got the benefit of it, as it had been applied to the payment of testator's debts. The commissioner in reporting the settlement of the ex parte account of the executrix for that year said: "After the death of Gilbert B. Gibson, it was considered to the best interest of the estate not to dispose of all the stock on the farm, but to operate the farm in the usual manner and sell the cattle when fattened and credit the estate with the proceeds." Pursuant to the plan referred to by the commissioner, as the account of the executrix for the first year shows, the estate was credited by the proceeds of 53 fatted cattle, which netted \$3,680.37, the greater portion of which cattle did not go off until December following the death of the testator, and no charge was made against the estate for housing, grazing, and fattening said cattle. The account also shows that the estate was credited that year (1907) with \$53 received from grazing other stock, and with the proceeds of corn raised, to the

amount of \$677.25, making an aggregate of \$1,525 actually received in the way of income credited to the estate from the farm lands during the year following the testator's death and applied in the reduction of the debts against his estate.

It is only claimed by the learned counsel for appellants that the aggregate of the items of interest and taxes paid during the first three years by the executrix and credited to her in her accounts amounted to \$1,811.60, and when the taxes for the first year, amounting to \$152.22, is deducted therefrom, the amount of interest included in the payments on the debts during the first three years of her administration was but \$1,659.38; whereas, as the record clearly shows, the estate has received benefits from the estate devised to the life tenants amounting to several hundred dollars in excess of the aggregate amount credited to her as payments of interest during the same years, leaving wholly out of view how much of the aggregate of the items of interest credited to the executrix, of which complaint is made, accrued in the lifetime of the testator. So that the record, as we view it, does not sustain or justify the complaint that the executrix has been erroneously allowed credit for the payment of taxes and interest in the settlement of her accounts to the injury of the appellants, and for the all-sufficient reason that these payments for which the executrix took credit were payments on the acknowledged debts of the testator and the interest thereon constituted as much an obligation on his estate as the principal of the debts themselves.

The situation in which the testator left his estate was simply this: His personal property, as he recognized to be probable, was not sufficient to pay his debts; certain of his real estate at his death was incumbered either by a trust charged thereon by him in favor of his four sisters or by trust deed creating a specific lien before the making of his will, to secure the payment of a debt, spoken of in the record as the Eliza N. Gibson dower fund, the principal of which debt was to become due and payable at the death of the said Eliza N. Gibson, and the interest thereon to be paid to her annually during her life; specific liens being upon the residue of Sunnyside in which appellants have an interest, as well as upon other real estate of the testator.

The testator, a trained lawyer and a man of affairs, is presumed to have known that his estate could not be speedily settled—in fact, it plainly appears from his will that he not only expected but desired that his aged sisters, the first objects of his bounty, should have the possession of his real estate pending the ascertainment of the necessity for a sale thereof for the payment of his debts, and receive any incidental benefits that might arise therefrom. He gave his entire estate, real as well as personal, to one

set of beneficiaries for life, with remainder to others in such portions thereof as "might remain" after sale for the payment of debts, all charged with the payment of his debts, and he directed not only the order in which the several portions of his estate should be subjected, if found necessary, to his debts, but the manner thereof, viz., by sale. Had he intended that the life tenants of his real estate were not to enjoy the benefits thereof pending an adjustment of his affairs and the ascertainment of the extent of his indebtedness, doubtless he would have so provided in his will by giving his executrix adequate powers to effect his intent, such as the power to take charge of and operate or rent the estate, rather than a bare power to sell in a given contingency certain portions of it in a stated order. Instead of conferring upon his executrix such power, the testator's will clearly and expressly provided that the only way in which his real estate should be subjected to his debts should be by sale, expressly directing also the order in which each parcel should be sold. Any advantage resulting to the life takers is merely incidental to the terms in which the testator chose to dispose of his bounty, "the ultimate expression of his wishes," and the remaindermen as well as others took "cum onere" and subject to the incidents resulting from carrying into effect that "ultimate expression" of the testator's wishes "which stands as an all-sufficient reason for his act and cannot be challenged" by any one claiming thereunder. *Frazier v. Littleton*, 100 Va. 9, 40 S. E. 108.

[4] The general proposition of law that a tenant for life of property subjected to incumbrances must keep down the interest accruing on such incumbrances during the continuance of his estate is well established, and is not here controverted, but the doctrine has to be qualified where, as in this case, there is a general charge of all of testator's debts on his real estate, in the event that the personal estate proved insufficient to pay them. In such a case the general doctrine does not apply. *Poindexter v. Green*, 6 Leigh (33 Va.) 504, which is in many respects like the case at bar, 18 Cyc. 307 and authorities cited; *Trent v. Trent*, Gilmer (21 Va.) 174, 9 Am. Dec. 594, where the opinion by Roane, J., says: "The right of possession thus doubly guaranteed to the present appellants (life tenants) ought not to be disturbed, until a change of possession should be made necessary, in fulfilment of the charge imposed on this property by the will; or until mismanagement thereof, or misapplication of its profits, should render it improper that the appellees should hold the possession any longer. In either of these events, however, the case ought to be previously made out to justify the interposition of the court." See, also, *Hobson v. Yancey*, 2 Grat. (43 Va.) 75; *Frazier v. Littleton*, supra; *French v. Vrandenburg*, 105 Va. 16,

52 S. E. 695, 3 L. R. A. (N. S.) 898, 115 Am. St. Rep. 838, 8 Ann. Cas. 590, where the principle is recognized.

If the testator in this case desired, as his will plainly indicates, the life tenants to take all of his real estate, and have the use of it until it became apparent that some of it had to be sold for the payment of his debts, those who take under his will, whether as life tenants or remaindermen, are but partakers of his bounty, and take it cum onere and subject to the liability that, when it becomes apparent that the personal estate will not be sufficient to pay his indebtedness, (in the language of the will) "then" the real estate devised to them in remainder, both life estate and remainder, must be sold. Nowhere in the will is there a suggestion of a purpose on the part of the testator that his estate was to be subjected to the payment of his debts by renting the same; the only provision made to that end being for a sale of certain of his real estate in a given event.

The devise to appellants in remainder is not the "residue of the Sunnyside tract," but the same "or any part of same or proceeds thereof if sold for the payment of my debts that may remain." As we view the record, it cannot be questioned that the necessity for the sale of this parcel of the testator's real estate for the payment of his remaining outstanding indebtedness had arisen when the decree directing its sale, of which complaint is made, was entered; and we have been unable to find in the settled

accounts of the executrix that any injustice has been done appellants. The accounts appear to have been stated upon correct principles of law, and the exceptions taken to the account dealt with in the decree of July 27, 1909, as said by the learned judge of the circuit court in his opinion made a part of the record, "but merely go to the methods of stating the accounts by the commissioner and calling attention to apparent errors and are largely argumentative of the main question submitted."

[5] Appellees assign as cross-error so much of the decree of January 31, 1911, appealed from, as holds that it is the duty of the life tenants to take out insurance, either for the benefit of themselves or for the remaindermen, on the buildings on the real estate devised either to them directly or to trustees. Whether such a burden could, in any case, be imposed by a court of equity upon a life tenant for the benefit and protection of the remaindermen, we need not express any opinion here, but are of opinion that the situation of the testator's property, as appears from the record in this case, did not warrant the requirement of the life tenants thereof in the decree of January 31, 1911, with respect to insurance of buildings thereon, and the decree will be amended by striking out of it that requirement; and as so amended it, as well as the decree of July 27, 1909, will be affirmed.

Amended and affirmed.

KNITH, P., absent.

(140 Ga. 10)

INTERNATIONAL SILVER CO. v. F. G. HULL & CO.

(Supreme Court of Georgia. May 13, 1913.)

*(Syllabus by the Court.)***FRAUDULENT CONVEYANCES (§ 47*) — BULK SALES OF MERCHANDISE—VALIDITY.**

If one desiring to purchase a stock of merchandise in bulk demands and receives from the vendor a written statement under oath, purporting to contain the names and addresses of all the creditors of the vendor, together with the amount of the vendor's indebtedness to each of them, and within the time required by the statute due notice of the proposed sale, the price to be paid, and the terms and conditions thereof is given by the purchaser to each of the creditors whose names appear on the list so furnished, and thereafter the purchaser in good faith pays over to the vendor the purchase price agreed on, without notice or reason to suspect that the vendor has omitted from the sworn list the name of any of his creditors, the sale is not void, either in whole or in part, by reason of the fact that the seller omitted to name one of his creditors, and the purchaser failed to give that creditor notice of the sale, though such creditor did not in fact have any notice of the sale, and though the seller is insolvent.

[Ed. Note.—For other cases, see *Fraudulent Conveyances*, Cent. Dig. § 34; Dec. Dig. § 47.*]

Certified Question from Court of Appeals.

Action by the International Silver Company against F. G. Hull & Co. A question is certified by the Court of Appeals to the Supreme Court. Answered in the negative.

See, also, 78 S. E. 610.

The Court of Appeals certified to the Supreme Court the following question for decision:

"If one desiring to purchase a stock of merchandise in bulk demands and receives from the vendor a written statement under oath, purporting to contain the names and addresses of all the creditors of the vendor, together with the amount of the vendor's indebtedness to each of them, and within the time required by the statute due notice of the proposed sale, the price to be paid, and the terms and conditions thereof are given by the purchaser to each of the creditors whose names appear on the list so furnished, and thereafter the purchaser in good faith pays over to the vendor the purchase price agreed on, without notice or reason to suspect that the vendor has omitted from the sworn list the name of any of his creditors, is the sale void, either in whole or in part, by reason of the fact that the seller omitted the name of one of his creditors, and the purchaser failed to give that creditor notice of the sale, when it appears that such creditor did not in fact have any notice of the sale, and it also appears that the seller is insolvent?"

J. J. Northcutt, of Acworth, for plaintiff in error. Joe Abbott, of Acworth, for defendant in error.

LUMPKIN, J. Prior to 1903 sales of stock of merchandise in bulk could only be attacked for fraud under the same rules as were applicable to sales generally. Civil Code, §§ 3224, 4109. The Legislature was of the opinion that this was not sufficient to meet the evil, or possible evil, of a failing merchant's making a secret sale of his stock in bulk, placing the proceeds beyond reach, and leaving his creditors helpless, unless they could show both fraud on his part and notice to the purchaser. Even then, a subsequent innocent purchaser might take a good title. It was deemed proper to give additional safeguards to creditors in connection with sales of stocks in bulk. The act of 1903 (now codified in Civil Code, §§ 3226 to 3229) was passed. Section 3226 makes it the duty of every person who shall bargain for or purchase any stock of goods, for cash or credit, before paying or delivering to the vendor any part of the purchase price, to demand and receive from the vendor a written statement under oath of the names and addresses of all the creditors of the vendor, together with the amount of the indebtedness due or owing to each. This duty is placed upon the proposed purchaser. The duty is placed on the seller to furnish such a statement, and also a statement of assets and liabilities and of the cost price of the merchandise—the cost price to be arrived at by an inventory taken at the time by both. "Thereupon" it is made the duty of the purchaser to give to each of "said creditors" notice of the proposed sale and the price and terms (accompanied by a copy of the statement of the assets and liabilities "as furnished him by the vendor"), at least five days before the completion of the purchase, or the payment of the purchase money. Section 3227. By section 3228 it is declared that, if the purchaser fails to comply with the duties required of him as therein specified, the sale shall be deemed fraudulent as against the creditors of the vendor.

A consideration of these sections will show that certain duties are imposed upon the proposed purchaser and certain duties upon the proposed vendor. If the purchaser fails to comply with the duties imposed upon him, he gets no title as against creditors of the vendor. If the vendor knowingly and willfully makes and delivers, or causes to be made and delivered, any statement of which a material portion is false, or fails to include the names of all his creditors, he is declared to be guilty of a misdemeanor. Penal Code, § 718. But if the purchaser demands from the vendor a written statement under oath of the names and addresses of the creditors of the latter, with the amount due or owing by the seller to each of them, and the seller delivers a statement purporting to contain all of his creditors, and the purchaser, in good faith and without any

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep't Indexes
78 S.E.—39

knowledge or notice of the omission of the name of a creditor therefrom, proceeds to comply with the requirements of the statute, there is no declaration that he shall lose his purchase because of the omission by the seller of the name of a creditor. On the contrary, in referring to the duty of the purchaser to send out the statement of assets and liabilities, after the two have taken an inventory, the expression is used "as furnished him by the vendor," indicating a legislative purpose as to such statement at least that the purchaser was not to be held liable for every possible omission of the vendor, of which the purchaser had no notice. And, in declaring when the sale shall be presumed fraudulent, one expression used is: If the purchaser shall pay or give any evidence of indebtedness for the purchase price, or any part thereof, "without having first demanded and received from said vendor the statement under oath, mentioned in section 3226, and without having first given to each of said creditors the notice," etc. There is nothing here to show that an omission by the vendor of a creditor from the sworn list should be visited on a bona fide purchaser without notice.

It was argued that the statute required the purchaser, not only to demand, but also to "receive," from the vendor a list of all of the creditors of the latter, and that he had not received a list of all of them, if one were omitted. But this is too exacting and verbal a construction. The statute did not make the purchaser a warrantor of the absolute completeness and accuracy of the sworn statement of the vendor, or punish him for the omission from such sworn statement of the name of a creditor, without any fraud on his part, or any notice thereof.

It was further urged that, if it should be held that an omission by the vendor from the statement of one creditor did not avoid the sale, he might omit any number of his creditors, and thus they might get no notice, and a fraud might be perpetrated upon them. This is possible. But the penal statute appears to provide some obstacle to the willful furnishing by the vendor of an incomplete list of creditors. And, moreover, the statute now under consideration furnished a cumulative protection to creditors. It did not repeal the pre-existing laws against fraudulent sales. If the vendor and purchaser should collude to omit certain creditors, and thus defraud them, or if the vendor should omit the names of one or more creditors, with intent to delay or defraud them by sale, and the purchaser should have notice thereof, the omitted creditors could still have a remedy under Civil Code, §§ 3224, 3225.

A careful consideration of the statute touching sales of merchandise in bulk leads us to the conclusion that the question pro-

pounded by the Court of Appeals should be answered in the negative. All the Justices concur.

(12 Ga. App. 812)

INTERNATIONAL SILVER CO. v. F. G. HULL & CO. (No. 4,588.)

(Court of Appeals of Georgia. June 10, 1913.)

(Syllabus by the Court.)

AFFIRMANCE ON ANSWER TO CERTIFIED QUESTION.

The Supreme Court having, in answer to a question certified to it by this court in this case (140 Ga. —, 78 S. E. 609), settled, adversely to the contentions of the plaintiff in error, all the issues involved in the case, the judgment of the court below is affirmed.

Error from Superior Court, Cobb County; N. A. Morris, Judge.

Action by the International Silver Company against F. G. Hull & Co. From a judgment for defendants, plaintiff brings error. Affirmed on answer (78 S. E. 609) to certified question.

J. J. Northcutt, of Acworth, for plaintiff in error. Joe Abbott, of Acworth, for defendant in error.

POTTLE, J. Judgment affirmed.

(12 Ga. App. 781)

ROBSON & EVANS v. WEATHERLY LUMBER CO. (No. 4,766.)

(Court of Appeals of Georgia. June 10, 1913.)

(Syllabus by the Court.)

SET-OFF AND COUNTERCLAIM (§ 33*)—RIGHT TO INTERPOSE.

The indebtedness set up in the plea constituted a valid set-off against the claim of the plaintiff, and the evidence of the defendant established prima facie the truth of the plea, and the direction of a verdict for the plaintiff was erroneous.

[Ed. Note.—For other cases, see Set-Off and Counterclaim, Cent. Dig. §§ 1, 32, 54, 55; Dec. Dig. § 33.*]

Error from Superior Court, Baldwin County; J. B. Park, Judge.

Action by the Weatherly Lumber Company against Robson & Evans. Judgment for plaintiff on directed verdict, and defendants bring error. Reversed.

Hines & Vinson, of Milledgeville, for plaintiffs in error. Allen & Pottle, of Milledgeville, for defendant in error.

HILL, C. J. The Weatherly Lumber Company brought suit on an accepted draft, and on the trial the judge, at the conclusion of the evidence, directed a verdict for the plaintiff. Error is assigned on this direction of the verdict.

The defendants admitted the execution of the acceptance and their apparent liability, but claimed, as a set-off, damages on account of the alleged breach of two previous con-

tracts which they had made with the plaintiff. They had previously ordered shingles and ceiling from the plaintiff; and they alleged, in their plea of set-off, that after they had bought the shingles from the plaintiff they sold them for a net profit, that the plaintiff had breached the contract by failing to deliver the shingles, and that they were entitled to set off the amount of the lost profit as against the claim of plaintiff in this suit. They claimed, also, that the ceiling delivered by the plaintiff was defective, and was worth \$2 a thousand less than the contract price, and they claimed they were entitled to set off this difference as against the plaintiff's claim. One of the defendants testified as to the nondelivery of the shingles and the amount of damage resulting from the nondelivery, and also testified as to the defective condition of the ceiling delivered to them. The defendants refused to pay for the shingles, on account of their nondelivery. They paid for the ceiling, but before it had been examined and its defective condition discovered.

It is unnecessary to go further into the merits of the claim of set-off; but it seems to us that it was allowable, under the law of mutual claims, or set-off, if proved, and that the evidence was of such a character that it should have been submitted to the jury. The defendants testified that they accepted the draft for the lumber which they had bought from the plaintiff, in order that they might be given an opportunity to plead this set-off when sued on the acceptance. In view of this statement of the defendants, the verdict was directed for the plaintiff, on the theory that, where one has a claim against another arising from breach of contract, he cannot make a subsequent contract with the same party, in order that he may have an opportunity to set off his claim for damages arising out of the breach of the former contract, when sued on the latter obligation; and the case of *Madison Supply Co. v. Brown Carriage Co.*, 137 Ga. 195, 73 S. E. 344, and the cases cited therein, are relied upon in support of this position. In that case a promissory note, given for certain personal property, was paid voluntarily to the original payee by the maker thereof, who subsequently purchased personal property from the same vendor, for the avowed purpose of refusing to pay therefor, and of pleading a set-off and partial failure of consideration to the first purchase, because of alleged defects in the property first purchased, which were known to the buyer at the time he paid the note given for the purchase price thereof; and it was held by the Supreme Court that this claim of set-off could not be allowed, because the buyer, when he paid the note, had full knowledge of the defects in the property first purchased, and therefore could not set up the same as a defense to his second obligation—in other

words, that the payment of the note with knowledge of the defects constituted a waiver of the defects and of any claim for damages arising therefrom.

Such are not the facts in the present case. Here the acceptance sued on was not given in payment of the shingles or ceiling previously purchased. It was an entirely different transaction. The evidence does not disclose that the lumber for which the acceptance was given was bought for the purpose of enabling the defendants to plead a set-off against the performance of their contract; nor does it appear that the defendants had notice of the defects in the ceiling when they made the subsequent purchase, or when they gave the acceptance. It seems to us that the purpose the defendants had in accepting the draft is wholly immaterial. They did not deny that they bought the lumber for which the acceptance was given, and as to that lumber they did not set up any defects, or any reason why they should not pay for it. The main question, so far as the right of set-off is concerned, is: Did they have a valid claim arising out of the previous two contracts, when they were sued on their acceptance? If they had, they would have the right, whatever their motive in accepting the draft, to set off a debt which the plaintiff owed them as against the debt which they owed the plaintiff, and whether the defendants had a valid claim arising out of the breach of the two previous contracts depended on the evidence, and was a question to be submitted to the jury, and we think the court erred in directing a verdict for the plaintiff.

Judgment reversed.

(12 Ga. App. 797)

GEORGIA EXCELSIOR CO. v. HARTFELDER-GARBUTT CO. (No. 4,785.)

(Court of Appeals of Georgia. June 10, 1913.)

(Syllabus by the Court.)

SALES (§ 364*)—TRIAL (§ 39*)—WITNESSES (§ 255*)—REFRESHING MEMORY—QUESTION FOR JURY—DOCUMENTARY EVIDENCE—INSTRUCTION.

This was an action on an open account, to recover \$1,597.68 for goods sold and delivered. The verdict was in favor of the plaintiff for \$872.54. There was a general denial of the account, a special plea of failure of consideration, and a cross-action claiming damages on account of the alleged failure of the plaintiff to deliver the goods within the time specified in the contract. There was sufficient evidence to authorize the jury to find that the account had been proved, especially in view of the fact that there was no denial that the goods sued for had been delivered. While, as to some of the items in the account, the testimony may not have been sufficiently definite, still a sufficient number of items were proved to authorize a verdict for the amount found by the jury. On the issues raised by the special plea and the cross-action, the evidence was sufficient to authorize a finding in favor of the plaintiff. It was not erroneous to permit the plaintiff's witness to attempt to refresh his recollection from the copy of the ac-

count attached to the petition. It was not essential that the witness should have made the memorandum himself. *Lenney v. Finley*, 118 Ga. 427, 45 S. E. 317. It was enough if he at any time had personal knowledge of the correctness of the entry of items set forth in the account. As to many of them he testified that he did have such knowledge. Whether, under his testimony, he did have sufficient knowledge in reference to the account, was a question properly submitted to the jury. In the light of the explanatory note of the trial judge, the testimony of the plaintiff's witness in reference to the entries from the plaintiff's books was not objectionable. Although the books were not formally introduced in evidence, the court certifies that they were produced and used on the trial, inspected by the court and counsel, and the witnesses interrogated in reference thereto. In this manner entries from the books were read to the jury, and thus became a part of the evidence in the case. Under these circumstances, the books were properly treated as evidence, at least in so far as they relate to the entries about which the witnesses had testified. The trial judge charged the jury in substance that, before the defendants could recover in the cross-action for damages incurred by reason of an independent third contract made by the defendant on the faith of the contract with the plaintiff, it must appear that the fact that such third contract was made was communicated to the plaintiff. This charge was not erroneous because the trial judge failed to charge that knowledge by the plaintiff of the independent contract, or reasonable grounds of knowing the same, would be sufficient. The language of the charge as given was sufficient to express the idea contained in the assignment of error. The trial was free from substantial error, and the court did not err in overruling the motion for a new trial.

[Ed. Note.—For other cases, see *Sales*, Cent. Dig. §§ 1065-1076; Dec. Dig. § 364;* *Trial*, Cent. Dig. §§ 92-98; Dec. Dig. § 39;* *Witnesses*, Cent. Dig. §§ 874-890; Dec. Dig. § 255.*]

Error from City Court of Savannah; Davis Freeman, Judge.

Action by the Hartfelder-Garbutt Company against the Georgia Excelsior Company. Judgment for plaintiff, and defendant brings error. Affirmed.

Robt. L. Colding, of Savannah, for plaintiff in error. Oliver & Oliver, of Savannah, for defendant in error.

POTTLE, J. Judgment affirmed.

(13 Ga. App. 750)

GEORGIA RY. & ELECTRIC CO. v. CROSBY.
(No. 4,896.)

(Court of Appeals of Georgia. June 10, 1913.)

(Syllabus by the Court.)

ATTORNEY AND CLIENT (§ 189*)—LIEN FOR FEE—SETTLEMENT OF SUIT.

After suit has been filed upon a cause of action, the suit and cause of action must be treated as one, and there can be no substantial separation; and although the cause of action may be settled before the suit has been filed, after the filing of the suit, no person, whether party or third person, can settle the suit or the cause of action so as to defeat the lien of the attorney for his fees, and the attorney, notwithstanding any settlement of the cause of ac-

tion, has the right to prosecute the suit in the name of his client for the recovery of his fee.

[Ed. Note.—For other cases, see *Attorney and Client*, Cent. Dig. §§ 407-411; Dec. Dig. § 189.*]

Error from City Court of Atlanta; H. M. Reid, Judge.

Action by H. M. Crosby against the Georgia Railway & Electric Company. From a ruling permitting the action to proceed for the use of plaintiff's attorney, defendant brings error. Affirmed.

Crosby sued the Georgia Railway & Electric Company to recover damages for personal injuries alleged to have been received by him while he was driving a wagon along Dover street in the city of Atlanta. His cause of action was based upon the presence in the street of a rotten pole, which fell down on him while he was legitimately using the street. The pole was the property of the Georgia Railway & Electric Company, and was in a public street of the city of Atlanta. It had been permitted to stand in the street a sufficient length of time to have rotted and become dangerous to those who were using the street. The injury occurred on June 19, 1911, and the suit was filed on June 21, 1911. The city of Atlanta was not joined as a codefendant. It seems that at the time of the injury the plaintiff was an employé of the city of Atlanta, and subsequently to the filing of the suit against the Georgia Railway & Electric Company he settled with the city of Atlanta any claim for damages which he might have had against the city for this injury, giving to the city the following release: "In consideration of the sum of nineteen dollars and eighty cents, the receipt of which I hereby acknowledge, I, H. M. Crosby, do hereby release the city of Atlanta from all claims for damages past, present, and future, on account of the falling of an electric light pole on me while driving one of the wagons of the chief of construction department. This accident occurred on Dover street in the city of Atlanta on June 19, 1911. [Signed] H. M. Crosby." It is not shown that the Georgia Railway & Electric Company, or any one acting in its behalf, had anything to do with the procurement of the settlement with the city of Atlanta. When the case against the Georgia Railway & Electric Company was called for trial and the foregoing facts were disclosed, the point was made by the railway and electric company that the settlement with the city of Atlanta operated in law to defeat the right of the plaintiff to recover against it, and the trial judge so ruled, and directed a verdict against the plaintiff in so far as right of action in himself was concerned. The plaintiff's attorney, however, insisted that he had a right to prosecute the suit in order to recover a contingent fee of one-half of whatever amount might have been recovered in the case against the railway and electric

company. The trial judge allowed the case to proceed to verdict and judgment in behalf of the plaintiff for use of the plaintiff's attorney. This direction was given the case over the objection of the defendant; and it is contended that the trial judge erred in allowing the case to proceed and the plaintiff's attorney to recover for his fees. The question whether the judge ruled correctly in holding that the settlement made with the city of Atlanta operated in law to defeat the right of the plaintiff to recover against the railway and electric company is not involved, since no exception was taken as to that ruling.

Colquitt & Conyers, of Atlanta, for plaintiff in error. Hines & Jordan, of Atlanta, for defendant in error.

HILL, C. J. (after stating the facts as above). The ruling of the trial court in allowing the case to proceed for the use of plaintiff's attorney is based upon the court's interpretation of the law of Georgia relating to the lien of attorneys for their fees. The Civil Code (1910) § 3364, par. 2, provides as follows: "Upon suits, judgments, and decrees for money, they [attorneys] shall have a lien superior to all liens but tax liens, and no person shall be at liberty to satisfy said suit, judgment, or decree until the lien or claim of the attorney for his fees is fully satisfied; and attorneys at law shall have the same right and power over said suits, judgments, and decrees, to enforce their liens, as their clients had or may have for the amount due thereon to them." Learned counsel for the plaintiff in error insist first that this lien attaches only to the suit, judgment, or decree, and the property recovered for his client, and that it does not attach to the subject-matter of the cause of action; and, second, that the words in the act, "no person," are intended to mean "no person litigant," no defendant, or person occupying the same relative position as the defendant. We think the distinction sought to be made in the first contention is based upon a misconception of the rulings of the Supreme Court on that subject. Unquestionably no lien in favor of the attorney at law attaches to the cause of action—that is, to the cause of action before the suit on such cause of action is filed—but upon the institution of a suit on the cause of action the attorney's lien attaches to the suit, which necessarily includes the cause of action. A cause of action can be settled by the parties before a suit thereon is filed, but after the suit has been filed the suit and cause of action become one in substance, and neither the suit nor the cause of action thereafter

can be settled so as to defeat the lien of the attorney. It is manifest that the attorney could not have a lien on a suit, unless the suit set forth a cause of action, and neither could he enforce such a lien unless the cause of action had been proved by the evidence under the law applicable thereto. If for any reason the suit is finally disposed of by operation of law, or by a ruling of the court thereon, the lien of the attorney is necessarily discharged. We think this is what is meant by the Supreme Court in the case of *Brown v. Georgia, Carolina & Northern Ry. Co.*, 101 Ga. 80, 28 S. E. 634. Prior to the adoption of our first Code a defendant was not allowed to settle with the plaintiff to defeat a lien of the plaintiff's attorney, whether the defendant had notice of the existence of the attorney's claim of lien or not, and the law as it then stood was incorporated in that Code (Code of 1863, §§ 1869, 1990). The law as thus codified remained without change until the act of 1873 (Acts 1873, pp. 42-46). One of the changes which the act of 1873 made in the law was that the mere filing of the suit constituted sufficient notice of the existence of a claim of a possible lien of the attorney for fees, so as to prevent the defendant from making any settlement or satisfaction of the suit to defeat the lien of the plaintiff's attorney for fees; and the act also gave to the attorney the right to control the case to collect his fees in all respects as fully as his client. These provisions of the act of 1873 are in the Code of 1910, § 3364. Construing the plain language of this section, it is clear that after suit has been filed it cannot be settled so as to defeat the lien of the attorney for his fees.

The second point insisted on by learned counsel for the plaintiff in error—that the inhibition is limited to a party defendant or litigant, or some one in his behalf—is not without logical force; for unquestionably the purpose of the statute is to prevent a defendant from settling with insolvent or dishonest plaintiffs a suit which has been brought by his lawyer, and thus deprive the lawyer of the fruits of his labor; but this court has no right, however logical this construction seems to be, to take from or add to the express language of the statute on the subject. That language is that "no person shall be at liberty to satisfy said suit, judgment, or decree until the lien or claim of the attorney for his fees is fully satisfied," etc. Courts have no right to restrict the application of the statute to parties litigant, or the defendant in the case, where the express language of the Legislature makes no such limitation, but expressly asserts the contrary.

Judgment affirmed.

(12 Ga. App. 783)

HAYWOOD v. KITCHENS. (No. 4,768.)
(Court of Appeals of Georgia. June 10, 1913.)*(Syllabus by the Court.)***JUSTICES OF THE PEACE (§§ 112, 113*)—CO-
REMOVAL OF VERDICT—INSTRUCTIONS.**

In the trial of a case on appeal in a justice's court, it was error for the magistrate to inform the jury that he desired to take the train in 30 minutes; that he wanted a verdict made, one way or the other, within that time, in order to permit him to take the train; and that he wanted to get rid of the case some way in that time. While the amount involved was small, the evidence was sharply conflicting and somewhat voluminous, and the conduct of the justice tended unduly to hasten the consideration of the case.

[Ed. Note.—For other cases, see *Justices of the Peace*, Cent. Dig. §§ 364, 365; Dec. Dig. §§ 112, 113.*]

Error from Superior Court, Glascock County; B. F. Walker, Judge.

Action between W. W. Haywood and B. B. Kitchens. Judgment for Kitchens. From denial of certiorari, Haywood brings error. Reversed.

J. C. Newsome, of Gibson, for plaintiff in error.

POTTLE, J. An action was brought in a justice's court by a physician on an open account for professional services rendered an employé of the defendant. The plaintiff testified that he was employed by the defendant to render the services, and that the defendant expressly agreed to pay for them. The defendant denied this, and contended that the services were rendered, not to him, but to his employé. Several witnesses were introduced. The evidence was sharply conflicting, and would have authorized a verdict either way.

Several assignments of error are made in the petition for certiorari, in reference to the manner in which the jury was drawn, and as to the composition of the jury; but none of these need be considered. At the conclusion of the evidence the justice gave the jury the following instruction: "Gentlemen, take this case and decide it according to the evidence produced to you. It is only about a half of an hour until train time. I want you to make a verdict, one way or the other in time for me to get off on that train. I want to get shut of it some way this time. If you find for the plaintiff, state the amount you find; if you find for the defendant, you need not state any amount."

In justices' courts the juries are the judges of both the law and the facts upon the issues submitted to them. The law does not contemplate that the justice shall have the same supervisory power over the trial as would the judge of a court of general jurisdiction. The truth is that, on the trial of an appeal in a justice's court, the magistrate is a sort of a figurehead. He is shorn most of his power, and little is left him save his dignity.

He is not bound to charge the jury at all. In fact, it is decidedly the better practice for him not to do so. *Bendheim v. Baldwin*, 73 Ga. 594. If he does, the jury is not bound to follow his instructions. They can set up their own views of the law in opposition to those of the justice. But, while all this is true, the magistrate is generally held in great respect by his neighbors. He is usually one of the leading men in the community. The very position of the justice on the bench may, in the minds of the jury, give to his statements greater weight than would attach to those of an advocate presenting to the jury his views of the law from his position on the floor. Hence it is that, when the justice undertakes to charge the jury, he must charge them correctly.

In the present case the justice did not attempt to instruct the jury in reference to the principles of law which should control them in reaching their verdict. But what he did say to them had the tendency to unduly hasten their consideration of the case. The amount involved is small, but there is much evidence. The smallness of the amount did not justify undue haste. Thirty minutes may have been ample, but it was more important that the jury should maturely consider the case and reach a correct conclusion than that the justice should "get shut of it" and catch his train. The certiorari should have been sustained.

Judgment reversed.

(35 S. C. 29)

CANTEY v. McCLARY-BROADWAY CO.

(Supreme Court of South Carolina. May 29, 1913. On Rehearing, June 12, 1913.)

**1. LANDLORD AND TENANT (§ 242*)—RENT—
LIENS.**

Where, as part consideration for services of a farm hand, the employer gives him the use of land to cultivate, there could be no lien on crops produced therefrom for rent.

[Ed. Note.—For other cases, see *Landlord and Tenant*, Cent. Dig. §§ 976, 979-981; Dec. Dig. § 242.*]

**2. CHATTEL MORTGAGES (§ 138*)—PRIORITY OF
LIENS—ADVANCES ON CROPS.**

An employer of a farm hand, who was given as part wages land to cultivate, is not entitled to a lien on crops produced, the lien not being reduced to writing, as against a factor holding a recorded mortgage for advances to the farm hand, who bought the crops and canceled the debt; Civ. Code 1912, § 4165, expressly requiring such liens to be recorded.

[Ed. Note.—For other cases, see *Chattel Mortgages*, Cent. Dig. §§ 228-236; Dec. Dig. § 138.*]

Appeal from Common Pleas Circuit Court of Clarendon County; Ernest Gary, Judge.

Action by J. M. Caney against the McClary-Broadway Company, a corporation. From a judgment for plaintiff, defendant appeals. Reversed.

Davis & Wideman, of Manning, for appellant. J. J. Cantey, of Summerton, for respondent.

PER CURIAM. The following is the agreed statement of facts: "The plaintiff, J. M. Cantey, a landowner near Summerton, Clarendon county, state of South Carolina, at the beginning of the year 1912, employed one Harper Gibson as a farm hand, and as a part of his wages permitted him to plant about seven acres of land upon his plantation, situated in said county and state. That during the year 1912 the plaintiff made advances to the said Harper Gibson in the sum of \$97.71 and the said plaintiff has never at any time reduced to writing any lien he may have for the said advances. That during the month of October, 1912, the said Harper Gibson sold and delivered to the defendant, McClary-Broadway Company, two bales of cotton grown upon the land so planted by Harper Gibson during the year 1912. That the value of the said two bales of cotton was, and is, the sum of \$68.88. That the plaintiff claims that the defendant is unlawfully withholding said two bales of cotton, or the market value of same, from said plaintiff, and has thereby damaged said plaintiff in the sum of \$68.88. That this is an action in claim and delivery for the possession of the said two bales of cotton, or the value thereof, as provided under section 290 of the Code of Civil Procedure of South Carolina. That the present claim of the plaintiff is for supplies the plaintiff made to the said Harper Gibson. The plaintiff, J. M. Cantey, has never been paid for the said advances by the said Harper Gibson. That before the commencement of this action the plaintiff made demand on the defendant, McClary-Broadway Company, for the two bales of cotton in question, or the market value of the same, but the defendant had long before such demand sold the said cotton without any notice whatever of the plaintiff's alleged lien upon such crops for advances. That on the 17th day of February, 1912, the said Harper Gibson gave to the defendant a chattel mortgage covering all crops made on the said seven acres of land, which chattel mortgage was duly indexed in the clerk of court's office for Clarendon county on February 27, 1912. That under the said mortgage the said Harper Gibson received advances from the defendant in the sum of \$68.20, which he owed the defendant at the time the cotton was received; the defendant paying the said Harper Gibson the difference between the value of the cotton and Harper Gibson's account in money."

The judgment of the magistrate in favor of the defendant was reversed in the circuit court, and the defendant appeals.

[1, 2] The use of the seven acres of land being a part of the wages paid Gibson for his labor, the plaintiff had no lien on it for

rent. Even if a lien for advances had existed, it could not be asserted against the defendant, McClary-Broadway Company, whose chattel mortgage was duly indexed, and who paid in cash the surplus purchase money of the cotton, because it does not appear that the defendant had actual notice of any lien for advances, and section 4165 of the Civil Code of 1912 expressly provides that such a lien is good against subsequent purchasers and creditors only when indexed and recorded.

The judgment of this court is that the judgment of the circuit court be reversed. Reversed.

On Rehearing.

After a careful consideration of the matter contained in the within petition, this court is satisfied that it has not overlooked any matter of fact or disregarded any provision of law. It is therefore ordered that the order heretofore granted staying the remittitur be revoked and the petition refused.

(95 S. C. 49)

WILLIAMS v. HATCHER.

(Supreme Court of South Carolina. June 6, 1913.)

1. PROCESS (§ 125*)—DEFECTS—WAIVER.

A defendant who demands a copy of the complaint, waiving no rights, expressly reserving same, and who accepts service of a copy without waiving any right as to appearance or otherwise, and who moves to strike part of the complaint, reserving all rights, and who moves to set aside the service of summons on the ground that he is a nonresident and in the state solely to attend court as an attorney and a witness, does not waive his exemptions; waiver being generally a question of intention.

[Ed. Note.—For other cases, see Process, Cent. Dig. § 153; Dec. Dig. § 125.*]

2. PROCESS (§ 126*)—SETTING ASIDE SERVICE—NOTICE OF MOTION—SUFFICIENCY.

Where the complaint states that defendant resides in a city in a sister state, the notice of motion to set aside the service of summons on the ground that he is a nonresident and in the state solely to attend court as an attorney and witness need not suggest by what manner plaintiff may obtain service on him.

[Ed. Note.—For other cases, see Process, Cent. Dig. § 154; Dec. Dig. § 126.*]

3. PROCESS (§ 126*)—NOTICE OF MOTION TO SET ASIDE—AUTHORITY OF ATTORNEY.

A notice of motion to set aside service of summons on the ground that defendant, a nonresident, is in the state solely to attend court as an attorney and witness may be signed by his attorney.

[Ed. Note.—For other cases, see Process, Cent. Dig. § 154; Dec. Dig. § 126.*]

4. ATTORNEY AND CLIENT (§ 16*)—PROCESS—SERVICE—EXEMPTIONS—ATTORNEY.

A foreign attorney attending court in the state is exempt from service of process.

[Ed. Note.—For other cases, see Attorney and Client, Cent. Dig. §§ 23, 24; Dec. Dig. § 16; Process, Cent. Dig. § 147.]

Appeal from Common Pleas Circuit Court of Spartanburg County; Frank B. Gary, Judge.

Action by Robert M. Williams against M. Felton Hatcher. From an order setting aside service of summons, plaintiff appeals. Affirmed.

Harry S. Stokes, of Nashville, Tenn., and Nicholls & Nicholls, of Spartanburg, for appellant. John Gary Evans and Sanders & De Pass, all of Spartanburg, for respondent.

FRASER, J. This is an appeal from an order of Judge Frank B. Gary setting aside the service of a summons. The defendant is an attorney residing in Macon, Ga. His client, W. J. Massee, was arrested in Spartanburg, S. C., and applied to Judge Sease for a discharge under a writ of habeas corpus. Massee was held by the South Carolina authorities pending extradition proceedings under a requisition from the Governor of Tennessee. The respondent had represented Massee in his troubles in Tennessee, and his affidavit claimed that his sole business in this state was to appear as attorney and witness for Massee in the proceedings before Judge Sease, and as such he was exempt from service of process in coming, remaining, and returning. After the service of the summons, the following notice was served upon plaintiff's attorneys:

"Please take notice that we appear for the defendant in the above-stated case solely for the purpose of demanding that you serve upon us a copy of the complaint in said case at our offices, either in Cleveland building or on the public square in the city of Spartanburg. In serving this notice we waive no rights, but expressly reserve the same. Jno. Gary Evans, Sanders & De Pass, Attorneys for Defendant.

"In conformity with the above notice, plaintiff on August 24, 1912, by his attorneys, served upon Messrs. Sanders & De Pass and John Gary Evans, attorneys for defendant, his complaint."

The following acceptance of service of the complaint was indorsed upon the original complaint: "Due and legal service of a copy of the within complaint accepted at Spartanburg, S. C., Aug. 24, 1912, without waiving our rights as to appearance or otherwise as set forth in demand for copy complaint. Sanders & De Pass, John Gary Evans, Defendant's Attorneys."

The plaintiff served an amended complaint. Service accepted as follows: "Service of copy of amended complaint accepted subject to conditions indorsed on original complaint. Jno. Gary Evans, Sanders & De Pass, Defendant's Attorneys."

Thereafter, defendant's attorneys asked of plaintiff's attorneys an extension of time to answer and then served the following notice of a motion to strike out certain allegations of the complaint: "Please take notice that, reserving to ourselves all rights, we will on Tuesday, September 17, 1912, at 9:30 o'clock a. m., or as soon thereafter as

counsel can be heard, we will, upon our amended complaint in the above-stated case, move before his honor, Frank B. Gary, circuit Judge, at Union, S. C., to strike from your complaint the following:"

There was an agreement as to the time for the hearing of the motion and time allowed to answer after the hearing. The motion was withdrawn and the following served: "Messrs. Nicholls & Nicholls, Attorneys for Plaintiff: Please take notice, we will on the first day of the next term of court of common pleas for Spartanburg county, at 10 o'clock a. m., or as soon thereafter as counsel can be heard, move the court upon the annexed affidavit, a copy of which is herewith served upon you, and upon all of the papers in the case, to set aside the services of the summons on the ground that the defendant not being a resident of the county of Spartanburg, or the state of South Carolina, and being in the state solely for the purpose of attending court as attorney and witness, he was exempt from suit, and under the facts stated in the affidavit he is not amenable to suit or process in this state. Jno. Gary Evans, Sanders & De Pass, Attorneys for Defendant."

Thereafter the case shows the following: "The matter came on to be heard before the Hon. Frank B. Gary, presiding judge, at the November, 1912, term of the court of common pleas of Spartanburg county, upon all the pleadings and papers hereinbefore set forth, and on December 5, 1912, his honor passed the following order, which was filed in the office of N. Leonard Bennett, clerk, on December 7, 1912: [Caption omitted.] The summons and complaint herein were served upon the defendant in Spartanburg county. The defendant is a nonresident of South Carolina. It appears that when he was served with the summons he was in this state for the purpose of testifying as a witness in a certain case then pending here and for the purpose of acting as chief counsel in the said litigation and for no other purpose. The defendant now appears for the sole purpose of objecting to the jurisdiction of the court. He contends that a nonresident is exempt from process while here for the purpose of testifying and of acting as principal counsel in a pending case, and here for no other purpose. It seems to me that the case of Breon v. Lumber Co., 83 S. C. 225, 65 S. E. 214, 24 L. R. A. (N. S.) 276, 137 Am. St. Rep. 808, and the cases therein cited, are conclusive of the question, and show that the contention of the defendant should be sustained. It is claimed, however, that the defendant has voluntarily submitted himself to the jurisdiction of the court by his conduct subsequent to the attempted service. I cannot take this view of the matter, for it seems to me that the defendant has throughout attempted to reserve his right and to avoid submitting himself voluntarily to the jurisdic-

tion. It is therefore ordered that the attempted service of the summons herein upon the defendant be, and the same is hereby, set aside and declared to be of no effect. Frank B. Gary, Presiding Judge. December 5, 1912." From this order there was an appeal. Let the exceptions be reported.

The questions raised are: Did the defendant waive jurisdiction?

[1] 1. Waiver is generally a question of intention. It is true intention will be conclusively presumed from conduct, at times. The authorities are not at one as to the conduct from which a conclusive presumption will be drawn. The reservation of rights was continually made, and the intention not to waive any rights as a matter of fact is clear throughout. The question is: Has the defendant done anything that, as a matter of law, is a waiver? The authorities, too numerous to cite, and too loose in expression to attempt to reconcile, are generally agreed that a general appearance, an answer, and a motion in the cause are, as a matter of law, waivers. Here the appearance was special, to demand a copy of the complaint. The answer was not served, and, while a notice of motion was given, it was not made. The circuit decree found that there was no intention to waive as a matter of fact, and there was no waiver in law.

Fitzgerald v. J. I. Case Threshing Machine Co., 77 S. E. 739, differs from this case. In that case a motion was made. Here there was only notice of intention to make a motion. The exceptions that raise this question are overruled.

2. The second question as stated in appellant's argument, is as follows: "(5) His honor erred in setting aside the service of the summons, the error being: (a) That the notice of the motion to abate was insufficient on its face in this: That it did not suggest or point out by what manner plaintiff could get service upon the defendant. (b) That the defendant did not personally sign the notice of the motion, and the subscription by defendant's attorneys of itself constituted a voluntary submission to the jurisdiction of the court." These propositions must be overruled.

[2] (a) The complaint states that the defendant resides in Macon, Ga.; he can be served there.

[3] (b) We know of no reason why the notice should not be signed by an attorney, and no controlling authority has been cited by appellant. If the position of the appellant is correct that an attorney is an officer of the court, and the court's consent is presumed, then there could be no plea to the jurisdiction because a nonresident is not presumed to know the procedure, and, as soon as he procured the services of an attorney, he waives the jurisdiction. This exception is overruled.

[4] 3. The third and fourth questions as made by appellant's argument raise this question: Are foreign attorneys, attending courts in this state, exempt from service of process? The answer is, they are. The case of Breon v. Lumber Company, 83 S. O. 225, 65 S. E. 214, 24 L. R. A. (N. S.) 276, 137 Am. St. Rep. 803, settles the question as to parties and witnesses, and the same principle applies to attorneys. The words italicized by appellant, "*as a party or as a witness and for no other purpose whatever*," does not mean that no other person will be exempt, but only those who come with no other purpose except to attend court are exempt. The showing here is that the respondent came to South Carolina for no other purpose whatever than to assist in the hearing before Judge Sease.

The judgment of the circuit court is affirmed.

GARY, C. J., and WOODS, HYDRICK, and WATTS, JJ., concur.

(115 Va. 280)

VIRGINIA BEACH DEVELOPMENT CO.
et al. v. COMMONWEALTH
ex rel. YARRELL.

(Supreme Court of Appeals of Virginia. June 12, 1913.)

1. INJUNCTION (§ 245*)—ACTIONS ON BOND—RIGHT OF ACTION—DISSOLUTION OF INJUNCTION.

Under Code 1904, § 3442, requiring an injunction bond to be conditioned to pay all such costs as may be awarded against the party obtaining the injunction, and all damages incurred "in case the injunction shall be dissolved," defendants cannot defend an action on an injunction bond on the ground that the injunction was dissolved because a new bond was not given by it as required, where at the trial of the injunction suit leave was granted to it to take further evidence after argument only upon condition that the bond be enlarged; thus indicating that the injunction would be dissolved unless further proof were put in.

[Ed. Note.—For other cases, see Injunction, Cent. Dig. §§ 264-271; Dec. Dig. § 245.*]

2. INJUNCTION (§ 252*)—ACTIONS ON BOND—DAMAGES.

Damages recoverable in an action for breach of an injunction bond are those which are the natural and proximate result of the issuance of the writ.

[Ed. Note.—For other cases, see Injunction, Cent. Dig. §§ 586-598; Dec. Dig. § 252.*]

3. INJUNCTION (§ 252*)—ACTIONS ON BOND—DAMAGES—EXCESSIVE DAMAGES.

Evidence in an action on an injunction bond given in a suit to enjoin plaintiff herein from erecting a public bathhouse on certain premises held to show that an award of \$850 damages was not excessive.

[Ed. Note.—For other cases, see Injunction, Cent. Dig. §§ 586-598; Dec. Dig. § 252.*]

Error to Circuit Court of City of Norfolk.
Action by the Commonwealth, on the relation of Yarrell, against the Virginia Beach Development Company and others. Judge

ment for complainant, and defendants bring error. Affirmed.

Loyall, Taylor & White, of Norfolk, for plaintiffs in error. J. Edward Cole, of Norfolk, for defendant in error.

CARDWELL, J. In the chancery cause of Virginia Beach Development Company against Metta D. Matthews and others, the plaintiff, on the 17th day of May, 1902, obtained from Hon. R. R. Prentiss, judge of the circuit court of Princess Anne county, an injunction restraining and prohibiting said defendants from erecting on the premises of the said Metta D. Matthews, at Virginia Beach, in the county of Princess Anne, described as lot 10 and half of lot 9, in square 11, etc., any building to be used as a public bathhouse or for any other purpose than as an outhouse to the residence theretofore erected on the said premises, and from using any building on the said premises for any other purpose than as a residence or boarding house until the further order of the court. The injunction was conditioned upon the plaintiff entering into and acknowledging a bond with good security in the clerk's office of the circuit court of Princess Anne county before the clerk of said court in the penalty of \$1,500, "conditioned to pay all such costs as may be awarded against the complainant and all such damages as may be incurred, in case the injunction herein mentioned shall be dissolved." Pursuant to the order of the judge of the circuit court awarding the injunction, the complainant, Virginia Beach Development Company, as principal, and N. Beaman, as surety, executed the required injunction bond in the penalty of \$1,500, conditioned as required in the order awarding the injunction, and in conformity with the terms of the statute, *infra*, in such cases made and provided.

Subsequently, in the same chancery cause, a decree was entered on May 21, 1903, directing that, "unless a new injunction bond in the penalty of \$3,000.00 should be given by the Virginia Beach Development Company within five days, the said preliminary injunction should stand dissolved." The said bond for the \$3,000 was not given, and on the 5th day of March, 1907, a decree was entered in the cause dismissing it at the complainants' costs, on the ground that the injunction issued therein stood dissolved by the decree of May 21, 1903, the complainant not having given the additional bond for \$3,000 required of it within five days from the date of said decree.

At the rules held for the circuit court of the city of Norfolk in the clerk's office thereof on the first Monday in September, 1908, the commonwealth of Virginia, at the relation of L. D. Yarrell, administrator of the estate of Metta D. Matthews, deceased, and Augustus Matthews, instituted this suit against the Virginia Beach Development Company and N. Beaman to recover costs

and damages to the amount of \$1,500 alleged to have been incurred to the said Metta D. Matthews and Augustus Matthews by reason of the suing out by the defendant, the Virginia Beach Development Company, of the said injunction in the above-named chancery cause which was dissolved as aforesaid.

The case was twice tried before a jury, in the first of which trials the jury found for the plaintiffs and assessed their damages at \$1,200 (no provision for interest being made in the verdict), and the court placed the plaintiffs on terms to accept a judgment for \$450, or else submit to a new trial; and, the plaintiffs declining to remit a part of the recovery, the verdict was set aside and a second trial ordered.

In the second trial had on May 6, 1912, the defendants demurred to the evidence, and, subject to the decision of the court on the demurrer, the jury brought in a verdict assessing plaintiffs' damages at \$951.67, with interest from the 26th day of May, 1903, which verdict the defendants moved the court to set aside, on the ground that the damages it allowed were excessive, but the court, overruling the demurrer to the evidence, overruled also the motion to set aside the verdict of the jury, and entered judgment thereon, to which judgment this writ of error was awarded.

There are two questions presented: First, on the demurrer to the evidence, whether the court should not have sustained the demurrer, on the ground that no cause of action had been shown by the plaintiffs (defendants in error here), as the injunction had been dissolved, not because it was erroneously awarded, but only because the Virginia Beach Development Company had not given the required new bond; second, whether the damages assessed, by the jury, subject to the demurrer to the evidence, are excessive.

[1] With respect to the first question presented, plaintiffs in error contend that, in order to recover damages resulting from the granting of an injunction, it must be alleged and proven by the plaintiff, in an action on the injunction bond, not only that the injunction has been dissolved, but that it was erroneously awarded.

The bond sued on in this instance is in the very terms of our statute (section 3442 of the Code of 1904), which provides that the condition of an injunction bond shall be "to pay all such costs as may be awarded against the party obtaining the injunction, and all such damages as may be incurred in case the injunction shall be dissolved. * * *

It is well settled by the decisions of this court that the liability of the obligors in such a bond is determined by the bond alone. *Blankenship v. Ely*, 98 Va. 359, 36 S. E. 484; *Columbia Amusement Co. v. Pine Beach Co.*, 109 Va. 325, 63 S. E. 1002, 16 Ann. Cas. 1120, and authorities cited.

In the last-named case it was held that a plaintiff who has executed an injunction

bond, and has obtained and acted upon the injunction is estopped to deny his liability upon the bond.

In *Claytor v. Anthony*, 15 Gratt. (56 Va.) 518, it was held: "Dissolution necessarily imports that the damages are to be paid, unless they are expressly remitted by the terms of the order."

The opinion of this court in *Hubble v. Cole*, 88 Va. 236, 13 S. E. 441, 13 L. R. A. 311, 29 Am. St. Rep. 716, cited for plaintiffs in error, says: "The defendant was undoubtedly bound by her deed; and if, without sufficient cause (and the dissolution of the injunction and the dismissal of the bill is conclusive of that), the defendant deprived the plaintiff of the benefit and profits accruing to him thereunder, she should undoubtedly respond in damages."

Several cases have been cited as supporting plaintiffs in error's contention here that, before the obligors in an injunction bond can be required to respond in damages to the obligee in the bond, it must first be determined that the injunction was erroneously awarded, but those cases were ruled by a statute different from ours, notably the case of *Palmer v. Foley*, 71 N. Y. 106, in which the decision of the court was based upon the statute of New York (section 222 of the Code) providing that the condition of the undertaking in an injunction bond should be that the plaintiff will pay to the defendant such damages, not exceeding an amount which is specified, as the defendant may sustain by reason of the injunction, if the court should finally decide that the plaintiff was not entitled thereto.

The difference in the condition of injunction bonds is discussed at some length in *Jesse French Piano Co. v. Porter*, 134 Ala. 302, 32 South. 678, 92 Am. St. Rep. 31, where the opinion says: "The bond is the contract of the party executing it, the statute prescribes its terms and conditions, and the right of action arises immediately upon the breach of its conditions. The promise is to pay all damages and costs if the injunction is dissolved. The failure to pay all damages and costs sustained by the suing out of the writ after the same has been dissolved is a breach of the bond, and there is nothing in the statute nor in the bond which postpones the right of action until after a final hearing on the merits. There are cases to be found which hold that there can be no assessment of damages for suing out the writ until a final hearing of the cause in which the writ issued. We apprehend that these cases, however, are based upon a statute different from ours, or upon a bond differing from the one sued on."

In *Alliance Tr. Co. v. Stewart*, 115 Mo. 236, 21 S. W. 793, the bond given and sued on was conditioned on the payment of "all damages that may be occasioned by such injunction, and of all sums of money, damages, and costs, which shall be charged against

it if the injunction shall be dissolved.'" Held that, "in an action on the injunction bond, the defendant could not maintain that the injunction was improperly issued in the first place, and that therefore only nominal damages should be awarded against him, for the very terms of the statute and of the obligations of the bond required the payment of damages should the injunction be dissolved." See, also, *Gray v. Railroad Co.*, 162 Ala. 262, 50 South. 352; *Roach v. Gardner*, 9 Gratt. (50 Va.) 93; *White v. Clay's Ex'ors*, 7 Leigh (34 Va.) 68.

The injunction in the case at bar was dissolved, and the bill upon which it was awarded dismissed before this action on the injunction bond was instituted, so that if it were true, as plaintiffs in error contend, that the injunction was dissolved and the chancery cause in which it issued dismissed, not because the injunction was erroneously awarded, but only because the Virginia Beach Development Company had not given the required new bond, that fact can avail them nothing as a defense to this action. Besides, it is shown upon the face of the decree providing that, unless the new injunction bond required be given within the time specified the injunction therefore issued in the cause should stand dissolved, that the cause had been regularly matured, the depositions of witnesses taken and also facts agreed to; that the case was then before the court for a complete hearing on the motion of the defendants in error to dissolve the injunction; and that it was after argument commenced, when counsel for plaintiffs in error asked leave to take further evidence, which was granted upon the condition expressed in the decree, that the injunction bond be enlarged to \$3,000, thus unmistakably indicating that plaintiffs in error well understood that upon the record as it then stood, unless strengthened by additional proof, the injunction would be dissolved then and there upon a full hearing upon the merits of the case. In these circumstances plaintiffs in error cannot escape liability to defendants in error in this action upon the theory that the injunction was dissolved because a new bond required of the complainant in the chancery cause was not given and not because the injunction was erroneously awarded; and therefore the trial court did not err in overruling the demurrer to the evidence.

Are the damages assessed by the jury excessive?

[2] "Damages recoverable in action for breach of an injunction bond must be such as are the natural and proximate result of the issuance of the writ." *Jesse French Piano Co. v. Porter*, supra.

The declaration in this case alleges that by reason of the issuance of the injunction the plaintiffs incurred the payment of costs amounting to \$101.67; that the bathhouse, which was partially constructed, had to be left without a roof, and the lumber for the

same, being exposed to the weather, commenced to rot and was damaged to the extent of \$400; that the plaintiffs lost entirely the sum of \$200, expended for labor, and also, by reason of the said injunction were compelled to erect a stable elsewhere, at a cost of \$50; and also lost the rent upon said buildings and premises, amounting to the sum of \$1,500.

This injunction was in force fully one year, and at the trial of this cause the court, without objection on the part of plaintiffs in error, instructed the jury as follows:

"Ins. No. 1. The court instructs the jury in finding damages in this case they may take into consideration the costs in the injunction suit, the rental value of the bathhouse in question, as shown by the evidence, from the time the said injunction was awarded on May 17, 1902, to the time the same was dissolved on May 26, 1903, and any deterioration, if any, that may be proved by the evidence to the property during the existence of said injunction, provided the sum shall not exceed \$1,500, with interest from the day of the breach of the conditions of said bond."

"Ins. No. 2. The court instructs the jury that the burden of proving damages is on the plaintiffs, and the jury can only find such damages as are proved by the evidence; they must not guess, but must base their findings upon the evidence introduced in the case."

The verdict of the jury was, as stated, for \$951.67, with interest from May 26, 1903, and when the amount of the costs in the injunction suit, \$101.67 (which was not disputed), is deducted, the verdict allowed only the sum of \$850 as the rental value of the bathhouse in question from the time the injunction was awarded to the time it was dissolved, and for the deterioration of the property during the existence of the injunction.

[3] There was evidence tending to prove loss to defendants in error by reason of damage to the bathhouse, left only partly constructed, and the amount expended in labor which was totally lost, as alleged in their declaration; so that the verdict of the jury does not cover the rental value of the property, as contended for by plaintiffs in error. But, be that as it may, W. J. O'Keefe, a totally disinterested witness examined on behalf of defendants in error, and who had lived on the beach for twenty years, had rented and used similar property to that here the subject of litigation, and was familiar with the condition and value of this specific property in 1902 and 1903, when asked as to his experience and familiarity with beach property and the rental value thereof, and the value of concessions, and what was a fair rental value for the "Matthews bathhouse," as located, in 1902 and 1903, answered: "In 1902, with the amusements and everything adjoining this bathhouse, I really thought a thousand dollars

would have been a proper value for it, because it had one of the best locations on the beach, because of the moving of the pavilion to the old hotel, and the excursions around it—the excursionists were around this property, and the bathhouse on the ground had a big advantage over one further away, adjoining the amusement end of it. That is my experience with bathhouses, and I have run them."

This witness further stated that the candy stand, as located on this property and used by its owners afterwards and intended to be used when enjoined, had an annual rental value of \$175. There is other testimony in the record corroborating that given by the witness O'Keefe.

Upon the whole case we are of opinion that the judgment of the circuit court is without error, and therefore it is affirmed.

Affirmed.

(115 Va. 55)

CULPEPER NAT. BANK et al. v. WRENN et al.

(Supreme Court of Appeals of Virginia. June 12, 1913.)

1. DEEDS (§ 93*)—CONSTRUCTION—INTENTION OF PARTIES.

Effect must be given to the intention of the parties to a deed, if reasonably clear and free from doubt.

[Ed. Note.—For other cases, see Deeds, Cent. Dig. §§ 231, 232; Dec. Dig. § 93.*]

2. DEEDS (§ 98*)—CONSTRUCTION—INTENTION OF PARTIES.

In determining the purpose of the parties to a deed, all parts must be construed together.

[Ed. Note.—For other cases, see Deeds, Cent. Dig. §§ 231, 232; Dec. Dig. § 93.*]

3. TRUSTS (§ 153*)—CONSTRUCTION — ESTATES CONVEYED—FEE SIMPLE.

A deed of partition conveyed the land in trust "for the sole, separate, and exclusive use of" grantor "during her lifetime and at her death in trust for her children," and the concluding paragraph provided that, if at any time grantor conveyed any part of the land by deed, the trustee should thereafter hold the same in trust for such person as may be appointed and directed by such deed of the grantor. *Held*, that grantor intended to reserve to herself the full power to dispose of the land at any time, and hence the deed vested a fee simple in her.

[Ed. Note.—For other cases, see Trusts, Cent. Dig. § 198; Dec. Dig. § 153.*]

4. DEEDS (§ 97*)—CONSTRUCTION—HABENDUM CLAUSE.

The rule, that the habendum clause of a deed yields to the granting clause when repugnant, does not apply where the intention of the parties can be ascertained with reasonable certainty from the whole instrument.

[Ed. Note.—For other cases, see Deeds, Cent. Dig. §§ 267-273, 434-447; Dec. Dig. § 97.*]

5. DEEDS (§ 28*)—CONSTRUCTION—HABENDUM CLAUSE.

The purpose of a habendum clause is to define the estate taken by the grantee.

[Ed. Note.—For other cases, see Deeds, Cent. Dig. § 53; Dec. Dig. § 28.*]

6. DEEDS (§ 97*)—CONSTRUCTION—HABENDUM CLAUSE.

If the whole deed shows that it was intended by the habendum clause to restrict or enlarge the estate conveyed by the granting clause, the habendum clause will control.

[Ed. Note.—For other cases, see Deeds, Cent. Dig. §§ 267-273, 434-447; Dec. Dig. § 97.*]

Appeal from Circuit Court, Culpeper County.

Suit by the Culpeper National Bank and others against Sarah E. Wrenn and others. From a decree in part for complainants, they appeal. Reversed.

Hidden & Thurlow, Gibson & Nottingham, and Waite & Perry, all of Culpeper, for appellants. Grimsley & Miller, of Culpeper, for appellees.

HARRISON, J. This suit was brought by the appellants to enforce the lien of their judgments against a tract of land alleged to be owned by their debtor, N. J. Taylor. In the progress of the suit the title of the debtor to the property sought to be subjected was questioned, and thereupon an amended bill was filed making the adverse claimants parties defendant. Upon final hearing the circuit court entered a decree holding that N. J. Taylor, the judgment debtor, only owned an estate in the land for the life of Sarah E. Wrenn, and that upon her death the fee simple passed to her children, named as defendants in the amended bill. From that decree this appeal was taken.

The record shows that Isaac Brimmer died some time prior to the year 1868, leaving considerable real estate in the county of Culpeper, and two daughters, Eliza Anne Edwards and Sarah E. Wrenn, as his only heirs at law. By deed dated June 29, 1869, these two sisters partitioned this landed inheritance between them; each of them, together with the husband of Sarah E. Wrenn, uniting in the partition deed. About ten days after this partition deed was executed, Sarah E. Wrenn, her husband uniting, conveyed with general warranty of title 102 acres of the land held by her under such deed to James and Sarah E. Michener, describing it as land which descended to her from her father; and on July 23, 1873, she and her husband conveyed with general warranty of title a further tract of 137 acres of such land to William H. Payne, as trustee to secure to Samuel B. Worsley \$1,500 loaned by him to the grantors, describing the land conveyed as derived from Mrs. Wrenn's father. This tract of 137 acres of land was subsequently sold under the trust deed and bought by the creditor, S. B. Worsley, who sold and conveyed the same to N. J. Taylor, and is the land which the appellants now seek to subject in his hands to the satisfaction of their judgments.

The question presented by this appeal in-

volves the proper construction of the deed of partition, dated June 29, 1869, between Sarah E. Wrenn and her sister, Eliza A. Edwards. That deed conveys the land in question to Daniel A. Grimsley in trust "for the sole, separate and exclusive use of Sarah E. Wrenn during her lifetime, and at her death in trust for her children." The concluding paragraph of the deed, after the metes and bounds are given, is as follows: "And if at any time the said Sarah E. Wrenn shall convey the whole or any part of the said land by deed duly executed according to the laws of Virginia, then the said Daniel A. Grimsley shall thereafter hold the same in trust for such person or persons as may be appointed and directed by such deed or deeds."

[1, 2] In *Temple v. Wright*, 94 Va. 338, 26 S. E. 844, it is said: "Every deed is supposed to express the intention of the parties, and however unusual the form may be, it is a primary and cardinal rule of construction that effect must be given to that intent whenever it is reasonably clear and free from doubt; and, in ascertaining the purpose and object of the parties, all parts of the deed must be taken and considered together, it being a rule of law too well settled to need citation of authority that, in the construction of any instrument, it must be construed as a whole."

This statement of the law has been frequently repeated by this court; its latest expression on the subject being found in the case of *Morris v. Bernard*, 77 S. E. 458, decided March 13, 1913.

[3] When the deed under consideration is read as a whole, it seems to be clear that in conveying her lands to a trustee the grantor, Mrs. Wrenn, intended to reserve to herself the full and complete power of disposing of the same at her will and pleasure, thus vesting in herself a fee-simple estate.

It is, however, contended on behalf of the appellees that the granting clause of the deed conveyed to Mrs. Wrenn only a life estate with remainder to her children, which cannot be taken away by any subsequent provision of the deed.

[4] There is no question as to the technical common-law rule relied on by appellees that the habendum clause of a deed yields to the granting clause where there is a repugnance between the estate granted and that limited in the habendum. That rule has, however, practically become obsolete; it certainly has no application where the intention can be ascertained with reasonable certainty from the whole instrument, and no legal obstacle lies in the way of giving effect to such intention. *Temple v. Wright*, supra.

[5, 6] In *Pack v. Whitaker*, 110 Va. 122, 65 S. E. 496, it is said, citing *Devlin on Deeds*: "The purpose of the habendum is to define the estate which the grantee is to take in the property conveyed, whether a fee, life estate,

or other interest." Further citing the same author, it is said: "If it appears from the whole instrument that it was intended by the habendum to restrict or enlarge the estate conveyed by the words of the grant, the habendum clause will prevail."

Applying these well-settled rules of construction to the deed under consideration, it cannot be doubted that, when Mrs. Wrenn exercised her unquestioned right to dispose of the property, she conveyed to her grantee a fee-simple title. The deed is practically a conveyance in trust to Mrs. Wrenn for life with remainder to her children, unless she should convey the land, and then in trust for such person or persons as she may appoint or direct by such deed or deeds. This language cannot properly be construed otherwise than as giving Mrs. Wrenn a fee in the land passing by the deed. The decree appealed from entirely ignores the clear and explicit intention expressed in the last or habendum clause of the deed and gives effect alone to the granting clause, whereas, as already seen, the purpose of the habendum is to define the estate which the grantee is to take, and must prevail if it appears from the whole instrument that it was intended by the habendum to restrict the estate conveyed by the words of the grant.

It follows from the construction given to the partition deed of June, 1869, that N. J. Taylor, the judgment debtor, who holds under Sarah E. Wrenn, has a fee-simple title to the land sought to be subjected by the appellants.

The decree appealed from must therefore be reversed, and the cause remanded for further proceedings not in conflict with the views expressed in this opinion.

Reversed.

(115 Va. 226)

ST. STEPHEN'S EPISCOPAL CHURCH
et al. v. NORRIS' ADM'R et al.

(Supreme Court of Appeals of Virginia. June 12, 1913.)

1. RELIGIOUS SOCIETIES (§ 16*)—CAPACITY TO TAKE BY DEVISE.

Where an entire estate consisting of realty and personalty was devised to a church, a certain amount to be used for tombstones for testator and his relatives, and half of the property to be used in putting a fence around the church yard, the church, prohibited by Code 1904, § 1398, from taking and holding a devise of real estate, was not the beneficiary, but the mere trustee as to that portion to be devoted to erecting a tombstone and the fence around the church, and, if it could not administer the trust as to the realty, a court of equity, which does not permit a trust to fail for want of a trustee, would administer the trust, and would discharge its interest from the personal property which it could take, and devote the real estate or its proceeds to the purposes of the trust, and hence the devise was not void.

[Ed. Note.—For other cases, see Religious Societies, Cent. Dig. §§ 103-108; Dec. Dig. § 16.*]

2. WILLS (§ 446*) — CONSTRUCTION — CONSTRUCTION IN FAVOR OF WILL.

It is not the policy of the law to seek grounds for avoiding devises and bequests, but rather to deal with both so as to uphold and enforce them if it can be done consistently with the rules of law.

[Ed. Note.—For other cases, see Wills, Cent. Dig. § 962; Dec. Dig. § 446.*]

Appeal from Circuit Court, Culpeper County.

Contest between the administrator and heirs of one Norris, deceased, and St. Stephen's Episcopal Church and others. Decree for contestants, and contestees appeal. Reversed and remanded.

Moore, Barbour, Keith & McCandlish, of Fairfax, and Hiden & Thurlow, of Culpeper, for appellants. Waite & Perry and Grimsley & Miller, all of Culpeper, for appellees.

HARRISON, J. W. C. Norris, of Culpeper county, died unmarried and without issue on the 11th day of May, 1909, leaving a will dated June 30, 1896. This will disposes of the testator's real and personal estate as follows:

"I have \$22.42 on my person and \$315.50 in bank. If I die, I leave everything real and personal to the Episcopal Ch. (St. Stephen's) of Culpeper. They to allow me sepulcher in Ch. yard and also my sister, who is to be brought from Catonsville, Md. \$600.00 is to be devoted to buying six tombstones for my mother, father & self & sister, & two aunts an account of whose birth, death, &c. will be found in my bible, which has my name on the back in gilt letters. I desire half of my property to be devoted to putting a brick or iron fence around the Ch. yard, with an inscription stating it to be in memory of my sister, Annie E. Norris."

Between the date of this will and the date of the testator's death he had converted the most valuable portion of his real estate into personal property, so that at the time of his death very much less than half of his estate remained in the form of realty.

The heirs at law of the deceased attack the validity of that portion of the will which disposes of the real estate, upon the ground that the church cannot take and hold real estate by devise, being prohibited from so doing by the provisions of section 1398 of the Code of 1904.

[1] It is not denied that under the statute invoked the church cannot take and hold a devise to it of real estate. The testator does not, however, as contended, leave his entire estate as a gift to the church. It is true that in the beginning of his will the testator says, "I leave everything real and personal to St. Stephens Episcopal Church," but when the will is read as a whole, and the intention of the testator is ascertained from the language used, it is plain that he did not leave the whole estate as a gift to the church, for in clear and unequivocal terms he dedi-

cates one-half of his estate to be used for the erection of a fence around the churchyard, which is to have an inscription thereon showing that it is a memorial to his deceased sister, and further appropriates \$800 of his estate for the purchase of tombstones for himself and certain other members of his family. There can be no question that the testator could lawfully dedicate the whole or any part of his estate, even though it consisted entirely of realty, to the erection of this memorial and the purchase of the tombstones mentioned. As to that portion of the estate dedicated to these purposes, the church is not the beneficiary but a bare trustee, holding the same for the objects named, and, if for any reason the church through its agents could not administer the trust, the court would administer it and accomplish the purposes of the testator; it being well settled that a court of equity will not permit a trust to fail for the want of a trustee.

The will is not expressed in an artificial manner; its plain meaning, however, is that the testator gives one-half of his estate to the erection of the fence as a memorial to his deceased sister; \$600 thereof for the purchase of tombstones for himself and other members of his family, and the residue of the estate is given to the church. The disposition made of the estate necessarily involves an equitable conversion of the real estate left into money, otherwise the purposes of the testator could not be effectuated; but if this were not so there would be no violation, in this case, of the statute inhibiting a church from taking a devise of real estate. Much the greater portion of the estate left was personal property, and a court of equity, in furtherance of the purposes of the testator, would discharge the interest of the church, under the will, from that portion of the estate which it could take without objection, and devote the real estate or its proceeds to building the memorial and buying the tombstones, which was not an illegal intent and violated no law.

[2] Every sane man must be allowed to make his own will, provided he violates no law or public policy in disposing of his estate. It is not the policy of the law to seek grounds for avoiding devises and bequests, but rather to deal with both so as to uphold and enforce them if it can be done consistently with the rules of law.

As Lord Hardwicke said: "The bequest is not void and there is no authority to construe it to be void, if by law it can possibly be made good." Perry on Trusts, § 709.

It is plain that the manifest purpose of this testator, in the case at bar, can be carried out and his estate appropriated as he directed without violating in any respect the provisions of the statute inhibiting a church from taking real estate by devise. We are, therefore, of opinion that the circuit court erred in so construing the will under

consideration as to give the real estate passing thereunder to the heirs at law of the testator, thereby diminishing, to that extent, the fund dedicated by the testator to the erection of a memorial to his deceased sister.

The decree appealed from must be reversed, and the cause remanded for further proceedings therein not in conflict with the views expressed in this opinion.

Reversed.

KEITH, P., absent.

(73 W. Va. 543)

CRAWFORD et al. v. BOSWORTH.

(Supreme Court of Appeals of West Virginia.
May 27, 1913.)

(Syllabus by the Court.)

1. INJUNCTION (§ 26*)—ACTION AT LAW—CONCURRENT JURISDICTION—EQUITY.

A suit at law cannot be enjoined, and the litigation transferred to a court of equity, merely on the assertion of defenses that are pleadable at law.

[Ed. Note.—For other cases, see Injunction, Cent. Dig. §§ 24-49, 54-61; Dec. Dig. § 26.*]

2. INJUNCTION (§ 199*)—ACTION AT LAW—DISSOLUTION—SUBSEQUENT PROCEEDINGS.

Upon dissolution of the injunction in such suit in equity, it is error for the court, without cross-pleadings by defendant, to refer the cause to a commissioner and decree recovery against the plaintiffs on the contract sued on at law.

[Ed. Note.—For other cases, see Injunction, Cent. Dig. § 417; Dec. Dig. § 199.*]

3. INJUNCTION (§ 26*)—ACTIONS AT LAW—MULTIPLICITY OF SUITS.

Where the liability of four persons arising from a single contract is several and distinct, equity has no jurisdiction to enjoin separate actions at law thereon on the ground of multiplicity of suits.

[Ed. Note.—For other cases, see Injunction, Cent. Dig. §§ 24-49, 54-61; Dec. Dig. § 26.*]

Appeal from Circuit Court, Randolph County.

Action by Lucy B. Crawford and others against Albert S. Bosworth. From a decree for defendant, plaintiffs appeal. Reversed.

W. B. Maxwell and E. A. Bowers, both of Elkins, for appellants. J. L. Wamsley and Harding & Harding, all of Elkins, for appellee.

LYNOH, J. To enjoin the prosecution of an action at law against each of the four plaintiffs, to cancel, as fraudulent and without consideration, the agreement, dated May 16, 1903, out of which the causes of action arose, and to settle herein the entire litigation, are the objects sought by the plaintiffs.

Having overruled defendant's demurrer, the circuit court, upon final hearing on answer and proof, and the report of the commissioner to whom the cause was referred to ascertain and report the debts due the defendant herein and plaintiff in the actions

at law, entered a decree of recovery against the plaintiffs, and they appealed.

[1] That failure of consideration in whole or in part, and fraud in the procurement of contracts, are available as defenses at law, is settled by section 5, c. 128, Code 1906, and *Gall v. Bank*, 50 W. Va. 597, 40 S. E. 390, *Railroad Co. v. Railroad Co.*, 56 W. Va. 458, 460, 462, 49 S. E. 532, *Connell v. Yost*, 62 W. Va. 67, 57 S. E. 299, *Mylius v. Massillon*, 70 W. Va. 576, 74 S. E. 728, and *Armentrout v. Armentrout*, 70 W. Va. 661, 74 S. E. 907. The facts of the *Armentrout Case*, and the action of the court thereon, alone afford ample authority for the determination of this case adversely to plaintiffs' contention. Equity will not interfere where there is adequate remedy at law. Even where there is concurrent jurisdiction, the tribunal "which first obtains possession of the subject must adjudicate, and neither party can be forced into another jurisdiction."

[3] Nor is there merit in the contention in this case that equity has cognizance to avoid multiplicity of suits. The liability of plaintiffs, if any, under the agreement of May 16, 1903, is several, not joint. Each is liable, if at all, only for commission on her share of the proceeds of sale. The defendant did not—in fact, could not properly—sue thereon jointly. Nor can they jointly complain because of the several actions at law.

[2] The defendant, under the principles announced in *Armentrout v. Armentrout*, supra, is not, under the pleadings, entitled to the relief granted by the decree of February 17, 1910.

The conclusion, therefore, is that the circuit court erred in its rulings upon defendant's demurrer, and all the proceedings subsequent thereto. The decrees of February 26, 1909, November 20, 1909, and February 17, 1910, will be reversed, the demurrer sustained, and the bill dismissed, without prejudice to the right of each of the plaintiffs to defend in the actions at law.

(72 W. Va. 555)

THOMPSON v. BALTIMORE & O. R. CO.

(Supreme Court of Appeals of West Virginia.
May 27, 1913.)

(Syllabus by the Court.)

RAILROADS (§ 482*)—FIRE SET BY LOCOMOTIVES—EVIDENCE.

The origin of a fire by sparks from a locomotive may be established by circumstantial evidence which justifies a reasonable and well grounded inference that the fire was of such origin, and rebuts the probability of the fire having originated from any other source.

[Ed. Note.—For other cases, see *Railroads*, Cent. Dig. §§ 1730-1732, 1734-1736; Dec. Dig. § 482.*]

Error to Circuit Court, Berkeley County.
Action by John L. Thompson, for use, against the Baltimore & Ohio Railroad Com-

pany. Judgment for plaintiff, and defendant brings error. Affirmed.

Faulkner, Walker & Woods, of Martinsburg, for plaintiff in error. H. H. McCormick, of Charles Town, and C. E. Martin, of Martinsburg, for defendant in error.

ROBINSON, J. The dwelling house of John L. Thompson, situated along the main line of the Baltimore & Ohio Railroad, was destroyed by fire. Claiming that the fire originated from sparks emitted from a locomotive, Thompson sued the railroad company to recover damages for the loss. At the trial the defendant demurred to the evidence. The court overruled the demurrer and entered judgment for the plaintiff.

By this writ of error defendant challenges the ruling of the trial court on the demurrer to the evidence. It is submitted that the evidence does not entitle plaintiff to judgment. The correct test on a defendant's demurrer to evidence is: Would the evidence warrant a verdict for the plaintiff? In this case, we are clearly of the opinion that it would. The court committed no error in giving plaintiff judgment.

Defendant insists that it is not proved that sparks from a locomotive caused the fire. Plainly from the facts and circumstances in evidence a jury would be warranted in the inference that the fire came from an engine on the railroad. "Circumstantial evidence to raise an inference is often all that can be had to show the origin of the fire." Baldwin on American Railroad Law, 440. See, also, 3 Elliott on Railroads, § 1243; 13 Amer. & Eng. Enc. of Law, 513. In this case, the evidence, though circumstantial, is sufficient to justify a reasonable and well-grounded inference that the fire originated from defendant's engine 1805, or its helper. The evidence is such as to rebut the probability of the fire having originated from any other source. Upon such evidence a jury could base a verdict. 33 Cyc. 1381-1385. Defendant argues that these engines passed the premises too long a time before the fire was discovered to have been the cause of the fire. But from facts and circumstances that are shown a jury could have reasonably found otherwise. Indeed one phase of the testimony would fix the starting of the fire on the porch roof next to the railroad very soon after the running of the train to which engine 1805 and its helper were attached.

Since under the evidence blame for the fire must be attributed to defendant, then presumptively it was negligent. *Jacobs v. Railroad Co.*, 68 W. Va. 618, 70 S. E. 369. As to engine 1805 and its helper, defendant offered no evidence to repel the presumption of negligence. So the origin of the fire and negligence in setting it out are both legally imputable to defendant.

The judgment will be affirmed.

(115 Va. 221)

LOONEY v. COMMONWEALTH.

(Supreme Court of Appeals of Virginia. June 16, 1913.)

1. CRIMINAL LAW (§§ 121, 1150*)—CHANGE OF VENUE—DISCRETION OF TRIAL COURT.

A motion under Code 1904, § 4036, for a change of venue on the ground of prejudice against accused is addressed to the discretion of the trial court, and its ruling will not be disturbed unless it plainly appears that the discretion has been improperly exercised.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 241, 3044; Dec. Dig. §§ 121, 1150.*]

2. CRIMINAL LAW (§ 1148*)—JURY (§ 7*)—SUMMONING JURY—MOTION TO SUMMON JURY FROM ANOTHER COUNTY—DISCRETION OF COURT.

A motion under Code 1904, § 4024, for a jury from another county is addressed to the discretion of the trial court, and its ruling will not be disturbed unless it plainly appears that the discretion has been improperly exercised.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 3050-3052; Dec. Dig. § 1148.* Jury, Cent. Dig. § 12; Dec. Dig. § 7.*]

3. JURY (§ 7*)—SUMMONING JURY FROM OTHER COUNTY—MOTION—TIME TO MAKE.

A motion under Code 1904, § 4024, for a jury from another county must precede a motion for a change of venue.

[Ed. Note.—For other cases, see Jury, Cent. Dig. § 12; Dec. Dig. § 7.*]

4. CRIMINAL LAW (§ 1144*)—SUMMONING JURY FROM ANOTHER COUNTY OR CORPORATION—GROUNDS.

Where a motion for a jury from another county was based on the ground that an impartial jury could not be obtained from the county, the conclusive presumption arising from the fact that an impartial jury was subsequently secured in the county is that the motion was unfounded.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2736-2764, 2766-2771, 2774-2781, 2901, 3016-3037; Dec. Dig. § 1144.*]

5. CRIMINAL LAW (§ 122*)—JURY (§ 7*)—QUESTIONS REVIEWABLE—MOTIONS DEPENDING ON CONDITIONS AT TIME OF TRIAL.

A motion for a change of venue on the ground of prejudice against accused, and a motion for a jury from another county or corporation, depend on conditions existing at the time of trial and are renewable on new trial when the exigencies of the situation require it.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 254; Dec. Dig. § 122.* Jury, Cent. Dig. § 12; Dec. Dig. § 7.*]

6. JURY (§ 70*)—SUMMONING JURY—STATUTORY PROVISIONS.

Code 1904, § 4018, providing that the writ of venire facias in case of felony shall command the officer to summon 16 persons taken from the list furnished by the clerk, and providing that the list shall contain the names of 20 persons drawn by the clerk in the presence of the presiding judge or, in his absence, of one of the commissioners in chancery, and a reputable citizen not connected with accused or prosecutor, and declaring that for good cause shown the presiding judge may direct more than 20 names to be drawn and shall specify the number of names to be drawn and summoned, the number drawn not being more than 4 in excess of the number to be summoned, is mandatory, and there must be a substantial compliance therewith, and, in the absence of

any cause, it is improper to prepare a list containing the names of 60 persons, and to order the officer to summon 30 from that list, and where the persons summoned on a second venire were practically the same as those summoned on the first venire, which was quashed, on the ground that it was drawn in the presence of the commissioner in chancery, who was the active head of the prosecution, the statute was disregarded, though when the second venire was ordered the judge and the clerk in form drew the names from the jury box.

[Ed. Note.—For other cases, see Jury, Cent. Dig. §§ 310-330, 340, 350; Dec. Dig. § 70.*]

7. CRIMINAL LAW (§ 363*)—EVIDENCE—RES GESTÆ.

Where there was no connection between a difficulty between accused and a third person, and the subsequent killing by accused of decedent, and the killing occurred at a different time and place, and decedent was not concerned in or present at the prior difficulty, the details and merits of the prior difficulty could not be shown, for they were no part of the res gestæ.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 804; Dec. Dig. § 363.*]

8. MUNICIPAL CORPORATIONS (§ 122*)—ORDINANCES—ADMISSIBILITY.

The mere fact that the records of the council of a town were kept in a crude manner in an account book or ledger which had been used for other purposes, and which contained other matter than the by-laws and ordinances of the town, and also contained a sheet of type-written matter concerning the business of the town, injected between the by-laws and ordinances and the certification and signatures of the clerk and mayor, did not render the records inadmissible to prove an ordinance, where as a whole they contained a sufficient authentication of the ordinance.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 281-289; Dec. Dig. § 122.*]

9. CRIMINAL LAW (§ 834*)—REQUESTED INSTRUCTIONS—MODIFICATION.

A requested instruction that, though decedent at the time he was shot was attempting to arrest accused, yet if in making such attempt he shot at accused, and thereupon, because of the shooting, accused, believing himself in "imminent danger of being killed or sustaining great bodily injury," killed decedent, the killing was not murder, though accused had previously threatened to kill any one who might attempt to arrest him, was properly modified by inserting after the quoted phrase the words "and being without fault in provoking the difficulty."

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2013, 2014; Dec. Dig. § 834.*]

10. HOMICIDE (§ 151*)—RESISTING UNLAWFUL ARREST—BURDEN OF PROOF.

Where an officer having a lawful warrant attempted to arrest accused, the presumption, in absence of evidence to the contrary, is that the officer discharged his duty in a lawful manner, and accused, resisting the arrest and killing the officer, has the burden of showing that the officer's conduct justified resistance.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. §§ 276-278; Dec. Dig. § 151.*]

Error to Circuit Court, Craig County.

Harvey D. Looney was convicted of murder in the first degree, and he brings error. Reversed.

O. B. Harvey, of Clifton Forge, and Wm. E. Allen, of Covington, for plaintiff in error. Samuel Williams, Atty. Gen., and J. P. Jones, of New Castle, for the Commonwealth.

WHITTLE, J. The plaintiff in error, Harvey D. Looney, was found guilty of murder in the first degree, and in accordance with the verdict of the jury was sentenced to death by the circuit court of Craig county. The case is before us on a writ of error to that judgment.

The prisoner, when put upon trial, moved the court for a change of venue under section 4036 of the Code. The grounds for the motion being that the county of Craig is a small mountainous county sparsely settled, and that in the town of New Castle the county seat and scene of the homicide, and throughout the entire county, great prejudice and ill will existed against the accused, both on account of the homicide and of numerous other difficulties in which he had been involved; that the deceased had a large relationship and connection in the community and many wealthy and influential friends who were taking an active part against him, and by whom the entire bar of the county had been employed to aid the prosecution. Moreover, that he had been informed of threats to lynch him in the event of his acquittal. For these reasons the accused alleged that he could not secure a fair and impartial trial in the county. The affidavits of 5 persons were offered in support of the petition, and of 20 persons in opposition to the change of venue, and the court overruled the motion. Thereupon the accused submitted a motion under section 4024 for a venire to be summoned from some other county or corporation, which motion was likewise overruled. The action of the court upon these motions constitutes the first and second assignments of error.

[1, 2] The trial court, in the exercise of the powers conferred upon it by sections 4024 and 4036, must of necessity be allowed a wide discretion, and it is the established rule that this court will not reverse the judgment of the trial court unless it plainly appears that such discretion has been improperly exercised. *Wormeley's Case*, 51 Va. 658, 672, 673; *Chahoon's Case*, 62 Va. 822; *Sands' Case*, 62 Va. 871, 882-884; *Richards' Case*, 107 Va. 881, 59 S. E. 1104; *Bowles' Case*, 103 Va. 816, 48 S. E. 527.

[3, 4] It is also the general rule that a motion for a jury from another county or corporation should precede the motion for a change of venue; and, where the motion is based on the ground that an impartial jury cannot be obtained in the county or corporation, the conclusive presumption from the fact that an impartial jury has subsequently been secured in the county is that such motion was unfounded. *Wright's Case*, 74 Va. 880; *Joyce's Case*, 78 Va. 289; *Waller's Case*, 84 Va. 492, 496, 5 S. E. 364. Cases may arise, however, where the general rule

would be inapplicable and a motion for change of venue should precede a motion for a jury from another county. See *Uzzle v. Commonwealth*, 107 Va. 919, 60 S. E. 52.

[5] We are of opinion that there is no reversible error in these assignments; nevertheless, as both motions depend upon conditions existing at the time of trial, they are, as a matter of course, renewable upon a new trial whenever the exigencies of the situation may call them into requisition.

[6] The third assignment of error is to the refusal of the court to quash the second venire facias. The facts touching this assignment are not disputed. On motion of the prisoner the first venire facias and list of veniremen was quashed because the venire was drawn in the presence of G. W. Layman, the commissioner in chancery designated for that purpose; it appearing that he was the active head of the prosecution. Thereupon the judge asked the sheriff if the persons summoned under the venire which had just been quashed were present in court, and, being informed that they were still in attendance, he retired with the clerk to the clerk's office and shortly returned into court with a list of veniremen and a new venire facias. The accused submitted a motion in writing to quash the second list of veniremen and venire facias for certain reasons enumerated in the motion, which motion the court overruled. In that connection the court made the following statement: "All the names remaining in the jury box were drawn, and all the available jurors in the box utilized, including such of the jurors as were upon the venire facias which was quashed in this case as were eligible jurors. That resulted in the drawing of 60 names. The judge of the court supposed that probably at least 30 of the jurors that had been drawn under the former venire facias were in attendance upon the court, and naturally expected that the sheriff, being ordered to summon forthwith, would summon the same jurors that were drawn under the former venire facias, the court understanding that there was no intimation that those jurors were drawn fraudulently or there was any improper or fraudulent conduct in the drawing of these former jurors; and, furthermore, that if a jury free from exception cannot be gotten out of those in attendance upon the court under the former venire facias, and who are summoned under the present venire facias, of course the statute will be pursued until the proper jury is obtained. When the court ordered the second venire facias after the first one was quashed, the judge of the court and the clerk retired to the clerk's office. The clerk produced the jury box, unlocked it, placed it on the table, and with a piece of paper in front of him prepared to record the names of the eligible jurors. The judge drew the folded ballots from the box in the presence of the clerk, no one else being present but himself and

the clerk, read the name of the juror, discussed with the clerk where he lived, his proximity to New Castle, his relationship, if any, to the prisoner, as well as to Mr. Oscar Martin, and selected 60 names from the box, which exhausted all of the eligible ballots in the box. The clerk then prepared the venire facias in due form, inserted the names so selected and delivered the writ to the sheriff, by which he was directed to summon 30 of that number."

Section 4018 of the Code prescribes the manner of selecting and summoning a venire in a case of felony. The ordinary course of procedure is for the list to contain the names of 20 persons drawn by the clerk of the court or his deputy from the names in the box, as provided for by sections 3142 and 3144. The drawing must be in the presence of the judge of the court or, in his absence, of one of the commissioners in chancery designated for the purpose under section 3146, and also a reputable citizen not connected with the accused or the prosecutor or, in case of homicide, with the deceased, who shall be called upon for that purpose by the clerk conducting the drawing. If the attendance of the commissioner cannot be obtained, the drawing shall be in the presence of two reputable citizens not connected as aforesaid and called upon by the clerk. If there is drawn from the box the name of a person who has died, removed from the county, or is related to the accused or the prosecutor or, in case of homicide, to the deceased, or lives within three miles of the place where the crime is charged to have been committed, such name shall not be placed on the list, but all other names drawn from the box shall be placed on the list as they are drawn; and when 20 names have been so placed the drawing shall cease. The section further provides that for good cause shown the judge may direct more than 20 names to be drawn and placed on the list and more than 16 persons to be summoned. In such case he shall specify the number of names to be drawn and the number of persons to be summoned, and the number drawn shall not be more than 4 in excess of the number to be summoned. The concluding paragraph of the section declares that no irregularities or errors in drawing the names or in making out or copying or signing or failing to sign the list, or in summoning the persons named in the list, shall be cause for summoning a new panel or for setting aside a verdict, or granting a new trial, unless objection thereto was made before the jury was sworn, and unless it appears that the irregularity, error, or failure was intentional, or was such as to probably cause injustice to the commonwealth or to the accused.

The record shows a plain departure from imperative provisions of the statute in several essential particulars. No good cause, or indeed any cause, was shown for directing more than 20 names to be drawn and placed

in the list to be summoned. Nevertheless, the second list of veniremen contained the names of 60 persons, and the order of the court and venire facias directed the officer to summon only 30 from that list. Moreover, the mandatory provision of the law that, when more than 20 persons are ordered to be drawn and summoned, the number drawn shall in no case be more than 4 in excess of the number to be summoned was wholly disregarded.

The manifest object of the foregoing provision of the statute is to secure a drawn list of veniremen and to render it impossible to pack the jury. Sixty veniremen, it is true, were in form drawn from the jury box; yet the persons summoned on the second venire were practically the same persons summoned on the quashed venire. Substantially the same result would have followed if there had been no drawing, and the court had merely ordered the sheriff to resubmit the original veniremen.

In these circumstances, the persons to be summoned were known in advance, and the solemnity of drawing the veniremen was an empty form. It was clearly the intention of the judge, by the method adopted, to secure the names of the 30 veniremen in attendance on the court; yet, had the statute been complied with, there would have been a list of 56 persons instead of 30 from whom to select the jury.

In what has been said we do not wish to be understood as in any way reflecting upon the integrity of the honorable judge of the circuit court. It was conceded that he acted in good faith. He did not think that the ground for quashing the original venire facias involved the eligibility of the veniremen, but merely the fitness of the commissioner in chancery to participate in drawing them; and his sole purpose in pursuing the method adopted was to facilitate the trial of the case. Still the probity of his motives cannot justify the utter disregard of these imperative and essential provisions, and such omission to comply with the statute constitutes reversible error.

In *Hall's Case*, 80 Va. 555, 561, the court, speaking through Lewis, P., says: "These provisions of the statute, in respect to impaneling juries, are not directory merely, but imperative. They are rules which are made essential in proceedings involving life or liberty, and it is the right of the accused to demand that they be strictly complied with. The disregard of them is to deprive the accused of that 'due process of law' which is provided by the Legislature, and which is required by the fundamental law of the land."

The importance of the observance by the courts of these safeguards thrown around the accused cannot be overstated. As was well said by Judge Harrison in *Hoback's Case*, 104 Va. 871, 879, 880, 52 S. E. 575, 578: "Jurors as triers of the fact wield far more power than the judge on the bench, in the

trial of an accused person, and the Legislature has seen fit to safeguard the rights of the commonwealth and the accused by the enactment of a mandatory provision for the Constitution of this important branch of the judicial system, which the courts are not at liberty to disregard, even if they deemed it expedient to do so." Jones' Case, 100 Va. 842, 41 S. E. 951; Patrick's Case, 78 S. E. 628, in which an opinion has been handed down during the present term.

We may observe that Hardy's Case, 110 Va. 910, 67 S. E. 522, does not sustain the action of the trial court in the particulars we have been discussing. In that case the irregularity complained of was that the sheriff summoned the entire list of 40 persons drawn as veniremen instead of 36, as ordered by the court; an irregularity which could not have prejudiced the accused.

[7] The fourth assignment of error involves the admission by the court, over the objection of the accused, of the details and merits of an antecedent controversy between the prisoner and W. O. Caldwell. There was no connection between that difficulty and the subsequent shooting of the deceased. It occurred at a different time and place, and the deceased was not present or concerned in the altercation. The evidence was not connected with the homicide and was no part of the *res gestæ*; it was therefore inadmissible. Joyce's Case, 78 Va. 287; O'Boyle's Case, 100 Va. 785, 40 S. E. 121.

[8] The fifth assignment of error challenges the authentication of the ordinance of the town of New Castle upon which warrants for the arrest of the prisoner were based.

It is true that the records of the council were kept in a crude and careless manner in an account book or ledger which had been used for other purposes and contained matter other than the by-laws and ordinances. And, moreover, that a sheet of typewritten matter, concerning the business of the town, was injected between the by-laws and ordinances and the certification and signatures of the clerk and mayor. But, considering the record as a whole, we think it contains a sufficient authentication of the passage of the ordinance in question and was properly admitted in evidence.

The sixth and last assignment of error which demands our attention relates to the ruling of the court in relation to instructions.

[9] While the record shows that the accused excepted to the refusal of the court to give a number of instructions, and also to its action in modifying other instructions, those to which our attention was specifically drawn by the oral argument were 11, 14, 15, 16, and 20.

The court modified 11 by interpolating the words, "being without fault in provoking the affray," and 16 by words of like import. Instruction 11, as modified, is as follows:

"The court further instructs the jury that, although they may believe from the evidence that the deceased at the time he was shot was attempting to arrest the accused, yet if they further believe from the evidence that in making such attempt he shot at the accused, and thereupon, because of said shooting at the accused by the deceased, the accused, believing himself in imminent danger of being killed or sustaining great bodily injury, and being without fault in provoking the affray, returned the fire and killed the deceased, * * * such killing was not murder, notwithstanding the jury may believe from the evidence that the accused had previously threatened to kill any one who might attempt to arrest him."

This instruction does not undertake to define the degree of guilt of the accused, if any, in the circumstances set forth in the instruction. But upon substantially the same hypothetical statement of facts the jury are told in instruction 16 that the killing would be justifiable (more accurately *excusable*) homicide. Both the instructions without the modification would have been erroneous, and instruction 14 is amenable to the same objection.

[10] Instructions 15 and 20, which are practically identical, are not a correct exposition of the law. Instruction 15 told the jury "that, when the commonwealth relies upon the fact that the homicide was committed by the defendant during the resistance to a lawful arrest, it has the burden of proving the legality of the arrest beyond a reasonable doubt."

Where an officer armed with a lawful warrant attempts to make an arrest in obedience to its mandate, the *prima facie* presumption, in the absence of evidence to the contrary, is that he will discharge his duty in a lawful manner; and the burden rests upon the accused, who undertakes to resist the arrest, to show that the officer's conduct was such as to justify such resistance.

As a new trial must be granted upon other grounds, it is unnecessary to consider the court's action in overruling the motion of the accused for a continuance.

For the errors to which attention has been called, the judgment must be reversed, the verdict of the jury set aside, and the case remanded for a new trial to be had therein. Reversed.

KEITH, P., absent.

(115 Va. 933)

PATRICK v. COMMONWEALTH.
(Supreme Court of Appeals of Virginia. June 16, 1913.)

1. JURY (§ 70*)—IMPANELING—PRESENCE OF COMMONWEALTH'S ATTORNEY.
Code 1904, § 4018, providing that the drawing of the names from the jury box to be

placed on the jury list shall be in the presence of the presiding judge or, in his absence, of one of the commissioners in chancery and a reputable citizen not connected with accused or prosecutor or, in case of homicide, with decedent, when read in connection with section 3140, authorizing the drawing of juries in civil cases in the presence of the attorney for the commonwealth, does not change the common-law rule that no one shall take part in the selection of jurors who does not stand indifferent to the parties, and it is improper for the commonwealth's attorney to be present during the drawing in felony cases.

[Ed. Note.—For other cases, see Jury, Cent. Dig. §§ 310-330, 340, 350; Dec. Dig. § 70.*]

2. JURY (§ 70*) — IMPANELING — STATUTORY PROVISIONS.

Under Code 1904, § 4018, providing that names drawn from the jury box shall be placed on the list, and that, when 20 names have been drawn and placed on the list, the drawing shall cease, unless, for good cause shown in a felony case, the presiding judge has directed more than 20 names, the action of the clerk in drawing and placing 30 names on the list is unauthorized in the absence of an order of the presiding judge.

[Ed. Note.—For other cases, see Jury, Cent. Dig. §§ 310-330, 340, 350; Dec. Dig. § 70.*]

3. JURY (§ 70*) — IMPANELING — STATUTORY PROVISIONS.

An order on the court's own motion, which directs the clerk in "drawing the list of venire facias for the trial of criminal cases" to draw the names of 30 persons and the sheriff to summon 26 from the list, is in violation of Code 1904, § 4018, authorizing the judge "for good cause shown in any felony case" to direct that more than 20 names be drawn and placed on the list and more than 16 persons summoned, and does not justify the clerk in drawing and placing 30 names on the list.

[Ed. Note.—For other cases, see Jury, Cent. Dig. §§ 310-330, 340, 350; Dec. Dig. § 70.*]

4. JURY (§ 82*) — IMPANELING — "INTENTIONAL IRREGULARITIES."

The irregularity in drawing and placing on the list of more than 20 names without an order of court duly made is an intentional irregularity within Code 1904, § 4018, authorizing the drawing and placing on the list of only 20 names, unless the judge for good cause shown directs the drawing and placing of more names, and is not within the curative provision that no irregularity in drawing the names or in making the list shall be cause for summoning a new panel, or for setting aside a verdict, or granting a new trial, unless the irregularity was intentional.

[Ed. Note.—For other cases, see Jury, Cent. Dig. §§ 282, 307-309, 331, 332, 348, 359, 367, 380; Dec. Dig. § 82.*]

5. JURY (§ 110*) — IMPANELING — OBJECTIONS — TIME TO MAKE.

An objection to the action of the court in not directing a venire facias to be issued to complete the panel, when a sufficient number of jurors was not obtained from the persons summoned and in attendance, not made until after verdict, comes too late, and a motion to set aside the verdict on that ground is properly overruled.

[Ed. Note.—For other cases, see Jury, Cent. Dig. §§ 502-513, 515-523; Dec. Dig. § 110.*]

6. CRIMINAL LAW (§ 814*) — INSTRUCTIONS — APPLICABILITY TO CASE.

An instruction based on the theory that there was evidence that accused was at fault in bringing on the difficulty in which the homi-

cide was committed is erroneous, when in fact there is no such evidence.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1821, 1833, 1839, 1860, 1865, 1883, 1890, 1924, 1979-1985, 1987; Dec. Dig. § 814.*]

7. JURY (§ 70*) — IMPANELING — STATUTORY PROVISIONS.

The statute governing the selection of jurors should be complied with, and the fact that it is inconvenient to the court to do so, or that a compliance will cause a delay in the trial, does not justify a departure from the statute.

[Ed. Note.—For other cases, see Jury, Cent. Dig. §§ 310-330, 340, 350; Dec. Dig. § 70.*]

8. CONSTITUTIONAL LAW (§ 70*) — JUDICIAL FUNCTIONS — WISDOM OF STATUTES.

The court must execute the legislative will, as evidenced by plain statutes, without any regard to its own views as to the necessity or wisdom thereof.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. §§ 129-132, 137; Dec. Dig. § 70.*]

Error to Circuit Court, Wise County.

Joshua Patrick was convicted of murder in the second degree, and he brings error. Reversed and remanded for new trial.

Bond & Bruce, of Wise, for plaintiff in error. Samuel W. Williams, Atty. Gen., for the Commonwealth.

BUCHANAN, J. The accused was indicted for murder in the circuit court for Wise county. Upon his trial he was found guilty of murder in the second degree and his term of confinement in the penitentiary fixed at 13 years, and judgment was entered in accordance with that finding. To that judgment this writ of error was awarded.

The action of the court refusing to quash the venire facias is assigned as error.

[1] The first objection made to that writ is that the list of names furnished by the clerk to the sheriff from which to summon the jury for the trial of the accused was drawn in the presence of the commonwealth's attorney of the county, in violation of section 4018 of Pollard's Code.

By that section it is provided that the drawing of the names from the jury box to be placed upon such list shall be done in the presence of the judge of the court, or in his absence in the presence of one of the court's commissioners in chancery designated by the judge of the court for that purpose by an order entered of record and a reputable citizen not connected with the accused or the prosecutor or, in case of homicide, with the deceased; and, if the presence of such commissioner cannot be obtained, such drawing shall be in the presence of two reputable citizens not connected with the accused, the prosecutor, or, in case of homicide, with the deceased. While section 3146 of the Code authorizes the drawing of juries in civil cases in the presence of the attorney for the commonwealth, there is no authority for his pres-

ence when juries are to be drawn in felony cases. On the contrary, it is clear from section 4018 of the Code, when read in connection with section 3146, that such official was purposely not included among those who should attend the drawing of juries in felony cases. The reason for such omission is apparent. He is counsel for the commonwealth, one of the parties to the proceeding in which the jury is to sit. It has always been the policy of our law, as far as human caution could reasonably provide, to see that the officials who select juries, as well as the jurors themselves, should stand impartial and unprejudiced. To permit counsel on either side to take part in drawing a jury for the trial of a cause in which they are counsel would be to disregard that principle of the law, both common and statutory, which has always sought to guard the purity of the administration of justice from even the suspicion of partiality.

The rule of the common law is that no one should take part in the selection of jurors who does not stand indifferent between the parties, and there is nothing in our statutes which changes that rule. See *Woods v. Rowan*, etc., 5 John. (N. Y.) 133; *Munshower v. Patton*, 10 Serg. & R. (Pa.) 334, 13 Am. Dec. 678; *Peak v. State*, 50 N. J. Law, 179, 12 Atl. 701, 705; *People v. Teague*, 106 N. C. 576, 11 S. E. 665; 24 Cyc. 226, 227; 12 Enc. Pl. & Pr. 420.

[2, 3] Another objection made to the venire facias is that it directed the sheriff to summon 26 persons from a list of 30 names, instead of 16 persons from a list of 20 names, as required by section 4018 of the Code.

It was held in *Jones' Case*, 100 Va. 842, 41 S. E. 951, that a venire facias which directs the summoning of a different number of jurors from that required by the statute in a felony case was invalid process. Since that decision section 4018 has been amended. It now provides that all names drawn from the jury box shall be placed on the list as drawn, except the names of persons who are dead or have removed from the county or corporation or are related to the accused or prosecutor, or, in a case of homicide, to the deceased, or who are known by the clerk or other persons attending the drawing, if the case be in a circuit court of a county, to live within three miles of the place where the crime is charged to have been committed, and when 20 names have been so drawn and placed upon the list the drawing shall cease, and a copy of said list shall at once be made and signed by the clerk and the persons attending the drawing and filed in the clerk's office. It also provides that the venire facias shall command the sheriff to summon 16 persons from the list of names furnished him by the clerk, which shall contain the names of 20 persons for that purpose. That section further provides that "for good cause shown in any felony case the judge of the court, in

term time or vacation, may direct more than twenty names to be drawn and placed in the list. * * *

No such order was entered in this case, and the action of the clerk in drawing and placing 30 names on the list was wholly unauthorized and in plain violation of the section, unless, as claimed by the Attorney General, the following order authorized the clerk's action:

"Virginia:

"At a circuit court continued and held for Wise county at the courthouse thereof on Monday, April 24, 1911. Present the same Hon. Judge presiding as on last Saturday.

"On motion of the judge of this court, it is ordered that the clerk of this court hereafter in drawing the list of venire facias for the trial of criminal cases draw the names of 30 persons as required by law and the sheriff shall summon 26 persons from said list as prescribed by law."

That order was not entered in this or any other felony case, but was a general order made upon the court's own motion. It was entered in April, 1911, nearly a year and a half before the accused was indicted and long before the homicide for which he was tried had been committed. The order was not only unauthorized but in violation of the provisions of section 4018 and furnished no authority for the clerk's action in this case to draw and place upon the list more than 20 names. The clerk not only had no authority to draw and place upon the list more than 20 names, but he was prohibited from doing so, for that section expressly declares that when 20 names have been drawn and placed upon the list "the drawing shall cease." *Looney's Case*, 78 S. E. 625, this day decided.

[4] It is clear under the *Jones Case*, supra, and the decisions cited in the opinion of the court in that case, that the motion to quash the venire facias on this ground ought to have been sustained, unless the failure to comply with the provisions of section 4018 in that respect is cured by the further provision contained in it that "no irregularity or error in drawing the names or in making out or copying or signing or failing to sign the list or in summoning the persons named on the list shall be cause for summoning a new panel or for setting aside a verdict or granting a new trial, unless objection thereto was made before the jury was sworn, and unless it appears that such irregularity, error, or failure was intentional or is such as to probably cause injustice to the commonwealth or to the accused."

The objection to the venire facias was made before the jury was sworn, and there can be no question that the irregularity or error in drawing and placing upon the jury list more names than the statute authorized or permitted was intentional. This being so, it follows that the irregularity complained of

is not within the curative provisions of section 4018, and that the court ought to have sustained the motion to quash the venire facias on that ground.

Whether or not the unauthorized presence of the commonwealth's attorney at the drawing of the jury was probably prejudicial to the accused need not be decided, as it is not likely to occur in drawing the next jury, and as the judgment complained of has to be reversed upon another ground.

[5] Error is also assigned to the action of the court in not directing a venire facias to be issued to complete the panel when a sufficient number of jurors was not obtained from the persons summoned and in attendance on the court, as required by section 4018 of the Code. There being no objection to this action of the court until after the jury was sworn, indeed until after verdict found, it came too late, and the motion to set aside the verdict on that ground was properly overruled.

[6] Error is assigned to the action of the court in giving instruction No. 4 asked for by the commonwealth and in refusing to give instruction No. 8 offered by the accused, as offered, and giving it as amended by the court. The ground of objection to these instructions, as given, is that they were based upon the theory that there was evidence tending to show that the defendant was at fault in bringing on the difficulty in which the homicide was committed, when in fact there was no such evidence. If this be true, the instructions as given were erroneous, and upon the next trial, if there be no such evidence, instructions based upon that hypothesis ought not to be given.

[7, 8] As there are now in our hands six felony cases, either upon the docket or upon petition for writs of error, in which the principal errors assigned are based upon alleged violations or disregard of our statutory provisions in reference to the selection of jurors, it may not be improper for this court to impress upon the trial judges the great importance, if not absolute necessity, of seeing that these statutes are strictly complied with. Our statutory provisions on the subject are plain and not difficult to enforce. They were enacted, not only for the purpose of securing fit jurors, but to avoid even the suspicion of partiality or corruption in their selection. The fact that it may sometimes be inconvenient to the court or cause delay in the trial of a cause is no sufficient reason why the statutes should not be strictly and rigidly enforced. The legislative intent in these matters should absolutely control the action of the judiciary. The courts have no other duty to perform than to execute the legislative will, without any regard to their own views as to the necessity or wisdom of the enactments. Sedgwick on Stat. Constr. 325.

The judgment complained of must be reversed for failure to comply with the law in drawing the number of names to be placed on the jury list, the verdict set aside, and the cause remanded for a new trial to be had not in conflict with the views expressed in this opinion.

Reversed.

KEITH, P., absent.

(115 Va. 33)

CHESAPEAKE & O. RY. CO. v. CHAPMAN.
(Supreme Court of Appeals of Virginia. June 12, 1913.)

1. APPEAL AND ERROR (§ 197*)—VARIANCE—WRIT AND DECLARATION.

Where plaintiff obtained leave to amend her declaration by increasing the ad damnum, and more specifically describing the land alleged to have been injured, but did not amend the writ, an alleged variance between the declaration as amended and the writ could not be reviewed on a writ of error, defendant not having cravedoyer of the writ nor made it a part of the record.

[Ed. Note.—For other cases, see Appeal and Error, Dec. Dig. § 197.*]

2. APPEAL AND ERROR (§ 197*)—WRIT TO ALLEGE ERROR—VARIANCE—QUESTION NOT RAISED AT TRIAL.

Plaintiff having obtained leave to amend the ad damnum and description of the property alleged to have been injured in the declaration, but, having failed to amend the writ, defendant did not move for a continuance, nor indicate that it would be surprised or prejudiced in making its defense by the amendment of the declaration, but pleaded generally thereto, and went to trial. Held, that defendant waived the variance if any, and could not object thereto for the first time on a writ of error.

[Ed. Note.—For other cases, see Appeal and Error, Dec. Dig. § 197.*]

3. ABATEMENT AND REVIVAL (§ 40*)—VARIANCE BETWEEN DECLARATION AND WRIT—REMEDIES.

A variance between the amended declaration and the writ, though involving an objection that the writ was illegally issued and executed, is nevertheless matter of abatement which can be taken advantage of only by plea or demurrer, as expressly provided by Code 1904, §§ 3259, 3260; and, when issue is joined on the amended declaration, it is conclusively presumed that the amendment is harmless, and did not prevent defendant from making a full defense to the action.

[Ed. Note.—For other cases, see Abatement and Revival, Cent. Dig. §§ 141-143, 147, 153-156, 168, 174, 188, 205-211; Dec. Dig. § 40.*]

4. APPEAL AND ERROR (§ 970*)—TRIAL (§ 59*)—ORDER OF PROOF—DISCRETION.

The order of the examination of witnesses lies chiefly in the discretion of the trial court, and its exercise will rarely, if ever, be controlled by an appellate court, especially where no prejudice or injury to the objecting party is shown.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3849-3851; Dec. Dig. § 970.* Trial, Cent. Dig. §§ 138-140, 142, 143, 145; Dec. Dig. § 59.*]

5. EVIDENCE (§ 536*)—WEIGHT AND SUFFICIENCY—AFFIRMATIVE AND NEGATIVE TESTIMONY.

An instruction that the positive testimony of a single credible witness that he saw or

heard a particular thing at a particular time ought ordinarily to outweigh that of a number of witnesses equally credible, who, with the same opportunities, testify that they did not see or hear it, but the negative statement of a credible witness, who had the same opportunity to see or hear and whose attention because of particular circumstances was equally drawn to the disputed point, becomes positive evidence, and is for the jury to decide between the two views, was proper, and did not invade the jury's province in passing on the weight of the evidence.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 2432-2435; Dec. Dig. § 586.*]

6. RAILROADS (§ 482*)—FIRES—EVIDENCE.

In an action for injuries to plaintiff's land by fire, evidence held to support a finding that the fire that burned over the land was set out by defendant railroad company.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 1730-1732, 1734-1736; Dec. Dig. § 482.*]

7. APPEAL AND ERROR (§ 1001*)—VERDICT—EVIDENCE—SUPPORT.

The jury may discard the preponderance of the evidence as unworthy of credence, and accept that of a single witness on which to base a verdict, and hence a verdict cannot be disturbed if the evidence of that witness is sufficient standing alone to sustain it under the rule that it may not be set aside, unless there is a palpable insufficiency of evidence.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3922, 3928-3934; Dec. Dig. § 1001.*]

Error to Circuit Court, Orange County.

Action by Josephine M. Chapman against the Chesapeake & Ohio Railway Company. Judgment for plaintiff, and defendant brings error. Affirmed.

Browning & Browning, of Orange, and Henry Taylor, Jr., of Richmond, for plaintiff in error. Gordon & Gordon, of Louisa, and V. R. Shackelford, of Orange, for defendant in error.

CARDWELL, J. This writ of error brings under review a judgment of the circuit court of Orange county in an action brought by defendant in error, Mrs. Josephine M. Chapman, to recover of plaintiff in error, Chesapeake & Ohio Railway Company, damages to growing timber on her lands, occasioned by fire alleged to have been set out from one of plaintiff in error's engines, operated in running its trains along its tracks between the towns of Gordonsville and Orange, Va.

One count in the declaration is grounded on negligence in setting out the fire, and the other on the statute, which makes a railway company liable in damages for an injury or loss from fire set out by it.

The defendant in error and her husband, Col. Chapman, each own a tract of land lying side by side, and both abutting on the right of way of the plaintiff in error between Gordonsville and Orange, the railway at that point running a little east of north. Each of said tracts of land extend from the railway company's right of way in an easterly and southeasterly direction for about a

mile or a mile and a quarter to and beyond a road known as the Ridge road running parallel with the railroad through and across the lands of the defendant in error and Col. Chapman, the latter's land lying to the south of the former's.

The theory of defendant in error is that shortly after the passage of one of plaintiff in error's trains, running between Orange and Gordonsville, between 10 and 11 o'clock on the morning of Wednesday, the 7th day of April, 1909, certain fence posts used to inclose the railway company's track through the lands of Col. Chapman were set on fire; and, if this fire was not communicated from the burning posts to his adjoining lands, it was communicated by sparks thrown from one of plaintiff in error's engines into the broom-sedge field of Col. Chapman, and from thence communicated itself to the woodlands of Col. Chapman and from his woodlands to the woodlands of defendant in error, resulting in the damage to her standing trees of which she complains.

On the other hand, plaintiff in error, while not controverting the fact that one of its trains set out the fire which burned the broom-sedge field of the "Easton tract" belonging to Col. Chapman and that it is liable to him for whatever damage he has sustained thereby, contends that the fire which reached the lands of defendant in error and caused the damage to her growing trees thereon for which she sues was communicated to her lands from a forest fire starting the Sunday night or Monday before in the woods a short distance northeast of Gordonsville, near the point where the De Souroux road intersects the Ridge road, with the origin of which forest fire plaintiff in error had no connection; that this fire continued to burn on Monday and Tuesday preceding the Wednesday of the fire in question and progressed down the Ridge road northerly, on the south side thereof, until it reached the lands of George Goodman and Hugh Goodman; and that it then crossed to the north side of the Ridge road and communicated itself to the lands of George Goodman and Hugh Goodman, and from Hugh Goodman to the lands of Col. Chapman, and from the latter's lands to the lands of defendant in error in the forenoon of Wednesday, April 7th, when the alleged damage to her timber was done.

Upon the plea of the general issue, "not guilty," the case was tried, and the jury after a view of the scene of the fire, and hearing the evidence adduced before them, rendered a verdict for defendant in error (plaintiff below), assessing her damages at \$2,500; but the trial court being of opinion that the quantum of damages found by the jury was excessive or not supported by the evidence, though sufficient to sustain the verdict for \$1,266.50, put defendant in error

to her election whether to release and remit the damages assessed by the jury in excess of \$1,266.50 or to have the verdict set aside by the court and a new trial granted; thereupon defendant in error, under protest, released and remitted all of the damages assessed by the jury in excess of \$1,266.50, whereupon the court overruled plaintiff in error's motion to set aside the verdict and entered judgment thereon, to which judgment this writ of error was awarded.

The original declaration filed at rules held in the clerk's office of the circuit court on the third Monday in April, 1910, claimed damages to the amount of \$1,200, based upon the burning over of about 192 acres of defendant in error's lands, thereby consuming all the growth on the cleared land and the dry leaves and combustible matter upon the woodland, killing, injuring, and greatly damaging the growing timber upon the woodland; and after the case had been remanded to rules for a new writ to be issued upon the declaration, which was done, and the case again put on the court's docket for trial, and after subsequent continuances from time to time until the April term of the court, 1912, it was called for trial, whereupon, defendant in error, immediately before the jury was impaneled and sworn to try the issue, asked leave to amend her declaration by inserting at the proper place "422 acres," instead of "192 acres" appearing in the declaration, and by inserting "\$2,500.00 damages" in lieu of "\$1,200.00 damages" claimed in the declaration, which motion the court, over the objection of plaintiff in error, granted; and thereupon the case went to trial upon the issue joined on the plea of the general issue.

The ruling of the court permitting the amendment of the declaration just stated is made the foundation of plaintiff in error's first assignment of error here.

[1] As there was no offer at the time to amend the writ in like manner as the declaration was amended, plaintiff in error contends that the amendment of the declaration produced a variance between the writ and the declaration, and that the judgment of the trial court should be reversed for this cause.

[2, 3] Whether there is a variance between the writ and the declaration cannot be judicially determined from the record, since no oyer was craved of the writ for the purpose of making it a part of the record. If the amendment of the declaration produced the alleged variance, plaintiff in error could have craved oyer of the writ for the purpose of making the variance appear, and thereupon, if the variance appeared, moved to quash the writ because of the variance between it and the declaration; but this was not done, and had it been done doubtless defendant in error would have asked and been granted leave to amend the writ in

like manner as the declaration was amended, and thus cured the variance. Neither did plaintiff in error move for a continuance of the case, nor did it indicate in any way that it would be surprised or prejudiced in making its defense by the permitting of the amendment of the declaration, but instead pleaded generally to the declaration as amended and went to trial. In these circumstances theories of surprise and injury in making its defense advanced for the first time in this court cannot avail plaintiff in error as a valid reason for reversing the judgment of the trial court complained of. It is true that the objection involved here is not that the writ was illegally issued and executed, but the matter is none the less in abatement only, which was not taken advantage of by plea or demurrer, but issue joined on the case made by the amended declaration, and therefore it is to be conclusively presumed that the amendment is harmless and in no manner prevented or hindered plaintiff in error in making full defense to the action. *Tabb v. Gregory*, 4 Call (8 Va.) 225.

That the amendment of the declaration objected to was proper in the circumstances disclosed by the record needs no citation of authority. The original declaration gave only a general description of the lands of defendant in error alleged to have been burned over and stated the number of acres to be about 192, while the amended declaration the jury that positive testimony is rather to locus in quo burned over by the fire alleged to have been set out by plaintiff in error, an amendment which the court would doubtless have required had objection been made by plaintiff in error that the original declaration was too general in its description of the locus in quo.

Sections 3259 and 3260, Code of 1904, do apply and were intended to control in just such cases as this. They are as follows:

"In other cases, a defendant, on whom the process summoning him to answer appears to have been served, shall not take advantage of any defect in the writ or return, or in any variance of the writ from the declaration, unless the same be pleaded in abatement. And in every such case the court may permit the writ or declaration to be amended so as to correct the variance, and permit the return to be amended upon such terms as to it shall seem just."

"Where the declaration or bill shows on its face proper matter for the jurisdiction of the court no exception for want of such jurisdiction shall be allowed unless it be taken by plea in abatement. No such plea or any other plea in abatement shall be received after the defendant has demurred, pleaded in bar or answered to the declaration or bill, nor after a decree nisi or conditional judgment at rules."

[4] The error complained of, referring to plaintiff in error's bill of exceptions No. 2, is predicated upon the action of the trial

court in permitting over its objection witnesses E. P. Taylor and Col. Chapman, for defendant in error, to testify as to the conformation of the ground where the fire which caused the injury she sued for was alleged to have been set out. This evidence is objected to mainly on the ground that it was admitted at the wrong stage of the trial, and was therefore "certainly incompetent."

The question presented goes merely to the order of introducing the testimony, and this court has repeatedly held that the order of the examination of witnesses lies chiefly in the discretion of the trial court, and its exercise is rarely, if ever, to be controlled by an appellate court; and its action in this regard is not reviewable where, as in this case, no prejudice or injury to the party objecting is shown. *Burke v. Shaver*, 92 Va. 345, 23 S. E. 749; *Southern Ry. Co. v. Stockdon*, 106 Va. 693, 56 S. E. 718; *McIntire v. Smyth*, 108 Va. 736, 62 S. E. 930.

The third assignment of error is predicated upon plaintiff in error's exceptions Nos. 3 and 4, relating to the admissibility of certain evidence, which assignment is not pressed either in the petition for this writ of error or in the oral argument, and as we think it is clearly without merit it will not be further considered.

[5] The next error assigned relates to instruction No. 1 given for defendant in error, which is as follows: "The court instructs the jury that the positive testimony of a single credible witness that he saw or heard a particular thing at a particular time ought ordinarily to outweigh that of a number of witnesses equally credible, who, with the same opportunities, testify that they did not see or hear it, but the negative statement of a credible witness, who had the same opportunity to see or hear and whose attention, because of particular circumstances, was equally drawn to the disputed point, becomes positive evidence, and it is for the jury to decide between the two views."

In the complaint made by plaintiff in error of this instruction much stress is laid upon its first clause and little, if any, importance is attached to the remaining portion of it. The insistence of counsel for plaintiff in error is that the first part of the instruction invaded the province of the jury in passing upon the weight of the evidence, and that the latter part of the instruction qualifying the language used in the first part of it does not cure the error complained of.

We do not understand the instruction, when read as a whole, as an expression or instruction from the court to the jury as to which theory of the case they should adopt, or to in any way trench upon the prerogative of the jury as the exclusive triors of the facts. The office of an instruction given by a trial court to the jury is to guide them as to the law applicable to the case that the

evidence tends to prove, and must be so framed that it leaves the jury untrammelled in passing upon the credibility of the witnesses testifying in the case and the weight to be given their evidence.

The instruction here in question has not been directly passed upon by this court, but the rule of law it propounded to the jury, with respect to positive and negative testimony, has been well established in this state and in other jurisdictions.

The opinion of the court delivered by Rieley, J., in *Southern Ry. Co. v. Bryant*, 95 Va. 212, 28 S. E. 183, says: "It is consonant with reason and human experience that the positive testimony of a single witness whose credibility is unimpeached that he saw or heard a particular thing at a particular time and place ought ordinarily to outweigh that of a number of equally credible witnesses, who, with the same opportunities, testify that they did not see nor hear it. The particular thing might have taken place, and yet from inattention they may not have seen, nor heard it, or, though conscious of seeing or hearing it at the moment of its occurrence, may have afterwards forgotten it from lapse of time or defective memory. In such case the evidence of the one witness is positive, while that of the many is merely negative. But where a witness who denies a fact in question has as good opportunity to see or hear it as he who affirms it, and his attention, because of special circumstances, was equally drawn to the matter controverted, the general rule that the witness who affirms a fact is to be believed rather than he who denies it does not hold good. The denial of the one in such case constitutes positive evidence as well as the affirmation of the other, and produces a conflict of testimony."

It is true that the court there was discussing the evidence in the case to reach the conclusion which it did, that the trial court had not erred in overruling the motion to set aside the jury's verdict as contrary to the law and the evidence; still the rule of law and the reason therefor with respect to positive and negative testimony was fully recognized in language very nearly the same as is embodied in the instruction complained of here.

In *Southern Ry. Co. v. O'Bryan*, 119 Ga. 147, 45 S. E. 1000, the Supreme Court of Georgia held that it was not error to charge the jury that positive testimony is rather to be believed than negative, with the qualification that "other things are equal, and the witnesses are of equal credibility." *Railway Co. v. Bigham*, 105 Ga. 498, 30 S. E. 934.

The cases of *St. Louis, etc., Co. v. Brock*, 69 Kan. 448, 77 Pac. 86, and *Pyne v. Delaware, etc., R. R. Co.*, 212 Pa. 143, 61 Atl. 817, are authority for the proposition that where there is positive evidence given by those in charge of a train that the whistle

was sounded at a crossing, and negative evidence of those witnesses within hearing that they did not hear it, the court should, on request, call the attention of the jury to the fact that the law gives a preference to positive over negative testimony.

In the case of *Rhodes v. United States*, 75 Fed. 740, 25 C. C. A. 186, it was held not to be error to charge the jury that it is for them to consider how much certain testimony of a negative character is worth as against positive testimony, and that ordinarily the evidence of a witness who swears positively that he saw something is more valuable than that of witnesses who say that they did not see it. So in a number of the decided cases, among them *Del. L. etc., R. Co. v. Devore*, 114 Fed. 155, 52 C. C. A. 77, and *Indiana L. & I. R. Co. v. Otstot*, 212 Ill. 429, 72 N. E. 387, it is held that an instruction that positive testimony of witnesses that a whistle was blown and a bell rung is entitled to more weight than testimony of other witnesses that did not hear the one or the other is not erroneous, provided the instruction contains the qualification that "other things are equal and the witnesses are of equal credibility."

The instruction No. 1 we have before us sets forth clearly the requisite qualification, where the jury are told that the law gives a preference to positive over negative testimony; it instructs the jury as to the law, but does not, as is so earnestly argued, express or intimate an opinion on the part of the court with respect to the weight of the evidence; and we are therefore of opinion that there is no error in the giving of the instruction.

Exceptions were taken to defendant in error's instructions Nos. 2, 3, and 4, and a general objection thereto made in the petition for this writ of error, but no error is pointed out in either of these instructions, and as we are unable to discover any they will not be considered further.

[6] The remaining assignment of error relates to the refusal of the trial court to set aside the verdict of the jury because contrary to the law and the evidence, and because of excessive damages allowed.

As has been observed, the question of fact submitted to the jury was whether the fire which reached and burned over defendant in error's woodland was set out by one of plaintiff in error's trains on the same day, April 7, 1909, or had its origin in the woods a short distance northeast of Gordonsville, starting on Sunday night or Monday next preceding April 7th, and spoken of in the record as the "forest fire," the theory of defendant in error being that the fire causing the damage to her property, of which she complains, was set out by plaintiff in error's train running between Orange and Gordonsville between 10 and 11 o'clock on the morning of Wednesday, April 7th; while the theory of plaintiff in error is that the "for-

est fire" starting on the Sunday night or Monday before continued to burn and spread from Monday till Wednesday, communicating itself first to the lands of George Goodman, second, to the lands of Hugh Goodman, thence to the lands of Col. Chapman, and from the latter's lands to the lands of defendant in error, in the forenoon of Wednesday, April 7th.

As is usual in such cases, there is a mass of testimony appearing in the record, much of which is irrelevant, and it is wholly unnecessary for us to attempt to review it in this opinion. Much stress is laid by counsel for plaintiff in error upon the alleged fact that the verdict of the jury must rest mainly upon the testimony given by defendant in error's witnesses, Sam Brown and L. I. Rumsey, who make positive statements as to the origin of the fire on Col. Chapman's lands, and how it continued to burn until it reached the lands of defendant in error Wednesday evening, April 7th; while a number of witnesses for plaintiff in error (though not similarly situated) show that the statements of Sam Brown and Rumsey could not possibly be true. Stress is also laid upon the fact that Rumsey when testifying in this case was himself the plaintiff in another suit against plaintiff in error for the recovery of damages caused by the same fire.

The evidence in the case has been carefully looked to, having due regard for the familiar rule governing its consideration, and we cannot say that the jury's finding of the fact that the fire which caused the damage for which this suit is brought was set out as alleged in defendant in error's declaration, is not supported by sufficient evidence; nor would we be warranted in holding that the damages for which the court entered judgment on the verdict with defendant in error's consent are excessive.

[7] The case, as we have seen, was fairly submitted to the jury under the instructions of the court, the evidence throughout was conflicting, and "in such case the preponderance of the evidence cannot influence the action of the court in considering a motion for a new trial. The jury may discard the preponderance of evidence as unworthy of credence, and accept the evidence of a single witness upon which to base their verdict, and upon well-settled principles the verdict cannot be disturbed if the evidence of that witness is sufficient, standing alone, to sustain it. Under repeated decisions of this court, the verdict of a jury cannot be set aside unless there is a palpable insufficiency of evidence to sustain it." *Morien v. Norfolk & A. T. Co.*, 102 Va. 622, 46 S. E. 907, and authorities cited.

It follows that the judgment of the circuit court here complained of has to be affirmed.

Affirmed.

WHITTLE, J., absent.

(115 Va. 257)

STRATTON'S ADM'R v. NEW YORK LIFE INS. CO.

(Supreme Court of Appeals of Virginia. June 12, 1913.)

1. INSURANCE (§ 387*)—NONFORFEITURE AND LOAN PROVISIONS—CONSTRUCTION—EFFECT.

A life policy provided that it could not be forfeited after three years from issue, and if any subsequent premium was unpaid the policy would be indorsed for paid-up insurance, payable at the death of the insurer, specified in the table, less any indebtedness on the policy, provided demand was made therefor, with surrender of the policy, within six months after default; that if any subsequent premium was not paid, and the policy was not surrendered according to the preceding provisions, the insurance, after payment of any indebtedness, would be extended, without request or demand, for the amount of its face during the time provided for extended insurance, and if the insured was living at the end of the term the policy should cease. Insured procured a loan on his policy, agreeing that if the note was not paid when due the policy should automatically cease to be a claim, and the company should retain all cash received as part compensation for the rights granted, except as might be provided by the nonforfeiture benefits, etc. At the time of insured's default in payment of the note, he made no request for paid-up insurance within the time specified, and after paying his indebtedness to the insurer there still remained of the reserve apportionable to the policy a sufficient amount to purchase extended insurance for a term beyond the time of insured's death. *Held*, that the loan provision should be construed in connection with the provisions of the policy, and that the insurer was not entitled to require payment of the indebtedness from other funds in order to prevent a forfeiture, but that the reserve should be applied to the payment of the loan and the purchase of extended insurance; and hence the policy was in force at the time of insured's death.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 935, 938; Dec. Dig. § 387.*]

2. INSURANCE (§ 146*)—FORFEITURE PROVISIONS—CONSTRUCTION.

A life policy containing nonforfeiture provisions, being the work of the insurer, will be construed most strictly against the insurer and in favor of the insured, in order to prevent a forfeiture.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 292, 294-298; Dec. Dig. § 146.*]

Error to Corporation Court of City of Lynchburg.

Action by Alexander B. Stratton's administrator against the New York Life Insurance Company. Judgment for plaintiff for less than the relief demanded, and he brings error. Reversed, and judgment rendered for plaintiff for the full amount sued for.

Thos. J. Williams and Wilson & Manson, all of Lynchburg, for plaintiff in error. Kirkpatrick & Howard, of Lynchburg, for defendant in error.

CARDWELL, J. This is an action upon notice under the statute, brought by the administrator of Alexander B. Stratton, Jr., deceased, against the New York Life Insurance Company to recover of the latter the amount

of an insurance policy alleged to have been held by the plaintiff's intestate and in force at the time of his death.

It appears that the defendant company issued to plaintiff's intestate on April 28, 1898, a policy of insurance for the sum of \$2,000, which policy contained what is called "a policy loan agreement"; that on October 30, 1905, the insured obtained from the company a loan of \$100 upon his policy as collateral, executing therefor also a "policy loan agreement," which loan had not been repaid in cash at the date of the insured's death, caused by drowning, on the 13th of November, 1907; that when the premium on the policy for the year beginning April 26, 1907, became due, the insured made a contract with the insurance company in regard thereto, which is evidenced by a writing, signed by the insured, called a "blue note" (on account of the color of the paper on which written), which note was for the sum of \$28, with interest, payable on or before August 26, 1907, and set forth that the note was accepted by the insurance company, together with \$10.20 in cash, on the following express agreement: "That although no part of the premium due on the 26th day of April, 1907, under policy No. 862036 issued by said company on the life of A. B. Stratton, Jr., has been paid, the insurance thereunder shall be continued in force until midnight of the due date of said note; that if this note is paid on or before the date it becomes due, such payment, together with said cash, will then be accepted by said company as payment of said premium and all rights under said policy shall thereupon be the same as if said premium had been paid when due; that if this note is not paid on or before the date it becomes due, it shall thereupon automatically cease to be a claim against the maker, and said company shall retain said cash as part compensation for the rights and privileges hereby granted, and all rights under said policy shall be the same as if said cash had not been paid nor this agreement made; that said company has duly given every notice required by its rules or the laws of any state in respect to said premium, and in further compensation for the rights and privileges hereby granted the maker hereof has agreed to waive, and does hereby waive, every other notice in respect to said premium or this note, it being well understood by said maker that said company would not have accepted this agreement if any notice of any kind were required as a condition to the full enforcement of all its terms."

When said note matured on August 26, 1907, the insured, Stratton, executed another "blue note" for \$18, payable on or before October 26, 1907, reciting that the note was accepted by the company at the request of the maker, together with \$20.20 in cash, on a certain express agreement, which is practically the same as contained in the "blue

note" quoted from above. When the last-mentioned note became due on October 26, 1907, it was not paid, and a new note was sent to the insured for execution by him, but it was never executed or returned to the company, and upon the lapse of the policy by reason of the insured's failure to settle this note the company wrote, on the 29th of October, 1907, to the insured, requesting him to revive his policy, and to that end inclosed a note for \$12, with the request that he execute and return the same along with \$6.15 in cash, to be received by the company in settlement of the premium on his policy for the year beginning April 26, 1907, which note was not executed by the insured, nor was the \$6.15 in cash paid.

This, it appears, was the situation existing between the insured and the insurer up to November 18, 1907, on which date the insured died, and proofs of his death were duly furnished the company, as required by the terms of the policy. It is admitted, however, by the company that at the date of the lapse of the policy on October 26, 1907, after deducting the loan of \$100 upon it, as aforesaid, and any other indebtedness upon the policy from the reserve due the insured thereon, there was a balance of \$42.22 to the credit of the insured then in the hands of the company, which, according to its application, would either have purchased for the insured \$105 of paid-up insurance, or would have served to secure for the insured an extension of the policy, at its face value of \$2,000, for a period of one year and three months from April 25, 1907. Whether or not it was competent, under the circumstances, for the company to apply the said balance to the purchase of paid-up insurance, or said balance should have been applied in the purchase of extended insurance, are questions unsettled by the agreed statements of facts appearing in the record.

The insurance company, before any action was commenced on said policy, tendered to the insured's personal representative \$105 in settlement of its liability under the policy, which was not accepted, and thereupon this action was brought.

When the cause was called for trial, a jury was waived by both parties, and all questions of law and fact were submitted to the court for decision upon the issue joined; whereupon the court, upon two statements of facts agreed to by the parties, entered its judgment for the plaintiff in the sum of \$105, instead of the sum of \$2,000, the face value of the policy claimed by the plaintiff, to which judgment the plaintiff applied for and obtained this writ of error.

The principal question presented is: To which of the two ways should the balance of \$42.22, admittedly to the credit of the insured at the date of the lapse of his policy on October 26, 1907, after deducting the \$100 loan upon the policy, have been applied—to the purchase of paid-up insurance, or to the

purchase for the insured of an extension of his policy at its full face value of \$2,000 for a period of one year and three months from the 25th of April, 1907? A decision of this question necessarily must turn upon the construction and interpretation of the contract between the insurer and the insured as evidenced by the policy and the "loan agreement."

The provisions of the policy which relate to the question are set out under the heading of "Benefits and Provisions," and are as follows:

"2.—Nonforfeiture.

"This Policy Cannot be Forfeited after It shall have been in Force Three Full Years as Hereinafter Provided.

"First.—If any subsequent premium is not duly paid, this policy will be indorsed for the amount of paid-up insurance payable at the death of the insured, specified in the table on the preceding page, less the value of any indebtedness on this policy, provided demand is made therefor with surrender of this policy within six months after such non-payment; or,

"Second.—If any subsequent premium is not duly paid, and if this policy is not surrendered as provided in the preceding clause, the insurance under this policy will, after the repayment of any indebtedness, be extended without request or demand therefor, for the amount of two thousand dollars, during the term provided in the table on the preceding page, payable only if the insured dies within said term. At the end of said term, if the insured is then living, this policy shall cease and determine.

"Third.—The insurance provided for in the two preceding clauses shall be based upon completed insurance years only, and shall be subject to the conditions of this policy, but without further payment of premiums and without loans or participation in surplus."

We need not advert to the "table" referred to in the foregoing provisions, set out in full on the second page of the policy, under the heading of "Special Advantages, Table of Loans and of Surrender Values in Paid-up Insurance, or Extended Insurance, etc.," further than to say that the terms provided therein do not militate against the view for which plaintiff in error contends, that under the provisions of the policy, upon default in the payment of any premium, the insurance was automatically extended, without any action whatever on the part of the insured, provided there was to his credit on the reserve fund an amount sufficient to pay the company any indebtedness due it from the insured, and to purchase for him extended insurance for at least one year from the due date of the premium on the policy as to the payment of which default was made, to wit, on April 26, 1907, unless the

insured made demand for paid-up insurance, which demand was not in this case made.

Under the "Nonforfeiture" provisions of the policy, when it lapsed on October, 1907, for nonpayment of the premium for the year beginning April 26, 1907, and no demand had been made for paid-up insurance, as is conceded, did the policy become forfeited, and, if not, was not the insured entitled to the benefit of extended insurance in accordance with the terms of the second clause thereof?

[1] That the policy was not forfeited, but was extended as in full force for a period of one year and three months from April 26, 1907, during which period insured died, and the insurer became liable to the personal representative of the deceased for the amount of the face value of the policy, is also conceded, unless the right to this extended insurance was lost to the insured by the nonpayment in cash of the \$100 loan he had obtained from the insurer, notwithstanding he had to his credit with the insurer a fund sufficient to repay the said loan and to purchase an extended insurance under his policy for a period extending beyond his death.

As it seems to us, there was no indebtedness due from the insured to the insurer when the policy lapsed on October 26, 1907, but, on the contrary, the company was, after deducting the indebtedness of the insured to it, due the insured a balance of \$42.22, an amount sufficient to purchase an extended insurance for a period beyond his death, and he had not applied for paid-up insurance for the amount of this balance, and that by the very terms of the contract between the parties the insured had the right to rely, as doubtless he did, upon the provision contained in clause second of his policy that he should be entitled to have the balance to his credit with the insurer applied to the purchase of extended insurance, unless he demanded paid-up insurance and surrendered his policy.

The position taken by the insurance company (defendant in error here) is that plaintiff in error's intestate owed it \$100 of borrowed money, and while it owed the insured \$142.22, instead of striking a balance and giving to the insured \$42.22 worth of extended insurance, it had the right to and did demand that the \$100 loan be first repaid to it, not out of the \$142.22 to the credit of the insured, but from other sources, before it was called upon to give to the insured \$42.22 worth of extended insurance. In other words, defendant in error denies that the insured had the right to set off against his loan of \$100 the \$142.22 to his credit with defendant in error, and contends that because the \$100 loan had not been paid from other sources no part of the \$142.22 to the credit of the insured, though applicable to the repayment of the loan, should have been applied to the purchase of extended insurance under the policy.

This contention is not borne out by the

language of the contract between the parties. Under the heading "General Regulations" in the contract is this clause: "Any indebtedness to the company, including any balance of the current year's premium remaining unpaid, will be deducted in any settlement of this policy or of any benefit thereunder." The defendant in error might have had the right to declare the policy in question forfeited by the nonpayment of the premium thereon for the year beginning April 26, 1907; but this it did not do, but instead treated the policy as in force, and sought to have the unpaid premium paid until after the death of the insured, and for weeks after it occurred, certainly up to the time it heard of the insured's death. It is not pretended that the policy was forfeited by reason of the nonpayment of a premium matured thereon, but because of the nonpayment of borrowed money under the "loan agreement," which is, in effect, to claim that the phrase "after the repayment of any indebtedness," contained in the policy, absolutely forfeited the right to extended insurance immediately upon the insured's contracting a debt with his insurer; and this, too, regardless of how small the debt or how large a sum there might be to the credit of the insured, by way of reserve upon his policy, in excess of the contracted debt. Had there been no debt for a loan contracted pursuant to the provisions of the policy in this instance, it would hardly be claimed that defendant in error would have had the right to declare the policy forfeited, as it did on December 24, 1907, over a month after the death of the insured, when it had in its hands on October 26, 1907, money enough to purchase for the insured extended insurance for a period extending beyond his death, so that the forfeiture of the policy, as remarked, is not based upon the failure to pay a premium due thereon, but upon the nonpayment, from other sources than the reserve fund to the credit of the insured, of a debt for money borrowed.

Forfeitures are not favored in law, and when they are mere penalties for the nonpayment of borrowed money they are not allowed.

In *N. Y. Life Ins. Co. v. Curry*, 115 Ky. 100, 72 S. W. 736, 61 L. R. A. 268, 103 Am. St. Rep. 297, it is said: "The courts have uniformly held in favor of the insurer that agreements for the forfeiture of the policy, when premiums were not paid when due, are valid, and their enforcement is upheld. This is said to be because 'on the prompt payment of the premiums depends the mutuality of the contract and the ability of the insurance company to meet its obligations.' But both the reason and the rule are restricted to the matter of premiums alone. Forfeitures are disfavored in law. When they are mere penalties for the nonpayment of borrowed money, they are not allowed. They lead to, and

themselves are, unconscionable oppressions of the unfortunate."

As said by this court in *Knights of Columbus v. Burroughs*, 107 Va. 688, 60 S. E. 46, 17 L. R. A. (N. S.) 246, "courts are astute * * * to discover modes of escape from declaring a forfeiture."

The case of *N. Y. L. Ins. Co. v. Curry*, supra, is also authority for the proposition that when an insurance company loans money to one of its policy holders it is in no different position from any other lender of money; and in lending its money it is subject to the same general rules and principles governing banks, trust companies, and other such corporations engaged in lending money. This general rule is that a borrower, say from a bank, when his loan falls due, has the right to offset against the loan any amount to his credit with the bank, a privilege which works equally in favor of the bank, and it is difficult to perceive a reason why an insurance company lending money to its policy holders should not be subject to the same rule, especially so in the absence of a different rule stipulated for and clearly expressed in the contract between the parties. The "table" made a part of the policy here in question was not, as appears to us, put there to restrict the rights of the insured, but to give expression to the agreement that at the end of three years from the date of the policy there was a certain reserve value to the credit of the holder of the policy, which reserve increased each year that the policy continued in force, and that upon the lapse of the policy for the nonpayment of a premium maturing thereon, the insured, under the heading "Special Advantages," showing what this reserve value would purchase at the end of any year, had the right, by refraining from demanding paid-up insurance therefor and surrendering his policy, to rely upon the provision made for him in his contract that this reserve fund, after deducting therefrom "any indebtedness to the company, including any balance of the current year's premium remaining unpaid," would be applied to the purchase for him of extended insurance.

"The 'table' could not prescribe the amount of continued or paid-up insurance in case of indebtedness of any kind, because the extent of the continued or paid-up insurance would be dependent upon the amount of the indebtedness to be first deducted before the continued or paid-up insurance was computed. The 'table' is inserted in the policy to show the rights of or benefits to the insured in continued or paid-up insurance in case of default at specified times in paying the premium to become due on the policy. * * *

"The time that the insurance would be extended, or the amount of the paid-up insurance, was definitely fixed and determined in the policy in all cases where it was possible to so fix and determine the time or the amount in advance. In all cases of indebted-

ness the continued or paid-up insurance was dependent upon the amount of indebtedness. The fact of an indebtedness to the defendant did not forfeit the right to continued or paid-up insurance, but simply left the time of the extension or the amount of the paid-up insurance dependent upon a computation to be made when the amount of the indebtedness was determined."

Taylor v. N. Y. Life Ins. Co., 197 N. Y. 324, 90 N. E. 964.

We are unable to appreciate the force of the argument on behalf of the defendant in error that the "loan agreement" changed the contractual relations between the insured and insurer. This agreement does provide that if default should be made in the payment of any premium on the policy, or any interest on the loan on the date when due, the defendant in error, without demand or notice of any kind, might deduct the amount due on the loan from the reserve on the policy computed as stipulated for in the agreement, and the balance of the reserve fund so computed would be taken as a single premium of life insurance at the published rates of the company, and shall be applied to the purchase of paid-up or extended insurance upon the life of the insured under said policy, at the age of said insured on said due date, payable under the same conditions as the original policy, without premium return, participation in profits, or further payment of premiums; but the purpose of this "loan agreement" was doubtless intended as providing a method of collecting and securing to defendant in error, the insurer, the loan of \$100, which method was by foreclosure of the policy, and upon foreclosure the only privilege remaining in the insured was the right to paid-up insurance for an amount to be computed by the insurer after the indebtedness had been deducted from the reserve value of the policy. We cannot construe this "loan agreement" as a waiver on the part of the insured, either expressly or impliedly, of any of his "nonforfeiture" privileges under the policy, but these privileges, as it seems to us, remained intact to the insured, subject, however, to the right of the insurer to cancel and foreclose the policy whenever it chose so to do after default in the payment of any premium past due and owing on the policy, or in the payment of interest due on the loan made thereon; but, again, it is to be observed that defendant in error did not avail itself of this right, and did not attempt a foreclosure of the policy until after it had incurred a loss thereon by reason of the death of the insured weeks before any action towards a foreclosure of the policy was taken, and after it had treated the policy as in full force, and had endeavored to collect the "blue note" taken for unpaid premiums, or to get from the insured renewals of this note. The foreclosure of the policy was neither automatically effected on October 26, 1907, upon the failure of the in-

sured to pay the "blue note" due on that date, nor was it effected on that date, or after, and before the death of the insured, by any affirmative action on the part of the defendant in error. To effect a foreclosure of the policy, some affirmative act was required on the part of the defendant in error. *Brady v. Prudential Ins. Co. of Amer.*, 9 Misc. Rep. 6, 29 N. Y. Supp. 44; 3 *Cooley's Briefs on Ins.* 2261, 2278; *O'Brien v. Prudential Ins. Co. of Amer.*, 12 Misc. Rep. 127, 33 N. Y. Supp. 67.

As we have seen, defendant in error took no action towards effecting a foreclosure of the policy here in question until weeks after the death of the insured. On the contrary, instead of availing itself of its right to foreclose immediately on default in the payment of the "blue note" falling due on October 28, 1907, defendant in error delayed the foreclosure of the policy until December 24, 1907, and in the meantime conducted a correspondence addressed to the insured, endeavoring to have him reinstate his policy, all of its letters admitting that the "nonforfeiture" benefits of the policy were in force pending foreclosure by the company, and one of these letters, dated October 29, 1907, inclosed to the insured, to be signed by him, a "blue note" for the amount of the balance of unpaid premiums, upon the face of which note appears the following: "This note is deposited with the New York Life Insurance Company pending the consideration by said company at its home office of an application for the restoration of policy No. 862036 on the life of Alex'r B. Stratton, Jr., which policy by the nonpayment of premium due April 28, 1907, is not now in force, *except as may be provided by the nonforfeiture benefits contained therein.*" (Italics ours.)

We again advert to the provision of the policy that provides that, in order to entitle the insured to paid-up insurance, he must have made demand therefor, and there is no pretense that such demand was ever made; and, further, that the "nonforfeiture" provisions of the policy stipulated that in these circumstances the only benefit remaining to the insured was the right to extended insurance.

The case of *Eagle v. N. Y. Life Ins. Co.*, 48 Ind. App. 284, 91 N. E. 814, relied on as authority in this case, does not sustain the position taken by defendant in error. In that case the insurance company foreclosed the loan made on the policy, and the question decided was whether the provision in the loan agreement providing for foreclosure without notice was illegal; and the court merely held that such provision was legal, and that the foreclosure in that case had been properly made. No such question is involved in the case at bar.

[2] It is said in the opinion of this court

by *Burks, J.*, in *Georgia Home Ins. Co. v. Kinnier's Adm'r*, 28 Grat. (69 Va.) 105, and afterwards cited in later cases: "The maxim that 'the words of an instrument shall be taken most strongly against the party employing them' is peculiarly appropriate in the construction of a policy of insurance, and especially of such conditions as we are now considering. The instrument is wholly the work of the underwriter, and is usually filled with a multitude and variety of stipulations seldom read by the assured when he accepts the policy, and, if read, rarely, if ever, understood. Abounding in forfeitures and in provisions, generally harsh and difficult of performance, it should be strictly construed against the insurer and liberally in favor of the insured. A modern writer on insurance thus states the rule: 'No rule, in the interpretation of a policy, is more fully established, or more controlling and imperative, than that which declares that in all cases it must be liberally construed in favor of the insured, so as not to defeat without a plain necessity his claim to indemnity, which, in making the insurance, it was his object to secure.' May on Insurance, 182."

In the light of this universally recognized rule of construction, and in view of the agreed facts made a part of the record in this case, until the policy in question was foreclosed, the ownership of it and the assured's rights under it were not affected; one of these rights being that of having his indebtedness to the insurer paid out of the amount to his credit from the reserve fund stipulated for in the policy, and the balance of this reserve applied to the purchase of extended insurance, and that, too, without any request or demand on his part. There being enough money to the credit of the insured with the company to pay it the loan he had obtained on his policy and to continue the policy as extended insurance for one year and three months from the time of default in the payment of the premium which matured April 28, 1907, during which period, and before the defendant in error attempted to exercise its right to foreclose the policy, the insured died, the agreement of defendant in error to pay \$2,000 to the deceased's personal representative became absolute and final.

For the foregoing reasons, we are of opinion that the judgment of the trial court is erroneous, and it will therefore be reversed and annulled, and this court will enter here judgment for \$2,000 in favor of plaintiff in error against defendant in error for the face value of the policy sued on, with interest thereon from the 13th day of November, 1908, till paid, and costs.

Reversed.

KEITH, P., absent.

(115 Va. 195)

RAFFERTY et al. v. HEATH et al.

(Supreme Court of Appeals of Virginia. June 12, 1918.)

1. EXCHANGE OF PROPERTY (§ 8*)—EXCHANGE OF REAL PROPERTY—RESCISSION—FRAUD.

Where one exchanging an apartment house for a farm falsely represented to the owner of the farm the value of the apartment house, the cost thereof, and the annual rentals, the owner of the farm, relying on the representations in making the exchange, was entitled to a rescission on the ground of fraud.

[Ed. Note.—For other cases, see Exchange of Property, Cent. Dig. §§ 8, 7; Dec. Dig. § 8.*]

2. CANCELLATION OF INSTRUMENTS (§ 23*)—EQUITABLE RELIEF—TERMS.

A party suing to rescind a contract can obtain relief only on equitable terms, and, where equity finds that a condition exists which renders it impossible to restore the parties substantially to their original position and that to rescind will result in injustice, a rescission will be denied.

[Ed. Note.—For other cases, see Cancellation of Instruments, Cent. Dig. § 82; Dec. Dig. § 23.*]

3. EXCHANGE OF PROPERTY (§ 5*)—RESCISSION—EQUITABLE RELIEF—TERMS.

Where an owner of a farm, induced by fraud to exchange it for other property, accounted for the income received from the other property, and promptly sought a rescission on the ground of the fraud, the mere fact that the adverse party, guilty of the fraud, had placed a mortgage on the farm, did not defeat a rescission.

[Ed. Note.—For other cases, see Exchange of Property, Cent. Dig. §§ 5, 6, 8-10; Dec. Dig. § 5.*]

Appeal from Circuit Court, Mathews County.

Suit by one Heath and others against one Rafferty and others. From a decree for complainants, defendants appeal. Affirmed.

John S. Barbour, of Fairfax, Sleman & Lerch, of Washington, D. C., and J. Boyd Sears, of Mathews, for appellants. Sale, Mann & Tyler, of Norfolk, and Henley, Garnett & Hall, of Williamsburg, for appellees.

KEITH, P. Heath was the owner of a farm in Mathews county containing about 200 acres, with improvements upon it, lying upon the waters of North river, together with about 2,000 bushels of oysters planted in that river adjacent to the farm, all of which be valued at the sum of \$60,000. He entered into negotiations, through the Southern Farm Agency, of Lynchburg, with Charles E. Rafferty for the exchange of his farm for property in the city of Washington, known as the Versailles Apartment House, which resulted in a contract dated September 19, 1910, by which Heath agreed to sell Rafferty his farm in Mathews county, with all the crops, tools, implements, furniture, and other personal property thereon for the sum of \$60,000, and to take in payment the Versailles Apartment property in Washington on the basis of \$200,000, subject to first and second liens amounting to \$134,500;

Rafferty agreeing to take the difference of \$5,500 in preferred stock in the Versailles Apartment Corporation, and to pay cash \$1,000 additional for preferred stock at par.

In addition to the first and second liens aggregating \$134,500, there was a third lien upon the Washington property, amounting to about \$13,000, which Rafferty undertook to satisfy.

On the 22d of September, 1910, Heath and his wife made a deed conveying to Rafferty the property set out in the agreement of September 19th. It seems to have been contemplated by the parties that Rafferty was to have made a deed of even date to Heath for the Versailles Apartment House, but there was some delay for reasons not necessary to mention, and the transaction was not consummated until some time in December.

By deed dated the 29th of November, 1910, and recorded on December 8th of that year, Rafferty and wife conveyed to the Versailles Corporation the Versailles Apartment House, subject to incumbrances of \$134,500.

The negotiations between Heath and Rafferty finally culminated as follows: Heath conveyed all of his Virginia property to Rafferty by an absolute deed, and Rafferty conveyed the Versailles Apartment House to the Versailles Corporation, which was authorized to issue \$50,000 worth of preferred stock and \$100,000 worth of common stock, Rafferty agreeing to take \$5,500 of preferred stock and to buy \$1,000 worth of that stock for cash at par; and it was this stock, preferred and common, that constituted the consideration received by Heath for his Mathews farm and personal property.

The deed from Heath to Rafferty is dated September 22, 1910. On the 28th of November, 1910, Rafferty conveyed the same property to a trustee to secure a loan of \$16,000 made to him by the Gloucester-Mathews Bank. With this loan he satisfied the third lien resting upon the Versailles Apartment House, which in his negotiations with Heath he had undertaken to pay, and also paid the \$1,000 in cash for the shares of preferred stock which he had agreed to purchase from Heath at its face value.

At the conclusion of the transaction, therefore, the title to all of Heath's Virginia property was in Rafferty, subject to the incumbrance which he had placed upon it to secure the Gloucester-Mathews Bank; the title to the Versailles Apartment House, subject to two liens amounting to \$134,500, was in the Versailles Corporation; and all of the stock of that corporation except preferred stock to the amount of \$6,500, which was held by Rafferty, and a few shares of common stock held by different parties, was held by the appellee Charles Heath.

Heath went into possession of the apart-

ment house, but very soon became dissatisfied with his bargain, and on the 6th of February 1911, he filed his bill setting out in detail the facts that we have already stated, and charging that he had been induced to part with his property as a result of a carefully concocted scheme to defraud him, and in reliance upon representations made to him by Rafferty which had proved to be wholly false; that Rafferty had assured him that his Washington city property had cost him \$210,000 and was producing an annual net revenue of \$10,000; and that in addition to these verbal assurances he had exhibited a statement, which is filed as an exhibit with the bill, from which it appears that the apartments were yielding a net revenue of more than \$10,000.

[1] We do not deem it necessary to go into a history of the organization and conduct of the Versailles Corporation, further than to say that its only asset was the Versailles Apartment House, upon which there were three liens, amounting in the aggregate in round numbers to \$148,000. The evidence proves beyond doubt, we think, that these representations were made, and that in reliance upon them Heath was induced to enter into the contract which he now seeks to have rescinded, and that these representations were false and known to be false when they were made. The evidence shows that the value of the property was far less than Rafferty represented it to be—but let that pass as a matter of opinion only. It appears that it cost far less than he represented it to have cost, and upon the evidence it is doubtful if it could be sold for enough to satisfy the liens upon it; but the most material misrepresentation which he made was as to the rents which were actually being received upon it. Upon consideration of the whole evidence we cannot resist the conclusion that the whole transaction was the outcome of a carefully contrived plot to deceive and to defraud the appellee.

It seems to be superfluous to cite authority upon such a case, and we shall content ourselves with only a few.

In *Wilson, Trustee, v. Carpenter*, 91 Va. 183, 21 S. E. 243, 50 Am. St. Rep. 824, it is said: "The false representation of a material fact, constituting an inducement to a contract for the purchase of real estate, on which the purchaser had a right to rely, is always ground for a rescission of the contract by a court of equity. The intent of the party making the representation, and his belief in its truth, are alike wholly immaterial. It is sufficient that the statement is material, was relied on by the purchaser, and was in fact untrue."

In *Fitzgerald v. Frankel*, 109 Va. 603, 64 S. E. 941, a case which has a great many

points in common with that under consideration, this court said: "If the purchaser of property has not equal means of information with the seller, and he has the right to rely upon representations made by the seller with reference to the property, evidence to show that he did not rely upon such representations must be of the clearest and most satisfactory character. In such cases there ought to be no room for inference or mere implication." See, also, *Cerriglio v. Pettit*, 113 Va. 533, 75 S. E. 303.

The appellee seems greatly to rely upon the inability of the court to place the parties in the same position which they occupied before the agreement was entered into which it is sought to rescind.

[2] As the plaintiff comes into a court of equity asking relief, he can only obtain it, of course, upon equitable terms. If, therefore, in a particular case a court of equity finds that a condition exists which renders it impossible to restore the parties substantially to their original position, and that to rescind the contract would result in an injustice, the rescission will be refused.

[3] But we are of opinion that no such condition exists in this case. The appellee acted with the greatest promptness. The exchange of the property was not finally concluded until some time in December, 1910; it was promptly repudiated and a demand for rescission made almost immediately; and the bill in this case was filed on the 6th of February, 1911. The legal title to the apartment house was never in Heath, the appellee. As has been said, he took it subject to two liens by mortgage or deed of trust, and the legal title was therefore outstanding in the trustees or mortgagees. The equity was conveyed by Rafferty's deed of December 8, 1910, to the Versailles Corporation, and all that Heath ever received were the shares of stock, preferred and common, in the Versailles Corporation, and the rents of the apartment house for a short period, all of which he accounted for. The only material alteration in the condition of the parties was the result of the act of the appellant who placed a mortgage upon the Mathews property to secure the Gloucester-Mathews Bank. That incumbrance is a legal and binding lien which must be paid and the proceeds of which passed to and were enjoyed by Rafferty. It would be a strange result indeed if he could defeat the rescission of a contract procured by his fraudulent misrepresentation upon the plea that he had received and was in the enjoyment of fruits of his fraudulent practices which he was unable or unwilling to restore.

The decree appealed from as far as possible in every particular preserves the rights of every party to the controversy, and is therefore affirmed.

Affirmed.

(115 Va. 109)

JORDAN et al. v. WALKER.

(Supreme Court of Appeals of Virginia. June 12, 1913.)

1. APPEAL AND ERROR (§ 927*)—REVIEW—DEMURRER TO EVIDENCE.

On a demurrer to the evidence, where it is such that a jury might have found for the demurree, it is the duty of the Court of Appeals to so find.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2912, 2917, 3748, 3758, 4024; Dec. Dig. § 927.*]

2. FRAUD (§ 22*)—DECEIT—DUTY TO INVESTIGATE.

Where a defendant, who was a director of a corporation and had knowledge of its insolvent condition, represented to plaintiff, who was also a director, to induce him to purchase defendant's stock and that of another, that the corporation was not only solvent, but had a surplus of \$3,000 in excess of its liabilities and capital stock, and immediately afterwards it was found that the corporation could not be continued, and on a sale of its assets in receivership proceedings the assets were only sufficient to pay creditors 30 per cent. of their claims, it was no answer to defendant's liability for fraud that plaintiff should not have relied on such representations, but should have investigated the corporation's condition for himself.

[Ed. Note.—For other cases, see Fraud, Cent. Dig. §§ 19-23; Dec. Dig. § 22.*]

3. FRAUD (§ 20*)—DECEIT—RELIANCE—REMEDY.

Where a party represents as true what he knows to be false in such a way as to induce a reasonable man to believe it, and the representation is meant to be acted on, and he to whom the representation is made believes and acts on it and in consequence sustains damage, there is such a fraud as will support an action for deceit at law or a bill for rescission of the transaction in equity, whether the representation is made innocently or knowingly; the fraud in the one case being constructive and in the other actual.

[Ed. Note.—For other cases, see Fraud, Cent. Dig. §§ 17, 18; Dec. Dig. § 20.*]

4. FRAUD (§ 22*)—FALSE REPRESENTATIONS—DUTY TO INQUIRE.

One to whom a representation has been made is entitled to rely on it as against the maker without further inquiry.

[Ed. Note.—For other cases, see Fraud, Cent. Dig. §§ 19-23; Dec. Dig. § 22.*]

5. FRAUD (§ 64*)—DECEIT—RELIANCE ON REPRESENTATIONS—QUESTION FOR JURY.

In an action for fraud, whether plaintiff relied on defendant's representations, or whether he acted in whole or in part on his own knowledge, is for the jury.

[Ed. Note.—For other cases, see Fraud, Cent. Dig. §§ 65½, 67-71; Dec. Dig. § 64.*]

Error to Circuit Court, Greensville County.

Action by L. G. Walker against R. W. Jordan and others. Judgment for plaintiff, and defendants bring error. Affirmed.

S. V. Southall, of Emporia, and R. B. Davis, of Petersburg, for plaintiffs in error. Buford, Lewis & Peterson, of Lawrenceville, and E. C. Palmer, of Emporia, for defendant in error.

CARDWELL, J. The material facts out of which this litigation arises are as follows: The Tillar-Smith Hardware Company, incorporated under the laws of Virginia, was organized on January 1, 1906, with a capital stock of \$12,500, divided into shares of \$100 each, having its principal office at Emporia, Greensville county, Va., of which stock W. T. Tillar held \$3,000, J. H. Smith \$3,000, Rupert Ivey \$500, L. G. Walker \$3,000, R. W. Jordan \$2,000, and B. D. Tillar \$1,000. All of the stockholders at that time resided in the town of Emporia, and at the organization of the company L. G. Walker became one of its directors and its vice president, but owing to other business engagements he was unable to give his personal attention to the affairs of the company, and soon afterwards removed from Emporia and engaged in business elsewhere, and before the year 1909 he had ceased to be a director or to hold any official connection with said company. W. T. Tillar was president of the company from its organization, and J. H. Smith its business manager, who together with R. W. Jordan and L. G. Walker were its directors, while B. D. Tillar was a clerk in the store kept by the company, both Jordan and B. D. Tillar being connected with the company "the entire time it was running," and both were familiar with its affairs and knew its financial status. The business of the company, it seems, was prosperous during the years 1906 and 1907, and a dividend of about 10 per cent. on its stock was declared in January, 1907, and again in January, 1908; but, during the year 1908, the company purchased and operated for a while a manufacturing plant which resulted in financial losses, whereby the capital stock of the company was somewhat impaired. Early in 1909 L. G. Walker became dissatisfied with the management of the affairs of the company: First, because J. H. Smith, its manager, had overdrawn his account to the amount of \$1,368; and, second, because the company had engaged in the manufacturing business, which he regarded as being beyond the scope of the business for which the company had been chartered. And thereupon he (Walker), accompanied by his counsel, went to Emporia to inquire into these two matters, and in ascertaining the status of Smith's account Walker's counsel had to be assisted by the bookkeeper of the company. This investigation, it appears, resulted in a determination on the part of Walker to institute legal proceedings to require Smith to settle his account, and perhaps to remove him from the position of manager, and to prevent the company from engaging further in the "mill" business, which determination on the part of Walker was communicated to Jordan in an interview about March 18, 1909. On the day following this interview, Jordan wrote to Walker, who was then at Danville, Va., endeavoring to dissuade him from instituting the threatened legal proceedings,

and suggesting the plan of buying up enough of the stock of the company to give control of the management of its affairs, and expressing a willingness to sell his stock and to aid in acquiring other shares of the stock. Then followed a lengthy correspondence between these parties, in which it appeared that Jordan and B. D. Tillar were, in fact, endeavoring to effect a sale of their stock, but Walker throughout stated that he did not wish to buy, and that he would only go so far as to unite with Jordan to get new parties interested in the business and to acquire a controlling interest in the stock, so that they might manage the business more satisfactorily; Walker believing then, as he had every reason to believe, from what had passed between him and Jordan, and to continue to believe from their subsequent dealings, that he and Jordan were co-operating in good faith to accomplish the same purpose. And it seems not to have occurred to Walker that such was not the case until after he had become the purchaser of the holdings of Jordan, B. D. Tillar, and Rupert Ivey in the company.

As a result of these negotiations, Walker, on July 31, 1909, went to Emporia with the view of interesting a Mr. Harper in the business, and to have him (a capable man) undertake the management of the company's affairs, and there and then Jordan, assisted by B. D. Tillar, went over the books and furnished Walker with a statement showing what the company owed, its assets, etc., by which it was made to appear that the business could pay all of its debts, pay the stockholders what they had put in, and still have a surplus left of about \$3,000. Harper, however, did not become interested in the business, and later, and after further interview with Jordan, Walker, relying upon the truth of the statement as to the condition of the company's affairs made up by Jordan and B. D. Tillar, decided to take over to himself the stock of Jordan, B. D. Tillar, and Ivey, and accordingly, on August 3, 1909, he made settlement with these parties for their stock and placed his (Walker's) brother temporarily in charge of the business. Having purchased this stock under the circumstances narrated, Walker left Emporia, and in the course of a few days received from his brother, who had been temporarily put in charge of the business, a letter stating that the affairs of the company were in a desperate condition. He also received a letter from W. T. Tillar of similar import, and acting upon this information he returned to Emporia and sought an interview with Jordan, the result of which was that Jordan did not deny the truth as asserted by Walker, but refused to take back his stock, as Walker claimed he had agreed to do, giving as his only reason for refusing to do so that he had hypothecated the note given by Walker in part payment for his (Jordan's) stock to a third party.

This action was brought by Walker on

the 3d day of January, 1910, against R. W. Jordan and B. D. Tillar to recover damages for false representations made by them as to the financial condition of the said company, by means of which representations the plaintiff alleged that he was induced to purchase 35 shares of the capital stock of the company for the aggregate sum of \$2,650.

There were two trials of the case—the first at the April term of the circuit court, 1910, resulting in a verdict for the plaintiff, which verdict was, on October 3, 1911, set aside by the court and a new trial ordered. On the second trial, at the conclusion of the evidence the defendants demurred thereto, in which demurrer the plaintiff joined, and in the conditional verdict rendered by the jury they assessed the plaintiff's damages "at the sum of \$2,650, with interest on \$1,150, part thereof, from the 4th day of November, 1909, and on \$1,500, the residue thereof, from the 3d day of February, 1910, until paid, subject to a credit of \$1,500 as of the 3d day of February, 1910, the amount of the note executed by the plaintiff to the defendant R. W. Jordan for the stock purchased of him." The court overruled the demurrer and rendered judgment for the plaintiff in accordance with the verdict of the jury, to which judgment the defendant obtained this writ of error.

In addition to those already stated, a material fact alleged, and which the evidence tended to prove, was the false representation made by plaintiffs in error, and which operated as a principal inducement to defendant in error to buy the stock in question, that the entire liabilities of the company did not exceed \$12,000, when in fact they were almost or quite double that amount. Relying, as he alleges, upon the truth of this and the other false representations made by plaintiffs in error, defendant in error purchased of Jordan 20 shares of his stock and 5 shares owned by Ivey, on which Jordan had procured an option for the purpose of enabling him to make a more advantageous sale of his own stock; and of B. D. Tillar 10 shares. He executed to Jordan a note for \$1,500 in part payment for his stock, and delivered to him a certified check for \$400 for Ivey's stock; and paid Tillar in cash \$500 and executed his note for \$250, which Tillar discounted at bank and defendant in error paid to the bank at maturity. The aggregate of the prices so paid constitutes the amount of damages awarded by the verdict of the jury and the judgment of the trial court in favor of defendant in error, which verdict and judgment, in effect, and were doubtless so intended, restore the parties to the litigation to the position they would have occupied had not the sale of the stock in question to defendant in error been consummated.

The questions arising upon the issue presented in the record are: (1) Was there a false representation of a material fact made by plaintiffs in error to the defendant in

error? (2) Did the plaintiffs in error know the representation was false, or was it made by them so recklessly as to amount to fraud? (3) Did the representation operate as an inducement to defendant in error to purchase the stock? (4) Was the defendant in error justified under the circumstances in relying upon the representation? (5) Did the defendant in error, notwithstanding the representation, undertake an independent examination of his own to ascertain the liabilities of the company? (6) Did defendant in error suffer damage as a result of the representation?

The case thus presented was peculiarly one for the determination of the jury, since the conclusions to be drawn from the evidence were not so certain and incontrovertible that fair-minded men might not have differed with respect thereto.

The plaintiffs in error were clearly shown by the evidence to have been in a position to know the truth or falsity of the representations made by them to defendant in error as an inducement to him to buy their stock, while defendant in error was not. Plaintiff in error Jordan was a director continuously from the organization of the company until August 4, 1909, the date of the sale of his stock to defendant in error; he had been elected vice president in the place of defendant in error, and held that position during the year 1909 until he sold his stock; was an expert bookkeeper and acted for a time as treasurer of the company; knew as early as the summer or fall of 1908 that the company was financially embarrassed and that on April 1, 1909, the bookkeeper for the company resigned her position because her salary of \$40 per month could not be paid. His coplaintiff in error, B. D. Tillar, was connected with the company "the entire time it was running," in the capacities of salesman, one of the directors and manager, and in these circumstances the two, pretending their co-operation with the defendant in error to bring about a better condition of the affairs of the company so that its business might be more satisfactorily conducted, made up on the night of July 31, 1909, a false statement of the liabilities and explaining the apparent solvency of the company, and also falsely declaring that the company had then recently paid off a considerable portion of its indebtedness, which statement was furnished to defendant in error by Jordan and B. D. Tillar; they well knowing that he would act upon it as well as upon other representations made to him as to the condition of the company's business, for the manifest reason that he (defendant in error) had been away from Emporia for a long while, and had every reason to believe that Jordan, at least, was co-operating with him, in good faith, in the efforts to put the company upon a better footing, and that its affairs could be thereafter successfully conducted.

[1] We do not consider it necessary to re-

view the evidence in the case further than has been done, since the testimony of the principal actors in the transaction of which defendant in error complains is conflicting on all essential points, and there is evidence amply sufficient to have justified a verdict by the jury in favor of defendant in error upon every question of fact presented, and it is hardly necessary to cite authority for the proposition that, if the jury could have so found, this court, upon the demurrer to the evidence, must so find.

The rule is clearly stated in *C. & O. Ry. Co. v. Corbin*, 110 Va. 700, 67 S. E. 179, where it is held: "Upon a demurrer to the evidence, where the evidence is such that the jury might have found for the demurree, it is the duty of the court to enter judgment in his favor."

[2] Plaintiffs in error's own evidence does not, by any means, refute the charge that they represented to defendant in error, not only the solvency of the company, but that it had a surplus of \$3,000 in excess of its liabilities and capital stock, when in fact it was then hopelessly insolvent, and that in the receivership proceedings which ensued shortly afterwards the assets were found sufficient to pay the creditors only about 30 per cent. of their debts, and therefore the stock was utterly worthless; but they insist that, though this was all true, defendant in error is not entitled to recover in this action as he did, or ought to have investigated for himself to find that the representations that had been made to him as to the financial condition of the company were false.

"Where it is established that there has been any fraudulent representation by which a person has been induced to enter into a contract, it is no answer to his claim to be relieved from it to tell him that he might have known the truth by proper inquiry. He has a right to retort upon his objector, 'You, at least, who have stated what is untrue, or have concealed the truth for the purpose of drawing me into a contract, cannot accuse me of want of caution because I relied implicitly upon your fairness and honesty.'" *West End L. Co. v. Chalborne*, 97 Va. 734, 34 S. E. 900.

[3] If one represents as true what he knows to be false, in such a way as to induce a reasonable man to believe it, and the representation is meant to be acted on, and he to whom the representation is made, believing it to be true, acts on it and in consequence thereof sustains damage, there is such fraud as will support an action for deceit at law, or a bill for rescission of the transaction in equity. Whether the representation is made innocently or knowingly, if acted on, the effect is the same. In the one case, the fraud is constructive; in the other, it is actual.

[4] "One to whom a representation has been made is entitled to rely on it so long as the

maker, and need make no further inquiry." *Cerriglio v. Pettit*, 113 Va. 533, 75 S. E. 303. See, also, *Rafferty v. Heath*, 78 S. E. 641, just decided by this court; *Strand v. Griffith*, 97 Fed. 854, 38 C. C. A. 444; 20 Cyc. pp. 60, 62.

[5] The authorities are uniform in holding that whether a plaintiff in such a case relied upon the defendant's representation, or whether he acted in whole or in part upon his own knowledge, is a question for the jury.

An effort is made by the learned counsel for plaintiffs in error in this case to extricate B. D. Tillar from the legal consequences of their deceit in inducing defendant in error to purchase their stock, but we are wholly unable to appreciate the force of the argument in support of this contention. It may be that plaintiff in error Jordan was the more experienced and shrewder of the two engaged in the transaction which resulted in procuring the defendant in error as a purchaser of their stock; still they (brothers-in-law) were participants in and the beneficiaries of the wrongs of which the defendant in error complains, which wrongs could not have been made effectual without the co-operation therein of Tillar with Jordan. From their own testimony they represented to the defendant in error the liabilities of the company as being only about half the actual amount, when they knew well at the time of the existence of other indebtedness which they did not mention. It also very clearly appears from the evidence that the statement of the witness W. T. Tillar, introduced by plaintiffs in error, in his letter of August 7, 1909, to defendant in error, was an accurate statement of the facts: "I feel like you have been misled and misinformed as to the true condition of this business. Some of the parties who sold you their stock offered to sell to me recently and evidently were glad to unload their stock on you."

The judgment of the circuit court is right and is therefore affirmed.

Affirmed.

(115 Va. 90)

JACOT v. GROSSMANN SEED & SUPPLY CO., Inc.

(Supreme Court of Appeals of Virginia. June 12, 1913.)

1. APPEAL AND ERROR (§ 1053*)—HARMLESS ERROR—ERRONEOUS ADMISSION OF EVIDENCE.

Where the court charged that a contract of sale of seed by sample contained only an implied warranty that the goods were of the quality set out in the contract and sold by sample, and that the jury must not consider any evidence of the failure of the seed to germinate, the error, if any, in permitting witnesses to testify as to representations as to the seed, made prior to and not contained in the contract, was not prejudicial.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4178-4184; Dec. Dig. § 1053; * Trial, Cent. Dig. § 977.]

2. SALES (§ 267*)—CONTRACTS—WARRANTIES.

A salesman of a seller of seed exhibited to a buyer a sample package containing the words: "Standard sample * * * crimson Calm Clover seed." The buyer ordered 1910 crop Crimson Clover seed. The seller accepted the order, and forwarded an invoice reciting that the seller did not guarantee any of the seeds sold, and, if not accepted on that condition, the buyer must return them at once. The buyer accepted the goods. *Held*, that the only warranties made by the seller were that the seed were of the 1910 crop and of the quality of the sample.

[Ed. Note.—For other cases, see Sales, Cent. Dig. §§ 760, 761; Dec. Dig. § 267.*]

3. SALES (§ 288*)—IMPLIED WARRANTY—ACCEPTANCE OF GOODS—DAMAGES FOR BREACH OF WARRANTY.

A buyer in a contract of sale by sample with the warranty that the goods shall correspond with the sample, who accepts the goods after opportunity for inspection, is not thereby prevented from recovering damages for breach of the warranty, though the retention and use of the goods without any complaint warrants a strong inference that they comply with the contract.

[Ed. Note.—For other cases, see Sales, Cent. Dig. §§ 817-823; Dec. Dig. § 288.*]

4. SALES (§ 442*)—IMPLIED WARRANTY—BREACH OF WARRANTY—MEASURE OF DAMAGES.

The measure of damages for breach of warranty of goods sold is the difference in the value of the goods at the time and place of delivery if they had conformed to the contract and the value at such time and place of the goods actually delivered, subject to a deduction for the unpaid price.

[Ed. Note.—For other cases, see Sales, Cent. Dig. §§ 1284-1301; Dec. Dig. § 442.*]

5. SALES (§ 181*)—CONTRACT—BREACH.

Evidence *held* to support a finding that a seller of 1910 crop of seed by sample breached his contract by failure to deliver seed of the crop of that year, and seed conforming to the sample.

[Ed. Note.—For other cases, see Sales, Cent. Dig. §§ 473-491; Dec. Dig. § 181.*]

Error to Hustings Court of City of Petersburg.

Action by William Jacot, trading as Jacot & Mullen, against the Grossmann Seed & Supply Company, Incorporated. Judgment for defendant, and plaintiff brings error. Affirmed.

The following are the instructions given by the court.

"(1) This is an action by the plaintiff, Jacot & Mullen, to recover of the defendant, the Grossmann Seed & Supply Company, Inc., the sum of \$1,700, with interest from September 11, 1911, due by negotiable note; it being claimed that said note was given for the balance of the purchase price on account of 120 sacks of crimson clover seed sold the defendant by the plaintiff in September, 1910. The defendant seeks to defeat said recovery upon the ground that said seed were sold as of the crop of 1910 and by sample, and it avers that said seed were not of the crop of 1910, or of the quality of the sample by which the sale was made; but, on the contrary, were of an older crop, of an inferior

quality, and sterile and utterly worthless, by reason of which the defendant has sustained great loss and damage to the amount of \$3,066.42, and prays that the same be set off and allowed against the sum of money alleged to be due and payable to the plaintiff.

"(2) The court further instructs the jury that if they believe from the evidence that the defendant signed the written bid or offer to buy introduced in evidence, and that the plaintiff by telegram of September 16th, and by letter of September 17, 1910, accepted said bid or offer, and a sample of the seed sold was, at the time of said bid, exhibited to the defendant by plaintiff's agent, as representing the kind and quality of seed offered, then said written bid, telegram, letter, and sample constitute the contract of sale between the plaintiff and the defendant, and no representation or recommendation made the defendant at the time by plaintiff's agent, can vary, take from, or add to its force or effect.

"(3) The court further instructs the jury that the contract between the plaintiff and defendant contains no warranty of the quality and germinating properties of the seed sold, except an implied warranty that they were of the kind and quality set out in the contract and as shown by the sample; and that they must not consider any evidence or statement of any witness as to the failure of said seed to sprout or germinate, except as evidence tending to show what was the quality or condition of the seed when delivered as compared with the quality of the seed sold with reference to the sample by which the sale was made.

"(4) The court further instructs the jury that the letters of the plaintiff to the defendant of January 18, 19, and 28, 1911, do not constitute any warranty, and must not be considered in that light, but can only be considered by the jury as evidence tending to show what was the quality of the goods the plaintiff understood had been sold as shown by the sample.

"(5) The court further instructs the jury, where a specific article, such as crimson clover seed, of the grade 'calm,' and of the crop of 1910, is sold and bought, there is no warranty, express or implied, that they are suitable for the purpose for which they are purchased, although the seller may have known the purpose to which the buyer intended to apply them; and, in the absence of an express warranty, the seller will not be held liable, however defective the seed may turn out to be.

"(6) The court further instructs the jury that, if seed are sold by description and by sample, no warranty of quality or fitness for a particular purpose is implied, except that when they are described as of a particular grade, and of a particular crop, a warranty that they are of such grade and crop is implied; and, where there is a sale by sample,

there is an implied warranty that the bulk of the seed is equal to the sample in kind and quality. A sale by description and sample carries with it an implied warranty that the seller shall deliver seed of the kind and quality of such description and sample.

"(7) The court further instructs the jury that if they believe from the evidence that the seed sold the defendant in September, 1910, were, at the time they were weighed, set aside and marked in the Lackawanna Warehouse Company's storehouse in Jersey City, N. J., of the crop of 1910, and of the same grade and quality as the sample exhibited by plaintiff's agent to the defendant, then the jury should find for the plaintiff and against the defendant.

"(8) The court further instructs the jury if they believe from the evidence that the seed so weighed, set aside, and marked were not of the crop of 1910, but were older seed, and of an inferior grade and quality to the sample, then the jury should find for the defendant and against the plaintiff.

"(9) The court further instructs the jury that, if they find for the plaintiff, the amount of their recovery should be the sum of \$1,700 with interest from September 11, 1911. If the jury find for the defendant, the measure of its damages is the difference in the value of the seed at the time of delivery in February, 1911, at Petersburg, if they had been of the kind and quality of the description and sample by which they were sold, and the value at such time and place of the seed actually delivered, but such amount cannot exceed \$3,066.42, the sum claimed by the defendant's plea. From the amount so ascertained by the jury must be deducted the sum of \$1,700, the difference being the amount to which the defendant is entitled, if the jury should find for the defendant."

Roper & Davis, of Petersburg, for plaintiff in error. Wm. B. McIlwaine, of Petersburg, for defendant in error.

KEITH, P. William Jacot, trading as Jacot & Mullen, made a motion for judgment in the hustings court of the city of Petersburg against the Grossmann Seed & Supply Company, Inc., to which the defendant pleaded the general issue and four special pleas, in the first of which it is alleged that the defendant had purchased of the plaintiff a quantity of crimson clover seed, which the plaintiff undertook and promised the defendant should be good merchantable seed, which proved not to be true, and that the clover seed were sterile and utterly worthless, to the damage of the defendant; the second plea sets out that the defendant bought of the plaintiff a quantity of standard crimson clover seed of the quality of a sample then and there exhibited by the plaintiff's agent, who undertook that the seed purchased should be of the quality of the sample then

and there exhibited, and that by the breach of this undertaking the defendant had suffered damages; the third plea states that the plaintiff undertook that the seed purchased should be good and merchantable and up to the standard of germination and purity required by the statute of Virginia in such case made and provided, and that by the breach of this undertaking the defendant had suffered damages; and the fourth special plea alleges that the plaintiff undertook and promised that the seed purchased were good and merchantable seed, and of such power of germination as to be suitable for sale and planting during the summer of 1911, and that by the breach of this undertaking damages were sustained.

The jury found the issue for the defendant and assessed its damages at the sum of \$3,066.42, less a credit of \$1,700, and to a judgment on that verdict this writ of error was awarded.

The facts in evidence are as follows: On September 16, 1910, Werner, the agent and salesman of William Jacot, went to the office of the defendant in the city of Petersburg, and exhibited to Grossmann, the president of the defendant corporation, an envelope containing a sample of seed which he proposed to sell, on the back of which was printed the words: "Standard Sample. Preserve for Reference. Crimson Calm Clover Seed From Jacot & Mullen, Seed Merchants, No. 1 Water Street, New York." The words "Crimson Calm" appear to have been placed on the envelope in a blank space left for the purpose with a rubber stamp or stencil, all the other words being printed, and the word "Calm" indicated the grade of the seed, the plaintiff having several grades of crimson clover seed; that known as "Calm" being the lowest grade. The sample having been examined by Grossmann, the president, and Ivey, the secretary and treasurer of the defendant corporation, they determined to purchase some of the seed if a satisfactory price and terms could be agreed upon, and in pursuance of this determination there was prepared by Werner and signed by the defendant corporation a written bid for acceptance. Said bid for acceptance is in the words and figures following:

Bid for Acceptance.

Order No.
Messrs. Grossmann Seed & Supply Co.
Ship to Petersburg, Va.

At
How Ship: O. D. When: As below.
Terms: As below.

120 bags, each about 220 lbs., 1910 crop crimson clover seed, at \$6.75 per bushel of 60 lbs. f. o. b. New York, payable by your 120 days note to be dated Oct. 1st, 1910, goods to be carried in warehouse in New York or New Jersey, buyers to have warehouse receipt, insurance to be covered by Jacot & Mullen.

Jacot & Mullen,
Per G. H. Werner.

1/2 collection charges to each party.
Grossmann Seed & Supply Co.
Interest 6% from Oct. 1st.

This offer was accepted by Jacot & Mullen by telegram, which is in the words and figures as follows:

New York, Sept. 16, 1910.

Grossmann Seed & Supply Co., Petersburg, Va.
Accept your bid made Werner will confirm tomorrow mail.
Jacot & Mullen.

And on the next day they confirmed the telegram by letter. The sample of seed exhibited was not left with the defendant for the reason that it was the only sample the salesman had, and he did not know whether the defendant's bid would be accepted, but on September 21, 1910, invoice for the seed was forwarded to defendant in a letter in which it is stated that another sample drawn from the lot of seed sold to the defendant was being mailed to it, but it does not appear that this sample was ever received by the defendant.

On the invoice for the seed inclosed in the letter of September 21st the following note was written across the face: "We do not guarantee any of the seeds sold in this bill, nor will we be responsible for the crop therefrom. If not accepted on these conditions they must be returned at once." And it appears that this statement was read at the time by the president of the defendant corporation.

In pursuance of this contract of sale 120 bags of crimson clover seed were set aside and marked in the Lackawanna Warehouse, Jersey City, N. J., and a negotiable warehouse receipt for said seed, issued by the Lackawanna Warehouse Company on September 26, 1910, was forwarded to the defendant. The warehouse receipt was enclosed in a letter as follows:

New York, Sept. 26th, 1910.

Messrs. Grossmann Seed & Supply Co., Petersburg, Va.

Gentlemen: We beg to inclose herewith warehouse receipt for the 120 sacks of Crimson Clover sample Calm, as we agreed to send you, and also an acceptance at 120 days from Oct. 1st, which we will ask you to accept and return to us.

Very truly yours, Jacot & Mullen.

On October 4, 1910, the defendant forwarded to the plaintiff an acknowledgment of said warehouse receipt and its note for the sum of \$2,970, dated October 1, 1910, and payable 120 days after date, in settlement for the seed. This note was subsequently curtailed and renewed at various times, until September 11, 1911, when, payment being refused by the defendant upon the last note given, it was protested and the present suit instituted, which resulted, as we have seen, in a judgment for the defendant by which it recovered back all that it had paid by reason of the transaction.

About the 1st of February, 1911, the defendant, the Grossmann corporation, sent the warehouse receipt to plaintiff and requested him to ship the seed, and the seed

were shipped via the Old Dominion Steamship Company and the Norfolk & Western Railway Company and were received by the defendant in Petersburg on February 9, 1911, and stored by the defendant in its warehouse in said city.

It appears that in the summer of 1911 and up to September 20, 1911, nine days after the last note had been protested, the defendant proceeded and continued to sell these seed to its customers in the counties around Petersburg, and, although the seed were in the actual possession of the defendant, in the city of Petersburg, after February 9, 1911, and although the defendant could at any time after said date have inspected the seed, it was not until after September 9, 1911, after the note given in payment had several times been curtailed and renewed, and after practically all of the seed had been sold by it, that the defendant claimed that the seed were not of the quality of the sample exhibited when the sale was made.

There was evidence showing that the seed was well cared for in the warehouse at New Jersey and after it was delivered to the Grossmann Company in February, 1911, and from this evidence the jury had the right to infer that there was no deterioration in the quality of the seed between September, 1910, and September, 1911, except such as was inevitable from the efflux of time, but it is also shown in evidence that it was the rule to buy seed of the crop of 1910 for sale to be used in the season of 1911, and that this was understood by all parties, and further that the quality of the seed, if properly cared for, would not be seriously impaired within that time. There was evidence that when the sample was exhibited to Grossmann Company by Werner, the agent of the plaintiff in error, it was carefully examined by expert seedsmen and found to be of good quality in all respects. It further appears that the seed when sold to farmers failed to germinate; that there was general complaint made, as a result of which, after due investigation, Grossmann Company refunded a large sum of money to those to whom the seed had been sold, and that they have undertaken to make restitution to all who purchased crimson clover seed from them.

[1] The first error assigned is because the court permitted the witnesses Grossmann and Ivey to testify with regard to representations alleged to have been made by plaintiff's agent Werner as to the seed sold prior to and not contained in the written contract in regard to the sale of said seed which had already been introduced in evidence.

We do not think that in any view of the case the ruling of the court constitutes reversible error, as the instructions which the court gave plainly informed the jury that the contract under investigation contained "no warranty of the quality and germinating properties of the seed sold, except an implied warranty that they were of the kind and

quality set out in the contract and as shown by the sample, and that they must not consider any evidence or statement of any witness as to the failure of said seed to sprout or germinate, except as evidence tending to show what was the quality or condition of the seed when delivered as compared with the quality of the seed sold with reference to the sample by which the sale was made."

[2] After the evidence was placed before the jury, the plaintiff asked for 15 instructions, all of which the court refused to give. We shall not undertake to deal with these instructions seriatim, as it could not be done in an opinion of reasonable length. The instructions given by the court were sufficient to inform the jury as to the law applicable to the facts. The trial court was of opinion that the only warranties of the seed sold by the plaintiff to the defendant disclosed by the evidence were that the seed were of the crop of 1910 and of the quality of the sample exhibited and examined at the time of the sale, and upon these two propositions we think the jury were correctly instructed.

[3] The second and ninth instructions asked for by the plaintiff in error and refused by the court present the question upon the solution of which this case depends.

No. 2 is as follows: "The court instructs the jury that if they believe from the evidence that the 120 sacks of crimson clover seed were actually received by Grossmann during the latter part of January or first part of February, 1911, and that the said Grossmann did not within a reasonable time after the receipt by him of said 120 bags of seed inspect the same, then the said defendant accepted the seed and waived any defect, if any there was, in said seed, and the jury shall not consider as evidence in this case any of the statements made by witnesses as to the failure of the seed to sprout or germinate when sowed in the ground in July, 1911, or later, or as to any tests made in September, 1911, or later."

And instruction No. 9, also refused by the court, is as follows: "The court instructs the jury that if they believe from the evidence that the sale of the crimson clover seed in question here was a sale by sample, and if they further believe that the 120 bags of crimson clover seed came into the actual possession of the defendant on or about the 9th of February, 1911, then the court instructs the jury that it was the duty of the said defendant, then or within a reasonable time thereafter, to inspect the 120 bags of clover seed, in order to ascertain whether the bulk of the seed corresponded with the sample by which the seed were purchased by the defendant; and the court further instructs the jury that if they believe from the evidence that the defendant did not, within a reasonable time after the receipt by it of the 120 bags of clover seed in question, inspect the same, that the defendant cannot now complain of any alleged failure of the bulk of the

seed to be equal in quality to the sample by which the seed were purchased."

In 2 *Mechem on Sales*, § 1395, it is said: "The express warranty, therefore, stands upon different ground in reference to acceptance from that occupied, according to many authorities, by the implied warranty or condition; and it is well settled where an express warranty accompanied the contract that while, by accepting the goods, the buyer may lose his right to subsequently reject them, he does not thereby necessarily lose his right to rely upon the warranty. The express warranty survives acceptance, and by the great weight of authority gives the buyer a remedy notwithstanding the defects were visible or open to discovery at the time they were received. The buyer may reject them, but he is not compelled to do so; he may retain them and rely upon the warranty."

In *Zabriskie v. Central Vermont R. Co.*, 131 N. Y. 72, 29 N. E. 1006, it is said: "Upon an executory sale of goods by sample, with warranty that the goods shall correspond with the sample, the vendee is not precluded from claiming and recovering damages for breach of warranty, although he has accepted the goods after an opportunity for inspection."

In *Holloway v. Jacoby*, 120 Pa. 583, 15 Atl. 487, 6 Am. St. Rep. 737, the buyer had paid for the goods (corn) in advance; on receipt he found it defective; he kept it and sold it on the best terms he could, giving no notice to the seller until after the sale, and two months after receipt. He then brought an action for damages on the warranty, and was held entitled to recover.

In *Minnesota Thresher Mfg. Co. v. Hanson*, 3 N. D. 81, 54 N. W. 311, the court said: "The retention and use of the property without notice (to the seller) of defects, under the great preponderance of the later—and, as we think, better—authorities, affects only the right to rescind. The buyer may still rely upon the breach of warranty to defeat a recovery in whole or in part in an action brought by the seller to recover the purchase price. Continued use of the property, with knowledge of defects, and without notice or complaint of the seller, may be more or less persuasive as evidence of waiver of defects, but cannot establish such waiver as a matter of law."

See *Williston on Sales*, §§ 488, 489, where the rule is stated that "acceptance of title does not, as matter of law, indicate a waiver of claims for inferior quality of the goods, is supported by a large number of decisions in this country, and is the unquestioned law of England."

We are of opinion that this view is supported by the better reason as well as by authority; but that, while the merely taking of title to the goods does not warrant the

conclusion that the buyer has agreed to take them in full satisfaction of all the seller's obligations, the retention and use of the goods for a considerable period without any complaint warrants a strong inference that the goods are either what the contract called for, or that the buyer is satisfied to accept them instead of such goods; and that for this reason it is important to give prompt notice of any defects which may exist.

We do not think, therefore, that there is any error shown in the ruling of the court upon the instructions to the prejudice of the plaintiff in error upon the point considered.

[4] Instruction No. 9, given by the court, as to the measure of damages, correctly states the rule as applied to the facts of this case.

[5] Nor do we think the court erred in refusing to set aside the verdict as contrary to the evidence. It is true there is no direct evidence that the seed which are the subject of this controversy were not of the crop of 1910. It is difficult to conceive how there could have been direct evidence of that fact upon the part either of the plaintiff or of the defendant. It is plain, however, that the affirmation of the fact that the seed were of the crop of 1910 was made by the plaintiff in error, and it was intended to influence the defendant in error as an affirmation of quality, and was so relied upon. There was no warranty of the germinating properties of the seed sold, but there was evidence that seed of good quality of the crop of 1910 were good, merchantable seed; that it was the well-recognized course of business to buy of the crop of 1910 to be seeded in the season of 1911; and that the lapse of a year would not materially affect the quality of the seed. If this be true, then the fact established beyond doubt that the seed had practically no germinating qualities strongly tended to prove that they were not grown in the season of 1910, and tended to prove a breach of the affirmation or warranty that they were seed of that year's growth.

With reference to the correspondence of the bulk with the sample, the sample itself was not produced in evidence before the jury; it was not in the possession of the defendant in error. It was exhibited at the time of the purchase, but was retained by the agent of the seller. But the testimony of expert seedsmen was before the jury that the sample exhibited was by them carefully examined, not only with the eye but with a magnifying glass, and was found to be fresh looking, bright seed, while the bulk of the seed were darker than the sample.

Upon the whole case we are of opinion that the judgment of the hustings court should be affirmed.

Affirmed.

CARDWELL, J., absent.

(115 Va. 130)

PHILLIPS et al. v. CITY OF PORTSMOUTH.

(Supreme Court of Appeals of Virginia. June 12, 1913.)

1. WATERS AND WATER COURSES (§ 203*)—CONTRACTS BETWEEN CITY AND WATER COMPANY—CONSTRUCTION.

Where a city agreed to pay a water company a specified rental for water supplied to certain hydrants, and also that if any city taxes, levies, or assessments for any public purpose should be imposed on the property or works necessary for the supply of water the rental should be increased by an amount equal to such taxes, levies, or assessments, and the company's entire capital stock was invested in and represented by its property and works necessary for the supply of water, a tax on its capital stock was a tax on its property necessary for the supply of water.

[Ed. Note.—For other cases, see *Waters and Water Courses*, Cent. Dig. §§ 289, 290-299; Dec. Dig. § 203.*]

2. ASSIGNMENTS (§ 23*)—RIGHTS ASSIGNABLE—RIGHT OF ACTION—"CHOSE IN ACTION."

Where a contract between a city and a water company provided that the rental for water should be increased by the amount of any tax levied upon the company's property or works necessary for the supply of water, a right of action by the company for the recovery of a tax so levied and paid was a "chose in action," within Code 1904, § 2860, providing that the assignee or beneficial owner of any chose in action not negotiable may sue thereon in his own name.

[Ed. Note.—For other cases, see *Assignments*, Cent. Dig. §§ 40, 41; Dec. Dig. § 23.*]

For other definitions, see *Words and Phrases*, vol. 2, pp. 1145-1148; vol. 8, p. 7602.]

3. MUNICIPAL CORPORATIONS (§ 967*)—TAXATION—EXEMPTION—WHAT CONSTITUTES.

A provision of a contract between a city and a water company that the rental for water should be increased by the amount of any city tax on the company's property or works necessary for the supply of water was not an exemption of the property or works from city taxation; and hence the right to such increased rental passed to another company with which the contracting company subsequently merged or consolidated.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. §§ 2062-2067; Dec. Dig. § 967.*]

4. MUNICIPAL CORPORATIONS (§ 977*)—TAXATION—RECOVERY OF TAXES PAID—PAYMENT INVOLUNTARILY.

The payment of a tax was not rendered involuntary, within the rule that taxes paid voluntarily cannot be recovered back, merely because the city ordinance levying the tax imposed a penalty for nonpayment when due.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. §§ 2099-2103; Dec. Dig. § 977.*]

Error to Circuit Court of City of Portsmouth.

Action by A. J. Phillips and another against the City of Portsmouth. Judgment for defendant, and plaintiffs bring error. Reversed.

The declaration was as follows:

"Declaration.**"Trespass on the Case in Assumpsit.**

"A. J. Phillips and T. J. Wool, plaintiffs, complain of the city of Portsmouth, defendant, of a plea of trespass on the case in assumpsit, for this, to wit: That heretofore, to wit, on the 13th day of September, 1887, the Portsmouth & Suffolk Water Company, and the city of Portsmouth, entered into a contract under seal, and to the court here shown, by which, for valuable consideration, the Portsmouth & Suffolk Water Company agreed to complete certain works for the supplying of the city of Portsmouth with water, and by which the said city of Portsmouth covenanted, amongst other things, that, the Portsmouth & Suffolk Water Company, faithfully performing its part of said contract, it, the said city of Portsmouth, would pay to the said Portsmouth & Suffolk Water Company, for water supplied to certain hydrants described in said contract, and for public purposes and uses set out in said contract, the sum of \$7,500 per annum, or at the rate of \$75 per hydrant, per year, payable every three months during the first ten years of said contract, and for each additional hydrant over and above 100 it, the said city of Portsmouth, would pay to the said Portsmouth & Suffolk Water Company at the rate of \$75 per hydrant per annum during the first ten years of said contract, and that for the next ten years of the existence of said contract it, the said city of Portsmouth, would pay to the said Portsmouth & Suffolk Water Company the sum of \$50 per hydrant per annum for each hydrant then set by the authority of the city of Portsmouth, or thereafter set or to be set by the authority of the city of Portsmouth, within the corporate limits of said city of Portsmouth, payable every three months; and the said plaintiffs say that said contract further provided that if at any time any city taxes, levies, or assessments for any public purpose should be imposed on the property or works necessary for the supply of water, as set out in said contract, the annual rental above set out should be increased to an amount equal to said city taxes, levies, or assessments (paving assessments excepted); and the said plaintiff says that the Portsmouth & Suffolk Water Company furnished water to said hydrants for the use of said city during the years 1901, 1902, 1903, and 1904 in accordance with said contract, and faithfully performed its part of said contract, and that during the years 1901, 1902, 1903, and 1904 city taxes for public purposes were imposed to the amount of \$1,812.50 for each of said years on the capital stock of the Portsmouth & Suffolk Water Company, all of which capital stock was invested in and represented by the property and works necessary for the supply of water, amounting in the aggre-

gate for said four years to \$5,250, which said amounts were paid as follows: On October 31, 1901, \$1,312.50; on October 31, 1902, \$1,312.50; on October 31, 1903, \$1,312.50; and on October 31, 1904, \$1,312.50, by the said Portsmouth & Suffolk Water Company to the city of Portsmouth; whereby and by reason of said contract the city of Portsmouth became indebted to the Portsmouth & Suffolk Water Company during the year 1901 in the sum of \$1,312.50, in the year 1902 in the sum of \$1,312.50, in the year 1903 in the sum of \$1,312.50, and in the year 1904 in the sum of \$1,312.50, aggregating the sum of \$5,250, in addition to the annual rental for said hydrants; and the said plaintiffs say that while said city of Portsmouth paid the said Portsmouth & Suffolk Water Company the annual rental of \$50 per hydrant, as hereinabove set out, it wholly neglected and refused to pay said additional rentals of \$1,312.50 for each of said years of 1901, 1902, 1903, and 1904; and the said plaintiffs further say that in the year 1902 the said Portsmouth & Suffolk Water Company was, pursuant to an act of the General Assembly of Virginia, consolidated with the Berkley & South Norfolk Water & Electric Light Company and the Nansemond Water Company, so as to form one company by the name of the Portsmouth, Berkley & Suffolk Water Company, by means whereof the Portsmouth, Berkley & Suffolk Water Company became vested with all the property, property rights, franchises, and privileges of said Portsmouth & Suffolk Water Company, and subject to all the responsibilities of said company, and that subsequently, to wit, on or about the 17th day of April, 1911, the said Portsmouth, Berkley & Suffolk Water Company assigned unto the plaintiffs said claim against the defendant, together with interest thereon, by means whereof the said city of Portsmouth then and there became liable to pay to the said plaintiffs said sums aggregating the sum of \$5,250, with interest on \$1,312.50, a part thereof, from the 31st day of October, 1901, and on \$1,312.50, another part thereof, from the 31st day of October, 1902, and \$1,312.50, another part thereof, from the 31st day of October, 1903, and \$1,312.50, the residue thereof, from the 31st day of October, 1904; and being so liable it, the said defendant, in consideration thereof, undertook and then faithfully promised the said plaintiffs the said sum of \$5,250, with interest as aforesaid, when it, the said defendant, should be thereunto afterwards requested.

"Yet the said defendant, not regarding its said promises and undertakings, did not, nor would it at the said time when it was so requested and demanded, nor at any other time before or afterwards, pay said plaintiffs the sums aforesaid, or any part thereof, but hath hitherto neglected and refused, and still doth neglect and refuse, to the damage of the plaintiffs, \$10,000.

"And for this also, to wit, that heretofore,

to wit, on the day and year aforesaid, the said city of Portsmouth entered into a contract in writing and sealed with its seal, and to the court here shown, with the Portsmouth & Suffolk Water Company, by which it, for valuable considerations, agreed that, the said Portsmouth & Suffolk Water Company faithfully performing its part of said contract, it would pay to the Portsmouth & Suffolk Water Company, for water supplied to certain hydrants described in said contract, the sum of \$7,500 per annum at the rate of \$75 per hydrant per year, payable every three months during the first ten years of said contract, and for each additional hydrant over and above 100 it, the said city of Portsmouth, would pay to the said Portsmouth & Suffolk Water Company at the rate of \$75 per hydrant per annum during the first ten years of said contract, and that for the next ten years of the existence of said contract it, the said city of Portsmouth, would pay to the said Portsmouth & Suffolk Water Company the sum of \$50 per hydrant per annum for each hydrant then set by the authority of the city of Portsmouth, or thereafter set or to be set by the authority of the city of Portsmouth, within the corporate limits of said city, payable every three months; and the said plaintiffs say that said contract further provides that if at any time any city taxes, levies, or assessments for any public purposes should be imposed on the property or works necessary for the supply of water, as set out in said contract, the annual rental above set out should be increased to an amount equal to said city taxes, levies, or assessments (paying assessments excepted); and the said plaintiffs say that it furnished water to the said hydrants during the years 1901, 1902, 1903, and 1904 in accordance with the said contract and faithfully performed its part of said contract, and that during the years 1901, 1902, 1903, and 1904 city taxes for public purposes were imposed to the amount of \$1,312.50 for each of said years on the capital stock of the Portsmouth & Suffolk Water Company, which capital stock was invested in and represented by the property and works necessary for the supply of water, amounting in the aggregate for said years to \$5,250, which said amounts were paid as follows: On October 31, 1901, \$1,312.50; on October 31, 1902, \$1,312.50; on October 31, 1903, \$1,312.50; and on October 31, 1904, \$1,312.50, by the said Portsmouth & Suffolk Water Company to the said city of Portsmouth; and the said plaintiffs say that under the ordinance of the said city of Portsmouth, unless said taxes were paid on or before the 1st day of November of each year, that then a penalty of 5 per cent. of the amount of said tax will be imposed, and to avoid said penalty the said Portsmouth & Suffolk Water Company, on the 31st day of October, 1901, paid the amount of said tax, to wit, the sum of \$1,312.50, and on the 31st day of October, 1902, it paid the sum of \$1,-

312.50, and on the 31st day of October, 1903, it paid the sum of \$1,312.50, and on the 31st day of October, 1904, it paid the sum of \$1,312.50; and the said plaintiffs say that said taxes assessed, as aforesaid, were illegal, and were imposed without authority of law, and were paid, as aforesaid to avoid said penalty of 5 per cent. under protest; and the said plaintiffs further say that in the year 1902 the said Portsmouth & Suffolk Water Company was, pursuant to an act of the General Assembly of Virginia, consolidated with the Berkley & South Norfolk Water & Electric Light Company and the Nansemond Water Company, so as to form one company by the name of the Portsmouth, Berkley & Suffolk Water Company, by means whereof the Portsmouth, Berkley & Suffolk Water Company became vested with all of the property, rights, franchises, and privileges of said Portsmouth & Suffolk Water Company, and subject to all the responsibilities of said company, and that subsequently, to wit, on or about the 17th day of April, 1911, the said Portsmouth, Berkley & Suffolk Water Company assigned to plaintiffs said claim against the said defendant, together with interest thereon, by means whereof the said city of Portsmouth then and there became indebted and liable to the plaintiffs in the said sum of \$5,250, with interest on \$1,312.50, a part thereof, from the 31st day of October, 1901, on \$1,312.50, another part thereof, from the 31st day of October, 1902, on \$1,312.50, another part thereof, from the 31st day of October, 1903, and on \$1,312.50, another part thereof, from the 31st day of October, 1904, and being so liable and indebted it, the said defendant, in consideration thereof, undertook and then faithfully promised to pay to the said plaintiffs the sum of \$5,250, with interest as aforesaid, when it, the said defendant, should be thereunto afterwards requested.

"Yet the said defendant, not regarding its said promises and undertakings, did not, nor would it at any time it was so requested and demanded, nor at any time before or afterwards, pay said plaintiffs the sums aforesaid, or any part thereof, but hath hitherto wholly neglected and refused, and still doth neglect and refuse, to the damage of the plaintiffs, \$10,000."

The demurrer of the defendant is as follows:

"The said defendant says that the declaration in this action and each and every count thereof, is not sufficient in law, and states the grounds of demurrer relied on to be as follows:

"First. That the tax imposed by the city of Portsmouth on the capital stock of the Portsmouth & Suffolk Water Company for the years 1901, 1902, 1903, and 1904, was not a tax, levy, or assessment imposed upon any property or works of the Portsmouth & Suffolk Water Company, or its successors, neces-

sary for the supply of water, as contemplated by the provisions of the contract between the city of Portsmouth and the Portsmouth & Suffolk Water Company, as set out in the plaintiffs' declaration, and hence there was no obligation on the defendant to pay the Portsmouth & Suffolk Water Company, or its successors, or the plaintiffs, the sums demanded in the declaration as increased hydrant rental.

"Second. That the plaintiffs, not being parties to the contract between the defendant and the Portsmouth & Suffolk Water Company, mentioned in the declaration, and not being the assignees of said contract, or of any part thereof, but the assignees of, if anything, only of a mere chose in action, to wit, the additional rental alleged to be due by the defendant to the Portsmouth & Suffolk Water Company for the years 1901, 1902, 1903, and 1904, cannot maintain this action in their own names for the violation of any rights growing out of said contract.

"Third. That the provision of the contract between the city of Portsmouth and the Portsmouth & Suffolk Water Company, mentioned in the declaration, that if at any time any city tax, levy, or assessment for any public purpose shall be imposed upon any of the property or works of the company necessary for the supply of water the rental agreed in said contract shall be increased to an amount equal to said city tax, assessment, or levy, is in effect an exemption of the property or works of the said company necessary for the supply of water from city taxation, and did not pass to the Portsmouth, Berkley & Suffolk Water Company under the act of merger or consolidation of 1902.

"Fourth. That the declaration does not allege facts sufficient to show that the payments of the taxes complained of were involuntary, or were made under such circumstances as would entitle the Portsmouth & Suffolk Water Company, or its successors, or the plaintiffs, to recover the same.

"Fifth. That the plaintiffs not being the persons in whose name the taxes for the years 1901, 1902, 1903, and 1904, mentioned in the declaration, were assessed, or the persons who paid the same, they cannot maintain an action in their own names to recover them back.

"Sixth. And for other good and sufficient grounds.

"Whereof," etc.

R. R. Hicks, of Norfolk, for plaintiffs in error. J. W. Happer and Frank L. Crocker, both of Portsmouth, for defendant in error.

KEITH, P. [1] The first ground of demurrer to the declaration in this case is: "That the tax imposed by the city of Portsmouth on the capital stock of the Portsmouth & Suffolk Water Company for the years 1901, 1902, 1903, and 1904 was not a tax, levy, or assessment imposed upon any

property or works of the Portsmouth & Suffolk Water Company, or its successors, necessary for the supply of water, as contemplated by the provisions of the contract between the city of Portsmouth and the Portsmouth & Suffolk Water Company, as set out in the plaintiff's declaration. * * *

One of the provisions of the contract set out in the declaration is that "if at any time any city taxes, levies, or assessments for any public purpose should be imposed on the property or works necessary for the supply of water, as set out in said contract, the annual rental above set out should be increased to an amount equal to said city taxes, levies, or assessments. * * *" Had the declaration stopped there, there would have been much force in the contention of the defendant, but it goes on to state that during the years 1901, 1902, 1903, and 1904 city taxes for public purposes were imposed to the amount of \$1,312.50 for each of said years on the capital stock of the Portsmouth & Suffolk Water Company, all of which capital stock was invested in and represented by the property and works necessary for the supply of water, amounting in the aggregate for said four years to \$5,250, which said amounts were paid. It would seem clear, therefore, that if the capital stock was invested in and represented by the property and works necessary for the supply of water, and the tax was levied upon the capital stock, that it was of necessity a tax upon the property and works necessary for the supply of water, as set out in the contract.

In *Farrington v. State of Tennessee*, 95 U. S. 686, 24 L. Ed. 558, it is said: "The capital stock and the shares of the capital stock are distinct things. The capital stock is the money paid or authorized or required to be paid in as the basis of the business of the bank, and the means of conducting its operations. It represents whatever it may be invested in."

And in *State Bank of Va. v. Richmond*, 79 Va. 115, it is said: "The capital stock, and the shares of the capital stock, are distinct things. The capital stock and the shares may both be taxed, and it is not double taxation."

As is said in the brief for the defendant in error, there is some confusion among the authorities in their definition of capital stock; the term sometimes being applied to the shares of stock in the hands of stockholders.

In *Cook on Stock and Stockholders* (2d Ed.) § 3, it is said: "Strictly the capital stock of a corporation is the money contributed by the corporators to the capital, and is usually represented by shares issued to subscribers to the stock on the initiation of the corporate enterprise."

And in 10 Cyc. at page 364: "The term 'capital stock' in an act of incorporation is said to mean the amount contributed or ad-

vanced by the shareholders as members of the company, and does not refer to the tangible property of the corporation."

But whatever obscurity or confusion may elsewhere exist as to the precise meaning and force of the term "capital stock," the averments of the declaration before us, admitted to be true by the demurrer, put the matter beyond the range of controversy; for it is expressly charged that the whole of the capital stock was invested in and represented by the property and works necessary for the supply of water, and a tax upon the capital stock, in the sense in which it is used in the declaration, was undoubtedly a tax upon the property in which it was invested.

The first ground of demurrer is therefore overruled.

[2] The second ground of demurrer is: "That the plaintiffs, not being parties to the contract between the defendant and the Portsmouth & Suffolk Water Company, mentioned in the declaration, and not being the assignees of said contract, or of any part thereof, but the assignees of, if anything, only of a mere chose in action, to wit, the additional rental alleged to be due by the defendant to the Portsmouth & Suffolk Water Company for the years 1901, 1902, 1903, and 1904, cannot maintain this action in their own names for the violation of any rights growing out of said contract."

It is not claimed in the declaration that the contract between the Portsmouth & Suffolk Water Company and the city of Portsmouth was ever assigned to the plaintiffs. The contention is that the plaintiffs are the assignees of a debt due to the water company, and that claim is a chose in action, within the terms of section 2860 of the Code. In reference to this section Barton, in the first volume of his *Practice* (2d Ed.) p. 236, says that "it now includes also open accounts in the use of the words 'or other chose in action,' upon which now suit may be brought in the name of the assignee, although formerly it could be only for his benefit. The language of the statute covers the right of the assignee or beneficial owner to assert in his own name the right to recover on any chose in action; whereas the former statute left every other instance except those specified in the language of the act to the rules as they were at common law."

[3] The third ground of demurrer is: "That the provision of the contract between the city of Portsmouth and the Portsmouth & Suffolk Water Company, mentioned in the declaration, that if at any time any city tax, levy, or assessment for any public purpose shall be imposed upon any of the property or works of the company necessary for the supply of water the rental agreed in said contract shall be increased to an amount equal to said city tax, assessment, or levy, is in effect an exemption of the property or works of the said company necessary for the

supply of water from city taxation, and did not pass to the Portsmouth, Berkley & Suffolk Water Company under the act of merger or consolidation of 1902."

If the premises were sound, the conclusion would follow; but is the contract stated in the declaration an exemption of the property and works of the company from taxation?

In *Grant v. City of Davenport*, 36 Iowa, 396, the ordinance construed was assailed as violative of article 8, § 2, of the Constitution, which declares that the property of corporations shall be liable to taxation the same as the property of individuals. "If," said the court, "we placed the same construction upon the ordinance as the counsel for appellants seems to, we should probably concur with him in his legal positions and conclusions thereon. But it seems to us that when the while ordinance is construed together it does not amount to an exemption from taxation. It, in effect, applies the taxes as they would otherwise become due, in part payment of, or in part consideration for, the water rent. The city pays the amount of money specified, and the taxes upon the franchise and the property required for the management of the works, as water rent. It might have required the payment of the taxes, and then returned the amount as part pay for water rent. The manner of doing it cannot defeat the power to do it."

In *Monroe Water Works v. City of Monroe*, 110 Wis. 11, 85 N. W. 685, it is said: "An agreement for immunity from taxation will not be recognized, unless couched in terms too plain to be mistaken. * * * Where, however, the agreement is express, and the intention evident, to exempt property and release it from tax burdens, it is void and will not be enforced. * * * The rule is equally well established that it is competent for a city and a company to agree that, as the price of services to be rendered, the city will pay a sum equal to the amount of municipal taxes to be levied."

In *Ludington Water-Supply Co. v. City of Ludington*, 119 Mich. 488, 78 N. W. 561, it was contended that the provisions of the contract under consideration relating to taxes were invalid, for the reason that the city had no power, under its charter, to exempt property from taxation, and that this contract was an attempt to exempt the property of the plaintiff in excess of a certain amount from its share of the public burden. The opinion says: "The contract does not purport to provide that the property of the plaintiff shall not be assessed. Its terms indicate that it was intended by both parties that it would be assessed, and that the plaintiff would pay the taxes on the property up to a certain amount, and the defendant all in excess, as a part of the consideration for the supply of water. The city no more exempts the property of the plaintiff from taxation by such an agreement than does the mortgagor who agrees to pay the taxes levied against the

mortgaged property exempt the mortgaged property from taxation. Possibly neither possesses the power to exempt property from taxation. Certainly neither has done it."

In *Cartersville, etc., Co. v. Mayor, etc., of Cartersville*, 89 Ga. 683, 16 S. E. 25, it was held that: "While a city cannot exempt a gas company from municipal taxation, it can contract to pay for gas a stipulated sum per lamp, and in addition thereto a sum for all the lamps supplied equivalent to the amount of taxes imposed upon the company, provided this additional sum is a fair and just allowance to compensate for the actual value of the light service, and the stipulation is bona fide and not in the nature of an evasion of the law prohibiting exemption from taxes. The present action is not brought to recover money voluntarily paid as taxes, but for a balance due under the contract for lighting the city; this balance being measured in part by the amount of taxes assessed and collected by the municipal government from the gas company."

See, also, *Los Angeles v. Los Angeles City Water Works*, 49 Cal. 638.

We are of opinion that the third ground of demurrer is insufficient.

[4] The fourth ground of demurrer is: "That the declaration does not allege facts sufficient to show that the payments of the taxes complained of were involuntary, or were made under such circumstances as would entitle the Portsmouth & Suffolk Water Company, or its successors or the plaintiffs, to recover the same."

This ground applies to the second count in the declaration, and raises the question frequently presented as to whether or not a payment of taxes was voluntary or involuntary, within the meaning of the law. If voluntary, they cannot be recovered back; if involuntary, the recovery may often be had.

It is contended by the plaintiffs in error that the payments here were involuntary, because the ordinance under which the tax was levied imposed a penalty of 5 per cent. if the tax was not paid when due. The claim of plaintiffs in error is that the imposition of a penalty is a species of duress, and that where the tax is paid to avoid this additional burden it is altogether different from the payment of a tax and the claim that it was involuntary merely because the tax was illegal.

The subject of the recovery back of illegal taxes paid under protest was fully considered by this court in the case of *Phoebus v. Manhattan Club*, 105 Va. 144, 52 S. E. 839, 8 Ann. Cas. 667, and we shall content ourselves upon this point with referring to the opinion of Judge Buchanan in that case and the authorities there cited. We do not think that the imposition of a penalty differentiates the two cases; that they are in principle identical; and that the case cited controls that under consideration. To hold that the imposition of

a penalty which is designed to accelerate the prompt payment of taxes, constitutes a duress would be to render the payment of the great bulk of our taxes involuntary and subject to be recovered back, and subject the collection of taxes to all the inconveniences and ills pointed out by Judges Carr and Tucker in *Mayor of Richmond v. Judah*, 5 Leigh (32 Va.) 305.

What we have said sufficiently disposes of the fifth ground of demurrer; and upon the whole case we are of opinion that the court erred in sustaining the demurrer to the first count in the declaration, but properly sustained the demurrer to the second count, and for the error in its ruling with respect to the first count its judgment must be reversed. Reversed.

(73 W. Va. 124)

BENEDUM v. FIRST CITIZENS' BANK et al.

(Supreme Court of Appeals of West Virginia.
Feb. 25, 1913. Rehearing Denied
June 30, 1913.)

(Syllabus by the Court.)

1. BANKS AND BANKING (§ 77*)—INSOLVENCY—RECEIVERSHIP—EFFECT.

The appointment of a receiver in a creditors' suit, brought to wind up the business of an insolvent bank and distribute its assets, does not preclude creditors other than the plaintiff in the bill from setting up in the same suit by cross-bill grounds of relief against the plaintiff, the officers, stockholders, and other creditors not set forth or admitted in the bill.

[Ed. Note.—For other cases, see *Banks and Banking*, Cent. Dig. §§ 165-176½; Dec. Dig. § 77.*]

2. BANKS AND BANKING (§ 77*)—INSOLVENCY—ASSETS.

In such case, the assets of the bank, including rights of action against its officers and stockholders for losses occasioned by their misconduct and misappropriation of funds, constitute a trust fund for the benefit of creditors and they may come in, not only to share in the distribution thereof, but also to require collection of the assets.

[Ed. Note.—For other cases, see *Banks and Banking*, Cent. Dig. §§ 165-176½; Dec. Dig. § 77.*]

3. BANKS AND BANKING (§ 77*)—INSOLVENCY—ASSETS.

If, in such case, grounds of relief against officers and stockholders have been omitted from the bill, and the receiver has not instituted any suit or other proceeding to enforce such claims, cross-bills by creditors, not seeking to withdraw such assets from the suit, nor to interfere with the custody or possession of the receiver, may be filed.

[Ed. Note.—For other cases, see *Banks and Banking*, Cent. Dig. §§ 165-176½; Dec. Dig. § 77.*]

4. BANKS AND BANKING (§ 58*)—INSOLVENCY—ASSETS—RIGHT OF ACTION—OFFSET.

An officer of an insolvent bank, held liable in such a suit for all of his indebtedness to the bank and losses occasioned by his misconduct or neglect of duty, required to restore all of his misappropriations, and deprived of the benefit of all preferences he has obtained, so far as claims against him on such accounts are

passed upon in the decree, cannot properly be denied participation in the distribution of the assets on account of his deposits and other claims against the bank. In such case his entire liability should be ascertained and decreed against him, and then he should be allowed to participate in the distribution, on payment or collection of a sufficient amount to insure ratable distribution among all creditors including himself.

[Ed. Note.—For other cases, see *Banks and Banking*, Cent. Dig. §§ 111-113, 115-120; Dec. Dig. § 58.*]

5. BANKS AND BANKING (§ 58*)—INSOLVENCY—ASSETS—RIGHT OF ACTION—OFFSET.

A creditor of an insolvent bank, though an officer and held liable for losses, misappropriations, and preferences, may set off against his deposits liability on his individual debts and notes and on his joint and several notes, but not his liability as surety or indorser, nor as a joint debtor.

[Ed. Note.—For other cases, see *Banks and Banking*, Cent. Dig. §§ 111-113, 115-120; Dec. Dig. § 58.*]

6. BANKS AND BANKING (§ 80*)—INSOLVENCY—CLAIMS—EFFECT OF ASSIGNMENT.

It is error to postpone, in a decree of distribution of the assets of an insolvent bank, the assignee of deposit accounts therein, though he is an officer held liable for losses and misappropriations and preferences. In this respect such claims should be treated as if they had been his originally, unless there is an equity against them in favor of the bank.

[Ed. Note.—For other cases, see *Banks and Banking*, Cent. Dig. §§ 184-196; Dec. Dig. § 80.*]

7. BANKS AND BANKING (§ 57*)—INSOLVENCY—LIABILITY OF OFFICERS.

In the settlement of the affairs of an insolvent bank, its president is properly chargeable with the amounts of worthless notes and overdrafts of corporations, promoted and controlled by him and his associates, discounted by the bank with his knowledge, under his direction and with notice on his part of the financial ability of the makers, inferable from his relation with them and participation in the management and control thereof.

[Ed. Note.—For other cases, see *Banks and Banking*, Cent. Dig. §§ 108-110; Dec. Dig. § 57.*]

8. BANKS AND BANKING (§ 51*)—OFFICERS—RESIGNATION.

An officer of a bank who has sold his stock and tendered his resignation is nevertheless a de facto officer, if his resignation has not been accepted, nor the vacancy in the office filled, and his acts and the surrounding circumstances prove he continued to act for the bank and participate in the management and control of its affairs.

[Ed. Note.—For other cases, see *Banks and Banking*, Cent. Dig. §§ 82-89; Dec. Dig. § 51.*]

9. BANKS AND BANKING (§ 82*)—INSOLVENCY—LIABILITY OF OFFICERS.

An officer is liable for withdrawal from an insolvent bank, after knowledge of its insolvency, of deposits made and controlled by him, though he is not sole owner thereof.

[Ed. Note.—For other cases, see *Banks and Banking*, Cent. Dig. §§ 203-209½; Dec. Dig. § 82.*]

10. BANKS AND BANKING (§ 74*)—INSOLVENCY—PREFERENCES.

Transformation by an officer of a failing bank of its certificates of deposit held by him into a well secured debt held by the bank, by surrender of the certificates in part payment of the debt and taking a new note from the debtor

secured and payable to himself constitutes a preference, the benefit of which must be surrendered in the settlement of the affairs of the bank.

[Ed. Note.—For other cases, see Banks and Banking, Cent. Dig. § 156; Dec. Dig. § 74.*]

11. BILLS AND NOTES (§ 373*)—CERTIFICATES OF DEPOSIT—BONA FIDE PURCHASERS.

Certificates of deposit in a bank, fraudulently issued, are valid obligations in the hands of a holder thereof for value without notice of the fraud.

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. §§ 966-970; Dec. Dig. § 373.*]

12. BANKS AND BANKING (§ 58*)—OFFICERS—LIABILITY.

Officers of a bank, participating in misappropriations and transactions occasioning losses, are jointly and severally liable for such misappropriations and losses, and there may be a separate decree against any of them.

[Ed. Note.—For other cases, see Banks and Banking, Cent. Dig. §§ 111-113, 115-120; Dec. Dig. § 58.*]

13. BANKS AND BANKING (§ 41*)—INSOLVENCY—ASSETS—SUBSCRIPTIONS OF STOCK.

In the settlement of the affairs of an insolvent bank, the unpaid subscriptions of stockholders constitute a part of the assets, and stockholders may be required to restore dividends unlawfully and improperly declared out of funds and assets other than profits, and paid in cash or applied in satisfaction of unpaid subscriptions.

[Ed. Note.—For other cases, see Banks and Banking, Cent. Dig. § 55; Dec. Dig. § 41.*]

14. BANKS AND BANKING (§ 76*)—INSOLVENCY—LIABILITY OF STOCKHOLDERS.

In a creditors' suit against an insolvent bank, the statutory liability of stockholders for amounts equal to their subscriptions and in addition thereto may be invoked, and such amounts brought in for distribution with the assets of the bank.

[Ed. Note.—For other cases, see Banks and Banking, Cent. Dig. §§ 158-164; Dec. Dig. § 76.*]

15. BANKS AND BANKING (§ 76*)—INSOLVENCY—CREDITORS' SUIT.

In such suit, a transfer of stock, made with intent to avoid the statutory liability and defraud creditors of the bank, may be assailed by cross-bill, if it has not been attacked by the plaintiff or the receiver.

[Ed. Note.—For other cases, see Banks and Banking, Cent. Dig. §§ 158-164; Dec. Dig. § 76.*]

16. APPEAL AND ERROR (§ 80*)—DECISIONS REVIEWABLE—PROVISIONAL ORDERS AND DECREES.

Provisional orders and decrees, not final in character, but reserving for future adjudication matters in litigation, are not appealable.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 429, 432, 433, 450, 456, 457, 494-509; Dec. Dig. § 80.*]

Appeal from Circuit Court, Marshall County.

Bill in equity by M. L. Benedum against the First Citizens' Bank and others. From the decree, plaintiff and defendants John A. Howard, special receiver, and August Wendt appeal. Reversed in part, modified in part, affirmed in part, and remanded.

T. S. Riley and J. W. Ritz, both of Wheeling, George J. Wolf, John S. Weller, and John O. Wicks, all of Pittsburgh, Pa., and Wm. M. O. Dawson and Malcom Jackson, both of Charleston, for appellants. J. C. Simpson, of Moundsville, and Caldwell & Caldwell and McCamic & Clarke, all of Wheeling, for appellees.

POFFENBARGER, P. The appellant M. L. Benedum, to whom there was decreed in this suit brought to wind up the affairs of the First Citizens' Bank of Cameron more than \$94,000 on account of deposits in his own name and those of other persons by him and interest thereon, and against whom large amounts were decreed, far in excess of the amount allowed him, on account of his liability on certain notes to which he was a party as maker or indorser, overdrafts alleged to have been permitted by him as president and director of the bank, preferences given by withdrawal of deposits, and losses occasioned by his negligence and misconduct, was denied the right of set-off as to the notes on which he was liable and also participation in the distribution of the assets of the bank, as to all sums decreed to him, until after all other creditors shall have been paid; and he has appealed from the decree. The bank closed its doors on the 24th day of December, 1903, in pursuance of an order of the board of directors thereof, made on the preceding day. Benedum commenced this suit on the 26th day of December, 1903, and on that day secured the appointment of a receiver to take charge of the assets of the bank. The bank itself and most of the stockholders were made parties defendant. In response to notice of the application for the appointment of a receiver, the bank, by its president, Wm. M. Kincaid, filed an answer, admitting substantially all the allegations of the bill. On the 1st day of March, 1904, J. M. Marsh and numerous other creditors of the bank filed their petition, praying to be made defendants which prayer was granted. On the 18th day of June, 1904, George N. Hoffman, G. W. Hazen, and W. A. Hazen filed a similar petition, the prayer of which was granted, and on the 2d day of July, 1904, these defendants and others filed answers and cross-bills in the cause, setting forth numerous grounds for relief against M. L. Benedum, former president, A. E. Fox, former cashier, Wm. M. Kincaid, president, and all of the directors and stockholders. These cross-bills charge many gross acts of negligence on the part of Benedum and Fox and violations of law both by them and the stockholders and other directors, among which were two unauthorized declarations of dividends, one of which was averred to have been credited on unpaid subscriptions and the other paid in cash. Large losses due to the negligence and misconduct of the directors and stockholders were charged. It is also alleged that Benedum and Fox,

knowing the insolvent condition of the bank, fraudulently disposed of their stock to avoid statutory liability thereon. Liability of the stockholders under the statute in amounts equal to their respective subscriptions and in addition thereto, as security for creditors, was asserted, and the benefit of the statute invoked. A demurrer to the cross-bills, assigning their insufficiency as a whole and the insufficiency of certain parts thereof, was overruled except as to three portions, those charging liability on account of the dividends declared, the fraudulent assignment of the stock by Benedum and Fox, and the statutory liability of the stockholders in excess of their subscriptions. Thereupon Benedum filed his answer and special reply to the cross-bills, and put in issue all of the allegations thereof against him.

[1, 2] The propriety of the overruling of the demurrer is challenged upon two principal grounds, the exclusive right in the receiver to take into his possession all of the assets of the corporation and enforce liabilities of the stockholders and others, and the relation of the matters or grounds of relief set up in the cross-bill to the subject-matter of the original bill. The admitted insolvency of the bank wholly changed its character and gave rise to new rights on the part of creditors, depositors, and stockholders. Its assets immediately became a fund to which all had the right to resort. In them they ipso facto acquired interests. The liability of the officers constituted a part of the assets of the bank. Though the relation of trustee and cestui que trust did not previously exist between the officers of the bank and the depositors, the liabilities of the officers as agents or trustees of the corporation were assignable and constituted part of the bank's assets, and in them the creditors had an interest as well as in its other assets. Though they were in the possession of the receiver or he had title to them, and could sue for and recover them, his possession was for and on behalf of all the interested parties, including the depositors and other creditors. He alone no doubt could have instituted separate actions at law against the derelict or fraudulent officers of the bank, had that course of procedure been adopted, for he had, as successor of the bank, the legal title or right of possession, but this argues nothing against the right of the creditors to assert in this suit their equitable claims against such sums as are due from the officers of the bank, on account of losses, misappropriations, and preferences, as parts of the fund to which they have a right to resort for satisfaction of their claims, if such liabilities may be enforced in this suit. The assertion of these rights here did not disturb the possession or title of the receiver nor in any way interfere with the exercise of his powers.

Though there are some decisions to the contrary, the better opinion is that such

claims and demands are cognizable in a suit to wind up the business of a bank and distribute its assets. "Those rights of the bank are choses in action, which are equitable assets in the sense that they are rights to recover for breaches of trust. They are assignable, and survive against the personal representative of the deceased officer.

* * * This right of the creditor can never be insisted upon except when the bank is insolvent, for as long as the bank is able to pay, and does pay, its creditors, no creditor is injured by or can complain of the officer's breach of his duty toward the bank. But, the bank being insolvent, two principles come into play: First, the assets ought to be equally distributed among the creditors; and, second, the suit being a creditors' bill, all creditors have a right to come into the action, and must come into the action. This fact being conceded, the necessity for a judgment at law and a return of 'nulla bona' is dispensed with. Such being the nature of the action, it is quite useless for us to say that without a statute such an action does not lie at law, because no creditors' bill lies at law. But, since the right against the officer which the creditor is asserting belongs to the bank, the corporation must be made a party, just as the debtor whose rights are being asserted must be made a party. In the next place, if the bank has an assignee or a receiver, he must be made a party, because the bank's choses in action belong to him; and since he is the custodian of those rights, if he is a receiver, an officer of the court, no suit ought to be brought, unless he has refused to bring a suit, and thus renounced his intention of enforcing the obligation on behalf of the bank." Zane on Banks and Banking, § 86. As the officers of a bank are virtually its trustees, or, at least, may be treated as such, losses occasioned by their negligence and certainly funds misappropriated are proper charges in the settlement of their accounts. Personal representatives of deceased persons are chargeable with such items. Pinckard v. Woods, 8 Grat. (Va.) 140; Hooper v. Hooper, 32 W. Va. 541, 9 S. E. 937; Anderson v. Piercy, 20 W. Va. 324; Evans v. Shroyer, 22 W. Va. 581; Reitz v. Bennett, 6 W. Va. 417. Guardians are chargeable with such items. Hunter v. Lawrence, 11 Grat. (Va.) 111, 62 Am. Dec. 640; Truss v. Old, 6 Rand. (Va.) 553, 18 Am. Dec. 743; Roush v. Griffith, 65 W. Va. 752, 65 S. E. 168. Trustees eo nomine fall under the same rule. Perry on Trusts, § 848. These cross-bills are, in effect, creditors' bills, not mere declarations against the corporate officers for injuries occasioned by their alleged deceit and fraud. Claims of the latter class for unliquidated damages might not be germane to the purpose of the bill, nor provable before the commissioner. These cross-bills charge the assets of the bank, including all sums due from its trustees, with debts, not claims for damages.

[3] Though a number of decisions say unwillingness, neglect, failure, or refusal of the receiver to sue must be shown by a creditor as a prerequisite to his right of action, many of them are instances in which creditors sought by their suits to withdraw from the custody of the receiver and the jurisdiction of the court in particular cases the assets of the insolvent corporation. That is not the character of these cross-bills. They are filed in a cause in which a receiver had been appointed, and do not attempt any interference with his possession or custody. While they relieve him of the necessity of suing to get in these assets or filing in this cause the necessary pleading to accomplish that result, they set up no right of withdrawal of any assets or interference therewith. Their sole purpose is to charge the officers and directors of the bank. Treating these claims against the officers as causes of action arising out of breaches of trust and assets of the corporation to which creditors may resort for satisfaction of their claims, as well as its other assets, the matter of the cross-bills was germane to the subject-matter of the bill; and, although the creditors might appear before the commissioner and file their claims and have them adjudicated, no reason is perceived why they might not also set up in this cause these breaches of trust without any intrusion upon the right of the receiver. Decrees for the amounts due by reason thereof would be in his favor and for the benefit of the creditors. The original bill might properly have contained the allegations of the cross-bills and likely would have done so, had it been filed by a creditor or some person not indebted or liable to the bank on any account; and failure to include them necessitated further allegations of vital matters requisite to bring into the suit all the creditors were entitled to. The cross-bills were filed by permission of the court, and did not conflict with any proceedings instituted by the receiver. He had not sued to get in these assets.

[4] The decree holds Benedum liable, individually in some instances, and, in others, jointly and severally with Fox and others, on notes amounting, together with their interest, to \$32,480.93; on account of losses from the discounting of bad notes, amounting with their interest to \$64,709.76; jointly and severally with Fox in two instances, and with Fox and Harkins in one, for overdrafts amounting to \$15,311.24; for a preference amounting with interest to \$29,200, in a transaction relating to a note for \$30,000, secured by a deed of trust, which he took over to himself partly in exchange for certificates of deposit in the bank; and for withdrawals amounting to \$10,144.97. Though required by the decree to restore to the assets of the bank these preferences and losses, all that have been decreed against him so far, he is denied participation in the distribution of the

assets until all the other creditors shall have been paid. As authority to sustain this discrimination, *Elliott v. Farmers' Bank of Philippi*, 61 W. Va. 641, 57 S. E. 242, is relied upon. The court's holding in that case, however, was based upon the special and particular facts disclosed by the record. In the opinion Judge Miller said: "The court below, acting on the principles of these authorities, evidently concluded, and we think rightly, that there had been such gross negligence and inattention to the business of the bank on the part of the directors, before and after insolvency, in relinquishing rights, and in acquiring for themselves unjust advantages over other creditors, as to require that they should be postponed until the claims of all other creditors had been fully satisfied." The conclusion evidently rested upon the assumption of undue advantages obtained, losses occasioned and never made good, misappropriations not restored, and other acts by which the complaining stockholders and officers had profited to the detriment of the general creditors. Here the position is different. The decree deprives Benedum of all preferences, makes good all losses occasioned by the negligence and misconduct of the directors and officers, and compels restoration of all misappropriations, so far as ascertained and determined.

The theory of the trial court seems to have been to make available for the depositors, by the postponement, a sort of general liability on the part of the managing officers for undefined and general damages for wrecking the bank by violations of law and other wrongs of omission and commission. This view, however, goes beyond both the pleadings and the evidence, and includes a species of liability not germane to the bill or subject-matter of the suit. These depositors sue here as creditors of the bank, and assert and prosecute the bank's claims and demands against the officers, not their own causes of action for fraud and deceit. For injury occasioned by misrepresentation as to the bank's solvency, inducing deposits and thus causing loss, each depositor would likely have to sue alone and at law. The cause of action would be his, not the bank's, and sole, not joint with other depositors, and the recovery would be his own, not a mere asset of the bank applicable to repayment of his deposit as a debt. Nor is the bank or anybody on its behalf suing for general damages, if such a demand could be asserted by a cestui que trust against the trustee, in a court of equity—a very doubtful proposition to say the least. The remedy of cestui que trust against trustees is an accounting in equity. If the property has been lost or misappropriated or sold for inadequate prices or other wrongs done by the trustee, the property loss, not damages for wrongs, is the basis of the accounting. *Norman's Ex'r v. Cunningham*, 5 Grat. (Va.) 63, 72; *Oliver v.*

Platt, 3 How. (U. S.) 333, 11 L. Ed. 622; Baker v. Whiting, 8 Sumn. 475, Fed. Cas. No. 787; Freeman v. Cook, 6 Ired. (41 N. C.) 373; Bradley v. Luce, 99 Ill. 234; Trecothick v. Austin, 4 Mason, 16, 29, Fed. Cas. No. 14, 164; Johnson v. Ames, 11 Pick. (Mass.) 181. But if the stockholders or creditors could assert, against the officers, a claim for such general damages in a creditors' suit, the data for the assessment thereof would have to be produced in evidence. All losses of every form, gains prevented, and loans and debts lost could not be charged up, without reference to the conduct of the officers in the particular instances, because of unlawful acts or misconduct not contributing in any way to the results in such cases. Bad loans may have been made and lost despite the utmost diligence and good faith. Advantageous bargains may have escaped and profits been lost, notwithstanding an honest exercise of judgment and diligent inquiry. Surely a court of equity will not inflict punitive damages or decrees for smart money. We do not construe these cross-bills as asserting any such claims, nor see in the evidence data for an assessment of such damages. While the answer charges in general terms the failure of the bank on account of the bad and improvident management of Benedum and Fox, this charge seems to have been intended as the basis of several and personal liability on their part for the specific losses and misappropriations pointed out and complained of. As Benedum is required to make good and restore all these, so far as his liability has been fixed, and other similar claims against him seem to be pending and undetermined, no reason for postponement of his debts to those of other creditors, as regards the assets reported by the receiver, is perceived. The only safe and just course is to ascertain his entire liability, and then allow him to participate in the distribution, on payment to the receiver of a sufficient amount to insure ratable distribution of the assets among all the creditors including himself. Should it become necessary to resort to unpaid subscriptions or amounts recovered under the statute, the rule applicable to distribution of such assets may be different.

[6] The decree further discriminates against Benedum by postponing him in the distribution of the assets as the owner of the following deposits, appearing upon the books of the bank: Bowman Farm Oil Company, \$34.50; British Columbia Company, \$419.13; Hammet Farm Oil Company, \$272.55; Ingram Farm Oil Company, \$136.93; Ingram Farm Oil Company, \$474.50; and Owens Farm Oil Company \$40.75—amounting in the aggregate to \$2,107.23. There is no basis for such discrimination. He could justly and fairly purchase these deposits, assuming that he did purchase them wholly or in part. It involved no injustice to other creditors. His assignors could lawfully and justly sell, and

he could buy, such interests as they had. Of course, he took them subject to any existing equities in favor of the bank.

[5] Denial of the right to set off his deposits against his liability on certain notes is complained of by the appellant. In proper cases the right of set-off is available between an insolvent bank and its depositors. Morse on Banks & Banking, § 337; Bolles on Banking, p. 856; Jones on Insolvent & Failing Corp. § 552; Bank v. Armstrong, 146 U. S. 409, 13 Sup. Ct. 148, 36 L. Ed. 1059. Until insolvency occurs, depositors are mere creditors of the bank, and this relation is not destroyed by the broader or more intimate one of trustee and cestui que trust, resulting from the fact of insolvency. It includes the former, but does not extinguish it. A claim of this kind was denied in Lamb v. Pannell, 28 W. Va. 663, but only because the claims were not mutual. It was an attempt on the part of a surety to set up his liability as such against his individual debt. In another aspect of the case the claimant was endeavoring to obtain the benefit of a preference, which the law did not allow. Only mutual debts are allowable under the law as set-offs. Liabilities on account of misappropriation or attempted preferences are not within that class, for the obvious reason that a set-off thereof would conflict with legal principles, denying the benefit of misappropriations and unlawful preferences. Nor does the law permit the set-off of a joint liability against an individual one. Elliott v. Bell, 37 W. Va. 834, 17 S. E. 399; Choen v. Guthrie, 15 W. Va. 100; Perkins v. Hawkins, 9 Grat. (Va.) 649; Porter v. Nekervis, 4 Rand. (Va.) 359. But joint and several demands may be set off. Elliott v. Bell, cited. Nor can a surety set off the debt of his principal against his own individual debt or his individual claim against a debt for which he is liable as surety, except under peculiar circumstances. Choen v. Guthrie, 15 W. Va. 100; Edmunds v. Harper, 31 Grat. (Va.) 637. This rule denies the right of set-off to persons liable as indorsers, because they are sureties. Bank v. Baker, 93 Va. 510, 25 S. E. 550; Daniel Neg. Instr. §§ 1303-1305.

Under these principles the court properly refused to allow Benedum to set off against his deposits the decree against him and Fox for \$14,139.45 on account of a promissory note executed by one Bostock and others to them and indorsed by them; the decree against him for \$500 on a note executed by him jointly with J. B. Myers and Fannie Myers; the decree for \$6,755.55 against him, Fox and Harkins, on account of a joint note, payable to the First Citizens' Bank, signed by the Cameron Glass Company, on the face thereof, and by them on its back; and the decree for \$3,839.17 against him and Fox on account of a note discounted for the Upshur Glass Company and the proceeds of which were used in the business of the said

company; it being a concern largely managed and controlled by Benedum. Substantially this last item was a misappropriation of the bank's funds. But he is entitled to set off against his deposits the decree for \$1,500 against him and Fox on account of their note made jointly and severally with Edgar H. Bostock, and the decree against him for \$100 on account of a joint and several note executed by him and J. L. Fisher.

[8] As some of the decrees against the appellant are founded upon official negligence and misconduct as a director and president of the bank, his relation to the institution is a question discussed at great length in the briefs. Having made an alleged sale of his stock to one Englehart on the 26th day of July, 1903, a date prior to some of the transactions complained of, and having at or about that time rendered his resignation, which the board of directors did not accept, it is urged that from and after that date he was not an officer or director of the corporation. Though the severance of his relation as a stockholder rendered him ineligible to the office of director or president, that circumstance is not conclusive, since he could still be liable as a de facto officer; and, if thereafter he assumed to act for and on behalf of the corporation and was in fact, though not in name, the president, he was a de facto officer. *Hulings v. Lumber Co.*, 38 W. Va. 351, 361, 18 S. E. 620; *Clark & Marshall, Corp.* § 662; *Cook, Corp.* § 623. As has been stated, Benedum's resignation tendered in July, 1903, was not accepted, nor was the vacancy filled until December 23, 1903. If the bank had any president during this interim, Benedum must have been the incumbent of the office. Witnesses say he did exercise the powers of the office and a few instances of official action are shown. On the 12th day of October, 1903, he indorsed the bank's name on a note, designating himself as president. In the same month he transformed \$20,000 of certificates of deposit in the bank into a well-secured note of J. Fay Watson which the bank had held. On the face of the matter the bank demanded payment of Watson, who applied to Benedum for a loan which was made, and \$20,000 of the Watson debt to the bank was paid in its own certificates of deposit, Benedum taking a new note from Watson well secured. This transaction was very much for the benefit of Benedum and to the detriment of the bank. Two days before the bank closed its doors a \$10,000 transaction took place between it and stockholders of the Wetzel Window Glass Company, in which Benedum and Fox were considerably interested. He and A. E. Fox were business associates, interested together in the bank and many other enterprises. Both claimed they had disposed of their stock and resigned at the same time. Fox, notwithstanding the tender of his resignation, continued to act as cashier until the

bank closed. Both attended the meeting of the directors on the 23d day of December, 1903, and participated in the proceedings then had, looking to the winding up of the corporation, closing its doors, and procuring the appointment of a receiver. Benedum himself says Kincaid was then elected president because there was a doubt as to whether he (Benedum) was president. After the tender of his resignation in July, 1903, much of the bad paper of the business concerns in which he and Fox were interested together was still carried by the bank and Benedum continued to be its largest customer, the bank holding large deposits of his as well as a good deal of his paper. In view of all these circumstances, we are unable to say the court erred in finding he was a de facto officer until December 23, 1903.

[7] The decree holds the appellant liable for the amounts of the following notes, to none of which he was a party as maker, indorser, or guarantor, on the theory that they were bad debts, negligently and recklessly made, and partially for his benefit as the promoter of the enterprises executing them: A Marshall Window Glass Company note for \$29,650, a note of the same company for \$4,500, a note of the Upahur Glass Company for \$7,500, and a note of the Wetzel Glass Company for \$3,580.83. Benedum was the promoter and president, and Fox the treasurer of the Cameron Glass Company, a part of whose indebtedness to the bank, represented by notes and overdrafts, was converted into a note of its successor, the Marshall Window Glass Company, for \$29,650. In violation of both the statutory law and the by-laws of the bank, the Cameron Glass Company had been allowed to become largely indebted to the bank. On December 23, 1901, it had an overdraft of \$4,628.23, and on March 4, 1902, of \$16,982.81. On April 1, 1902, a note for \$16,588.45 was given for the Cameron Company's overdraft and the form of the indebtedness changed. Thereafter its overdrafts were as follows: October 4, 1902, \$17,188.89; April 9, 1903, \$22,633.88; July 19, 1903, \$21,000; December 23, 1903, \$6,042.40, increased on the same day to \$9,022.12 by the transfer of a fund or overdraft on another account known as the federation account. In the meantime, about April 27, 1903, the Cameron Company sold and transferred its plant, machinery, and everything, except the glass on hand, to a new company known as the Marshall Window Glass Company for \$29,650, taking its note therefor. At that time the plant was estimated to be worth only about \$30,000 and constituted all the property the Marshall Window Glass Company had, so far as the record discloses, and the Cameron Glass Company, having thus sold its plant and being largely indebted, was insolvent, so that its indorsement constituted no security. A deed of trust was taken on the plant to secure the note, but that security was obviously insufficient, and in the next

year the plant was destroyed by fire so that it wholly failed. At the time of this transformation of the Cameron Glass Company into the Marshall Window Glass Company, the former owed the bank in notes about \$34,400 and large overdrafts. Besides, there was a heavy overdraft in the federation account of the company, for which it was liable, so that its indebtedness to the bank was \$50,000 or \$60,000, and it owed other debts to other persons. The note for \$29,650 was substituted for the Cameron Company's notes to that extent, leaving a balance of \$5,750 on account thereof, no settlement for which is shown. Both the Upshur Glass Company and the Wetzel Glass Company were organized by Benedum and Fox. The former seems to have been the older, and was largely financed by overdrafts for the purpose in the name of Benedum, agent. Some time after its organization, Benedum and Fox sold out their interests in it to other persons for \$14,200, taking a series of notes therefor, executed by W. H. Howard as agent of the makers, the stockholders of the company. These notes were discounted by the Citizens' Bank of Cameron and the proceeds placed to the credit of M. L. Benedum, agent. They were never paid, but in December, 1903, a note of the Wetzel Window Glass Company for \$10,000 on which there was a balance due of \$9,450 with some interest was substituted for a part of them. It seems that the proceeds of the Howard, agent, notes discounted by the bank were largely used in the promotion of the Wetzel Window Glass Company. All these enterprises seem to have been mere speculative ventures, having no solid basis, and, of course, Fox and Benedum, the promoters and managers thereof, knew all about their condition, and must have known their assets constituted no sufficient security for their large notes discounted and overdrafts permitted in the bank. Whether Benedum can be said to have received the benefit of these sums of money, or is responsible for having made the loans and permitted the overdrafts with knowledge of the insufficiency of the security, the result is the same. If he actually received the benefit thereof, he is bound to make restoration, and, if he knowingly made bad loans or permitted them by his inattention to the business of the bank, he is liable for the losses resulting, and in neither case can he be permitted to set off his deposits against these liabilities, for, in the former, he would obtain a preference, and in the latter take the benefit of his own wrong. In view of the facts here stated and others disclosed by the record, we are of the opinion that the circuit court did not err in holding him liable for these notes.

These observations, principles, and conclusions apply with equal force to the overdrafts decreed against Benedum, except in those instances in which the court erred in holding

or finding the existence of overdrafts. One of these was for \$13,081.07, made by the Cameron Glass Company. Related to it is a decree for \$224.20 as interest on the same overdraft. Another is for \$135.30 on account of the overdraft of the S. D. Outward Farm Oil Company account. Lastly, there is one for \$1,698.89 on account of an overdraft in the name of M. L. Benedum, agent. We perceive no error in any of these. But in this connection there is an erroneous charge against him as to a withdrawal of \$3,920.59, pertaining to the same account. On December 21, 1903, there was in the bank to the credit of that account \$3,139, against which checks were drawn on that date amounting to \$3,920.59. This created an overdraft of \$781.59 which, with the interest thereon and on other overdrafts to December 24, 1903, aggregated \$1,171.65. The checks constituted a withdrawal to the extent of the amount of money then in the bank to the credit of that account, \$3,139, but not \$3,920.59, and an overdraft to the extent of the difference between these two sums, \$781.59. As this is the amount decreed as an overdraft, together with interest, the error is in the decree for the withdrawal, and the extent thereof \$781.59 as of the 21st day of December, 1903.

[9] On account of funds withdrawn from the bank from November 9, 1903, to December 21, 1903, most of them in December, and all after the insolvency of the bank must have been apparent, the court decreed against Benedum sums aggregating \$10,144.97, and with their interest at the date of the decree to \$14,709.18. They were as follows: Benedum and Fox account, \$550; M. L. Benedum, agent, \$3,920.59; Buckhannon account, M. L. Benedum, agent, \$750; Benedum Bros., \$235.70; C. Y. Benedum, Trustee, \$3,000.25; Bowman Oil Company, \$715; Hammet Oil Company, \$217.43; and British Columbia Company, \$756. As these accounts were under Benedum's control, he is properly chargeable with them in so far as the findings as to amounts are correct. He either got the benefit of them, or was the instrumentality of their wrongful withdrawal. The amount charged on account of the withdrawal from the M. L. Benedum, agent, account is too large, however. Deducting from the total the erroneous charge of \$781.59, with its interest from December 21, 1903, to June 11, 1911, found to be \$352.01, the amount the court should have decreed on account of these withdrawals is ascertained to be \$13,575.48, and the decree will be modified accordingly.

[10] The charge on account of the J. Fay Watson transaction is sustained by the evidence. Seeing the failing condition of the bank, and holding certificates of deposit therein for large amounts the bank was unable to pay in cash, he took over the Watson secured debt in exchange for \$20,000 of these certificates and \$10,000 in cash, and so obtained a preference over the other creditors, inhibited

by law. Though the bank may have thus obtained \$10,000 in cash, it, with the other \$20,000 represented by the certificates, was secured to Benedum by the deed of trust he took over from Watson. Against this view as to Benedum's motive is urged his failure to withdraw his considerable deposits and his continued patronage of the bank. But the bank was no doubt unable to pay his deposits, and for some months before its doors were actually closed he made few additional cash deposits of any consequence to the credit of any of his numerous accounts, and some of them were withdrawn very soon after they had been made. No error is perceived in the allowance of a 5 per cent. commission to the attorneys of the cross-bill plaintiffs on the general fund, created for the creditors by this suit, to be apportioned and charged against the several creditors in the distribution. But this provision of the decree will be so modified as to make it conform to the decree as here altered respecting the rights of M. L. Benedum. No commission to the attorneys of the cross-bill plaintiffs can be allowed on such portion of the fund as shall go to him. The decree in its present form may not give it, but, as a matter of precaution, it will be made clearer by a modification.

The action of the court in refusing to find and hold the notes of W. J. Bryan, amounting to more than \$25,000, constitute a part of the assets, is complained of; but, as the court merely continued the hearing and consideration of the motion for such a finding and did not finally dispose of it, the assignment is not well taken.

[11] An adjudication of the liability of the bank, in the sum of \$7,275.36, including interest, in favor of the Security Savings Company of Columbus, Ohio, on account of two certificates of deposit issued to Englehardt and by him assigned to the company, is the subject-matter of one of the assignments of error. The certificates were fraudulently issued, but, as they are negotiable and no knowledge of the fraud, on the part of the holder, is shown, we see no error in the decree as to that item.

[12] There was no error in decreeing separately against Benedum. Two or more trustees participating in a breach of trust incur joint and several liability to the cestui que trust. *Barksdale v. Finney*, 14 Grat. (Va.) 338; *Rowe v. Bentley*, 29 Grat. (Va.) 756; *Miller v. Holcombe's Ex'r*, 9 Grat. (Va.) 665.

[13] The cross-assignments of error, going to the action of the court in sustaining the demurrer to certain portions of the cross-bill and striking them out, are well taken. As to the dividends, they were charged to have been declared and paid, not out of any profits of the bank, but out of the capital stock and to its serious impairment. The trial court seems to have based its action in sustaining the exceptions to these portions of the cross-bills on the theory of indefiniteness

and uncertainty. In our opinion this theory is untenable. A fact was charged, without the details, which made the declaration and payment of dividends improper and unlawful. Apparently the subsidiary facts were not within the knowledge of the cross-bill plaintiffs, as they say, and were within the peculiar knowledge of the officers of the bank, of whom the plaintiff Benedum was one.

[14] The other two cross-assignments of error involve the question whether or not the statutory liability of stockholders for amounts equal to their subscription of stock and in addition thereto is available in a creditors' suit against an insolvent bank. In some jurisdictions it is held they are not, because the statute was designed for the protection of creditors, and not the bank, and does not contemplate the recovery of these additional amounts as part of the assets of the bank. Where the statute is so construed, each creditor must sue separately and individually for the amount of his loss. Though the terms of our statute are very general and indefinite, we are of the opinion that the legislative design was to make this liability a fund to which creditors may resort collectively for satisfaction of their claims in full or pro tanto, as the case may be. The whole spirit of our law is against preferences and inequality in the distribution of the assets of an insolvent person or corporation and collective terms are used in the statute. It says: "The stockholders of every bank * * * shall be personally liable to the creditors thereof over and above the amount of stock held by them respectively, to an amount equal to their respective shares so held for all liabilities accruing while they are such stockholders." If this fund is intended for the common benefit of the creditors, as we think it is, it is virtually, though not in name, an asset of the bank, for it is distributable along with the other assets. It could not be apportioned and distributed without reference to other assets. Hence it becomes necessary, in the apportionment thereof, to marshal the assets, and, for the purpose, bring all the funds together, from which it follows that a fraudulent transfer of stock by a stockholder to avoid this liability to the creditors in general and also the right to invoke the benefit of the statute against all stockholders are germane to a bill to wind up the business of an insolvent bank and distribute its assets.

[15] We think, therefore, the court erred in sustaining the exceptions to the portions of the cross-bills, relating to fraudulent transfers of their stock by Benedum and Fox and the invocation of the statutory liability of the stockholders. What has been said on the subject of postponement suffices to sustain the action of the court in refusing to postpone the deposit account of Benedum Bros.

The finding of the commissioner that the Camden Pottery Company deposit account is

held by Sadie U. Benedum as collateral security for a note of that company is challenged, because M. L. Benedum, speaking from recollection in the course of his testimony, said he had bought it. We agree with the trial court that this is not sufficient to overcome the commissioner's finding. Benedum had just said he did not remember what accounts he had purchased. The commissioner goes into details, showing how it is held by another person. The commissioner charged Benedum with a note of C. S. Harper, upon the statement of the receiver that he had a pencil memorandum signed by Benedum, in which he had guaranteed, or agreed to pay, the note. Not having it with him, the receiver did not file it as a part of his deposition at the time nor at all. The court sustained an exception to the finding, but did not reserve to the cross-bill plaintiffs or the receiver the right to file it hereafter. Since there is evidence of the existence of the paper and consequent probability that the claim can be proved, this right should have been reserved. *Hager v. Melton*, 66 W. Va. 62, 66 S. E. 13. In other respects the ruling is correct, and as to this it will be corrected.

In so far as the decree of June 24, 1911, denies the appellant M. L. Benedum right of participation in the distribution of the assets of the bank, respecting any of the several sums adjudged or decreed to him in any capacity or on any account, until the other creditors of the bank shall have been paid in full, and denies to him the right to set off against his deposits in said bank the \$1,500 note and the \$100 note, hereinbefore mentioned, it will be reversed, set aside, and annulled; and in so far as it requires said Benedum to pay, on account of withdrawals and interest thereon, the sum of \$14,709.18, and purports to allow the attorneys for the cross-bill plaintiffs a commission of 5 per cent. on so much of the fund created in this cause for the benefit of creditors as is collected or received by the special receiver under it, subject to certain specified exceptions, the same will be modified and corrected, so as to require said Benedum to pay, on account of withdrawals and interest thereon, the sum of \$13,575.48, and so as not to allow said commission to said attorneys on such portion of said fund, or any part of such portion, as shall be payable to said Benedum in the distribution thereof. Said decree will be further modified and limited so as to leave open the question of said Benedum's liability on the C. S. Harper note. In all other respects the same will be affirmed.

The decree of the 28th day of April, 1906, is reversed, set aside, and annulled in so far as it sustains the demurrer and exceptions to certain portions of the answers and cross-bills of Geo. N. Huffman et al. and J. M. Marsh et al., and strikes out the same. In all other respects said decree is affirmed.

Appeal of John A. Howard, Special Receiver.

[16] The appeal of John A. Howard, special receiver, complaining of the disallowance to him of credit in his account, for certain attorney's fees paid out on account of the collection of certain claims, was improvidently awarded and should be dismissed. Deeming the evidence to sustain these claims unsatisfactory and insufficient, the court disallowed them only provisionally, expressly declaring in the decree that none of such matters were finally passed upon.

Appeal of August Wendt.

A decree entered November 8, 1911, allowed the special receiver \$1,000 out of the funds in his hands on account of compensation for his services, but reserved for future adjudication the question whether the receiver's compensation and expenses shall ultimately be decreed against the plaintiff or paid out of the fund. From this decree August Wendt has appealed. His appeal was improvidently awarded. The decree is not final, and does not settle any principle nor change the title or possession of property. It is a mere provisional allowance out of a fund in the custody of the court.

(72 W. Va. 581)

STATE v. TINOVITS et al.

(Supreme Court of Appeals of West Virginia.
May 20, 1913.)

(Syllabus by the Court.)

1. PLEADING (§ 436*)—SCIRE FACIAS—AIDED BY VERDICT.

Upon a writ of scire facias for award of execution on a judgment previously recovered and which recites said judgment, the plea of *nil tiel record*, though proper, and concluding with a verification, but introducing no new matter, amounts simply to the general issue, and omission to enter a similiter or general reply is cured after verdict or finding of the court.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 1482, 1483; Dec. Dig. § 436.*]

2. COURTS (§ 117*)—RECORD — IMPEACHMENT BY AFFIDAVITS.

The record of a court having jurisdiction of the parties and of the subject-matter, and the facts recited therein upon which final judgment was pronounced, cannot, after the end of the term, be impeached by certificates of court officers or ex parte affidavits of the parties.

[Ed. Note.—For other cases, see Courts, Cent. Dig. § 374; Dec. Dig. § 117.*]

Error to Circuit Court, Lewis County.

Action by the State against Isadore Tinovits, W. W. Brannon, and others. Judgment for plaintiff, and defendant Brannon brings error. Affirmed.

W. G. Bennett, of Weston, John W. Davis, of Clarksburg, and B. S. Stathers, of Weston, for plaintiff in error. Wm. G. Conley, Atty. Gen., for the State.

MILLER, J. The present writ of error, obtained by defendant W. W. Brannon, is to

a judgment of December 3, 1910, awarding execution upon a former judgment pronounced against him on July 3, 1907, and upon which latter judgment no execution had been previously issued.

[1] The first point urged is that the judgment was pronounced without issue joined on defendant's plea of *nul tiel record*, this plea, as it is claimed, and as the order recites, concluding with a verification. We see nothing of merit in the point. The writ of *scire facias* recites the date, the amount, and the parties to the judgment, recovered in the same court, and on which execution was awarded. The writ is both summons and declaration in such cases. 35 Cyc. 1152. And though the plea of *nul tiel record* is a proper defense, *Greathouse v. Morrison*, 68 W. Va. 714, 716, 70 S. E. 710, yet in this case it amounts to nothing more than the general issue; it introduces no new matter. *Henry v. Ohio River R. R. Co.*, 40 W. Va. 234, 21 S. E. 863. And though concluding with a verification nothing but a similitur was called for to complete the issue. *Hogg's Pl. & Forms*, 293, citing for the proposition, *Hunt v. Mayfield*, 2 Stew. (Ala.) 124; and *Hall v. Williams*, 6 Pick. (Mass.) 232, 17 Am. Dec. 356. It is well settled that when the general issue has been pleaded, but there has been no similitur, the verdict cures the error, and the omission of the similitur will not be permitted as error in the appellate court. 8 Enc. Dig. Va. & W. Va. Rep. 296.

[2] Treating the issue as properly made up on the plea, the next point is, that there was no evidence offered to support the writ or declaration. In support of this contention plaintiff in error relies mainly on the judgment order awarding the execution and certain *ex parte* affidavits attempting to impeach the verity of the supplemental record brought up on certiorari. The judgment order relied on, after reciting the pleadings, says: "And thereupon, the Court upon inspection of the said writ of *scire facias*, orders and considers that the State may have execution against the said W. W. Brannon, upon the judgment heretofore entered herein for the sum of Three Hundred Dollars," with interest and costs. It is claimed that this judgment is conclusive of the fact that the court without evidence, and upon a mere inspection of the writ, pronounced the judgment complained of. We do not think the recital in the judgment conclusive. Besides the supplemental record shows that an order was entered December 6, 1910, at the same term of the court, in and by which it is certified that the record of the judgment upon which execution was awarded, was received in evidence and considered by the court. *Ex parte* affidavits are filed here seeking to impeach the verity of that record, and tending to show that that order of December 6, 1910, was not in fact made in term,

but after adjournment, and after the original record filed here had been made up and certified by the clerk of the circuit court. It is conceded, however, that this objectionable order was entered on the order book before the adjourning order was signed by the judge. Can the solemn records of a court be so impeached? We think not. To so hold would be against all authority, and would be dangerous in the extreme. We do not think the affidavit or certificate of the judge himself can be received for this purpose, certainly not in an appellate court. In this case a certificate of the judge filed by plaintiff in error among other things recites: "When I endorsed said order for record, I supposed and believed it represented correctly what had transpired in court. There being so many matters before me in court, I could not remember in detail all that occurred in any particular case, and cannot remember what was read in evidence, or by whom read, nor do I now say that the recitals in said order are incorrect, but do remember distinctly, that after the entry of the order of which Mr. W. W. Brannon complains, he became earnest and insistent in his objections thereto."

The rule is well settled that the record of a court, having jurisdiction of the parties and subject matter, is a verity and cannot be attacked. *Braden v. Reitzenberger*, 18 W. Va. 286; *State v. Vest*, 21 W. Va. 796; *Bank v. Houston*, 66 W. Va. 336, 348, 349, 66 S. E. 465.

We must, therefore, affirm the judgment.

LYNCH, J., absent.

(72 W. Va. 512)

MEANS v. BARNES et al.

(Supreme Court of Appeals of West Virginia.
May 13, 1913.)

(Syllabus by the Court.)

ABATEMENT AND REVIVAL (§ 73*)—DEATH OF JOINT DEFENDANT.

The common-law rule abating an action on the death of one of two or more joint defendants is not so altered by section 2 of chapter 127 of the Code of 1906 as to authorize revival of the action against the personal representative of the deceased joint defendant. Said section merely prevents total abatement and enables the plaintiff to keep the action alive against the surviving defendants.

[Ed. Note.—For other cases, see *Abatement and Revival*, Cent. Dig. §§ 403-411, 417-428; Dec. Dig. § 73.*]

Error to Circuit Court, Taylor County.

Action by Nathan H. Means against Joseph Barnes and others. Judgment for plaintiff, and defendant G. H. A. Kunst, administrator, brings error. Reversed and remanded.

John L. Hechmer, of Grafton, for plaintiff in error. Warder & Robinson, of Grafton, for defendant in error.

POFFENBARGER, P. The plaintiff in error is the administrator of Adolphus Armstrong, deceased, whom the defendant in error sued jointly with one Joseph Barnes for the recovery of a debt. Pending the action, Armstrong died and there was an attempt to revive the action against his administrator, and an abatement of the action as to Barnes. An order of revival was entered on the motion of the plaintiff before a writ of scire facias was sued out. This, of course, availed nothing. Afterwards a further order was entered, reciting the alleged revival, and abating the action as to Barnes. After the scire facias had been served and returned there was another order of revival against the administrator, followed by a verdict and judgment.

At common law, a total abatement of the action was occasioned by the death of one of two or more joint defendants. This result is avoided by a statute (Code, c. 127, § 2) saying the action may proceed against the others, if the cause of suit survives against them. In *Henning v. Farnsworth*, 41 W. Va. 548, 23 S. E. 663, the statute was relied upon as authorizing and requiring the suit to proceed against the surviving defendants and the personal representative of the deceased party. Declaring this position untenable, the court proceeded to interpret the statute fully. In so far as it says revival against the personal representative of the deceased party is not authorized, the opinion is only persuasive authority, since that proposition was not involved in the case. Its reasoning, however, is clear and sound in principle. By the common law, the death of one of two or more joint defendants occasioned a total and absolute abatement of the suit, and nothing further could be done in it against any of the parties. The statute, in terms giving only partial relief from this common-law rule, enables the plaintiff to keep the action alive against the surviving defendants. Beyond this its terms do not reach, and the court is powerless to add anything to them. This is the true interpretation of section 2 of chapter 127 of the Code, and section 4 of that chapter does not undertake to say in what cases there may be a revival. It deals only with the mode and manner of revival, as Judge Brannon has well said. The text of Barton's Law Practice, vol. 1, p. 252, § 79 (2d Ed.), is applicable to the Virginia statute, which is entirely different from ours, expressly providing for revival of the action against the personal representative of the deceased party and prosecution thereof as a separate action against him, as though the deceased had been the sole defendant.

The second clause of section 2 of the statute relates to sole, not joint, parties. Death of joint parties is dealt with by the first clause. The New Jersey statute, interpreted

in *Fisher v. Allen*, 86 N. J. Law, 203, in all substantial respects like ours, was analyzed and applied in conformity with the rules and principles here declared. Power to revive against the personal representative of the deceased joint defendant was denied. Discontinuance of the action was declared as the legal result of the abatement as to the surviving defendant. In the statute, two sections were devoted to the subject-matter of our single one, and the court said the first related to joint parties and the other to sole parties. Further authority for the conclusion here announced will be found in 4 Min. Inst. 974; 5 Ency. Pl. & Pr. 836; *New Haven, etc., Co. v. Hayden*, 119 Mass. 361; *Gayle v. Agee*, 4 Port. (Ala.) 507.

As the death of Armstrong terminated the action against him and his estate beyond power of revival, the judgment will have to be reversed, the verdict set aside, and the action dismissed as to the administrator of Armstrong's estate.

(73 W. Va. 540)

PEYTON v. HOLLEY et al.

(Supreme Court of Appeals of West Virginia.
May 27, 1918.)

(Syllabus by the Court.)

1. MUNICIPAL CORPORATIONS (§ 48*) — BIPARTISAN COMMISSION.

The charter of the city of Charleston, providing for bipartisan commission government, does not limit party representation to the political parties established and maintained for general purposes. For any municipal election held under it, new parties may be formed out of members of pre-existent parties.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. §§ 127, 128, 130-133; Dec. Dig. § 48.*]

2. MUNICIPAL CORPORATIONS (§ 48*) — CITY COUNCIL—MEMBERSHIP.

A candidate of a new party, entitled to a seat in the city council under the terms of said charter, cannot be denied such right because the party he represents was formed by members of an old party and bears its name, qualified by the word "independent."

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. §§ 127, 128, 130-133; Dec. Dig. § 48.*]

Petition by C. P. Peyton for writ of mandamus against J. A. Holley and others. Writ awarded.

Mollohan, McClintic & Mathews, of Charleston, for petitioner. John A. Thayer, T. S. Clark, and L. D. Vickers, all of Charleston, for respondents.

POFFENBARGER, P. In the city election held in Charleston, April 21, 1913, under its charter providing what is known as the commission form of municipal government, candidates were nominated under the general election law, applicable to city elections, on five tickets, Democratic, Independent Democratic, Independent Republican, Progressive, and Republican. Candidates were placed on all

of them for members of the council, each ward being entitled to elect four, not more than two of whom, belonging to the same political party, are eligible to seats in the council at the same time. Under the law, the four candidates receiving the highest number of votes are declared elected, provided only two of the four can be taken from the candidates of one party.

In the Seventh ward, the two regular Democratic nominees had very considerable leads over all others. Next to them came H. S. Matthews, a Progressive candidate, with 207 votes. Next to him stood C. P. Peyton on the Independent Democratic ticket, with 190 votes, and then L. D. Vickers on the Progressive ticket, with 170 votes. On this result, the board of affairs, acting as a canvassing board, declared Matthews and Vickers elected, along with the two candidates on the regular Democratic ticket, leaving Peyton out, with more votes than Vickers had, because he had always affiliated with the Democratic party in national, state, and some local elections, and had run on what was known in the city election as the Independent Democratic ticket. Peyton asks a writ of mandamus to compel the board of affairs to reassemble as a board of canvassers and declare him elected.

[1, 2] A voter may belong to one political party for state and national purposes and another for municipal purposes, and his party affiliations generally do not class him politically as to municipal elections. *Hasson v. Chester*, 67 W. Va. 278, 87 S. E. 731. And a new political party can be formed at any time for a particular election or for participation in elections generally. *Morris v. Ballot Commissioners*, 76 S. E. 446. These cases assert the right of such parties to have the names of their candidates printed on the ballots, when nominated as provided by law. Peyton was so nominated as a candidate of a new party. That his party may have been composed entirely of former Democrats is immaterial. In the general election of last year, we had a new party composed of former Republicans, and in 1896 there was a new party, called the National Democratic party, composed entirely of former Democrats.

Nothing perceived in the charter of the city of Charleston modifies this general law. Of course, it is intended to secure bypartisan government; but it does not contemplate indestructibility of existing parties, nor endeavor to prevent the birth of new ones. Nor does it contain any expression of intent to limit the right of party participation in city elections to the political parties maintained for general political purposes. To give the statute such a construction, it would be necessary to depart from its language and treat it as containing terms the Legislature did not use.

If bad faith on the part of members of an existing party in nominating candidates as representatives of a pretended, not real, new party would vary the rule, we have no proof of it here, and it is, therefore, unnecessary to enter upon an inquiry as to the effect of such conduct.

The relator challenges the constitutionality of the statute, declaring it to be within the inhibition of test oaths and other restrictions upon individual right; but nothing presented here calls for an inquiry as to its validity. It is not necessary to a decision of the case, and courts will not pass upon that kind of a question, except in cases of such necessity. *Edgell v. Conaway*, 24 W. Va. 747; *Shepherd v. Wheeling*, 30 W. Va. 479, 4 S. E. 635; *Rutter v. Sullivan*, 25 W. Va. 427.

These conclusions result in the award of a peremptory writ asked for.

(73 W. Va. 496)

GARRISON v. VILLAGE OF FLATWOODS.
MOORE v. SAME.

(Supreme Court of Appeals of West Virginia.
May 13, 1913.)

(Syllabus by the Court.)

DEDICATION (§ 44*)—EVIDENCE—SUFFICIENCY.
Evidence held insufficient to establish dedication of land to public use.

[Ed. Note.—For other cases, see *Dedication*, Cent. Dig. §§ 85-87; Dec. Dig. § 44.*]

Appeal from Circuit Court, Braxton County.

Suits by C. H. Garrison and by one Moore against the Village of Flatwoods. Decree for defendant in both actions, and plaintiffs appeal. Reversed, and decrees rendered.

Jake Fisher and Hines & Kelly, all of Sutton, for appellants. Hall Bros. and Haymond & Fox, all of Sutton, for appellee.

ROBINSON, J. The cases styled above are identical. The issue in the one is the same as that in the other. By agreement the same evidence has been made to apply to both. It is proper therefore to dispose of them together.

Each suit has for its object the perpetual enjoining of the town authorities from taking the enclosed and improved ground of the plaintiff therein for the widening of a street. Two adjoining lots, one owned by Garrison, and the other by Moore, abut on a street called Squires Street. These lots to the full extent now claimed by the plaintiffs in these suits have long been in their possession, or in the possession of those under whom they hold, under exclusive fence enclosure. Squires Street, running by the side of the two lots, for a long time has been laid out and used as a street about twenty feet wide. The town authorities, claiming that Squires Street had been dedicated as a street thirty feet wide by the owner of the farm on which

the town grew up, were proceeding to widen it to thirty feet by taking a strip of each lot, when Garrison and Moore by these suits obtained injunctions. Pleadings and proofs were fully submitted in the cases, and upon a hearing the injunctions were dissolved and the plaintiffs were ordered by the decrees to permit the widening of the street.

A careful review of the record leads us clearly to the conclusion that the court erred in denying relief to plaintiffs. It will serve no useful purpose to detail and discuss much of the mass of facts and circumstances shown. Out of it all there prevails that which is decisive against the town—a dedication to the public of the ground sought to be taken is not proved.

Susan C. Squires owned the farm out of which the lots and the street were laid off. The town rests its claim on a dedication by her. She had certain building lots surveyed out of the farm in 1889 by James Morrison, long before the incorporation of the municipality. If a plat of this work was ever made, it was never recorded, and no lots were ever sold by reference to it. Morrison laid off a street where Squires Street now is, and *his recollection* is that he made it thirty feet wide. The western line thereof—the one now in dispute—was run by him where the town now insists it should be. Morrison says that it came considerably inside the enclosure of the garden and yard of the farm home, up to the well curb, that Susan C. Squires objected, and that she and her husband had words about such location of the line, but that they decided to let the line remain there. Another witness testifies that he heard Mrs. Squires protesting against such location of the line, but does not know what was done in the end. This is absolutely the only evidence tending to bind Mrs. Squires to a location of the western line of Squires Street over on what is now the property of plaintiffs. Some declarations of her husband that the street was to be thirty feet wide are shown, but contrary declarations by him are also proved. The property was the separate estate of this married woman. Surely all that we have seen so far would not take her land from her. Moreover, the street was never thrown open according to the line to which Mrs. Squires made objection. Some time after Morrison's survey, a way, that which has long been used as Squires Street, was opened from the farm house down to the turnpike. So Mrs. Squires enforced her objection to the line surveyed by Morrison. She opened the way some eight or ten feet narrower than he had laid it off, and made it conform to the yard and garden fence. Her unequivocal act in laying out this way was to make it of the width that did not encroach on the land which is now the lots of plaintiffs.

Moore now owns what was the farm house yard and garden, and Garrison owns

the land extending therefrom to the pike, all adjoining the west side of the way as actually opened to the public by Mrs. Squires. The mere running of the line by Morrison plainly did not bind Mrs. Squires irrevocably to let the public have her land in accordance with it. Besides, no plat recorded by her, no deed made by her in the sale of lots, ever recognized Squires Street as being located by the Morrison line or as being thirty feet wide. Indeed no deed by her for any lot on the east of Squires Street ever called for such a street at all, or for any street where Squires Street now is, though she conveyed lots which now adjoin it. Her only recognition of Squires Street in a deed was in the conveyance made by herself and husband to their son for the lot in the angle at the intersection of Squires Street and the pike, which lot is now a part of the property owned by Garrison. This lot of course is on the west side of that street. But she did not recognize the line surveyed by Morrison when she made this deed in 1893. She therein conformed to the line of the street as she had opened it. This fact conclusively appears from the evidence. The deed calls for a post at the corner of the pike and Squires Street. The surveyor who made the survey for the deed locates this post several feet to the east of the Morrison line. Its location corresponds with the location of Squires Street as actually opened by Mrs. Squires. Here again she by the deed to her son ignored the line run by Morrison. Again she expressed her disapproval of it.

But the town says that this deed by Mrs. Squires, calling as it does for Squires Street, is a dedication of that street. As between the grantor and the grantee it is a dedication. As to the public, under the circumstances proved in these cases, we need not say. However that may be, it is not a dedication of that street as one thirty feet wide. It may be that by opening Squires Street and by calling for it in this deed, intention to dedicate is shown on the part of Mrs. Squires. But she opened it only about twenty feet wide, and her deed recognizes it exactly in the same way. She did not open it on that which is now the properties of Garrison and Moore, nor did she in the deed to her son calling for Squires Street include any of the lot now belonging to Garrison. This deed to the son is plainly against a dedication of the strip which the town seeks to open. Yet that deed and the line by Morrison is really as much as the case discloses to prove dedication on the part of Mrs. Squires of a street thirty feet wide.

The gist of the town's contention is that since Mrs. Squires recognized Squires Street in the deed to her son, since she conveyed other lots for which it would be convenient outlet, and since Morrison had surveyed it thirty feet wide, it was thus dedicated as a public street thirty feet wide, thereby in-

cluding a strip of the properties of plaintiffs. But how can the Morrison survey control the call for Squires Street in the single deed calling for that street, when it is conclusively shown that the survey from which the deed was made does not follow the Morrison line, but follows the way as actually opened and used. While the deed may be evidence of a dedication of Squires Street, it certainly can not be taken to recognize Squires Street as including part of the land which the deed itself conveys. Further, the fact that Susan C. Squires conveyed other lots that would have more convenient access by Squires Street affords no evidence of dedication—particularly no evidence of the width of that street. She conveyed these lots by no fixed or recorded plan and gave no recognition in her deeds to the existence of any such street. Her only mention of such a street in a conveyance is in the deed to her son. And, as we have shown, the located call of that deed for Squires Street is squarely against the contention of the town. It places Squires Street right where plaintiffs insist it should be.

The decrees will be reversed. The relief prayed for by plaintiffs will be granted by decrees entered here.

(72 W. Va. 514)

LYNCH et al. v. MERRILL et al.

(Supreme Court of Appeals of West Virginia.
May 20, 1913.)

(Syllabus by the Court.)

1. SALES (§ 61*)—CONSTRUCTION—EXECUTORY SALE.

Whether a sale of personal property is complete, or only executory, is to be determined from the intention of the parties as gathered from the contract, the situation of the thing sold, and the circumstances surrounding the sale.

[Ed. Note.—For other cases, see Sales, Cent. Dig. §§ 162-170; Dec. Dig. § 61.*]

2. SALES (§ 199*)—PASSING OF TITLE.

Where the goods sold are sufficiently designated, so that no question can arise as to the thing intended, it is not absolutely necessary to the passing of title that they should be in a deliverable condition, or that the quality or quantity, when the sale depends on either or both, should be determined. They are mere circumstances indicating intent, but are not conclusive.

[Ed. Note.—For other cases, see Sales, Cent. Dig. §§ 516-523; Dec. Dig. § 199.*]

Error to Circuit Court, Wirt County.

Action by J. S. Lynch and others against Will Merrill and others. Judgment for plaintiffs and defendant Little Kanawha Log & Tie Company brings error. Reversed, and new trial granted.

George W. Johnson, of Martinsburg, and William Beard, of Parkersburg, for plaintiff in error. L. H. Barnett, of Glenville, and Brannon & Stathers, of Weston, for defendants in error.

LYNCH, J. This is a writ of error obtained by the Little Kanawha Log & Tie Company to a judgment for plaintiffs. The action, originating before a justice, is to determine the right to the possession of 32 sawlogs, if to be had, and, if not, to recover their value and damages for detention thereof.

The defendant log and tie company claims title to the logs under a contract with Beall dated February 15, 1909, whereby at an agreed price per cubic foot Beall sold the logs to it, to be "rafted" or delivered as rafted at the mouth of Duck run in the Little Kanawha river, the company to furnish, and it did furnish, "chain dogs" and anchor ropes for the purpose. The logs being cut at the date of the contract, Beall proceeded with the work; but the exact date of completion is not shown, though some of the witnesses say the raft was completed in a floatable condition as early as April 20th. If then completed, the logs were rafted at an earlier date.

The plaintiffs trace title to the logs through a sale by an officer under an execution against Beall received at 4 o'clock p. m. April 19th, and levied about May 10th; the sale being made May 21st.

The summons as issued fixed the value of the logs at \$240 and damages at \$100, the aggregate of which exceeded the amount for which a justice could render judgment. Before appearance of defendants Merrill and Petty, by plea or otherwise, except to object thereto, plaintiffs with leave amended the summons by reducing the damages to \$50, thereby bringing the total within the jurisdictional amount. Defendants then entered the general issue of non detinet, and, thereafter, according to the record, moved to dismiss for want of jurisdiction, and, on denial thereof, proceeded to trial, ending in a judgment for plaintiffs.

On appeal to the circuit court, defendants Merrill and Petty, disclaiming title to the logs and averring title thereto in the log and tie company, the latter, pursuant to an order requiring it to appear, state and defend its title, if any, thereto, appeared to the action, and likewise moved a dismissal thereof. Upon the refusal of the motion, the court, at the instance of the company, continued the case until the next succeeding term, when a trial was had, resulting in a verdict and judgment thereon for plaintiffs.

The defendant company complains of the court's ruling on the motion to dismiss, and cites in support of its contention former decisions of this court. But the cases cited do not and could not discuss the question, because it was not therein involved. They hold, as will appear from examination, that, when there is conflict between the amount claimed or proven and that stated in the summons, the latter, and not the former, determines the right to maintain the action,

The case of *Hynds v. Fay*, 70 Iowa, 433, 30 N. W. 683, cited, does tend in some degree to support the view urged by the company. But that case does not cite any authority, nor do the facts stated therein correspond in all respects with the facts of this case. In so far as it holds that the parties may not waive the irregularity, if any, it does not accord with our views. Under the circumstances of this case, to dismiss would make substance yield to mere technicality, and to sustain the motion after two trials, in both of which the parties joined, would operate to delay, if not deny, speedy termination of the litigation sought by this action.

[1, 2] The trial, however, proceeded upon the wrong theory, as appears from the instructions in bills of exception 8 and 10, and thereby the jury may have been and probably were misled. The first instruction told the jury, in substance, that if anything remained to be done, such as measuring, counting, and branding the logs, title thereto could not vest in the defendant until they were measured, counted, and branded, omitting entirely the intention of the parties as to the time at which title should vest in the purchaser. *Morgan v. King*, 28 W. Va. 1, 57 Am. Rep. 633; *Bank v. Napier*, 41 W. Va. 481, 23 S. E. 800; *Buskirk v. Peck*, 57 W. Va. 360, 50 S. E. 432; *Justice v. Moore*, 69 W. Va. 51, 71 S. E. 204, Ann. Cas. 1912D, 17; *Moore v. Patchin*, 76 S. E. 426. "Whether a sale of personal property is completed, or only executory, is to be determined from the intention of the parties as gathered from the contract, the situation of the thing sold, and the circumstances surrounding the sale." "Where the goods sold are sufficiently designated, so that no question can arise as to the thing intended, it is not absolutely necessary * * * that the goods should be in a deliverable condition, or that the quality or quantity, when the price depends upon either or both, should be determined; these are circumstances indicating intent, but are not conclusive." *Hood v. Bloch*, 29 W. Va. 244, 11 S. E. 910. This instruction, omitting, as it did, this essential element of intention, should not have been given; nor should the one contained in bill of exceptions 10. The facts did not warrant the latter. The logs were hauled and substantially, though perhaps not skillfully, bound together in a floatable condition about the date of the execution under which plaintiffs trace title. They were, as already stated, at first levied on as a "raft," and not as separate logs. If so, they had been hauled, and doubtless rafted, although it may be that some of the logs purchased by defendant in addition to those involved in this action were not hauled at that time. But they were not levied on or sold under the execution, and therefore are not now involved.

Defendant's instructions contained in bills

of exception 15 and 16 should have been given, for reasons heretofore stated. They properly propounded the law applicable to the facts of the case.

The court should have permitted the witness Beall to answer the questions by defendant's counsel, shown in bills of exception 2, 3, 4, 5, and 6, because plaintiffs' witnesses J. M. Lynch and M. B. Summers testified to the same matter, and no sufficient reason appears for refusing Beall's on the same subject. If a proper inquiry, Beall should with propriety have had an opportunity to admit or deny their statements.

Invalidity of the sale under the execution, because the purchaser was not present at the time of sale, is also relied on by defendant. At the instance of the constable, he offered \$100, a definite and fixed sum, and to that extent only was the constable authorized to cry his bid. 2 Freeman on Executions (2d Ed.) § 292, says: "The officer making the sale cannot act as the agent of a person desirous of bidding. He can neither bid for himself nor for another. We apprehend that this rule must be confined to cases in which the officer, in acting as agent, would be expected to exercise his discretion in making bids, and to purchase the property at the lowest price for which it could be obtained. It ought not to be extended to cases where he is authorized by letter, or otherwise, to offer a specified amount on behalf of an absent bidder." This we think is the true rule.

From what has been said, the conclusion is to reverse the judgment, set aside the verdict, and grant the defendant a new trial.

(72 W. Va. 518)

BAKER et al. v. WORKMAN et al.

(Supreme Court of Appeals of West Virginia.
May 20, 1913.)

(Syllabus by the Court.)

CONSTITUTIONAL LAW (§ 61*) — JUDICIARY — LEGISLATIVE POWERS.

Sections 2 and 9, chapter 47, Code 1906, do not contravene article 5 of the Constitution (Code 1906, p. lv) because they invest the circuit court with a discretion to determine the exact extent of territory to be included in a municipality seeking to be incorporated, and with discretion to direct the clerk to issue a certificate of incorporation therefor. *Morris v. Taylor*, 70 W. Va. 613, 74 S. E. 872.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. §§ 103-107; Dec. Dig. § 61.*]

Appeal from Circuit Court, Mingo County.

Bill by Lindsey Baker and others against William Workman and others. Decree for plaintiffs, and defendants appeal. Affirmed.

Marcum & Marcum, of Huntington, and Sheppard, Goodykoontz & Scherr, of Williamson, for appellants. G. R. C. Wiles, of Williamson, for appellees.

WILLIAMS, J. On the 7th of June, 1910, the county court of Mingo county issued a

license to William Workman to sell spirituous liquors at retail in the town of Kermit, in said county, without his having obtained permission therefor from said town. In July following Lindsey Baker and William T. Mead, citizens of the town, brought this suit to enjoin Workman from selling liquor in the town. Harry Scherr, as special commissioner, had sold the building in which the business was to be conducted to S. U. G. Rhodes, and they were made parties defendant to the bill. On the 11th of July, 1910, the judge of the circuit court of said county, in vacation, awarded a temporary injunction. After due notice to plaintiffs, defendants moved the judge, in vacation, on the 29th of July, to dissolve the injunction, and he made a vacation order refusing to dissolve it; and defendants have appealed.

Workman admits that he did not obtain permission to sell liquor from the council of the town of Kermit, but avers that it was not necessary for the reason that the town was not lawfully incorporated. If Workman was selling liquor without a proper license, he could be enjoined, on the ground that his business was a public nuisance. *Devanney v. Hanson*, 60 W. Va. 3, 53 S. E. 603. And if the town was lawfully incorporated, the county court could not license the sale of liquor within its limits without its consent, and Workman's license, issued by the county court alone, would not protect him.

The certificate of incorporation was issued to the town of Kermit by the circuit court of Mingo county on 15th of December, 1909, pursuant to chapter 47 of the Code. Counsel for appellants admit that the only question presented to us for decision relates to the constitutionality of sections 2 and 9 of chapter 47, Code 1906. Section 2 was amended and re-enacted by chapter 54, Acts 1907, but the amendment did not divest the court of the discretion given it, which is the matter, as counsel contend, that renders those sections unconstitutional. Article 5 of the Constitution (Code 1906, p. lv) requires that the executive, legislative, and judicial branches of the government shall be kept separate and distinct from each other. And because the sections of the statute in question invest the circuit courts with the discretion to determine the exact extent of the territory to be included in the municipality, and with discretion to issue the certificate of incorporation, they are, therefore, claimed by defendant to be unconstitutional.

At the time the appeal in this case was allowed, there was another case pending in this court, on appeal from the circuit court of Harrison county, which has since been decided, involving this identical question. *Morris v. Taylor*, 70 W. Va. 618, 74 S. E. 872. We there held that the statutes in question did not contravene article 5 of the Constitu-

tion; that the discretion there conferred on the circuit court was judicial and administrative, rather than legislative. We adhere to that opinion, and it controls the decision of this case. It is only necessary to refer to Judge Poffenbarger's opinion in that case for the reasons to support our decision in this. The two cases present the same identical question of law.

The order refusing to dissolve the injunction will be affirmed.

(72 W. Va. 428)

CAMPBELL v. MYERS et al.

(Supreme Court of Appeals of West Virginia.
May 6, 1913. Rehearing Denied
June 30, 1913.)

(*Syllabus by the Court.*)

LOST INSTRUMENTS (§ 14*) — JURISDICTION — ACTION AT LAW.

Unless, at the time of trial, it is destroyed or barred by limitation, a payee of a lost negotiable promissory note cannot maintain an action at law thereon against the makers thereof; a court of law being without authority to require indemnity against recovery thereon by a bona fide indorsee.

[Ed. Note.—For other cases, see Lost Instruments, Cent. Dig. §§ 27-29; Dec. Dig. § 14; *Action, Cent. Dig. § 142.]

Error to Circuit Court, Jefferson County.

Action by J. T. Campbell against W. El Myers and others. Judgment for plaintiff, and defendants bring error. Judgment reversed, verdict set aside, and action dismissed without prejudice.

Marshall McCormick, of Roanoke, Va., and T. C. Green, of Charlestown, for plaintiffs in error. F. L. Bushong and C. N. Campbell, both of Charlestown, for defendant in error.

LYNCH, J. Plaintiff sued and obtained a judgment before a justice. On appeal and verdict of a jury, the circuit court entered judgment for plaintiff, and defendants obtained a writ of error.

The object of the proceeding is the collection of a lost negotiable note, dated in July, 1907, payable to plaintiff or order six months thereafter, and not indorsed by him. It was overdue at the date of the action. The paramount and practically the only question for decision is one of jurisdiction, the jury having not improperly determined all other issues favorably to plaintiff. Defendants urged, without avail, before the justice and the trial court, want of jurisdiction in a court of law to entertain the action. They now rely on the same defense here.

The authorities in this state and Virginia hold that equity is the proper forum in such cases, because therein, and not on the law side, indemnity may be required of plaintiff against loss should the instrument be subsequently found in the possession of another, to whom it may have been indorsed by the

payee before maturity. In this case the payee testifies that he had not indorsed the note. But his testimony in this respect would not, of course, be conclusive against the claim of the rightful indorsee, if in fact so indorsed. An indorsement after maturity would, to some extent, affect the reason generally assigned for equitable cognizance. But even then equity has jurisdiction. The cases discussing the subject, and binding here, are in equity; and, while some of them indicate a concurrent jurisdiction at law, they in effect agree, for reasons heretofore stated, that equity alone is the proper forum on lost negotiable instruments. *Harrison v. Field*, 2 Wash. (Va.) 136; *Shields v. Com.*, 4 Rand. (Va.) 541; *Thornton v. Stewart*, 7 Leigh (Va.) 128; *Hunter v. Robinson*, 5 W. Va. 272; *Hickman v. Painter*, 11 W. Va. 386; *Mitchell v. Chancellor*, 14 W. Va. 22; *Bank v. Morrall*, 16 W. Va. 546; *Hall v. Wilkinson*, 35 W. Va. 167, 12 S. E. 1118. See, also, *Little v. Cozad*, 21 W. Va. 183; *Matthews v. Matthews*, 97 Me. 40, 53 Atl. 831, 94 Am. St. Rep. 464, 466, and note.

2 Daniel on Neg. Inst. (5th Ed.) states the rule at section 1475 to be: "In England, where the line of demarcation between legal and equitable jurisdiction is well defined, and strictly observed, it is well settled that the remedy upon a lost negotiable instrument can be sought only in a court of equity, which alone can require the plaintiff to secure the defendant by execution of sufficient indemnity, and administer fully the equities between the parties. If the instrument be payable to bearer, or indorsed in blank, it is obvious that it might reach the hands of a bona fide holder for value, without notice of the loss, and that if the parties liable were compellable to pay the amount thereof to the owner in a suit at law, without indemnity, such parties might, without the slightest negligence on their part, be forced to pay it a second time to such bona fide holder. The courts of law, which proceed in accordance with established and unbending forms, do not possess the elastic machinery necessary to require the owner to make suitable indemnity against the loss which might thus occur, or the lesser loss produced by defending a suit brought by a party in actual possession of the instrument. And, therefore, such cases are remitted to the exclusive cognizance of courts of equity." Likewise, at section 1478, the author further says that, while in some states an action is maintainable against the makers of negotiable notes lost before maturity, courts of law being competent, as supposed, to provide indemnity, "the weight of authority and reason are against jurisdiction in such cases."

In *Moses v. Trice*, 21 Grat. (Va.) 556, 8 Am. Rep. 609, an action of debt, the question

arose whether an action at law could be maintained on a lost negotiable note; and it was held that a court of law had no jurisdiction in such matters. Judge Staples said: "In England the doctrine is firmly established that such an action cannot be maintained, and the sole remedy of the owner is in a court of chancery, which can adjust the equities of the parties, and require suitable indemnity as a condition of relief. *Hansard v. Robinson*, 7 Barn. & C. 90; *Ramuz v. Crowe*, 1 Exch. 166, 18 Eng. Law & Eq. 514. In this country, there has been some conflict of opinion on the subject; but the great weight of authority is in harmony with the English doctrine. In some of the states, statutory remedies have been provided, by which most of the difficulties standing in the way of actions at law have been removed." But, in states where the common law prevails, the courts generally, though not always, refuse to take jurisdiction upon lost instruments of the character sued on in this case.

For the reasons stated, the judgment is reversed, the verdict set aside, and the action dismissed, without prejudice to the right of plaintiff to institute other proper proceedings for recovery on the cause of action alleged.

(73 W. Va. 524)

MILLER SUPPLY CO. v. STATE BOARD OF CONTROL

(Supreme Court of Appeals of West Virginia.
May 20, 1913. Rehearing Denied
June 30, 1913.)

(Syllabus by the Court.)

STATES (§ 191*)—ACTION AGAINST—WHAT CONSTITUTES—"STATE BOARD OF CONTROL."

The State Board of Control is a direct governmental agency of the state; an action on a contract made by that board in the line of its state agency is in reality and substance a suit against the state itself and cannot be maintained.

[Ed. Note.—For other cases, see States, Cent. Dig. §§ 179-184; Dec. Dig. § 191.*]

Error to Circuit Court, Cabell County.

Action by the Miller Supply Company against the State Board of Control. Judgment for defendant, and plaintiff brings error. Affirmed.

George S. Wallace, of Huntington, for plaintiff in error. William G. Conley, Atty. Gen., for defendant in error.

ROBINSON, J. May a suit be maintained against the State Board of Control for goods, wares, and merchandise furnished to one of the state institutions upon the alleged order of that board? Is not such an action one against the state, within our constitutional limitation which reads: "The State of West Virginia shall never be made defendant in any court of law or equity"? These are the questions brought to us. They arise upon

the ruling of the trial court in sustaining a demurrer to the plaintiff's declaration.

Our decision is that the action cannot be maintained—that it was rightly dismissed on demurrer. The State Board of Control is a direct governmental agency of the state. True, the statute creating that board made it a corporation. But still as such corporation it is only a state governmental agency. When it acts, it acts for the state in the administration of state affairs. Its contracts are the contracts of the state. Further true, the statute says it may sue and be sued. It may be that by appropriate process some mere ministerial duty of the board may be controlled. This we do not decide, for the question is not now before us. Certain it is, no contract or property right of the state can be brought into litigation in the courts by a suit against that board. The state has a direct, immediate, and total interest in every valid contract made by the State Board of Control, and in truth and in substance any suit on a contract with that board is a suit against the state. Principles recognized and discussed in *Miller v. State Board of Agriculture*, 46 W. Va. 192, 32 S. E. 1007, 76 Am. St. Rep. 811, are controlling here. They need not be repeated. It is said that the board involved in that case was not a corporation. That fact makes no distinction. It was a state agency, though not incorporated. Principles applicable to an unincorporated state agency, in relation to whether a suit against it is in substance one against the state, are as clearly applicable to a corporate agency of the state. The same test applies. That test is: Is the matter involved the state's matter?

In *Railway Co. v. Conley*, 67 W. Va. 129, 67 S. E. 613, this court held that the particular suit against a state officer could not be considered one against the state itself. But in that decision the principle we now apply was plainly recognized. It was distinctly made to appear, by way of exception, that whenever a suit against an officer or agency of the state involves a contract right or liability on the part of the state government, or property belonging to it, the suit is in reality one against the state itself.

Reference has been made to *Tompkins v. Kanawha Board*, 19 W. Va. 257. It suffices to say that the defendant therein was not an agency in the government of the state—not one having to do directly with the administration of state government as the State Board of Control has.

Let us append that which has been deduced from the cases as the generally accepted view of the subject in hand: "Suits against officers of a state as representing the state in action and liability, and in which the state, although not a party to the record, is the real party against which relief is sought and in which a judgment for plaintiff, although

nominally against defendant as an individual, could operate to control the action of the state or subject it to liability, are suits against the state. A broad line of demarcation separates such suits, in which it is sought to compel the performance, by affirmative official action on the part of defendants, of an obligation which belongs to the state in its political capacity, from suits against defendants personally on account of wrongs done or threatened to the personal or property rights of plaintiffs without authority or under color of authority unconstitutional and void. It seems that the rule which forbids a suit against state officers because in effect a suit against the state applies only where the interest of the state is through some contract or property right, and it is not enough that a state should have a mere interest in the vindication of its laws, or in their enforcement as affecting the public at large or the rights of individuals or corporations; it must be an interest of value in a material sense to the state as a distinct entity." 36 Cyc. 915.

An order affirming the judgment will be entered.

(73 W. Va. 406)

GARTIN v. DRAPER COAL & COKE CO.

(Supreme Court of Appeals of West Virginia.

Jan. 28, 1913. Rehearing Denied

June 30, 1913.)

(Syllabus by the Court.)

1. PLEADING (§ 64*)—DECLARATION—DUPLICITY.

The allegation, in a single count of a declaration, of numerous acts of negligence, all actionable and involved in the same transaction, does not render the declaration bad on demurrer.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 134-137; Dec. Dig. § 64.*]

2. PLEADING (§§ 193, 367*)—DECLARATION—DUPPLICITY.

At common law such a count would be bad for duplicity, advantage of which could have been taken by special demurrer. Special demurrers having been prohibited by statute, the exception must be taken by a demand for specification of the particular ground of action.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 428-443, 1173-1198; Dec. Dig. §§ 193, 367.*]

3. PLEADING (§§ 193, 406*) — DEMURRER — GROUNDS.

Defective statement of an element in a cause of action is not available as ground of insufficiency on a demurrer to the declaration, and, in the absence of a demand for a more particular statement, the defect is deemed to have been waived.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 428-443, 1355-1359, 1361-1365, 1367-1374, 1386; Dec. Dig. §§ 193, 406.*]

4. MASTER AND SERVANT (§ 95½*)—INJURIES TO SERVANT—FELLOW SERVANTS.

To obtain the exoneration from liability, conferred by the statute requiring operators of coal mines to employ mine foremen, such operators must comply strictly with the conditions prescribed in the act.

[Ed. Note.—For other cases, see Master and Servant, Dec. Dig. § 95½.*]

5. MASTER AND SERVANT (§ 95½*)—INJURIES TO SERVANT—FELLOW SERVANTS.

Employment of a person as mine foreman, who has his domicile outside of the state, is a violation of the statute and makes such employé the mere common-law agent of the employer and his vice principal in respect to non-assignable duties delegated to him.

[Ed. Note.—For other cases, see Master and Servant, Dec. Dig. § 95½.*]

6. MASTER AND SERVANT (§ 95½*)—INJURIES TO SERVANT—FELLOW SERVANTS.

The statute requires the mine foreman to have both his domicile and his actual residence in the state.

[Ed. Note.—For other cases, see Master and Servant, Dec. Dig. § 95½.*]

7. MASTER AND SERVANT (§ 284*)—INJURIES TO SERVANT—ACTIONS—QUESTION FOR JURY.

If a person employed as mine foreman actually resides in the state and the evidence is inconclusive as to his domicile, his eligibility to employment as foreman is a question for jury determination.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 1000-1132; Dec. Dig. § 284.*]

8. MASTER AND SERVANT (§ 267*)—INJURIES TO SERVANT—ACTIONS—ADMISSIBILITY OF EVIDENCE.

On such an issue, the court may properly exclude a statement of the mine foreman as a witness that he considered himself a citizen of the state at the time of his employment, and also a statement that he had voted in the county, unaccompanied by any indication of the time at which he had voted.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 909, 911; Dec. Dig. § 267.*]

9. MASTER AND SERVANT (§ 95½*)—INJURIES TO SERVANT—FELLOW SERVANTS—MINE FOREMAN—SUPERINTENDENT.

The positions of statutory mine foreman and superintendent of the same mine are incompatible in the sense that the owner of the mine cannot claim the protection of the statute against liability for negligence of the foreman in respect to common-law nonassignable duties imposed upon the foreman by the statute, if he employs the same person for both positions.

[Ed. Note.—For other cases, see Master and Servant, Dec. Dig. § 95½.*]

10. MASTER AND SERVANT (§ 95½*)—INJURIES TO SERVANT—FELLOW SERVANTS—MINE FOREMAN.

If a mine foreman, thereunto authorized by the operator of the mines, employ a minor and place him in a dangerous place to work, without apprising him of the danger and instructing him as to means of avoidance thereof, and such employé is injured or killed as a result of such action, the operator is liable, notwithstanding the statute makes it the duty of mine foremen to instruct the men working under them.

[Ed. Note.—For other cases, see Master and Servant, Dec. Dig. § 95½.*]

11. MASTER AND SERVANT (§ 270*)—INJURIES TO SERVANT—ACTIONS—EVIDENCE.

In an action against a coal mining company for the wrongful death of a miner 17 years old, in which both the eligibility of the person employed as mine foreman and authority in him to employ servants and assign them to duties are questions for jury determination, evidence of the assignment of the decedent to work in a room having a dangerous roof with a machine peculiarly liable to jar down slate

and rock, without full explanation of the danger and instructions as to precautions for its avoidance, is admissible.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 913-927, 932; Dec. Dig. § 270.*]

(Additional Syllabus by Editorial Staff.)

12. MASTER AND SERVANT (§ 95½*)—INJURIES TO SERVANT—FELLOW SERVANTS—MINE FOREMAN—"CITIZEN."

In the statute exonerating mineowners from liability on employing mine foremen who are citizens, the word "citizens" includes only citizens actually residing in the state and entitled to participation in the government.

[Ed. Note.—For other cases, see Master and Servant, Dec. Dig. § 95½.*]

For other definitions, see Words and Phrases, vol. 2, pp. 1164-1174; vol. 8, p. 7602, 7603.]

13. MASTER AND SERVANT (§ 284*)—INJURIES TO SERVANT—ACTIONS—QUESTION FOR JURY.

Evidence held to warrant submission to the jury of the question of authority in a mine foreman to employ and discharge men.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 1000-1132; Dec. Dig. § 284.*]

Error to Circuit Court, Logan County.

Action by William Gartin, administrator, against the Draper Coal & Coke Company. From an order setting aside a verdict for plaintiff, he brings error. Reversed and rendered.

E. T. England, of Logan, and Marcum & Marcum, of Huntington, for plaintiff in error. Lilly & Shrewsbury, of Logan, and Campbell, Brown & Davis, of Huntington, for defendant in error.

POFFENBARGER, P. Plaintiff's decedent, a boy 17 years old, and a servant of the defendant company, was killed in its mine by fall of slate. A verdict for \$6,000 against the company was set aside by the court under the impression that it had erred in the trial of the case. Upon this writ of error, reversal of that order and judgment on the verdict are sought.

[1-3] In support of the action of the trial court, there is a cross-assignment of error based on the overruling of the demurrer to the declaration. Though the declaration was not skillfully drawn and might have been made more direct and certain in some of its material allegations, it sets forth numerous acts of negligence and then says, "By means whereof a large and ponderous piece of slate and a large quantity of stone and earth" fell upon the decedent. It charges general failure to comply with the statute requiring the employment of a citizen of the state, with five years of practical experience, as a mine foreman, failure to provide safe machinery and appliances, to operate the mine with ordinary care, to provide sufficient props and stays for the roof, and to give the decedent information as to the danger of the work and instructions to enable him to avoid danger and injury. It also charges palpable defects in the mine roof and the use of a ma-

chine unsafe and unsuited to the work the servant was doing at the time of the accident. It also charges the employment of an inexperienced, incompetent, and impractical person as mine foreman "instead of employing such a person as is required" by the mining laws of the state. Employment of a nonresident of this state or a citizen of another state as mine foreman is not directly charged, but the express allegations indicate intent to rely upon failure to comply with the statute in this respect. In this unskillful manner, grounds of action are stated in the declaration and the injury attributed to them by the averment of injury by means thereof. At common law this would have made the declaration bad for duplicity or double pleading, but it was a formal defect, remediable by special demurrer. In this state the special demurrer has been abolished and the remedy for such defect is a demand for specification of grounds of the action or defense. *Lydick v. Railroad Co.*, 17 W. Va. 427, 446; *Jacobs v. Williams*, 67 W. Va. 378, 67 S. E. 1113; Code, c. 125, § 29. The expression of intent to rely upon violation of the statute by the employment of a nonresident as mine foreman, by the terms already referred to, brings that wrongful act into the declaration as an element. These indefinite terms constitute, under our decisions, an allegation uncertain and insufficient at common law but sufficient under our statute, in the absence of a demand for specification. *Jacobs v. Williams*, cited; *Transportation Co. v. Oil Co.*, 50 W. Va. 611, 40 S. E. 591, 56 L. R. A. 804, 88 Am. St. Rep. 895; *Clarke v. Railroad Co.*, 39 W. Va. 732, 20 S. E. 696; *Wheeling v. Black*, 25 W. Va. 266.

Admission of evidence excepted to on the ground of inadmissibility, exclusion of evidence offered, and refusal to give an instruction asked for are relied upon as errors in the trial justifying the setting aside of the verdict. It is necessary to the proper disposition of these claims and contentions to state the general grounds of liability asserted by the plaintiff and the general character of the evidence.

The plaintiff proceeded in the trial upon two theories or claims of liability, violation of the statute in the employment of a citizen of another state as mine foreman, and delegation to the mine foreman of nonassignable duties of the employer outside of and beyond his statutory duties, the employment of men and assignment of their duties in the mines.

[4] It is said the employment of a person not belonging to the class of persons designated by the statute as eligible for employment as mine foreman, citizens of the state having had five years experience as miners, does not give the employer the protection of the statute in respect to the duties prescribed for mine foremen, nor make the mine foreman a fellow servant of the other employees in respect to acts which at common

law would be breaches of nonassignable duties of the master. In other words, it is claimed the principles announced in *Williams v. Coal Co.*, 44 W. Va. 599, 30 S. E. 107, 40 L. R. A. 812, *McMillan v. Coal Co.*, 61 W. Va. 581, 57 S. E. 129, 11 L. R. A. (N. S.) 840, and *Squillache v. Coal Co.*, 64 W. Va. 337, 62 S. E. 448, do not apply, if the person employed as mine foreman was not a citizen of the state.

Compliance with the statute in question absolves the employer from very great responsibility and casts it upon the mine foreman. The reason for requiring the latter to be a citizen of the state is not disclosed by the terms of the statute. As he is substituted, to some extent, for the employer and made liable both civilly and criminally, we may well suppose intent to subserve the interests of the state and also those of his fellow servants by requiring him to have his domicile in the state and thus be within the reach of the process of its courts. Persons injured by his negligence or dereliction of duty and having the right to look to him for damages might find it inconvenient and detrimental to their interests to be compelled to go to a distant state to sue him. It is against state policy to send a citizen to the courts of another state for redress of an injury or vindication of a right. Likely the Legislature intended compliance with this requirement as a protection to the interests of the numerous persons brought into relation with the mine foreman by virtue of the statute and compelled to look to him as the source of redress of wrongs. Failure to comply with the statute in this respect, therefore, would no doubt in many cases work serious injury which the Legislature did not intend to permit. Obviously there is no reason why a citizen of another state may not be just as competent, as regards skill and ability, to perform the duties of mine foreman as a citizen of this state. This requirement was evidently not intended as a means of securing familiarity, on the part of the mine foreman, with mining conditions in this state, for it requires citizenship only at the time of employment and a certain amount of experience in mining without reference to the location of its acquisition. Nevertheless there are substantial reasons for requiring citizenship in the state on the part of the mine foreman, and as the statute substitutes the foreman for the owner or employer, on the latter's compliance with certain conditions, but not otherwise, noncompliance therewith leaves him in the situation in which he would be without such a substitute. Although a nonresident foreman might do just as well as a resident foreman, the statute confers no authority to substitute him for the owner. *Expressio unius est exclusio alterius*.

[5, 6, 12] There is a divergence of views among counsel as to who is a citizen within the meaning of the statute. The word

"citizen" is sometimes used in the restricted sense of "inhabitant." In such cases the context is supposed to disclose legislative intent to include actual residence as a part of the definition or purpose in the particular instance. Citizenship is broader in meaning than inhabitancy. A man may be a citizen and not an actual resident. No doubt in some connections the word "citizen" may be regarded as having been used in the sense of "inhabitant" only. It depends upon the legislative purpose as well as the terms. Nothing in the context here indicates purpose to narrow the meaning of the word "citizen" to that of "inhabitant." No doubt the mine foreman must be a resident citizen, an inhabitant as well as a citizen, but there is no indication of intent that simple inhabitancy of the state shall render a person eligible to employment as mine foreman. Our conclusion is that only citizens, persons actually residing in the state and entitled to participation in the government thereof and management of its affairs, are eligible to employment as mine foremen.

[7] Conclusiveness of the proof of citizenship is insisted upon for the defendant in error as justification for the setting aside of the verdict. Kitchen, the mine foreman, spent a number of years as a miner in various places in Kentucky. Just when he first came into the state of West Virginia is not disclosed. He says he worked at Belmont, W. Va., and Handley, W. Va., but does not give the years of such work. Then he went to Ironton, Ohio, where he was engaged in the coal business for about six years. From Ironton he went to Williamson, W. Va., and worked as mine foreman for a period of four months. Then he was at Twin Branch, W. Va., as mine foreman, one month, and from that point he went to Ft. Branch, W. Va., where he worked in the same capacity for one year and 20 days, after which he went to work for the defendant company on the 20th day of January, 1908. He brought his family to Logan county the latter part of February, 1907, nearly a year before he was employed by the defendant company. He went to Ft. Branch January 1, 1907, and his family came there about a month and a half later from Ironton, Ohio. They were also with him during the last three months of his employment at Williamson. He owns a dwelling house and seven or eight acres of land at Ironton and, when out of employment, goes there to reside. Some time after the death of the miner whose administrator is plaintiff here, his employment ceased and he moved his family back to Ohio. While employed here, he lived in dwelling houses owned by his employers and purchased no residence in the state. During a portion of his employment here as mine foreman, his family were at their home in Ohio.

Domicile is so largely a matter of intention that it is often a question of fact. The legal definition thereof is not difficult of ap-

plication when the facts do not give rise to conflicting inferences as to the intention. All authorities agree as to the essentiality of two elements: Actual residence and intent to remain indefinitely, *animo manendi*. Determination of the latter requisite is the difficult point here. For the defendant in error, *White v. Tennant*, 31 W. Va. 791, 8 S. E. 596, 13 Am. St. Rep. 896, and *Dean v. Cannon*, 37 W. Va. 123, 16 S. E. 444, are relied upon as asserting sufficiency of the evidence to prove the requisite intent as to permanency. As stated in the opinions of those cases, an intent to remain forever is not necessary. There may be mental reservation or an indistinct purpose to leave at some time in the future. But, upon the acquisition of a residence in another state, the domicile is not changed unless the intention to return to the old home, *animo revertendi*, ceases. The length of residence and its purpose are immaterial, so long as there remains an intention to return. Intent to move a second time to a third state or country is not incompatible with domicile in the place of actual residence, for the authorities say every man must necessarily have a domicile somewhere. He loses his domicile by removal with intent not to return. Then his domicile is at the place at which he stops for actual residence and remains there until he moves again without intent to return. But, if he moves from a domicile with intent to return to it, he does not lose it, for which reason he does not gain a new one. In *White v. Tennant*, Judge Snyder said: "A change of domicile does not depend so much upon the intention to remain in the new place for a definite or indefinite period as upon it being without an intention to return." The evidence is clearly not conclusive as to the intent with which Kitchen took up his residence in this state. Hence it was a question for the jury.

[8] On the examination of Kitchen, the court struck out the following answer to a question as to his citizenship in January, 1908: "Well, I considered I was a citizen of the state of West Virginia." On motion his statement that he had voted at a school election in Logan county was stricken out. An exception was taken to proof of an admission by him that he lived in Ohio. The answer of the witness as to his citizenship was nothing more than an expression of opinion. He said nothing as to his intention at the time. Without any intention whatever to return to his former place of residence, he might have expressed the opinion that he was a citizen, or so regarded himself. There was no error in excluding the answer. The admission as to his home was admissible. It bore directly upon the question of intention. The time at which he voted at a school election not having been stated, the court did not err in striking out the testimony as to it. Voting and attempts to vote are compe-

tent evidence on the question of domicile. *Jacobs on Domicile*, § 435. If the defendant had intended to rely seriously upon this act of Kitchen as evidence of citizenship, they should have shown the voting to have been done prior to the injury to the decedent. It may have occurred afterwards and after his employment ceased. We do not think enough is shown to render the circumstance admissible.

Obviously the state of the evidence and the rulings of the court properly left it to the jury to say whether, by reason of the violation of the statute, the man acting as mine foreman was a mere common-law agent of the employer and, as to nonassignable duties, its vice principal. On that finding the entire statutory system, in so far as it absolves the employer from liability, falls and becomes inapplicable. Provision of a safe place to work, maintenance thereof, employment of competent servants, instruction to minor employes, and all other common-law duties and liabilities remain in full force. The negligence of the ineligible foreman as to such matters is his master's negligence, and common-law principles govern in the formulation and trial of the issues.

[8] The second theory of liability conflicts with the terms of the statute, making it the duty of the mine foreman to instruct miners working under him. Though employed and assigned to their work by him, under authority as agent, conferred by the employer, the statute places the duty of instruction upon him, not the employer. Code Supp. 1909, § 405. By another provision, found in section 410, Code Supp. 1909, the miner is required to prop his room for his own protection. These are new provisions inserted by chapter 78 of the Acts of 1907. Code Supp. 1909, c. 15H. These statutory duties of the mine foreman, however, conflict with the duties of his agency for the employer, respecting other nonassignable duties, when such agency has been conferred. Superintendency of a mine is representation of the owner, who stands in a certain relation to the mine foreman created by the statute. Upon him the foreman is required to make requisitions for materials, machinery, and supplies for maintenance of the safety of the mine. If these two positions are held by the same person, it is necessary for him, acting in one capacity, to make demands upon himself in the other to comply with the letter of the statute. Compliance with its letter in this manner would violate its spirit. The agent's interest in one direction would oppose his interest in the other. His superintendency would be in the nature of an inducement to neglect and avoidance of his duties as mine foreman. In other words, the two positions are incompatible with the spirit of the statute and the relation it establishes. As superintendent, he could ignore his own negligence or incompetence as foreman to the detriment of both miners and

owner. It was not the purpose of the statute wholly to relieve mine operators of responsibility. It must have a reasonable interpretation and construction. We borrowed it from Pennsylvania, and its spirit as understood and applied there is its spirit here, though the terms and provisions of the statute in the two states differ somewhat in detail provisions.

In *Wolcott v. Coal & Coke Co.*, 226 Pa. 204, 75 Atl. 197, the court held: "While a mine foreman is a fellow servant of the miners employed in the mine, yet if the company which employs him makes him also the superintendent of the mine, and through his negligence the roof of an entry falls and injures a miner, the company will be liable in damages for his negligence to the person injured." While the opinion in that case refers to some special provisions of the statute not found in ours, the basis of it is the incompatibility of the two positions. The court says: "The duties imposed by the act on the mine foreman do not relieve the superintendent from the duties which he owes to the employes of the mine. When the owner employs a certified mine foreman and puts him in charge of the internal workings of the mine, he has done all that the law requires him to do and he is not required through his superintendent to inspect and look after the interior of the mine. The law presumes that the certified foreman is fully competent, more so even than the superintendent or the owner, to keep the mine in proper and safe condition, and hence it does not impose the further and additional duty on the owner of requiring the superintendent to look after the interior of the mine and hold him responsible for the negligence of the superintendent in failing to perform such duty. * * * Suppose the positions of mine foreman and superintendent had been filled by different parties, and the knowledge that the former had not performed his duty and removed it, would it not have been the duty of the superintendent to have taken the necessary steps to have remedied the defect? In other words, when the superintendent knows that the mine foreman has, for any reason, become unfit to perform his duties, or is negligent in the performance of them and permits the mine to become dangerous and unsafe, is it not the superintendent's duty to take the necessary steps to remove the danger and place the mine in a safe condition?"

Our statute prescribes no duties for the superintendent by name, as the Pennsylvania statute does, but he is the mere representative of the owner upon whom our statute does impose duties. He or his agent is bound to maintain in his mine a competent and qualified mine foreman for the protection of the miners. This provision must have effect according to its spirit and purpose. If, having employed a competent man for foreman,

the owner knows he is habitually and persistently negligent and subjecting his fellow servants to danger and fails to remove him or in some way effect a remedy, he is not complying with the purpose of the statute. Hence notice to him of the interior conditions of the mine and transactions therein will, under certain conditions, impose liability. The statute was not designed to shield him from noncompliance with its substantial requirements. If the same person is mine foreman and superintendent and duties as mine foreman are omitted, the employer is given notice in law through the agency of the same person as the superintendent, and responsibility immediately attaches.

The ground of incompatibility of these two positions may be found in legal principles, outside of the statute. There may be a joint agency by contract, express or implied, but, in the absence of such an agreement, one person cannot take advantage of an agency created for the benefit of another and appropriate it or the fruits thereof to his own benefit. *Rohrbough v. Express Co.*, 50 W. Va. 148, 40 S. E. 398, 88 Am. St. Rep. 849; *Bank v. Furniture Co.*, 57 W. Va. 625, 50 S. E. 880, 70 L. R. A. 312. Surely the employer of a mine foreman, a quasi public agent whose duties are imposed and defined by law and involve conflict with the employer himself, cannot, by agreement with him, limit such duties or change their character. Nor can it be supposed the Legislature intended to authorize the existence of any relation between them that might constitute an inducement or cause for neglect of the performance of such duties. It is perfectly apparent that the position of superintendent, conferred upon a foreman, would, in many instances, have that effect. As mine foreman the employer is supposed to have the safety of the men in mind at all times and, if necessary, to the exclusion of everything else. The superintendent has for his dominating purpose the production and marketing of coal for the profit of the owner. The two positions in the hands of the same man are thus naturally in conflict.

[10] The mine foreman here is not shown to have been, in all respects, the superintendent of the mine in his charge, but it is claimed he was authorized by the owner to employ servants to work in the mine and assign them to their duties. In so far as these acts involve the safety of the employes, either the individual assigned to a particular duty with reference to his own safety or others who might be injured by his incompetency, they are nonassignable duties of the owner which the statute does not impose upon the mine foreman. If, therefore, the operator delegates them to the mine foreman, he thereby makes him a superintendent pro tanto, and, if the latter, in the exercise thereof, comes in conflict with his own duties as mine foreman, the result is logically

the same, as regards that act, as if he were the superintendent in the fullest sense of the term.

The employment of miners and assignment to their duties necessarily comes in direct conflict with the duty of instruction. The desire for promotion of the work and the largest possible yield of product has a natural and inevitable tendency to induce the foreman, acting as superintendent, to forego and neglect this particular duty and also to permit men to work in dangerous places, contrary to the statutory duty of the foreman. Hence, if the operator confers such authority upon the foreman, he is not entitled to the benefit of the statutory provisions imposing duty of instruction upon the foreman and making it the duty of the miner to prop his room. In this respect, the whole spirit of the statute is violated.

[13] Insufficiency of the evidence of authority in the mine foreman to employ and discharge men is relied upon in this connection, but, under principles declared in *Ewing v. Fuel Co.*, 65 W. Va. 730, 65 S. E. 200, 29 L. R. A. (N. S.) 487, the evidence warranted submission of the question to the jury. Kitchen testifies that he employed and discharged men generally. He said the company had a superintendent who had something to do with the employment and discharge of men, but this does not destroy the effect of his other testimony. He was competent to testify to his own agency. *Garber v. Blatchley*, 51 W. Va. 148, 41 S. E. 222; *Piercy v. Hedrick*, 2 W. Va. 458, 98 Am. Dec. 774. He was in charge of the defendant's mine for more than a year and says he employed and discharged men generally. The exercise of these powers for so long a time is sufficient evidence of authority from the defendant, even though it had a superintendent who did something not named about the employment of men.

The decedent, a youth 17 years old, had worked in the mine as a trapper, driver, and helper on a cutting machine. He had never operated a machine except as a helper under the supervision and direction of an experienced operator. About three days before his death he was set to work by the mine foreman with this machine in a room near the outcrop of the coal where the roof was dangerous by reason of what are called hill seams and previous blasting in the entry which necessarily loosened the slate to some extent.

[11] Evidence tending to prove the unsuitableness of the machine for use in such a room was admitted over the objection of the defendant. The company had several machines, one of the Sullivan type and all the others of the Harrison make, and witnesses were permitted to say it was peculiarly dangerous to use the Sullivan machine in a room in which the top was loose or dangerous because its use was likely to jar

slate or rock down from the roof. A comparison of the machines in this respect was made by the witnesses, showing that the Sullivan machine struck heavy blows and had a heavy rebound, while the Harrison machines struck much lighter blows without giving any jar from rebound, and were not so likely to cause a fall of slate. This evidence was admissible in connection with the assignment of an inexperienced and youthful servant to a dangerous place for work. The rule of law absolving employers from duty to furnish servants particular kinds of machines and appliances has no application under the circumstances. Had the servant in question been an adult or fully instructed and advised as to the danger of using such a machine in such a place, the principle relied upon would apply, but there is no evidence of such instruction. Kitchen says he told him to be careful with the machine and that the roof of that room was not like the roof in rooms in which he had been working, but this falls far short of full information as to the danger and means of avoidance. Minor servants are entitled to more than mere notice. The law imposes upon the master duty to instruct them. The decedent should have been advised as to the necessity for props, their number and arrangement in view of the unusual character of the roof, and also as to the kind of precautions to adopt in the operation of the machine.

In substance and effect, defendant's instruction No. 15, refused, is covered in its instructions Nos. 11 and 13. Its purpose was to give the defendant the benefit of the presumption of capacity on the part of the decedent to comprehend and avoid danger and place upon the plaintiff the burden of rebutting it by proof. The other two instructions do that, not in the same, but equivalent, terms.

Seeing no error justifying the action of the court in setting aside the verdict, we reverse the order complained of and render a judgment on the verdict.

(33 S. C. 556)

BELL v. JACKSON.

(Supreme Court of South Carolina. March 14, 1913.)

1. APPEAL AND ERROR (§ 103*)—PLEADING (§ 11*)—APPEALABLE ORDER—ORDER TO MAKE COMPLAINT MORE DEFINITE AND CERTAIN.

An order requiring plaintiff to make his complaint more definite and certain in specified particulars, being one involving the merits, is appealable.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 689-710; Dec. Dig. § 103;* Pleading, Cent. Dig. § 31; Dec. Dig. § 11.*]

2. PLEADING (§ 9*) — COMPLAINT — STATEMENTS.

The complaint stating the facts constituting plaintiff's cause of action, as required by Code Civ. Proc. 1912, § 192, he cannot be re-

quired to add allegations of law, as whether the cause of action is legal or equitable—that is, whether it is an action on the note set out in the complaint, or an action on it and an equitable mortgage alleged in the complaint—and for foreclosure thereof, nor can he be required to set out mere evidentiary matter.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. § 29; Dec. Dig. § 9.*]

3. PLEADING (§ 32*) — COMPLAINT — STATEMENTS.

Plaintiff may not be required to set out in his complaint the terms of instruments given him by defendants, but, if defendant has forgotten their terms, he may proceed in the method provided by Code Civ. Proc. 1912, § 192, to obtain an inspection and copy of them.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 53-57; Dec. Dig. § 32.*]

Appeal from Common Pleas Circuit Court of Marlboro County.

"To be officially reported."

Action by J. P. Bell against J. W. Jackson. From an order for amendment of the complaint, plaintiff appeals. Reversed.

The complaint and order for amendment are as follows:

"Complaint.

"The plaintiff, J. P. Bell, complaining of the defendant, J. W. Jackson, alleges:

"(1) That the defendant, J. W. Jackson, heretofore, on the 24th day of August, A. D. 1912, executed and delivered to plaintiff his promissory note, of which the following is a copy: '\$23,500.00. Dillon, S. C., August 24th, 1911. On the 1st day of December, after date, I promise to pay to the order of J. P. Bell, twenty-three thousand five hundred and no-100 dollars. Value received. Payable at the Farmers' & Merchants' Bank of McColl. To be discounted at the rate of eight per cent per annum, and if not paid at maturity to bear interest thereafter at the rate of eight per cent per annum, and agree to pay all costs of collection, including ten per cent attorney's fees, if not paid when due. J. W. Jackson.'

"(2) The said note is a purchase-money note, and was given to plaintiff to secure the unpaid purchase money of the following described land, to wit: 'All that certain piece, parcel or tract of land, situate, lying and being in Hillsboro township, county of Dillon, and state of South Carolina, known as the Dr. Craig place, the same comprising three different tracts of land, as described in the deed from Dr. Wade Stackhouse to Daisy D. Craig, dated November 1, 1909, and recorded in the clerk of court's office for Marion county, in Book QQQ, page 643, and therein described as follows.' [Here follows description.]

"(3) That at the same time the said note was given, to wit, on the 24th day of August, 1911, and as a part and parcel of the same transaction, the said J. W. Jackson executed an instrument in writing to plaintiff, by the terms of which, among other things, he acknowledged and agreed that the \$23,500, set

out in the note above mentioned, represented the unpaid purchase price of the land hereinabove described, and was given to secure the payment of the unpaid purchase price of said land, and that the said land was to stand good for the purchase money thereof, the amount of which is set out in the above-mentioned note.

"(4) That the above-mentioned note, according to the terms thereof, became due and payable on the 1st day of December, A. D. 1911.

"(5) That no part of said sum of \$23,500, to wit, the purchase money of the land above described, has been paid, except the sum of \$3,608.88, on the 8th day of September, 1911, which said payment has been duly credited on the said note.

"(6) That by the terms of the said note the said J. W. Jackson agreed to pay all costs of collection, including 10 per cent. attorney's fees, if the said debt was not paid when due. That there is now due, outstanding, and unpaid, on the purchase price of said land, the sum of \$19,891.12, and interest thereon from the 1st day of December, 1911, at the rate of 8 per cent. per annum, and in addition thereto 10 per cent. of the whole amount involved as attorney's fees, as provided in said note. Wherefore, plaintiff prays judgment against the defendant:

"(1) For the sum of \$19,891.12, and interest thereon from the 1st day of December, 1911, at the rate of 8 per cent. per annum.

"(2) For 10 per cent. of the whole amount involved, as attorney's fees, according to the terms of the said note.

"(3) That the entire sum for which judgment is given herein be declared by the court to be for the unpaid balance of the purchase money for the tract of land hereinbefore described, and to be and constitute a mortgage on said land for the purchase money thereof.

"(4) That the defendant, and all persons claiming under him, be forever barred and foreclosed of all rights, title, and interest, and equity of redemption, in the premises hereinbefore described, or any part thereof.

"(5) That the said premises be sold, under the order and direction of this court, and the proceeds of said sale, after deducting the costs and expenses of this action, and of such sale, and any taxes that may be a lien upon the premises, be applied to the amount due upon the note hereinbefore mentioned, with interest on the same from the 1st day of December, 1911, at the rate of 8 per cent. per annum, until paid, as provided by said note, and in addition thereto the sum of 10 per cent. of the whole amount involved, as attorney's fees, for the collection of said note, as provided therein."

"Order.

"This matter comes before me upon a notice duly served upon the plaintiff's attorney on a motion to make the complaint in the above-entitled action more definite and cer-

tain in the particulars mentioned and set forth in the said notice.

"After hearing the argument of counsel, and upon motion of D. D. McCoil, Jr., attorney for the defendant above named, it is ordered that the said plaintiff do make his complaint more definite and certain by stating whether or not the alleged cause of action attempted to be set up in the said complaint is based upon the promissory note therein mentioned, or whether the said cause of action is based upon a real estate mortgage.

"It is also ordered that the plaintiff be required in the event that he bases his said cause of action upon a real estate mortgage, or a contract in the nature of a real estate mortgage, to set forth definitely and clearly the terms and contents of the said mortgage or agreement, also such other facts as may be necessary to enable the defendant to know what is the exact nature of the instrument of writing relied upon by the plaintiff as the basis of his cause of action.

"It is also ordered and adjudged that the plaintiff be required to make his complaint more definite and certain by showing the manner in which the written instrument, constituting the basis of plaintiff's cause of action, is claimed to give to the said plaintiff a lien upon a tract of land described in the complaint; and also that the plaintiff be required to allege with definiteness and certainty such facts as the plaintiff relies upon to establish a lien upon the said tract of land and to entitle the said plaintiff to maintain this action in the county of Dillon, where the said land lies.

"It is also ordered and adjudged that the plaintiff be required to allege with more definiteness and certainty at what time and in what manner the defendant made the payments alleged in paragraph five of said complaint, and also that the plaintiff be required to allege with definiteness and certainty the nature and contents of the written instrument upon which the plaintiff relies as the basis of his cause of action, and to allege with definiteness and certainty whether or not the promissory note mentioned and described in the complaint is the only written instrument upon which plaintiff relies as the basis of his cause of action, and that the plaintiff allege definitely and clearly the nature and contents of any other written instrument relied upon by him as the basis of the cause of action in this case.

"It is also ordered and adjudged that in the event that the plaintiff does not allege the existence and execution of any other written instrument except the promissory note set up in the complaint that so much of his complaint as attempts the enforcement of a specific lien upon the said tract of land by a sale of the same be, and the same is hereby, declared irrelevant and redundant and be stricken out upon the motion of the plaintiff.

"The plaintiff is required to show clearly and definitely, by his complaint, whether he intends to institute a suit against the defendant upon a mere promissory note, or whether he intends to seek the foreclosure of a real estate mortgage, or some paper in the nature of a real estate mortgage; and if plaintiff seeks to foreclose a mortgage, or a paper in the nature of a real estate mortgage, he must, by proper allegations, describe the same with sufficient clearness and definiteness that the defendant may be able to make answer thereto; that defendant have 20 days after service of said amended complaint within which to answer same."

I. W. Le Grand, of Bennettsville, for appellant. McColl & McColl, of Bennettsville, for respondent.

HYDRICK, J. [1] The order involves the merits, and is therefore appealable. Pickett v. Fidelity Co., 52 S. C. 584, 30 S. E. 614.

[2] Section 192 of the Code of Procedure of 1912 says that "the complaint shall contain a plain and concise statement of the facts constituting a cause of action, without unnecessary repetition." The only fault that can be found with the plaintiff's complaint is that it lacks conciseness, and contains too much repetition. He stated the facts constituting his cause of action. The order of the circuit court requires him to add allegations of law, to wit, whether his action is legal or equitable; that is, whether it is an action on the note set out in the complaint, or an action on the note and equitable mortgage alleged in paragraph 3 of the complaint, and for the foreclosure thereof; also, the manner in which said written instrument is claimed to give plaintiff a lien. These are questions for the court. The order also requires him to set forth in the complaint at least a part of the evidence upon which he relies to prove the facts alleged. Evidentiary matter ought not to be set out in the pleadings. They should contain only allegations of fact—naked facts—accompanied by as few modifying adjectives as the exigencies of the case will permit.

[3] Defendant knows, or ought to know, what instruments he gave plaintiff. If he has forgotten their terms, the Code of Procedure provides a method whereby he may obtain an inspection and copy of them.

Order reversed.

GARY, C. J., and WOODS, WATTS, and FRASER, JJ., concur.

(13 Ga. App. 22)

HARDIN v. STANSEL. (No. 4,805.)
(Court of Appeals of Georgia. June 25, 1913.)

(Syllabus by the Court.)

1. BROKERS (§ 56*)—RIGHT TO COMMISSION.

Where property placed in the hands of a broker for sale is subsequently sold by the

owner, the broker is entitled to his commission if he was the procuring cause of the sale, although the sale was actually consummated by the owner. *Graves v. Hunnicutt*, 8 Ga. App. 99 (2), 68 S. E. 558; *Doonan v. Ives*, 73 Ga. 295.

[Ed. Note.—For other cases, see *Brokers*, Cent. Dig. §§ 85-89; Dec. Dig. § 56.*]

2. VERDICT SUSTAINED.

No error of law is complained of, and the verdict is supported by evidence.

Error from City Court of Bainbridge; H. B. Spooner, Judge.

Action by A. S. Stansel against R. S. Hardin. Judgment for plaintiff, and defendant brings error. Affirmed.

R. G. Hartsfield, of Bainbridge, for plaintiff in error. Harrell & Wilson, of Bainbridge, for defendant in error.

HILL, C. J. Judgment affirmed.

(13 Ga. App. 34)

HARDEN v. STATE. (No. 4,918.)
(Court of Appeals of Georgia. June 25, 1913.)

(Syllabus by the Court.)

1. CRIMINAL LAW (§ 824*)—INSTRUCTIONS—REQUEST.

In the absence of an appropriate request, the court is not required, in the trial of one charged with the offense of larceny, to call the attention of the jury to specific facts or circumstances adduced in the evidence which might indicate the innocence of the accused. For this reason the court did not err in omitting to call the special attention of the jury to evidence in the record tending to show that the defendant's possession of the hog in question was bona fide and under a fair claim of right.

[Ed. Note.—For other cases, see *Criminal Law*, Cent. Dig. §§ 1996-2004; Dec. Dig. § 824.*]

2. CRIMINAL LAW (§ 824*) — INSTRUCTION — CIRCUMSTANTIAL EVIDENCE.

Where the proof of guilt of one accused of crime depends wholly upon circumstantial evidence, it is error to omit to instruct the jury that to warrant a conviction on circumstantial evidence the proof must not only be consistent with the hypothesis of guilt, but must exclude every other reasonable hypothesis save that of the guilt of the accused (Pen. Code, § 1010); and it is the duty of the trial judge to so instruct the jury, even though there be no request to that effect. *Riley v. State*, 1 Ga. App. 651, 57 S. E. 1031; *Hamilton v. State*, 96 Ga. 301, 22 S. E. 528; *Jones v. State*, 105 Ga. 649, 31 S. E. 574; *Toler v. State*, 107 Ga. 682, 33 S. E. 629; *McElroy v. State*, 125 Ga. 39, 58 S. E. 759; *Weaver v. State*, 135 Ga. 320, 69 S. E. 488, and citations.

[Ed. Note.—For other cases, see *Criminal Law*, Cent. Dig. §§ 1996-2004; Dec. Dig. § 824.*]

Error from Superior Court, Miller County; W. C. Worrill, Judge.

Henry Harden was convicted of larceny, and brings error. Reversed.

W. I. Geer, of Colquitt, for plaintiff in error. J. A. Laing, of Dawson, B. T. Castellow, Sol. Gen., of Cuthbert, and R. R. Arnold, of Atlanta, for the State.

RUSSELL, J. Judgment reversed.

13 Ga. App. 37)

ROBERTSON v. RUSSELL. (No. 4,823.)
(Court of Appeals of Georgia. June 25, 1913.)

(Syllabus by the Court.)

1. CERTIORARI (§ 31*)—JUDGMENT (§ 27*)—VOID JUDGMENT.

"The writ of certiorari does not lie to set aside a verdict or judgment which is not merely erroneous, but absolutely void." *Levadas v. Beach*, 117 Ga. 178, 43 S. E. 418. See, also, *Bass v. City of Milledgeville*, 122 Ga. 177, 50 S. E. 59; *Simpkins v. Hester*, 3 Ga. App. 160, 59 S. E. 322.

[Ed. Note.—For other cases, see *Certiorari*, Cent. Dig. §§ 43, 88-90; Dec. Dig. § 31;* *Judgment*, Cent. Dig. § 38; Dec. Dig. § 27.*]

2. JUSTICES OF THE PEACE (§ 119*)—PLACE OF HOLDING COURT.

A judgment rendered by a justice of the peace at a place other than that at which the court could lawfully sit is void. *Hilson v. Kitchens*, 107 Ga. 230, 33 S. E. 71, 73 Am. St. Rep. 119; *Carter v. Atkinson*, 12 Ga. App. 390, 77 S. E. 370.

[Ed. Note.—For other cases, see *Justices of the Peace*, Cent. Dig. §§ 373-376; Dec. Dig. § 119.*]

Error from Superior Court, Catoosa County; A. W. Fite, Judge.

Action between A. B. Robertson and J. B. Russell. From a judgment for the latter, the former brings error. Reversed.

Wm. E. Mann, of Dalton, for plaintiff in error. W. H. Payne, of Chattanooga, Tenn., for defendant in error.

POTTLE, J. [2] It appears from the answer of the magistrate that on account of the inclemency of the weather the court was moved about 40 yards from the usual place for holding court and in sight of that place. The judgment rendered against the plaintiff in certiorari was probably void, as was held by the trial judge who sustained the certiorari. *Cortier v. Atkinson*, 12 Ga. App. 390, 77 S. E. 370.

[1] If the judgment was void, certiorari was not the remedy. A void judgment is no judgment, and may be disregarded and treated as an absolute nullity. The judge of the superior court should therefore have overruled the certiorari, since it was not available as a remedy to set aside a void judgment.

Judgment reversed.

(13 Ga. App. 13)

SOUTHERN RY. CO. v. FLEMING.
(No. 4,870.)

(Court of Appeals of Georgia. June 25, 1913.)

(Syllabus by the Court.)

APPEAL AND ERROR (§ 1051*)—HARMLESS ERROR—ADMISSION OF EVIDENCE.

This case is fully controlled by the decision of this court in *Central of Georgia Ry. Co. v. Butler Marble & Granite Co.*, 8 Ga. App. 1 (3, 4), 68 S. E. 775, and by the decision of the Supreme Court in *Louisville & Nashville R. Co. v. Venable*, 132 Ga. 501 (1), 64 S. E. 466. Un-

der these decisions, the evidence demanded the verdict for the plaintiff, and any error in the admission of testimony was immaterial.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 4161-4170; Dec. Dig. § 1051.*]

Error from Superior Court, Franklin County; D. W. Meadow, Judge.

Action by J. W. Fleming against the Southern Railway Company. Judgment for plaintiff, and defendant brings error. Affirmed.

W. R. Little and G. L. Goode, both of Carnesville, and A. G. & Julian McCurry, of Hartwell, for plaintiff in error. W. L. Hodges, of Hartwell, and Claude Bond, of Toccoa, for defendant in error.

HILL, C. J. Judgment affirmed.

(13 Ga. App. 9)

KERR v. HOLDER. (No. 4,395.)

(Court of Appeals of Georgia. June 25, 1913.)

(Syllabus by the Court.)

1. APPEAL AND ERROR (§ 641*)—BILL OF EXCEPTIONS—CERTIFICATION.

The bill of exceptions will not be dismissed because the judge certified that it was "due," instead of "true"; it being manifest, from the context, that this was a mere clerical error, and that his intention was to certify that the bill of exceptions was true.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 2789, 2790; Dec. Dig. § 641.*]

2. APPEAL AND ERROR (§ 323*) — PARTIES — BILL OF EXCEPTIONS.

Where there are two defendants, one may except without the other; and it is not necessary to make the party not excepting a party to the bill of exceptions, when it is apparent that his rights cannot be affected in any wise by the decision of any question presented for adjudication in the writ of error. *Civil Code* 1910, § 6176; *W. U. Tel. Co. v. Griffith*, 111 Ga. 551, 36 S. E. 850.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 1796, 1798-1805; Dec. Dig. § 323.*]

3. APPEAL AND ERROR (§ 274*)—PRESENTATION OF ERROR—SUFFICIENCY.

If the ruling or decision complained of as erroneous preceded the final judgment, and if it is specifically made the subject of exception and of proper assignment of error, and the final judgment is excepted to, not because of additional error in it, but because of the antecedent ruling complained of, which entered into and affected the further progress or final result of the case, a general exception to the final judgment, and an exception to and a specific assignment of error on the antecedent ruling, will suffice to give the reviewing court jurisdiction relatively to the point under consideration. *Lyndon v. Georgia Ry. & Electric Co.*, 120 Ga. 354 (3), 58 S. E. 1047.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 1591, 1592, 1605, 1606, 1607, 1624, 1631-1645; Dec. Dig. § 274.*]

4. EVIDENCE (§ 423*)—PAYMENT (§ 9*)—MEDIUM—PAROL EVIDENCE.

A note in which it is stipulated that a certain sum will be paid means that this sum will be paid in money, and neither the maker nor the indorser will be heard to plead or prove that there was an agreement by which

the note was to be satisfied with something else than money. Civil Code 1910, §§ 4266, 5788; Stapleton v. Monroe, 111 Ga. 848, 36 S. E. 428; Brewer v. Grogan, 116 Ga. 60, 42 S. E. 525; American Harrow Co. v. Dolvin, 119 Ga. 186, 45 S. E. 933; Berendt v. Ripps, 120 Ga. 228, 47 S. E. 595.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 1957-1965; Dec. Dig. § 423; Payment, Cent. Dig. §§ 34, 38, 40, 41, 45, 49, 53; Dec. Dig. § 9.*]

5. EVIDENCE (§ 423*)—PLEADING (§ 354*)—PAROL EVIDENCE—PLEA—STRIKING OUT.

Since the contract expressed by a general indorsement by the payee of a promissory note cannot be varied by oral evidence of an agreement between the parties different from that evidenced by the note itself, the trial judge, in an action against the maker of such an indorsement, did not err in striking a plea setting up that the note was given to the defendant for the rent of land to the maker for a certain year, and that the plaintiff, as holder of the note, permitted the maker to divert crops raised upon the land to the payment of other debts, some of them due to the plaintiff, although this debt for rent constituted a first lien upon the crops, and although the plaintiff, at the time the defendant indorsed and transferred the note to him, agreed to collect it out of the crops raised by the maker in the year for which the land was rented.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 1957-1965; Dec. Dig. § 423; Pleading, Cent. Dig. §§ 1092-1095; Dec. Dig. § 354.*]

Error from City Court of Floyd County; J. H. Reece, Judge.

Action by G. B. Holder against Mrs. M. A. Kerr and another. Judgment for plaintiff, and defendant named brings error. Affirmed.

M. B. Eubanks, of Rome, for plaintiff in error. Lipscomb, Willingham & Wright and Nathan Harris, all of Rome, for defendant in error.

RUSSELL, J. Judgment affirmed.

(13 Ga. App. 29)

CITIZENS' NAT. LIFE INS. CO. v. RAGAN. (No. 4,832.)

(Court of Appeals of Georgia. June 25, 1913.)

(Syllabus by the Court.)

1. WITNESSES (§ 94*)—TRANSACTIONS WITH DECEDENTS—INTEREST OF WITNESS.

In a suit upon a policy of life insurance, where the issue is as to payment or nonpayment of the premium, an agent of the insurer is not incompetent, under Civ. Code 1910, § 5858 (4), to testify that the premium was paid to him by the insured, and that he had not remitted it to the insurer. In such a case the pecuniary interest of the witness was the same, no matter which party prevailed. If the plaintiff recovered, the witness was liable to the insurer for the amount of the premium. If the defendant prevailed, on the theory that the contract of insurance had never been executed, the witness would be bound to pay the amount of the premium to the legal representative of the insured. Crawford v. Parker, 96 Ga. 156, 23 S. E. 196; Hidell v. Dwinell, 89 Ga. 532, 16 S. E. 79.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. §§ 249-257; Dec. Dig. § 94.*]

2. APPEAL AND ERROR (§ 1050*)—HARMLESS ERROR—ADMISSION OF EVIDENCE.

A verdict will not generally be set aside on account of the admission of testimony of a fact as to which the witness is shown to have had no adequate knowledge, when other competent evidence of the same fact has been admitted without objection.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1068, 1069, 4153-4157, 4166; Dec. Dig. § 1050.*]

3. TRIAL (§ 191*)—INSTRUCTIONS—APPLICABILITY TO EVIDENCE.

An agent for the defendant testified positively that the insured paid to him the premium in cash. There was no evidence to warrant an instruction upon the theory that the cancellation by the insured of a debt due him by the agent would not be payment of the premium according to the terms of the policy. There was testimony offered for the purpose of impeaching the agent, to the effect that he had stated that no money had been paid him by the insured but that a debt due the agent by the insured had been canceled. If this impeaching testimony was credible, the agent's testimony on the subject of payment should have been disregarded; but the testimony offered for impeachment did not authorize an instruction upon the theory that the previous statements made by the witness were the real truth of the transaction.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 420-431, 435; Dec. Dig. § 191.*]

4. INSURANCE (§ 361*)—PAYMENT OF PREMIUM—FAILURE OF AGENT TO REMIT.

There was no error in charging that, if the policy was delivered and the premium paid to the defendant's agent, the company would not be relieved from liability merely because its agent failed to remit to it the amount of the premium.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. § 923; Dec. Dig. § 361.*]

5. TRIAL (§ 256*)—INSTRUCTIONS—REQUEST FOR MORE SPECIFIC CHARGE.

In the absence of a request for more specific instructions, the following charge is not so deficient in fullness as to require a new trial: "A witness may be impeached by disproving the facts testified to by him; a witness may be impeached by contradictory statements previously made by him as to matters relevant to his testimony and the case; and if he may have been sought to have been impeached, he may be sustained by evidence of general good character. The credibility of the witness is a matter to be determined entirely by the jury. Nor would the court have you to infer, from what the court has said to you, that any witness has been impeached, or that any witness has spoken an untruth. The credibility of the witnesses is a matter entirely for the jury to determine." Although not so instructed in terms, the jury must have understood that they should not believe the witness, if they thought he had been successfully impeached.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 628-641; Dec. Dig. § 256.*]

6. EVIDENCE (§ 77*)—PRESUMPTIONS—SUPPRESSION OF EVIDENCE.

The fact that a party called only one of three witnesses who had an equal opportunity to know the fact sought to be established does not authorize an inference that the other witnesses would have testified differently, or warrant an instruction to this effect to the jury.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 97; Dec. Dig. § 77.*]

7. TRIAL (§ 260*)—INSTRUCTIONS—REQUEST.

Other than as above dealt with, the pertinent and legal requests to charge which were

refused were substantially covered by the charge given to the jury.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 651-659; Dec. Dig. § 260.*]

8. SUFFICIENCY OF EVIDENCE.

The evidence warranted the verdict.

Error from City Court of Leesburg; H. L. Long, Judge.

Action by Pearl H. Ragan against the Citizens' National Life Insurance Company. From a judgment for plaintiff, defendant brings error. Affirmed.

R. R. Forrester, of Leesburg, and I. H. Hofmayer, of Albany, for plaintiff in error. H. A. Wilkinson, of Dawson, for defendant in error.

POTTLE, J. Judgment affirmed.

(13 Ga. App. 5)

SOUTHERN RY. CO. v. OLIVER.

(No. 4,390.)

(Court of Appeals of Georgia. June 25, 1913.)

(Syllabus by the Court.)

CERTIORARI (§ 43*)—BOND—APPROVAL—SUFFICIENCY—NECESSITY.

The statement by the trial magistrate in his certificate to a petition for certiorari, that the petitioner has given bond and security as required by law, is not an equivalent, nor a sufficient substitute, for the magistrate's approval of the certiorari bond. Any attesting officer may legally witness a certiorari bond, but only the officer whose decision is to be reviewed has authority to approve it; and if the bond is unapproved at the date of its filing with the petition it is insufficient to authorize the clerk to issue the writ, and no subsequent approval (which might be implied from the magistrate's certificate or otherwise) can cure the deficiency. "A writ of certiorari in a civil case, unless sued out in forma pauperis, is void, if the same be issued before the applicant has given the bond required by Civ. Code 1910, § 5185; and the bond, to render it effectual, must be approved by the judge or justice of the court in which the case was originally tried." *Dykes v. Twigg County*, 115 Ga. 699-701, 42 S. E. 37, 38. "No subsequent action approving or ratifying the bond will save the certiorari from dismissal." *State v. Wynne*, 4 Ga. App. 719, 62 S. E. 499.

[Ed. Note.—For other cases, see Certiorari, Cent. Dig. §§ 74, 80, 91-97; Dec. Dig. § 43.*]

Error from Superior Court, Hall County; J. B. Jones, Judge.

Action by W. N. Oliver against the Southern Railway Company. From a judgment of the superior court dismissing certiorari, defendant brings error. Affirmed.

Adams & Quillian, of Gainesville, and O. R. Faulkner, of Belton, for plaintiff in error. J. D. Underwood and Wm. M. Johnson, both of Gainesville, for defendant in error.

RUSSELL, J. On the call of the case in the court below the defendant in certiorari moved to dismiss the petition, because

the certiorari bond did not show on its face that it had been approved by the justice of the peace who tried the case. The judge of the superior court sustained this motion and passed an order dismissing the certiorari.

We are of the opinion that the court properly dismissed the certiorari. The plaintiff in error relies upon those decisions of the Supreme Court in which it was held that, if it appeared from the record that the certiorari bond had in fact been approved, the certiorari should not be dismissed, and upon the fact that, inasmuch as the magistrate who tried the present case certifies, in his certificate as to the payment of costs, that the petitioner has given the bond required by law, this statement of the magistrate cannot be otherwise considered than as an implied approval of the bond which appears in the record. After a careful review of all of the decisions of the Supreme Court upon the point now before us, we are convinced that there cannot be such a thing as an implied approval of a certiorari bond. The statement of the magistrate who tried the case, in his certificate as to the payment of the costs, that the petitioner for certiorari "has given the bond required by law" is not the equivalent, or a sufficient substitute, for that express and unequivocal approval of the bond which must be evidenced by the signature of the magistrate prior to the filing of the petition and the issuance of the writ. There can be no such thing as ratification of a bond by its acceptance.

In *Dykes v. Twigg County*, 115 Ga. 698, 42 S. E. 36, the Supreme Court held that "a clerk of a superior court has no authority of law to issue a writ of certiorari, not applied for in forma pauperis, unless the plaintiff files with his petition for certiorari such a bond as that required by the Civil Code, § 4639 [Civil Code of 1910, § 5185], which must, either on its face, or by other written evidence bearing the official signature of the judicial officer before whom the case was tried in the first instance, show that it has been duly approved by him." In that case Justice Fish followed the rulings made in *Wingard v. Southern Railway Co.*, 109 Ga. 177, 34 S. E. 275, and *Stover v. Doyle*, 114 Ga. 85, 39 S. E. 939, and pointed out that the use of the expressions that "the record must show somewhere that such justice did accept and approve the bond," used in *Hester v. Keller*, 74 Ga. 369, or that "the fact of approval may be evidenced * * * by any conduct on the part of the trial judge showing his acceptance of the bond," used in *Hamilton v. Insurance Co.*, 107 Ga. 723, 33 S. E. 705, and similar language used in *Wingard v. Southern Railway Co.*, 109 Ga. 177, 34 S. E. 275, was due to the peculiar facts of these cases and was purely obiter. In the *Wingard Case*, supra, the judgment of the judge of the superior court was reversed, and it

was held that the judge erred in refusing to sustain a motion to dismiss the petition for certiorari, because it did not appear that the bond filed by the plaintiff in certiorari was approved by the justice of the peace in whose court the case had been tried. The precise ruling of the court was that, "the certiorari having been issued in the absence of a duly approved bond, the writ was void, and the motion to dismiss the same ought to have been sustained," and for this reason, as pointed out by Judge Fish in the Dykes Case, the dictum of Justice Lewis that, "while the law does not require any formal certificate of such approval, or any special method of showing the acceptance by the magistrate of the bond, yet it must appear from the record that such acceptance and approval were had," was a statement upon a question not then before the court for decision.

In *Stover v. Doyle*, 114 Ga. 85, 39 S. E. 939, it was held that the bond given by the applicant for certiorari, in order to be effectual, must be approved in some manner by the judge or justice of the court in which the case was originally tried; and this language might seem to give support to the argument of the plaintiff in error in the present case but for the ruling in the Dykes Case, *supra*, and but for the fact that it is very apparent from the decision that the language in the headnote was used inadvertently. The exact point before the court was the dismissal of a petition for certiorari, upon the ground that the certiorari bond had not been approved by the judge of the court in which the case was tried; and the judgment of dismissal was affirmed. It was therefore unnecessary to rule upon the mode of approval that might be adopted, and evidently, from the opinion of the learned presiding justice, it was not intended to provide any other mode of approval than that which would be implied in the plain meaning of that word, for in the opinion Judge Lumpkin says: "The statute necessarily means an approved bond, and accordingly this court, in *Hamilton v. Insurance Co.*, 107 Ga. 728 [33 S. E. 705], held that when a writ of certiorari issues upon the filing of a bond, which has not been approved by the judge or justice of the court in which the case was tried, the writ is to be treated as a nullity." The court then declines to overrule the decision in *Wingard v. Southern Railway Co.*, 109 Ga. 177, 34 S. E. 275, and *Carpenter v. Southern Railway Co.*, 112 Ga. 152, 37 S. E. 186, holding that the cases of *Memmler v. State*, 75 Ga. 576, and *Watson v. State*, 85 Ga. 237, 11 S. E. 610, are applicable only to writs of certiorari in criminal cases.

The rulings in *Brown v. State*, 124 Ga. 411, 52 S. E. 745, and in *Johnston v. State*, 7 Ga. App. 249, 560, 67 S. E. 684, are based upon this distinction, pointed out by Presiding Justice Lumpkin in the *Stover* Case,

supra, in referring to the *Memmler* and *Watson* Cases. The present case, however, is one of certiorari to review the judgment in a civil case, and it is clear that, as to civil cases, the ruling in the Dykes Case, *supra*, is controlling; for it has been followed in *Miller Co. v. Anderson*, 118 Ga. 432, 45 S. E. 365, and in *Alabama Midland Ry. Co. v. Stevens*, 116 Ga. 790, 43 S. E. 46. And even as to criminal cases the distinction to which we have above referred as dependent upon the ruling in the *Memmler* and *Watson* Cases seems to be considered no longer existent or controlling; for the rule laid down in *Dykes v. Twiggs County*, *supra*, was followed in *Hill v. State*, 115 Ga. 833, 42 S. E. 286, and in *Brown v. State*, 124 Ga. 414, 415, 52 S. E. 745. Whatever may be the conflict as to the rule in certiorari in criminal cases, there can be no doubt that the correct rule in certiorari brought to review judgments in civil cases is that stated in the headnote of this decision.

Judgment affirmed.

(13 Ga. App. 34)

MAYWEATHER v. MAYOR, ETC., OF CARROLLTON. (No. 4,931.)

(Court of Appeals of Georgia. June 25, 1913.)

(Syllabus by the Court.)

CONVICTION SUSTAINED.

The evidence authorized the conviction of the defendant, and there was no error in overruling the certiorari.

Error from Superior Court, Carroll County; R. W. Freeman, Judge.

Hill Mayweather was convicted in the mayor's court of Carrollton, and from denial of certiorari in the superior court he brings error. Affirmed.

Smith & Smith, of Carrollton, for plaintiff in error. J. O. Newell, of Carrollton, for defendant in error.

RUSSELL, J. Judgment affirmed.

(13 Ga. App. 32)

SMITH v. STATE. (No. 4,885.)

(Court of Appeals of Georgia. June 25, 1913.)

(Syllabus by the Court.)

1. CRIMINAL LAW (§ 596*)—CONTINUANCE—GROUNDS.

There was no abuse of discretion in refusing to grant a continuance on the ground of the absence of a witness, whose evidence was wanted by the accused to attack the credibility of one of the state's witnesses, especially since the verdict did not depend alone upon the testimony of the witness whom he sought to impeach.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1328-1330; Dec. Dig. § 596.*]

2. CRIMINAL LAW (§ 824*)—INSTRUCTION ON IMPEACHING TESTIMONY—NECESSITY OF REQUEST.

It has been repeatedly held that, in the absence of a timely request, failure of the trial

Judge to charge on the subject of impeachment of witnesses is not reversible error. *Perdue v. State*, 135 Ga. 278, 69 S. E. 184; *Jackson v. State*, 135 Ga. 685, 70 S. E. 245; *Hunt v. State*, 8 Ga. App. 378, 69 S. E. 42.

[Ed. Note.—For other cases, see *Criminal Law*, Cent. Dig. §§ 1996-2004; Dec. Dig. § 824.*]

8. INSTRUCTION ON STATEMENT.

The charge of the trial court on the prisoner's statement was substantially in the language of statute.

4. DEFINITION OF REASONABLE DOUBT.

The definition of the term "reasonable doubt," while not apt or necessary, could not possibly have misled or confused the jury as to the meaning of the term.

5. NO ERROR—VERDICT SUSTAINED.

No error of law appears, and the evidence supports the verdict.

Error from Superior Court, Johnson County; K. J. Hawkins, Judge.

E. K. Smith was convicted of crime, and brings error. Affirmed.

B. B. Blount, of Wrightsville, for plaintiff in error. E. L. Stephens, Sol. Gen., of Wrightsville, for the State.

HILL, C. J. Judgment affirmed.

(13 Ga. App. 31)

HARRISON v. STATE. (No. 4,872.)

(Court of Appeals of Georgia. June 25, 1913.)

(Syllabus by the Court.)

FORGERY (§§ 5, 35*)—INTENT TO DEFRAUD—BURDEN OF PROOF.

The intent to defraud being an essential element in the offense of forgery, and affirmative proof thereof being necessary to authorize a conviction, and there being no proof of such intent in the present case, the verdict of guilty was unauthorized.

[Ed. Note.—For other cases, see *Forgery*, Cent. Dig. §§ 4-6; Dec. Dig. §§ 5, 35.*]

For other definitions, see *Words and Phrases*, vol. 3, pp. 2900-2910; vol. 8, p. 7665.]

Error from Superior Court, Glynn County; C. B. Conyers, Judge.

J. F. Harrison was convicted of forgery, and brings error. Reversed.

J. T. Powell, of Brunswick, and Thomas & Gibbs, of Jesup, for plaintiff in error. J. H. Thomas, Sol. Gen., of Jesup, for the State.

POTTLE, J. The accused was convicted of forging his employer's name to an order, upon which he received a check which he admits he cashed. He claims that the money received from the check was expended for the benefit of his employer, by buying feed for live stock belonging to the employer.

The state was bound to show an intent to defraud. The employer does not positively deny receiving and using the feed, and the circumstances indicated that he did. It was wrong to sign the employer's name to the order without his consent; but, unless there was an intent to defraud, no crime was committed. The circumstances indicating that

the prosecutor was not in fact defrauded, the conviction was unauthorized.

Judgment reversed.

(13 Ga. App. 28)

SCARBORO v. KALMON. (No. 4,825.)

(Court of Appeals of Georgia. June 25, 1913.)

(Syllabus by the Court.)

GUARANTY (§ 61*)—DISCHARGE OF GUARANTOR—ACCEPTANCE OF NOTE.

The decision of this court in this case at a previous term is controlling upon all the questions now involved, and the court did not err in rendering judgment against the defendant.

[Ed. Note.—For other cases, see *Guaranty*, Cent. Dig. § 71; Dec. Dig. § 61.*]

Error from City Court of Tifton; R. Eve, Judge.

Action by G. H. Kalmon against Frank Scarboro. From a judgment for plaintiff, defendant brings error. Affirmed.

L. P. Skeen, of Tifton, for plaintiff in error. C. W. Fulwood, of Tifton, for defendant in error.

POTTLE, J. This was an action on a contract of guaranty. The facts as set forth in the petition are fully stated in the opinion of this court in *Kalmon v. Scarboro*, 11 Ga. App. 547, 75 S. E. 846, when the case was here on demurrer to the petition. The principles then decided control the case. The fact that one of the guarantors did not consent to the execution of the promissory notes by the debtor was immaterial, as was also the fact of the execution of the notes themselves. The contract of the guarantors was to pay if the debtor failed to pay at maturity. The creditor is not attempting to enforce the notes, nor to enlarge the guarantors' liability, nor to increase their risk. The notes were merely a form of security for the payment of the account, and really operated to the benefit of the guarantors, rather than otherwise. The notes contained a waiver of home-stead; and if the guarantors pay the debt and take a transfer of the notes, they will be in a better position to enforce their claim against the original debtor than if they held simply an assigned open account. We cannot see how the execution of the notes by the debtor operated to discharge the guarantors. See *Case v. Howard*, 41 Iowa, 479; *Smith v. Dann*, 6 Hill (N. Y.) 543.

Judgment affirmed.

(13 Ga. App. 29)

CEDARTOWN SUPPLY CO. et al. v. HOOPER et al. (No. 4,828.)

(Court of Appeals of Georgia. June 25, 1913.)

(Syllabus by the Court.)

HUSBAND AND WIFE (§ 209*)—TRESPASS (§ 81*)—CONVERSION OF COMMON PROPERTY—RIGHT OF ACTION—JOINT TRESPASSERS.

The suit was for the value of a bale of cotton alleged to have been tortiously taken

from the plaintiffs by the defendants and converted to their own use. The evidence was sufficient to authorize a recovery by both of the plaintiffs, who were husband and wife; it appearing that both owned the land on which the cotton was grown and that the bale of cotton had been delivered to the husband by the tenant in part payment of rent due both the husband and the wife on a rent note, though the note had been executed to the husband alone. The evidence was also sufficient to show that the defendants were joint trespassers, and, this being so, all were liable in damages for the greatest injury done by any one of them. Civil Code 1910, § 4512. The verdict was fully supported by the evidence, and there is no merit in any assignment of error contained in the motion for a new trial.

[Ed. Note.—For other cases, see Husband and Wife, Cent. Dig. §§ 766-772; Dec. Dig. § 209; *Trespass, Cent. Dig. § 70; Dec. Dig. § 31.*]

Error from City Court of Polk County; F. A. Irwin, Judge.

Action by J. N. Hooper and another against the Cedartown Supply Company and others. From a judgment for plaintiffs, defendants bring error. Affirmed.

Wm. W. Mundy, of Cedartown, for plaintiffs in error. John K. Davis, of Cedartown, for defendants in error.

POTTLE, J. Judgment affirmed.

(13 Ga. App. 14)

SEABOARD AIR LINE RY. v. DAVIS.
(No. 4,776.)

(Court of Appeals of Georgia. June 25, 1913.)

(Syllabus by the Court.)

CORPORATIONS (§ 507*)—PROCESS—SERVICE—AMENDMENT OF RETURN.

Where, in a suit against a corporation, the officer's return of service shows that the corporation has been served, it is permissible to amend the return so as to show that service upon the corporation was perfected by handing a copy to a named person as its agent in charge of its office and business in the county where the suit was brought.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 1971-1974, 1976-2000; Dec. Dig. § 507.*]

Error from Superior Court, McIntosh County; W. W. Sheppard, Judge.

Action by Marcus Davis against the Seaboard Air Line Railway. Judgment for plaintiff, and defendant brings error. Affirmed.

C. N. Feldelson and Anderson, Cann & Cann, all of Savannah, for plaintiff in error. Chas. M. Tyson, of Darien, for defendant in error.

POTTLE, J. Suit was brought in a justice's court against the Seaboard Air Line Railway, and the officer's return of service was as follows: "I have this day served a copy of the within summons upon the S. A. L. Ry. Co., Mch. 20-12. Louis Bailey, Constable." The defendant failed to appear, and a default judgment was entered in favor of

the plaintiff. To the levy of the execution the defendant filed an illegality, setting up that the judgment was void for want of a legal return of service. On motion of the plaintiff the constable was allowed to amend his return of service by stating that he had served the defendant "by handing a copy of the within summons to R. E. Yoemans, its agent at Darien Junction." The record shows merely that the return was amended by showing the manner of service, but counsel for both sides state in their brief that the amendment was in the language above quoted. It will therefore be dealt with. The defendant's certiorari was overruled and it excepted.

The return of the officer is but evidence of service. It is the fact of service that gives the court jurisdiction of the defendant and not the entry of the officer. It is, of course, necessary, before the court can proceed, to have before it evidence of service. But the return of service itself is not jurisdictional. If there is an entire absence of a return, or if the return as made is void because showing service upon the wrong person or at a time and place or in a manner not provided by law, the court cannot proceed. If, however, the fact of service appear, but the officer's return is irregular or incomplete, it should not be treated as no service, but rather as furnishing defective proof of the fact of service. *Jones v. Bibb Brick Co.*, 120 Ga. 321, 48 S. E. 25. The return of service was defective in the present case, because the return failed to set forth the mode of service. Civil Code, § 2258. If the return shows service upon the wrong person, the court has no authority to enter judgment by default. *News Printing Co. v. Brunswick Pub. Co.*, 113 Ga. 160, 38 S. E. 333. Such a return is not merely defective or irregular; it is absolutely void as to the defendant, and constitutes no evidence of service. An irregular return may be amended so as to set forth the real truth in reference to the service actually made. Civil Code, § 5700. Such an amendment may be made on the trial of an illegality in which the sufficiency of the service is attacked. *Marsh v. Phillips*, 77 Ga. 436.

In the present case the officer's return was not void, but merely irregular. The law required service to be made upon the Seaboard Air Line Railway. The officer's return shows that he served the Seaboard Air Line Railway. The only question was whether he had served the corporation in the manner required by law; that is, by service upon an agent in the county having charge of its business. If the officer had said in his return that he had served the defendant by handing a copy to a named person as agent, the return could have been amended so as to show that this agent was in charge of the corporation's business in the county. South-

ern Express Co. v. National Bank of Tifton, 4 Ga. App. 399, 61 S. E. 857. And so, where the officer's return shows service of some sort upon the corporation, it may be amended so as to show that service was perfected in the manner required by law.

Judgment affirmed.

(13 Ga. App. 25)

PITMAN v. HODGES. (No. 4,815.)
(Court of Appeals of Georgia. June 25, 1913.)

(Syllabus by the Court.)

PLEADING (§ 248*)—AMENDMENT.

An action upon an account for goods sold and delivered and for money expended for the use of the defendant cannot be converted by amendment into an action for the breach of a contract by the defendant to purchase the plaintiff's interest in a copartnership of which they were both members, and for the benefit of which the goods and money were furnished.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 686, 687, 689-706, 709; Dec. Dig. § 248.*]

Error from City Court of Sandersville; E. W. Jordan, Judge.

Action by G. T. Hodges against H. B. Pitman. Judgment for plaintiff, and defendant brings error. Reversed.

J. J. Harris, of Sandersville, for plaintiff in error. Evans & Evans, of Sandersville, for defendant in error.

POTTLE, J. Hodges sued Pitman on an open account. The petition was in the usual form, alleging indebtedness in the sum of \$335, besides interest, on an account, a copy of which was attached to the petition. The account contained a number of items for sums paid for machinery, fixtures, etc., and other items, under different dates, of divers quantities of syrup. The plaintiff offered an amendment setting up that the plaintiff furnished to a partnership, of which he and defendant were members, certain money and articles as shown in the bill of particulars attached to the petition, and that the defendant contracted to pay to the plaintiff the sums set forth in the account, for the plaintiff's interest in the partnership business; that the plaintiff did surrender his said interest, and the defendant failed and refused to pay the amount agreed on. An objection to this amendment, on the ground that it set forth a new cause of action, was overruled, and the plaintiff recovered a verdict. The case is here upon a bill of exceptions assigning error upon this ruling and upon the overruling of a motion for a new trial.

As the petition stood before amendment, the suit was one to recover for money paid for the use of the defendant, and to recover

for goods sold and delivered to him. The law implied a promise by the defendant to reimburse the plaintiff for the sums expended and to pay for the goods received by the defendant. There may, however, have been an express promise to pay, but this would not have prevented recovery on the account. Hence it is that in a suit on an open account for goods sold and delivered the petition may be amended by alleging a special contract and setting forth the terms and conditions of the promise. Such an amendment is, however, allowable only for the purpose of alleging the pertinent facts and circumstances under which the sale and delivery were made, and not for the purpose of counting upon the contract as a distinct cause of action. *Tumlin v. Bass Furnace Co.*, 93 Ga. 594, 20 S. E. 44; *May Mantel Co. v. United States Blow-Pipe Co.*, 93 Ga. 778, 21 S. E. 142; *Ala. Const. Co. v. Continental Car Co.*, 131 Ga. 365, 62 S. E. 160. The suit cannot by amendment be changed from one to recover the price of goods sold on open account to an action for damages for the breach of a contract. Such an amendment would introduce a new cause of action and present issues which could not arise under the cause of action originally declared on. See *Groover v. Tattnall Supply Co.*, 10 Ga. App. 679, 73 S. E. 1083; *Hartwell Ry. Co. v. Kidd*, 11 Ga. App. 771, 74 S. E. 310. In the original petition the plaintiff, in effect, alleged that he had sold and delivered certain described articles to the defendant and had paid out certain money for his use. In the amendment it is averred, in substance, that the defendant agreed to purchase the plaintiff's interest in a copartnership for a certain sum, and failed and refused to comply with this contract. This is but an effort to recover from the defendant for breach of a contract of purchase, and it bears no resemblance to the suit as originally brought. It happens that the sum to be paid as the purchase price was to be ascertained by looking to the value of certain goods and the amount of money which the plaintiff had furnished to the partnership, but the cause of action disclosed by the amendment is, nevertheless, essentially for the breach of a contract by one partner to pay the other's interest in the partnership business. It is true that in the amendment there is no express prayer for recovery upon the cause of action therein disclosed, but there could not have been any other purpose than this in offering the amendment, and proof of the facts therein set forth would have shown a fatal variance between the original petition and the proof. The court erred in allowing the amendment and all that occurred thereafter was nugatory.

Judgment reversed.

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

(72 W. Va. 278.)

FERGUSON v. GLADY FORK LUMBER CO.

(Supreme Court of Appeals of West Virginia.

April 15, 1913. Rehearing Denied

June 30, 1913.)

*(Syllabus by the Court.)***1. MASTER AND SERVANT (§ 189*)—DUTY OF MASTER—SUPERINTENDENCE.**

The master is not bound to be present at all times to superintend the work and give directions to his employes, but may employ a foreman for that purpose.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 427-435, 437-448; Dec. Dig. § 189.*]

2. MASTER AND SERVANT (§ 189*)—INJURY TO SERVANT—NEGLIGENCE OF FOREMAN.

The master's liability for injury to his servant, resulting from the negligence of his foreman in charge of the work, depends upon whether the negligent act relates to a nonassignable duty of the master.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 425-435, 437-448; Dec. Dig. § 189.*]

3. MASTER AND SERVANT (§ 216*)—INJURY TO SERVANT—NEGLIGENCE OF FOREMAN—NON-ASSIGNABLE DUTY.

A case in which the master is held not liable for the negligence of its foreman, which caused plaintiff's injury, on the ground that the negligence was one of the risks which plaintiff had assumed, and did not relate to the master's nonassignable duty.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 567-573; Dec. Dig. § 216.*]

Error to Circuit Court, Randolph County.

Action by Andrew Ferguson against the Gladly Fork Lumber Company. Judgment for plaintiff, and defendant brings error. Reversed and remanded.

Talbott & Hoover, of Elkins, for plaintiff in error. J. L. Wamsley and W. E. Baker, both of Elkins, for defendant in error.

WILLIAMS, J. Writ of error to a judgment of the circuit court of Randolph county in favor of plaintiff for \$3,000, in an action of trespass on the case for damages on account of a personal injury alleged to have been caused by defendant's negligence.

Defendant was the owner of a large sawmill and lumbering plant, and in connection therewith operated its own private railroads, logging cars, and engines for the handling of its logs and lumber. There was a side track or switch connecting with its main line upon which cars were placed for repairs. Plaintiff was employed as a day laborer upon the millyard, and at the time of his injury was assisting Mr. Hamner, the blacksmith, to put a drawhead in one of the cars, having been directed to do so by S. V. Poling, the yard foreman. There were two or three other cars on the siding, between the broken car and the switch. Some time in the afternoon Mr. Poling went to the siding where the men were at work, and asked Mr. Hamner if he could complete the repairs that evening, stating he would like to put

plaintiff on another job on Monday morning. This was on a Saturday. Mr. Hamner replied that he could finish by working a little over time that evening, and told Mr. Poling to see the engineer and tell him not to back the engine in on the switch while they were at work, and he said he would do so. This conversation was in the presence and hearing of plaintiff, and he was thereby informed that the engine was liable to be run on to the switch against the cars. Poling neglected to warn the engineer, and the engine was backed upon the switch, shoving the loose cars against the one on which plaintiff and the blacksmith were working, breaking plaintiff's leg and otherwise injuring him. It is shown that Poling actually forgot that the men were at work on the car, and was acting as fireman on the engine at the time of the accident, threw the switch, and signaled to the engineer to back onto the siding. These facts are fully proven, and are not denied. Defendant offered no proof, but rested its case upon a demurrer to plaintiff's evidence. The court overruled the demurrer and rendered judgment for the damages assessed by the jury.

The case turns upon the answer to this question: Was Poling, the yard foreman, whose negligence was the proximate cause of plaintiff's injury, a vice principal, in respect to the negligent act; or merely a fellow servant? Plaintiff's counsel assume, in their brief, that because Poling was foreman and had authority to direct the movements of the men under him he was therefore a vice principal. But that does not necessarily follow. The law is, as recognized by this court, the courts of the United States, and of most of the states, that the liability of the master for injury to the servant depends upon whether the negligent act relates to a duty which the master is bound to perform, and not upon the superior position of the negligent servant. If the negligence causing the injury respects a duty which the master owes to his servant, the master is liable, whether the negligence be that of a superior, or of an inferior servant. All persons engaged in the performance of the same general work, although working in different grades or departments, are fellow servants, notwithstanding one of them may be a foreman over the others.

[1] The law does not impose upon the master a duty to be present always, to give personal supervision to the work and directions to his servants. But it enjoins upon him certain other duties. He is bound to use reasonable care to provide his servants a reasonably safe place in which and with reasonably safe machinery and appliances with which to work. He must exercise reasonable care in the selection of competent servants; and, if the work is so complicated and classified that dangers incident to the performance

of it cannot reasonably be anticipated and guarded against by the servants, he must establish reasonable rules for their protection. Having performed his duty in these respects, the law discharges the master from liability for injury to the servant resulting from the employment. The servant assumes such risks as are incident to the nature of the employment, whether on account of accident or negligence of a fellow servant. Plaintiff does not allege that defendant was negligent in the selection of its foreman, or its laborers, or that it failed to formulate rules regulating the manner of carrying on the work (even if such rules in this case were necessary), or that the place or the appliances were unsafe. The only negligence averred is the act of backing the engine against the cars on the switch. That the foreman's negligence was the proximate cause of plaintiff's injury is fully proven. But his negligence in respect to that act is not the negligence of defendant. Before we could attribute his negligence, to it, we would have to say that it was its duty to be present all the time, to superintend and direct the movements of its men; and that is not the law.

[2] Defendant's foreman is not its alter ego, or vice principal, for all purposes. He is such only in respect to the performance of those duties which the company owes its servants. If injury result from his negligence in the performance of those duties, then the master is liable; and in respect to such nonassignable duties the same rule respecting the master's liability applies, whether the negligence be that of a foreman or of his subordinate. Acts relating to his duties cannot be delegated by the master, so as to escape liability for negligence in the doing of them. And, on the other hand, if the negligence which is the approximate cause of the injury does not relate to the master's duty to his servants, he is not liable, even though the negligence be that of a superior servant. The master's liability is determined by the nature of the negligent act, and not by the grade, or position, of the servant who committed it. This proposition has been so frequently asserted and discussed in former decisions by this court that we deem it unnecessary to elaborate further upon it in this opinion. We dealt with it in the recent case of *Miller v. Limestone Co.*, 70 W. Va. 644, 75 S. E. 70, and we refer to the discussion there as being equally applicable to the facts in this case. See, also, the following authorities, most of which are cited in the opinion in that case: 2 *Labatt on Master and Servant*, 508; *Jackson v. Railroad Co.*, 43 W. Va. 380, 27 S. E. 278, 31 S. E. 258, 46 L. R. A. 337; *Kniceley v. Railroad Co.*, 64 W. Va. 278, 61 S. E. 811, 17 L. R. A. (N. S.) 370; *Unfried v. Railroad Co.*, 34 W. Va. 260, 12 S. E. 512; *New England Railroad Co. v. Conroy*, Adm'r, 175 U. S. 323, 20 Sup. Ct. 85, 44 L. Ed. 181; *Durst v. Steel Co.*, 173 Pa. 162, 33

Atl. 1102; *Mielke v. Railroad Co.*, 103 Wis. 1, 79 N. W. 22, 74 Am. St. Rep. 834; *Fraser v. Lumber Co.*, 45 Minn. 235, 47 N. W. 785; *McGinty v. Reservoir Co.*, 155 Mass. 183, 29 N. E. 510.

[3] Plaintiff was aware of his danger. He knew that if the engine was allowed to back against the cars, while he and the blacksmith were at work on one of them, he was liable to be injured; he also knew that the engine would be backed onto the switch at quitting time, if Poling did not notify the engineer of their presence, and he assumed the risk of Poling's possible failure to do so. Poling's promise to the blacksmith, in the presence of plaintiff, that he would see the engineer and direct him not to back the engine on the switch while they were working on the car, was his personal undertaking for their safety, not an undertaking for defendant, and plaintiff trusted him to perform it. The negligent act was not in respect to a duty which the law imposes on the master, and hence defendant is not liable. Poling's promise to notify the engineer, and thereby prevent what all realized was certain to happen if he was not notified, was an undertaking by one fellow servant on behalf of another, and his neglect to perform it cannot be attributed to defendant. The evidence wholly fails to prove any negligence on its part. Plaintiff's injury was severe and his misfortune is regrettable; he seems to have been guilty of no negligence himself. But, in view of the evidence, there is no principle of law which justifies the judgment in his favor, and we are therefore compelled to reverse it, set aside the verdict, and, the case having been submitted on a demurrer to the evidence, render final judgment here for defendant.

Note by MILLER, J. (ROBINSON, J., concurring). I question the correctness of this decision. Plaintiff was injured while at work on a car standing on a track at the repair shop, a part of the plant where he was employed to work. True, in this instance, plaintiff may have relied on the promise of a fellow servant to see to it that the engine was not shifted onto this track while he was at work there; but was defendant not negligent in not providing against such injuries by establishing proper rules and regulations for moving engines and cars on that track to avoid such accidents? A rule that engines and cars should not be thrown upon that track without proper signals or warnings would no doubt have avoided the injury of which plaintiff complains. I see little room for differentiating this case from *Robinson v. City & Elm Grove Railroad Co.*, 76 S. E. 851, recently decided. In that case defendant was held liable for injury to an employé for failure to so render his place of employment safe. The case is a close one I admit, but if uninfluenced by the opinion of my Associates, I stood alone, I am inclined to think I would have reached a different conclusion.

(72 W. Va. 526)

McVEY et al. v. BUTCHER et al.

(Supreme Court of Appeals of West Virginia.
May 20, 1913. Rehearing Denied
June 30, 1913.)

*(Syllabus by the Court.)***1. WILLS (§ 246*)—RECORDING FOREIGN WILL—SETTING ASIDE—LIMITATIONS.**

A county court has no jurisdiction, by section 25, chapter 77, Code 1906, after five years from the date of its order admitting to record an exemplified copy of a will from another State, as therein prescribed, to set aside such order, upon the petition and motion of an interested party begun but not concluded before the expiration of the five years. By failing to act within the five years the jurisdiction of the court lapses. The statute operates not only upon the parties proceeding, but upon the jurisdiction of the court to proceed thereafter.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 582, 583; Dec. Dig. § 246.*]

2. PROHIBITION (§ 10*)—WHEN LIES—SETTING ASIDE RECORD OF WILL.

Prohibition lies in such cases to prevent further action by a county court proceeding under the statute after the period of limitation has run.

[Ed. Note.—For other cases, see Prohibition, Cent. Dig. §§ 37-56; Dec. Dig. § 10.*]

Petition of Tena McVey and George Woof-ter for writ of prohibition against Ephraim Butcher and others. Writ awarded.

Henry Brannon and W. W. Brannon, both of Weston, for petitioners. H. N. Ogden and W. S. Meredith, both of Fairmont, for respondents.

MILLER, J. Petitioners seek to prohibit the County Court of Taylor County, and the commissioners thereof, and others, from further action in a proceeding begun December 16, 1912, and pending therein, on the petition and motion of defendants Butcher and others, to have set aside the order of said court, made December 20, 1907, admitting to probate an authenticated copy from the probate court of Monroe County, Ohio, where the testatrix resided, of the last will and testament of Louisa Ann Armstrong, known also as Louisa Butcher and Lou Smith, deceased.

The record shows that on the filing of said petition with notice attached, said county court, December 16, 1912, entered an order providing for publication to non-resident defendants, and fixing April 7, 1913, as the return day and the day for hearing on said petition and motion. Whereupon, on February 18, 1913, an application was made to this court for a writ of prohibition, and upon which the present rule to show cause against it was awarded.

The statute governing the subject, section 25, chapter 77, Code 1906, provides: "Where a will relative to estate within this State has been proved without the same, an authenticated copy and the certificate of probate thereof, may be offered for probate in this State. When such copy is so offered,

the court to which, or the clerk to whom, it is offered, shall presume, in the absence of evidence to the contrary, that the will was duly executed and admitted to probate as a will of personalty in the State or country of the testator's domicile, and shall admit such copy to probate as a will of personalty in this State; and if it appear from such copy that the will was proved in the foreign court of probate to have been so executed as to be a valid will of land in this State by the law thereof, such copy may be admitted to probate as a will of real estate. But any person interested, may, within five years from the time such authenticated copy is admitted to record, upon reasonable notice to the parties interested, have the order admitting the same set aside, upon due and satisfactory proof that such authenticated copy was not a true copy of such will, or that the probate of such will has been set aside by the court by which it was admitted to probate, or that such probate was improperly made."

We decided in *Woofter v. Matz*, 76 S. E. 131, that the relief provided by this statute was exclusive; that equity had no jurisdiction, general or statutory, to set aside the probate of a foreign will admitted to probate here on an authenticated copy as provided by that section.

Jurisdiction of the county court to further proceed is challenged upon two grounds: First, that more than five years had elapsed after the date of the order of ancillary probate, and before the date appointed for hearing. Second, that if the first ground be not good, the writ should go to prohibit the court from considering grounds of revocation not specified in the statute.

Of course if the first ground be sustained, the second need not be specially considered, for if the court is now without jurisdiction to consider grounds specified, it is patent it has no power or authority to consider grounds not specified in the statute.

As already noted the order sought to have set aside was entered December 20, 1907. The present proceeding was begun December 16, 1912, within five years from the date admitting the will to record, but the court fixed April 7, 1913, a date beyond the five years, for the hearing, so that, according to the contention of the petitioners, the court thereby lost jurisdiction. The statute plainly says the party interested may within the five years prescribed have the order of probate set aside. It does not in terms say he may do so by proceeding within that time. Respondents contend, however, that the statute is not a limitation upon the jurisdiction of the court, but upon the right of the interested party to proceed, and that if jurisdiction is acquired to proceed within the five years, the court has the right at any time thereafter to pronounce judgment. Which of these views of the statute is the correct one?

[1] A correct answer to the question depends largely on the nature of the remedy prescribed. It is conceded that the remedy is purely statutory, and that without the statute it would not exist. It is a creature of the statute, and not the affirmance of a remedy existing independently of the statute. At common law no such right existed, and no rule of practice gives it. Besides public policy and justice call for the prompt administration of estates. Other provisions of the same chapter, our chapter on wills, relating to the probate and contest of domestic wills clearly evince this purpose. And that the language of section 25 was not carelessly or inadvisedly chosen, we think quite manifest from the language of section 29, relating to order or sentence of the court respecting domestic wills. That section gives right to an aggrieved party, within one year thereafter to "file his petition in the circuit court of such county, * * * appealing to that court," in which latter court the proceeding shall be *de novo*, as if no proceeding had taken place in the county court. So much respecting the purpose and language of the statute. Besides these reasons involving the language of the statute, it is a familiar rule of construction that a purely statutory remedy of this character must be confined to the very case provided for, and extended to no other, and that it cannot be made available except by strict adherence to the letter of the statutory provisions, that nothing is to be taken as intended except what the very letter of the statute authorizes. 2 Lewis' Sutherland, Stat. Const. §§ 564-566; Black on Int. of Laws, p. 305.

But what of the theory that the statute is a limitation on parties aggrieved, and not on the jurisdiction of the court? Undoubtedly the statute operates as a limitation on the parties; but if the thing permitted, the remedy given, may not be availed of except by the action of the court within the period prescribed, is not the jurisdiction of the court also limited and prescribed thereby? We think necessarily so. Unlike section 6, chapter 104, Code 1906, relating to limitations of actions generally, the statute here involved not only operates to limit the action, but to bound the jurisdiction of the court to pronounce judgment. It has been held by high authority, with respect to probate proceedings that the statute operates not merely upon the suit but likewise upon the power of the courts. 23 Am. & Eng. Ency. Law, 139, citing *Luther v. Luther*, 122 Ill. 558, 18 N. E. 166, *Sinnet v. Bowman*, 151 Ill. 146, 37 N. E. 885. The sixth syllabus in the latter case reads: "The seventh section of the statute of wills, allowing the contest of wills by bill in equity at any time within three years after their probate, is not a statute of limitation, but is a mere grant of jurisdiction, to be exercised only in case it is invoked within

the time prescribed, and that jurisdiction extends to an investigation of every ground upon which the validity of the will may be assailed." Page on Wills, at page 372, says: "The statute of limitations in contests differs from the ordinary statute, in that it is jurisdictional in its nature, and can not be waived by consent of the parties, since after the limit fixed by statute, the court has no jurisdiction of the subject-matter of the contest." Citing *Meyer v. Henderson*, 88 Md. 585, 41 Atl. 1073, 42 Atl. 241. See, also, *Nichol's Estate*, 174 Pa. 405, 84 Atl. 566, cited by the same author in the preceding paragraph. The latter case is particularly applicable to the case at bar. The syllabus says: "A decree of probate of a will is conclusive as to personalty after three years, and as to real estate after five years; and the mere fact that there is an undisposed of caveat pending before the register of wills during the time does not affect the rule." The Maryland case is to the same effect.

Assuming that the court had jurisdiction for a time between the date of the order filing the petition, and the date of the expiration of the period of limitations, did not that jurisdiction lapse by its failure to act within that period and immediately upon the expiration of the time limit? We think the statute can receive no other construction. Analogous statutes are found in our code, and have received that construction. As for example, section 114, chapter 50, Code 1906, prescribing the time within which a justice may enter judgment, and set aside judgments already entered. *McClain v. Davis*, 37 W. Va. 330, 16 S. E. 629, 18 L. R. A. 634; *Brand v. Swindler*, 68 W. Va. 571, 70 S. E. 362; *Packet Co. v. Bellville*, 55 W. Va. 560, 47 S. E. 301. These decisions support the proposition that a court acquiring jurisdiction by a proceeding begun within the period of limitation may lose that jurisdiction by failing to act within the time when prescribed by the statute. *Nichol's Estate*, and *Meyer v. Henderson*, *supra*, also support the proposition.

[2] Upon these principles so firmly established we are of opinion that the county court is without authority to further proceed in the case before it, and that the writ of prohibition should go as prayed for. Writ awarded.

(72 W. Va. 252)

PERRY v. OHIO VALLEY ELECTRIC RY. CO.

(Supreme Court of Appeals of West Virginia.
April 15, 1913. Rehearing Denied
June 30, 1913.)

(Syllabus by the Court.)

1. MASTER AND SERVANT (§§ 228, 213*)—ASSUMPTION OF RISK—ELECTRICITY.

A servant employed to reset electric poles, requiring his climbing amongst live wires for the purpose of attaching a pulley to the old

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

poles, used in hoisting the new ones, assumes the risk of all ordinary dangers incident to so hazardous an employment, but not the risk of unknown and abnormal dangers due to the master's negligence.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. §§ 659-667; Dec. Dig. §§ 226, 213.*]

2. MASTER AND SERVANT (§ 119*)—INJURY TO SERVANT—ACTIONABLE NEGLIGENCE—ELECTRICITY.

It is negligence for which the master is liable to a servant so employed, who is injured or killed on account thereof, to permit a joint or connection to be made in a highly charged electric wire and remain uninsulated, and so close to one of the metal braces supporting a crossarm on the pole as to charge it.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. § 210; Dec. Dig. § 119.*]

3. MASTER AND SERVANT (§§ 119, 217*)—SAFE PLACE TO WORK—INSPECTION BY SERVANT—ELECTRICITY.

The master, acquiescing in the use which his servant makes of the old poles in performing his work, is bound to see that the wires thereon are not in an abnormally dangerous condition. The rule in regard to reasonably safe appliances with which to work applies, and the servant is not required to make inspection.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. §§ 210, 574-600; Dec. Dig. §§ 119, 217.*]

4. MASTER AND SERVANT (§ 289*)—INJURY TO SERVANT — CONTRIBUTORY NEGLIGENCE — QUESTION FOR JURY.

In view of the evidence in this case, the question of contributory negligence is held to be a fact for the jury to determine.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. §§ 1089, 1090, 1092-1132; Dec. Dig. § 289.*]

Error to Circuit Court, Cabell County.

Action by John W. Perry, administrator, etc., against the Ohio Valley Electric Railway Company. From judgment for plaintiff, defendant brings error. Affirmed.

Vinson & Thompson, of Huntington, for plaintiff in error. L. D. Isbell, J. W. Perry, and Holt & Duncan, all of Huntington, for defendant in error.

WILLIAMS, J. Trespass on the case by the administrator of Clifford R. Dugger, deceased, to recover damages for his unlawful death, alleged to have been caused by defendant's negligence. Verdict and judgment for plaintiff for \$7,500, and defendant was awarded a writ of error.

[2] Deceased was in the service of defendant as foreman of a gang of men engaged in erecting electric poles. Two methods are commonly employed in raising them. One is to lift them by means of spike poles, and the other is, if they are being erected to take the place of old ones, to hoist them with block and tackle attached to the old pole. On the 12th of September, 1910, deceased was preparing to hoist a pole at the corner of Third avenue and Seventh street in the city

of Huntington. He ascended the old pole, which was equipped with a primary wire carrying 2,300 voltage, a transformer, and telephone wires, and had fastened the block and pulleys to the pole, just above the lower or third crossbeam, and had begun to descend, when J. W. Sturgeon, defendant's general line foreman, who was standing near the foot of the pole, called to him that the "fall" line was not properly adjusted; that it should hang next to the pole, instead of on the outside of the block, as it was. Deceased then returned, adjusted the rope, and in descending the pole caught hold of one of the metal braces supporting the crossarm. The brace being highly charged with electricity, and his body coming in contact with one of the telephone wires, a short circuit was formed, and he was killed. There was an uninsulated joint, three inches long, in the primary wire, which, by contact with the brace, caused it to become charged with a deadly current of electricity.

Workmen in climbing the pole were liable to come in contact with the exposed joint, and it was liable to come in contact with the brace. It was negligence to leave it in such a condition. *Mitchell v. Coal Co.*, 67 W. Va. 480, 68 S. E. 366; *Thomas v. Electrical Co.*, 54 W. Va. 395, 46 S. E. 217; and *Thornburg v. Railroad Co.*, 65 W. Va. 379, 64 S. E. 358. It is a common practice among pole climbers to take hold of the metal braces, and, if the wiring is normal, there is no danger in doing so.

[1] But nonliability is claimed on two grounds: (1) Assumption of risk, and (2) contributory negligence. The availability of the first defense depends upon the scope of deceased's employment. If he was employed to do any and all kinds of work in repairing an old line which he knew was abnormally dangerous, then he assumed the risk of all the dangers incident to that kind of work. If he knew the wires, as well as the poles, were out of repair, and was employed to put both in proper condition, while the current was on the wires, the cause of his death was one of the assumed risks, and plaintiff cannot recover. If such was his knowledge and such the scope of his undertaking, he must have expected to encounter such dangers as the one that caused his death.

But if he was simply employed to set poles, and did not know that the wires were in an abnormally unsafe condition, he had a right to assume that they were no more dangerous than similar wires, in like use, ordinarily are. If such be the case, the exposed wire was an extraordinary hazard which he did not assume, because it is not reasonable to suppose he could have anticipated a condition so abnormal and unusual. The law does not burden the workman with the assumption of extraordinary risks. He assumes only such as an ordinarily prudent man knows

are incident to the employment. However dangerous the employment, the workman is never held to assume risks not ordinarily incident thereto, and of which he has no knowledge. 1 Labatt, § 270.

The scope of deceased's employment was a fact for jury determination, and we think they could very properly infer from the testimony of defendant's own witnesses that it was limited to setting poles. He had worked as a member of the same gang of which he was made foreman, under another foreman by the name of Shafer, from some time in June to some time in August, 1910, when Shafer quit. He then applied to W. W. Magoon, defendant's general manager, for the position of foreman, and was employed as such. Mr. Magoon testifies that he then said to him: "You must remember that this work down here takes a very careful man, a man who knows how to handle live wires, because that work has got to be done with live wires, in order to keep our service going in town." He said, 'I can handle that all right,' and I then gave him instructions. I said, 'All right, go ahead,' and he took charge of the work." On cross-examination he said: "Q. He was removing old poles and putting in new ones at the time? A. He was working in the line of his work; yes, sir. * * * Q. His duty was simply to put in new poles, was it? A. No, sir; his duties were to make all corrections on that line, changing the wires and general line of work." But he had been working in this gang, either as a common laborer or as foreman, from June to September 12th, and there is no proof that he ever transferred a single wire from an old pole to a new one.

J. W. Sturgeon, who was the "line foreman," testified, on his examination in chief, as follows, viz.: "Q. Do you know who had charge of the work that was being done there at that place, Mr. Sturgeon? A. What do you mean, what time? Q. At the time this accident occurred? A. Mr. Dugger had charge of setting the poles. Q. Was there anything else being done? A. Nothing, only setting poles, at that time." On cross-examination he testified as follows: "Q. You were foreman there, were you, Mr. Sturgeon? A. I was foreman over the whole line; yes, sir. Q. And Dugger was under you, was he? A. Yes, sir."

[3] The rule in regard to a safe place and safe appliances applies in this case, because the old pole was a means or appliance which deceased used in the performance of his work, with the master's acquiescence. It was therefore defendant's duty to see that the wires on the pole were in a reasonably safe condition. Deceased was bound, of course, to take notice of whether the strength of the pole was sufficient for the purpose for which he was about to use it, because the new one was being erected to take its place,

and that was sufficient to put him on guard as to any defect in the pole; but he was not chargeable with the duty to use extraordinary care to avoid unknown danger from imperfect wiring. There being no proof that the line was being repaired because the wires were bad or imperfectly strung, deceased was not bound to use extraordinary caution. He was not required to inspect the wiring to see if there were hidden dangers or latent defects. This case is distinguishable from *Whorley v. Lumber Co.*, 70 W. Va. 122, 73 S. E. 263, cited by counsel for defendant. In that case Whorley was assisting in installing machinery in a sawmill, and was injured by the bursting of a steam pipe while he was tightening a leaky joint in it. In the present case deceased was killed while making use of an electric pole, an already completed appliance, as a proper means of accomplishing the work he was set to do. He was neither installing nor repairing the appliance that killed him. The case is more analogous to *Madden v. Minneapolis, etc., Ry. Co.*, 32 Minn. 303, 20 N. W. 817, in which Madden, a brakeman on a gravel train, was injured because of a defect in the old track over which gravel and ties were being hauled for the purpose of repairing it. The company was held liable. Says the court: "The fact that the work in which plaintiff was employed was that of repairing or making preparations to repair the track did not diminish its duty to furnish safe and suitable means and instruments to do his work. As it required him in that work to use the old track, it should have had it reasonably safe for the purpose." That the appliance—the old pole in this case—was not erected and equipped with reference to its use as a means for erecting new poles, can make no difference in the application of the principle that it is the master's duty to furnish reasonably safe appliances, because defendant knew that the poles were constantly so used, and acquiesced therein. The proof is that block and tackle, attached to the old pole, was a usual and customary means employed in raising poles. "The master's acquiescence in the use of an appliance for some purpose other than that for which it was intended puts him in the same position as if the appliance had been originally furnished for that purpose." 1 Labatt, § 28. The same rule was applied in the following cases, which are very similar to the Madden Case: *Dunn v. New York, etc., R. R. Co.*, 107 Fed. 666, 46 C. C. A. 546; *Lauter v. Duckworth*, 19 Ind. App. 535, 48 N. E. 864. The rule applied in cases of injury to a servant by falling platforms, erected by the master for the use of his servant, is the proper rule to be applied here. In such cases it is uniformly held: (1) That the servant is not bound to make inspection; (2) that the workmen who prepare the place or appliance are not fellow servants to those

who are employed to work in the place or with the appliance; and (3) that the master is liable if the defect causing the injury was unknown to the servant. *McLean v. Standard Oil Co. of Indiana*, 21 N. Y. Supp. 874; ¹ *Benzling v. Steinway & Sons*, 101 N. Y. 547, 5 N. E. 449; *Goldie v. Werner*, 50 Ill. App. 297, affirmed in 151 Ill. 551, 38 N. E. 95; *Hines Lumber Co. v. Ligas*, 172 Ill. 315, 50 N. E. 225, 64 Am. St. Rep. 38; *Giles v. Diamond State Iron Co. (Del.)* 8 Atl. 368; and *Cole v. Warren Mfg. Co.*, 63 N. J. Law, 626, 44 Atl. 647.

[4] Whether deceased was guilty of negligence, contributing to his death, was likewise a question of fact for the jury. It is contended that his failure to see that the untaped joint in the primary wire rested against the metal brace was proof of his negligence. It is proven that he was an experienced lineman, and that he climbed the pole in the usual manner. He ascended it on the side opposite the transformer, and the metal brace came between him and the exposed joint in the wire. There is evidence tending to prove that a person in his position could not see whether the wire came in contact with the brace or not; and, it being an unusual condition, he may not have been on the lookout for it. He may have noticed that the insulation on other parts of the primary wire, which he could see, was sound and in good condition, and he may have supposed that the parts he could not see were equally good. He had a right to assume that defendant had performed its duty, and that the wires were normal, both as to place and condition, because the evidence is that it is the custom to tape such joints when made. The primary wire carried 2,300 voltage, and the untaped joint, so close as to touch the brace, made the position of deceased extraordinarily dangerous. He was not bound to anticipate such danger. A number of persons were present, around the pole, when deceased was killed, among them defendant's line foreman, and none of them knew that the primary wire was against the brace. It was not discovered until afterwards. That no other witness saw it is evidence tending to disprove that deceased was negligent. And that witness Rodgers climbed the pole a few minutes before, and found it charged and hot, is not conclusive that deceased was negligent. Why did not Rodgers discover the cause of its being charged? Such evidence is a sword cutting both ways, and the jury considered it.

There were two theories of the case, depending upon the scope of deceased's employment as affecting the risk which he had assumed, and both were fairly presented by the court's instructions to the jury.

We find no error and affirm the judgment.

¹ Reported in full in the New York Supplement; reported as a memorandum decision without opinion in 66 Hun, 635.

(72 W. Va. 483)

REED v. BACHMAN et al.

(Supreme Court of Appeals of West Virginia.
May 13, 1913.)

(Syllabus by the Court.)

1. MORTGAGES (§ 369*)—TRUSTEE SALE—ACTION TO SET ASIDE—SUFFICIENCY OF EVIDENCE.

Reed, Bachman, Reno, Swope, and Reeves, being joint purchasers and grantees—except Swope, who, though not named as grantee, had an equitable, but not legal, title to one-fifth interest therein—conveyed the lands in trust to Hall to secure part of the purchase money therefor. Reed and Bachman, having by grant from Reeves acquired his interest in the lands, also conveyed the same in trust to Hall to secure the purchase money therefor. Bachman thereafter by grant from Swope acquired his equitable interest. Reno died, owning his fifth interest. Under the authority of both trust deeds and "as required by law," Hall sold the three-fifths interest of Reed and Bachman to Doubt, who had no interest therein, except as beneficiary under the first trust. Hall sold to Cain and Doubt the fifth conveyed to Reed and Bachman by Reeves, and conveyed to the purchasers the interests so sold by him under the trusts. Cain and Doubt thereafter conveyed to Bachman the interests so conveyed to them. Reed knew of the sales and deeds thereunder to Bachman 19 years prior to suit assailing the same as fraudulent.

Held, that the fraud charged is not sustained by proof.

[Ed. Note.—For other cases, see *Mortgages*, Cent. Dig. §§ 1093-1100; Dec. Dig. § 369.*]

2. MORTGAGES (§ 369*)—TRUSTEE SALE—ACTION TO SET ASIDE—SUFFICIENCY OF EVIDENCE.

In absence of fraud, Bachman acquired good title.

[Ed. Note.—For other cases, see *Mortgages*, Cent. Dig. §§ 1093-1100; Dec. Dig. § 369.*]

(Additional Syllabus by Editorial Staff.)

3. MORTGAGES (§ 369*)—TRUSTEE SALE—ACTION TO SET ASIDE—BURDEN OF PROOF.

A party who seeks to have sales made by a trustee set aside for irregularity, want of notice, or fraud has the burden of proving his contention; it being presumed, in the absence of evidence to the contrary, that the sales were regular.

[Ed. Note.—For other cases, see *Mortgages*, Cent. Dig. §§ 1093-1100; Dec. Dig. § 369.*]

4. EQUITY (§ 71*)—LACHES.

Unless a person seeking to annul another's title in land for fraud in its inception acts with diligence, equity will deny relief.

[Ed. Note.—For other cases, see *Equity*, Cent. Dig. §§ 204-211; Dec. Dig. § 71.*]

Appeal from Circuit Court, Pleasants County.

Action by Joseph S. Reed against M. Bachman and others. From a decree for defendants, plaintiff appeals. Affirmed.

H. P. Camden, of Parkersburg, G. D. Smith, of St. Marys, and E. A. Brannon, of Weston, for appellant. Van Winkle & Ambler and L. N. Tavener, all of Parkersburg, for appellees.

LYNCH, J. Denied relief on final hearing upon bill seeking partition of lands in Pleasants county, answers denying right thereto.

exhibits and proof, plaintiff seeks review and reversal here. The defendants are the widow and heirs at law of Martin Bachman, who died in 1884, claimants of portions of the lands under grants by him while living, grantees of other portions under judicial proceedings subsequent to his death, lessees for oil and gas purposes, and others. The lands, in which plaintiff claims a seven-tenths interest, were conveyed August 9, 1870, by Patterson, Braford, and Douth to Reno, Reeves, Reed, and Bachman. The acreage, though not material, is not readily ascertainable from the record before us; but it is variously stated from 1,000 to 1,500 acres, the deed stating the latter quantity.

Though not named in the deed as grantee, the bill alleges, and the defendants, who by their answers, refer thereto, admit, the proof shows, and various subsequent deeds state that David Swope was a joint purchaser of the lands, each taking an undivided one-fifth interest therein. He, therefore, has or had at least an equitable interest, enforceable against his copurchasers. The failure to name him in the deed evidently resulted from inadvertence or error on the part of the draftsman. On July 2, 1874, Reeves conveyed his interest to Reed and Bachman.

[1, 2] The interests asserted by plaintiff include the Reno and Swope two-fifths, and one-half of the Reeves fifth, together with his own, constituting seven-tenths of the whole tract. His claim to the Reno and Swope interests rests upon the averments of the bill, denied by answers, that at the time of the purchase from Patterson and others he paid therefor, upon an agreement with Reno and Swope that unless reimbursed he should have their interests, and that they failed to reimburse him. No one representing either Reno or Swope is a party to this suit except Reno's widow, who, the bill alleges, is his sole heir at law; but of this there is no proof. She is a nonresident of the state, without notice to answer, except by order of publication, and does not appear herein for any purpose. The evidence, of which more will be said later, in support of Reed's claim to these interests, is of a general and inconclusive character—that Reed, through Reeves, paid \$3,500 of the \$5,500 consideration for the lands in 1870, and reimbursed Reeves therefor. In any event, Reed cannot now, except upon full and satisfactory proof, not produced, maintain his claim to the Swope interest, because, in 1876, Swope conveyed to Bachman all his right, title, and interest in the lands mentioned. Therefore it may be said that, thus far, Reed's interest is his original one-fifth and half of the Reeves fifth, and that Bachman's interest is his original one-fifth, half of the Reeves fifth, and the Swope equitable interest.

But the title is still further involved. On the same day that Patterson and others con-

veyed the lands to Reed and others, they in turn, Swope joining, conveyed the same lands to W. W. Hall, trustee, to secure the payment of the residue of the unpaid purchase money, namely, \$2,000, divided into notes payable in different amounts to each of the grantors in the deed. Likewise, Reed and Bachman, on the day Reeves conveyed his interest to them, conveyed the same interest to Hall to secure the purchase money therefor to Reeves. Acting under these two trusts, Hall sold to Cain and Douth the Reeves fifth for \$550, and to Douth an undivided three-fifths interest in the original tract for \$730. The date of these sales, although evidently on or prior to March 23 and April 30, 1877, is not more definitely shown. On the first date, and subsequent to the sale, Hall conveyed to Cain and Douth the Reeves interest, and to Douth on the second date the three-fifths interest in the lands, "with all the right, title, and interest of Reed, Reno, Swope, Reeves, and Bachman therein, to have and to hold the said real estate unto the said A. R. Douth, his heirs and assigns, forever." Each of these deeds recites that Hall sold under the authority of each trust and "as required by law." By way of explanation for failure to sell the tract in its entirety under the trust of August 9, 1870, and for selling thereunder the three-fifths only, the Hall deed to Douth for the three-fifths recites that prior thereto Douth had released to Bachman the other two-fifths, because theretofore Patterson and Braford had been fully paid their share of the purchase money. The record shows such release by Douth to Bachman, executed in due form and recorded. Cain and Douth, on April 13, 1877, conveyed to Bachman, for \$1,000, the interest conveyed to them by Hall's deed of March 23d; and for a like sum Douth, on April 30, 1877, conveyed to Bachman the three-fifths interest conveyed on the same day to him by Hall. Each of these deeds acknowledges payment of the consideration therein recited. Thus it will be observed that Bachman paid for these interests a sum in excess of that paid by his grantors to Hall, trustee.

[3] Reed challenges the validity of the Hall sales under the trusts for irregularity or want of notice, and the purchases by Bachman from Cain and Douth as fraudulent. The defect in the notice relied on is not indicated, except by argument to the effect that, as Douth released the two-fifths interest only 12 days before Hall's deed to Douth for the three-fifths, the notice was not, and for lack of time could not have been, published and posted as required by law. But Hall's deeds, in effect, say notice was so published and posted. For aught appearing to the contrary, Hall may have advertised the tract in its entirety, and not an interest only. The other defect is that notice was not personally served on Reed. The statute did not then require such notice or personal service on the grantor in a trust

deed, nor does it now, except where he "or his agent or personal representative be within the county, at least twenty days prior to the sale." Code 1906, c. 72, § 7, first so amended in this state by chapter 140, Acts 1882. There is no averment or proof of this essential condition demanding service, even if then required. Reed does not specify any other defect. Even if specified, he assumed the burden of proving it. *Lallance v. Fisher*, 29 W. Va. 512, 2 S. E. 775. If none are specified and proven, "it will be presumed that the land was properly advertised," and that "the trustee conformed to the law." *Burke v. Adair*, 23 W. Va. 139; *Fowler v. Lewis*, 36 W. Va. 112, 132, 14 S. E. 447.

The charges in the bill indicative of fraud are, first, that Reed had paid his share of the original purchase money, and of the purchase money for the Reeves interest, and that, therefore, he was not in default, and that it was Bachman's fault, if any, which made the sales by Hall necessary. The other ground of fraud is the charge of conspiracy between Cain and Doult and Bachman, whereby, as alleged, the first two were to buy the lands and subsequently convey them to Bachman. This latter averment is denied by answers, and is not supported by any proof whatever. Reed seeks to sustain the first charge by Reeves as a witness. But his testimony on this subject is uncertain, inconclusive, and unreliable. It is scarcely conceivable that any man 61 years of age could remember so distinctly, and aver with such minute detail, what he states in his testimony concerning transactions occurring nearly a third of a century before his examination. In fact, he admits that his recollection of these events was stimulated by reading the record of a former appeal, brought to him, as he also admits, by the plaintiff and his daughter for examination before testifying, for which he repeatedly calls while on the witness stand, and without which it may be doubtful whether he would be able to recollect what he so volubly and confidently asserts. He speaks flippantly of himself as the "moneyed man" in the transaction, and later, as if by apology, he says, "Reed and I were the moneyed men," when the evidence shows that both of them borrowed whatever was paid by them, if any was paid, from Reeves' mother, who, as Reeves now says, took a deed of trust from Jacob Reed, a brother of Joseph Reed, as security therefor, and that he (Reeves) took the same with him to Pleasants county and caused it to be admitted to record. This deed was not produced. Had it been produced, or its absence explained, it would at least have tended in some degree to corroborate Reeves and lend some credit to his testimony. It may therefore, with propriety, be presumed that no such trust then existed, or ever did exist.

Again Reeves confidently contradicts the statements of the plaintiff's bill and the re-

citals in the deed of trust by Reed and Bachman to Hall, trustee, in each of which it is explicitly stated that Reed and Bachman united in the making and execution of the two notes thereby secured. He says each executed separate notes, not joint notes. Both notes are dated July 2, 1874—one for \$877, due at one year, the other for \$942, at two years. The second note Reeves says he assigned to Cain after its maturity. It became due in 1876. He returned to Pittsburgh in 1871, never thereafter seeing the lands, as he admits. Yet he says Cain, with whom he was evidently intimate, asked him in 1876 how he was "making out up there," clearly meaning on the lands, five years after he had permanently abandoned them, in fact two years after he had in Pittsburgh sold his interest to Reed and Bachman.

Admitting the averments of the bill as sufficiently charging fraud, of which some doubt may be properly expressed, there is no proof thereof, except the discredited statements of the witness Reeves—and he speaks only of payments by Reed—unless fraud is presumed from the acts of Cain, Hall, Doult, and Bachman, all of whom, except Cain, and he is incapacitated by age, died long before the institution of this suit. This condition, therefore, leads us directly to the inquiry whether the sales and deeds thereunder by Hall to Cain and Doult and by them to Bachman were in fact fraudulent as to Reed, and, if not fraudulent, whether Bachman's purchases operated as deferred payment, for the joint benefit of Bachman and Reed, of the debts secured by the Hall trusts. In other words, did Bachman's purchases from Cain and Doult inure to the common benefit of Reed and Bachman? Reed relies for relief on both grounds.

First, it is noted that, in the bill, plaintiff alleges that Bachman informed him in Pittsburgh in 1884 of these sales and purchases. As to Reed, of course, this allegation must be taken as true, whether denied or not by answers. But it is not denied. He then knew, 19 years before the institution of this suit, that Hall had sold, that Doult and Cain had purchased and conveyed to Bachman, and that Bachman was then, in effect, holding or claiming to hold the lands thereunder. It is true he also says in the bill that Bachman told him, at the same time, that he had purchased for their joint benefit. But this averment is denied by answers, and not supported by proof. In fact, there is no proof that Reed saw Bachman in Pittsburgh in 1884, or at any time or place after 1870. His statement, in that respect, rests wholly upon the allegations of his bill, which, as stated, must be taken as true, except in so far as denied by answers.

Thus it is apparent that the question presented for decision is not the purchase by one cotenant of an outstanding title or incumbrance prior in time or right to that of the cotenants, nor of a purchase by one co-

tenant of the interest of another cotenant in the common property. But, admitting the existence of a cotenancy between Reed and Bachman, the question is whether a trust relation arises from the purchases by Bachman from Cain and Doult, who bought the interest of both Reed and Bachman at a sale under a deed of trust thereon authorized by both; neither deceit nor fraud appearing. That Cain and Doult could so purchase and obtain and hold title thereunder against Reed and Bachman is unquestionable. Under these circumstances, they were as free to purchase thereat as any other person or persons. Cain had no prior interest in the lands, and, so far as appears, never had. Doult was, of course, one of the former owners, a grantor in the deed of 1870, and beneficiary under the deed of trust securing the unpaid balance of the purchase money therefor, and hence interested in the sale to that extent only. But that interest did not disqualify him as a purchaser; nor was it sufficient to impugn his motives as a bidder at a public sale of the property subject to the lien of the trust. They could, therefore, as they in fact did, covin, deceit, or fraud not otherwise appearing, purchase and obtain deeds therefor from the trustee, acting under ample authority and "as required by law." Having so purchased and obtained deeds therefor, they became the fee-simple owners of the Reed and Bachman interests, and legally authorized to hold or dispose of the same at their pleasure. They could, with propriety, sell and convey to Bachman; and he, with equal propriety, could purchase and acquire title from them. No valid reason is or can be assigned why he could not, provided, of course, no fraud or deceit entered into his acquisition of the title thereto.

Reed admits he was on the verge of insolvency as early as 1873, the year of the panic; that he made a general assignment for the benefit of his creditors in 1876, not therein mentioning his interest in these lands, except under the terms, "all my estate, real, personal, and mixed, wherever situate"; that in 1877, the year of the Hall sales and deeds he filed several petitions in bankruptcy in Pennsylvania, in 1878 and 1879 he obtained a discharge from all his liabilities, paying only 8 per cent. thereof, and in none of which was any effort made to charge or otherwise dispose of the interest now claimed by him in the Pleasants county lands. Notwithstanding Reed's financial condition, and knowledge, acquired by him from Bachman, as he says, as early as 1884, of the Hall sales and deeds, he delayed the assertion of any right or claim of benefit from the sales or deeds until after the expiration of 19 years from the date of his knowledge thereof. During these years in fact from 1870 to 1903, he at no time, so far as disclosed, asserted or endeavored to assert any interest or claim to an interest in the lands or the rents, issues, or profits thereof. Why

he thus delayed, under these circumstances, he does not pretend to say, except for vague and doubtful reasons averred by the bill, which are unsustained by any competent or trustworthy proof. In fact not a word falls from the lips of any witness by way of explanation for this unusual and extraordinary delay.

[4] The rule seems universal that one seeking to hold another as trustee for his benefit must act with diligence. Otherwise, equity will deny relief. So, where fraud is charged. This rule, and the validity of the Bachman title, find support in *Morris v. Roseberry*, 46 W. Va. 24, 32 S. E. 1019. There the plaintiff and defendant were cotenants with others as owners of the lands by descent. The cotenant in possession failing to pay the taxes, the lands were sold therefor, and purchased by one not formerly interested in the title, who thereafter, upon receipt of the amount and interest necessary under the statute, joined with the clerk of the county court in a tax sale deed to the cotenant so in default. The sale and title thereunder so acquired were sustained as valid, although less than 10 years elapsed between the date of purchase and suit. Laches is held applicable as a good defense to defeat recovery in many instances within a less period than the statutory bar. In *Patrick v. Stark*, 62 W. Va. 602, 59 S. E. 606, it is stated that "the equity rule of laches is applicable to proceedings to enforce all trusts affecting title to land, for the establishment of which resort must be had to parol evidence, without regard to classification as express, implied, resultant, or constructive trusts." Here, Reed relies on a trust or fiduciary relation forbidding purchase by Bachman. But *Bargamin v. Clarke*, 20 Grat. 544, holds that when this relation is no longer admitted to exist, or time and long acquiescence have obscured the nature or character of the trust, or other circumstances give rise to presumptions unfavorable to its continuance, in all such cases a court of equity will refuse relief, upon the ground of lapse of time and its inability to do exact justice. In this case there are such circumstances. This is the rule of general application, where the cotenant buys an outstanding superior title. To participate in its benefits, the cotenant must, within a reasonable time after knowledge thereof, elect not only to claim the benefit thereof, but must also offer to contribute to the expenses incident to the purchase; and "if he unreasonably delays until there is a change in the condition of the property, or in the circumstances of the parties, he will be held to have abandoned all benefit arising from the new acquisition." But Reed not only unreasonably delays after knowledge, but makes no offer to contribute to the expense of Bachman's purchases or taxes since paid by him. In the meantime the condition of the property and the circumstances of the parties have materially changed—the prop-

erty by improvements, the parties by death and infirmity. The active participants, those who knew all the facts, are dead. None now live who may defend Bachman's title by a denial of the averments of the plaintiff's bill, in support of which he, although examined as a witness, knew nothing, and said nothing on which counsel rely to maintain his right to the relief now sought.

It is urged that the decision on the former appeal settles the principles of the case adversely to the Bachman claims. That appeal settled nothing except upon the facts alleged in the bill, the truth of which the demurrants admitted. But here the facts then so admitted are denied, and are unsupported by any proof, or by testimony deemed sufficient as proof thereof. As an illustration, the former opinion dwelt at length and repeatedly on the Bachman admissions to Reed in the alleged conversation in Pittsburgh in 1884, when now there is not a word of proof in the record of any such conversation or admission, although the denial of the answers challenged Reed to produce proof in its support.

For reasons stated, and in view of the principles herein announced and sustained by the authorities cited, the conclusion is reached that there is no error in the decree of which the plaintiff complains. Therefore an order may be entered here affirming the same.

(72 W. Va. 500)

STATE v. MERRILL.

(Supreme Court of Appeals of West Virginia.
May 13, 1913.)

(Syllabus by the Court.)

1. HOMICIDE (§ 228*)—EVIDENCE—CORPUS DELICTI.

Upon an indictment for murder (in this case infanticide), before a conviction can be had, or the accused can be required to answer, the *corpus delicti* must be satisfactorily proved either by direct evidence or by cogent and irresistible grounds of presumption, and that such death was not due to natural or other causes in which the accused did not participate.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. §§ 471-476; Dec. Dig. § 228.*]

2. HOMICIDE (§ 250*) — EVIDENCE — SUFFICIENCY.

A case in which the evidence was not sufficient to establish the fact of the crime charged, and to justify the verdict and judgment of conviction.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. §§ 515-517; Dec. Dig. § 250.*]

Error to Circuit Court, Tucker County.

Ona Merrill was convicted of voluntary manslaughter, and brings error. Reversed, and new trial granted.

C. O. Strieby and Cunningham & Stallings, all of Elkins, for plaintiff in error. A. A. Lilly, Atty. Gen., and John B. Morrison, Asst. Atty. Gen., for the State.

MILLER, J. Upon an indictment for the murder of an infant child, born out of wedlock, by defendant, its grandmother, the jury found her guilty of voluntary manslaughter, and the judgment of conviction thereon was that she be confined in the penitentiary for not less than one nor more than five years.

The one question, presented in numerous ways, is, was the *corpus delicti* established justifying the verdict and judgment, which depended solely on circumstantial evidence?

The mother of the child was defendant's daughter, a girl of less than sixteen years. To establish the fact or body of the crime the state rested its case mainly on the testimony of a young physician, temporarily at the place of the birth, and according to his own statement, of but two years experience, to the effect that before the birth of the child defendant stated to him that her daughter had been sick several times and had never complained or felt the movements of the child and gave it as her opinion that the child was probably not living, but if living, very weak, and if so she recommended that he make no effort to revive it; that it would be a good thing to take it to the home of another daughter, who had a nursing child—to lose it; that after its birth defendant threw a blanket over it, and when told by him that she should not do that, she answered, that there were people in the house, and what should she do, to which he answered, have them removed, which she did; that it was agreed between them, mother and grandmother, that the child should be so taken, and that defendant took the child, and after being gone some fifteen or twenty minutes she returned very much excited, saying she had run the whole way; that same evening he visited the mother, and on inquiry defendant said the baby was fine; that the next morning he went first to the home of the other daughter to inquire about the child, did not see it, and from there drove directly to defendant's house, where he saw her and inquired of her about the child, and who said the child was doing well; later defendant said an uncle had come and taken the child to Baltimore.

In addition, this witness testified that about six days after the child's birth, he gave notice to the public authorities, who visited the premises, and in a short time found the child dead and buried under a stable in the back yard, and that he next saw the child after it was found at the coroner's inquest, and identified it as the child of which he had delivered defendant's daughter, principally by the string tied on it by him at its birth. On cross-examination he admitted knowing that several doses of morphine had been administered to the mother by another doctor, shortly before he took charge of the case; that her appearance was that she had a good dose, and that he had

himself administered a dose; and he gave it as his opinion that this drug would have had no effect on the child, but admitted that when the child came it was in a very low state of vitality, but after fifteen or twenty minutes it breathed and cried, that its skin was more dark than normal, darker than the average child, the reason for which he did not know; later he denied having said the child was in a low state of vitality, but had said it didn't breathe at first. While denying that it was done upon or on his suggestion, he admits that it was customary with Catholics, when a child is born like this one, to baptize it, and that when defendant, as he claims, administered baptism he held the child for her and made no objection to it.

And being recalled, and interrogated with reference to what he saw and did after the child was found and taken to the undertakers, where he first saw it, he said the child was as it was exhibited in the court room at the trial, except it had more clothes on it, that at first the clothes were loosened, and everything removed except the cloth on the body and the one that come down over its face, that he examined the shoe string tied around the neck on the outside of the coverings, and gave it as his opinion that it was tied tight enough to choke it. "Q. Would you say it would or did choke it? A. Yes, sir. Q. How would it suffocate it? A. By the cloth." And being again cross examined he testified as follows: "Q. Doctor when you spoke of the cloth having been drawn tightly over the child's face, you don't mean to say by an external examination or look at the child that you could tell whether it was dead before that cloth was tied over it? A. I removed the cloth at that time from the face, but not the string around the throat, but I didn't untie the string. Q. You don't mean to say you could tell if it had been dead before or whether it died from the string tied around its neck, or the cloth drawn over its face? A. No one could tell that."

The only other evidence offered by the state was the testimony of McVeigh and Williams, town sergeant and assistant, and Dunkin, the undertaker, relating to the finding of the child, its condition when found, particularly as to how it was wrapped, and the string about its neck. As to the string around its neck the undertaker said it was drawn he thought very tight. McVeigh, the town sergeant, said, respecting the finding of the body and its condition when found: "It was wrapped in a piece of muslin, and then wrapped in a piece of ticking. * * * There was a piece of muslin or pillow slip or something of that kind pulled down over its head and wrapped around the neck two or three times with a shoe string; then there was a shoe string wrapped three times around the neck and tied, then that one end of the muslin or pillow slip was brought

around the body and pinned with a safety pin and then it was wrapped in a piece of bed ticking, three pieces wrapped around the neck and tied." He further says, that when they tore the rag off of the face he "noticed that the nose was pressed down flat."

The record shows there was a coroner's inquest, but the result of that inquest or what took place, and the scope of the investigation is not disclosed. The record is silent as to whether a post mortem examination of the body was had. There were doctors and at least one hospital at the place of the birth and death of the child. No marks of violence on the body are shown, from which death could have resulted. The state relied solely on the theory of suffocation or strangulation, due to the coverings over or the string found tied around the neck, and yet showed none of the general evidences of death by strangulation or suffocation, which scientific investigation or even common observation usually disclose. Books on medical jurisprudence are replete with information on this important subject, for the guidance of court and counsel. See 3 Wharton & Stille, Med. Jur. 79-96, on the subject, "Infanticide"—"Death after Labor;" also the chapter on "Strangulation," in the same volume, beginning at page 311. Why was this important phase of the case neglected? There was no evidence even of the most superficial signs of strangulation or suffocation, which the books say are usually present. It is unnecessary to repeat here what the books say on this subject, it suffices to refer to the books, and to say that in this case no attention appears to have been given to it on the trial.

Of course we do not mean to intimate that conviction would not be justified without the application of all the scientific tests referred to in the books. It is probably true that competent experts could not have been found in the community where this case originated and was tried, but if the books speak truly, many of these evidences are apparent to any one, not requiring much, if any, scientific knowledge.

Shall courts and juries allow those accused to go to prison on bare suspicion of motive or circumstance when more unerring evidences of crime if any are at hand and either neglected or suppressed? As applicable to this case we think it should be so. Witnesses for defendant, two daughters, a servant girl, and two physicians gave evidence which, if true, tended strongly to exculpate defendant from guilt, or to show that the death of the infant was or may have been due to the poisonous drugs administered to the mother, or to natural causes. The mother of the child, for instance, swore that soon after its birth, when no one else was in the room, she got up, and found the child dead, and herself wrapped it up and put it in her trunk, to hide it from view, until she could put it away, and that she and not her moth-

er, had prepared it and buried it temporarily under the stable where it was found. She goes into rather minute details on this subject, and explains conflicting stories told, and imputes some of them to agreements with the doctor, whose testimony is relied on by the state.

[1] Of course where there is conflict, the jury are the judges, and the court cannot properly invade their province. But independently of any conflict in the evidence, the question going to the very foundation of the prosecution is, has the state established by competent proof the fact of the crime charged? After consideration of all the evidence and the authorities bearing on the subject we do not think it has done so. True many suspicious facts and circumstances are shown. But suspicion alone will not do. That the body of the little one was laid away as it was, is, under the facts and circumstances of its birth, reconcilable as well on the theory of innocence as of guilt of the accused, and so are most if not all other suspicious facts and circumstances. The books all say that before inquiry as to the guilty agent should be entered upon the fact that a crime has been committed should be established by proof. In our case of *State v. Flanagan*, 26 W. Va. 116, a leading and well considered case, point 6 of the syllabus states the rule thus: "It is a fundamental and inflexible rule of legal procedure, of universal obligation, that no person shall be required to answer or be involved in the consequences of guilt without satisfactory proof of the corpus delicti either by direct evidence or by cogent and irresistible grounds of presumption." *State v. Parsons*, 39 W. Va. 464, 19 S. E. 876, says: "Both the corpus delicti, or criminal act, and the agency of the accused in such act, must be proven before the jury beyond a reasonable doubt." In the *Flanagan Case*, at page 123, Judge Snyder says: "While the discovery of the body necessarily affords the best evidence of the fact of the death, and the identity of the individual, and more frequently also, the cause of the death, yet in such cases the *corpus delicti* cannot be said to be proved until it be fully and satisfactorily proved that such death was not caused by natural causes, accident, or by the act of the deceased." Other cases laying down or recognizing the same rules are, *Brown v. Commonwealth*, 89 Va. 379, 16 S. E. 250; *Goldman v. Commonwealth*, 100 Va. 865, 42 S. E. 923; *McBride v. Commonwealth*, 95 Va. 828, 30 S. E. 457; *Smith v. Commonwealth*, 21 Grat. 820. But why multiply citations? It is universal law.

As illustrations of the rule respecting the proof of the fact of the crime, and fastening it on the accused, counsel have referred us to the following cases. *People v. Palmer*, 109 N. Y. 110, 16 N. E. 529, 4 Am. St. Rep. 423; *State v. Williams*, 52 N. O. 446, 78 Am. Dec. 248-257; *Hatchett v. Com.*, 76 Va. 1026; *Harris v. State*, 28 Tex. App. 308, 12 S. W.

1102, 19 Am. St. Rep. 837; In re *Davis*, 3 City H. Rec. (N. Y.) 45; *Lee v. State*, 76 Ga. 498; *Josef v. State*, 34 Tex. Cr. R. 446, 30 S. W. 1067. In the Virginia case cited defendant was indicted for poisoning Y. There was no post mortem examination, and no analysis of the contents of the stomach, or of the vessel which contained the liquor administered, and which was said to contain poison. The accused administered the liquor, but there was no proof that he knew it contained poison, if it did contain poison, nor was any motive or provocation shown. Held, that a verdict of guilty would be set aside, and a new trial granted. In the Georgia case, on the trial of an indictment for murder it was proved that the defendant had been delivered of a child, which was found some distance from her house, and was returned to her in a healthy condition. The next morning it was dead. A physician testified that there were no marks of violence upon the child, and that he did not know whether it had died from exposure or been smothered. It was there held that the evidence was insufficient to warrant a verdict of guilty. In the Texas case of *Josef v. State*, it is said: "On a prosecution for infanticide, there was evidence that the infant was found dead in a cistern, near a house in which defendant and a woman occupied a single room prior to and at the time of the murder; that when officers, with a physician, came to the house, four days after the murder, defendant objected to their entering; that previous to the examination of the woman, to which the defendant strenuously objected, to determine whether she had been recently confined, defendant denied any knowledge of the fact of her confinement; and that a cord around the infant's neck was tightly drawn, which physicians testified might have caused death by strangulation. Physicians testified from an examination of the corpse that the child was born alive, and the woman testified that she gave birth to the child, and upon its death, immediately after birth, placed it, without the knowledge of any person, in the cistern. Held, that the evidence did not warrant conviction."

[2] We must not be understood as holding that the fact of the crime, and of the guilty agent cannot be established by circumstantial evidence. It can, by all authorities; but not on mere suspicion. Probably the case of *Cluverius v. Commonwealth*, 81 Va. 787, as well illustrates the application of the rule as any. But the facts shown in that case, which were many, including the marks on the face and the hands of deceased, and her general appearance, showing that she had been first struck on the head by some one and then thrown into the water, proved beyond any reasonable doubt that she had been foully dealt with. But the strength of that case is not paralleled by this, far from it. On the main theory of the State, that the child died from strangulation from the string tied

around its neck, the main witness, the attending physician, said "no one could tell that." Why was he not examined on the more unerring evidences of suffocation and strangulation, present or absent, in the child? No one can tell that. At least no one did.

We are loath to disturb verdicts of juries in such cases; but upon the authorities cited, and the absence of important evidence, of which we must take judicial notice, we cannot with clear conscience allow defendant to go to prison on the record as presented.

Our opinion is to reverse the judgment and award defendant a new trial.

(72 W. Va. 507)

FINK v. UNITED STATES COAL & COKE CO.

(Supreme Court of Appeals of West Virginia.
May 13, 1913.)

(Syllabus by the Court.)

1. ANIMALS (§ 48*)—RUNNING AT LARGE—COMMON LAW—UNRULY AND DANGEROUS.

The common law, inhibiting the running at large of domestic animals, is not in force in this state, except as to such of them as are unruly and dangerous.

[Ed. Note.—For other cases, see *Animals*, Cent. Dig. §§ 143, 144; Dec. Dig. § 48.*]

2. ANIMALS (§ 48*) — RUNNING AT LARGE — COMMON LAW—"UNRULY AND DANGEROUS."

"Unruly and dangerous" animals, within the meaning of the law, are such as are likely to injure other domestic animals and persons, not such as merely endanger real property by trespass thereon.

[Ed. Note.—For other cases, see *Animals*, Cent. Dig. §§ 143, 144; Dec. Dig. § 48.*]

3. ANIMALS (§ 95*)—TRESPASSING—RIGHT TO DISTRAIN.

No statute of general operation throughout this state confers right upon a landowner to seize and hold domestic animals found trespassing on his land as a remedy for enforcement of payment of the damages done by them, unless they are estrays, or the land is inclosed by a lawful fence, and the animals have trespassed on the same a third time, after notice in writing to the owner of the two previous trespasses.

[Ed. Note.—For other cases, see *Animals*, Cent. Dig. §§ 390-396, 402-408, 415; Dec. Dig. § 95.*]

4. ANIMALS (§ 95*)—TRESPASSING—RIGHT TO DISTRAIN.

To avail himself of the right of acquisition of title to trespassing animals, given by section 3 of chapter 60 of the Code, the claimant must clearly show strict and full compliance with its provisions and maintenance of a lawful fence.

[Ed. Note.—For other cases, see *Animals*, Cent. Dig. §§ 390-396, 402-408, 415; Dec. Dig. § 95.*]

5. SET-OFF AND COUNTERCLAIM (§ 35*)—CONVERSION — UNLIQUIDATED DAMAGES FOR TRESPASS.

In an action for the value of animals taken and sold as having been forfeited to the owner of lawfully inclosed premises, by virtue of proceedings under section 3 of chapter 60 of the Code, the damages done to the property by the animals can neither be recouped nor set off against their value.

[Ed. Note.—For other cases, see *Set-Off and Counterclaim*, Cent. Dig. §§ 58-64; Dec. Dig. § 35.*]

Error to Circuit Court, McDowell County.

Action by Laura E. Fink against the United States Coal & Coke Company. Judgment for plaintiff, and defendant brings error. Affirmed.

Anderson, Strother & Hughes, of Welch, for plaintiff in error.

POFFENBARGER, P. Claiming to have maintained a lawful fence around a certain lot of which it had possession as lessee, known as the "Clubhouse Lot," the defendant caught and put up 15 of the plaintiff's hogs on said lot, as having trespassed thereon the third time, after notice to the owner of two previous trespasses thereon, and afterwards sold them as his own, claiming title thereto by virtue of the provisions of section 3 of chapter 60 of the Code, saying the owner or occupier of lawfully inclosed grounds upon which the third trespass is committed, after notice in writing of two previous trespasses thereon, shall be entitled to such animal. On the writ of error to the judgment in favor of the plaintiff for \$103.50, there are numerous assignments of error.

Proof of plaintiff's title to the hogs at the date of their seizure is full and complete, and the only possible ground of justification for their sale by the defendant is the statute already referred to. An effort was made to prove compliance with its requirements and acquisition of title by procedure under it. There was proof of numerous trespasses by the hogs, and also of the service of such notice as the statute requires, before the date of the last trespass and seizure of the animals. But the evidence clearly fails to establish the maintenance of a lawful fence. The lot on which the hogs were found adjoined a railroad right of way and borders on a deep railway cut. On that side of the lot there is no fence. The other three sides are inclosed partly by picket fences and partly by a board fence, the former about 4½ feet high, running from the back line to the railroad cut, and the latter about 5½ feet high and inclosing the side opposite the railroad cut. The embankment to which the picket fences extend was from 15 to 25 feet deep, solid rock at the bottom and earth at the top. A witness says the slope from the top for a distance of about 10 feet was on a grade or angle of about 45 degrees, and then the rock was perpendicular from that point to the bottom of the cut. At the point at which the fences came to the cut, the same witness says the embankment consisted of 12 feet of rock and from 3 to 5 feet of slope. There is no proof of connection of the fence with the perpendicular rock embankment. One witness says the fence extended down the edge of the embankment at both ends, and denies the existence of opportunity for animals to pass around the ends of the fence, between the fence and the embankment. An-

other says the fence joined the embankment just a few inches from the top of the slope, and he thinks an animal could not pass between the ends of the fences and the cut and get into the lot. Neither of these witnesses nor any other says the fence extended down over the 45-degree slope to the top of the rock embankment. The former says an animal could not pass between the fences and the embankment; but the slope was a part of the embankment, and the latter witness says the fence extended but a few inches down the slope of from 3 to 5 feet. Plaintiff's husband swears there was an opening at the end of the fence through which people traveled going to and from the clubhouse, and this statement is nowhere denied. In response to a question as to this, one of the defendant's witnesses said: "They would have no occasion to do that, because the gate was not over six feet from the end of the cut." Replying to a pointed question as to whether men could go out at that opening, if they wished to do so, he said: "If they wished to go around the embankment, the gate is not over 10 or 15 feet from the cut at the most." Another witness says he does not think there was such an opening, but admits he never examined the fence at that point. One of the witnesses for the defendant admits that the hogs entered the lot through the holes they rooted under the fence, and by working the gate open. The statute requires the fence to be so constructed that animals cannot creep through it, and it must be maintained in that condition. The rooting propensity of a hog is well known, and it cannot be supposed the Legislature intended to absolve the owner of the premises from duty to repair such holes as might be made in that way.

In its rulings upon prayers for instruction, the court properly treated the evidence as insufficient to warrant instruction respecting the maintenance of a lawful fence. Accordingly at the instance of the plaintiff, one instruction was given, authorizing a verdict for the plaintiff, if the jury believed the defendant, through its authorized agent, took possession of the hogs, and appropriated them to its own use by sale or otherwise, and refused all others asked for by the plaintiff. At the request of the defendant, it gave one instruction, denying right of recovery, unless the jury should believe the defendant by its duly authorized agent unlawfully took possession of the plaintiff's hogs and appropriated them by sale or otherwise to its own use, and refused a number of others, one directing a verdict for the defendant, one allowing a set-off for damages done by the hogs against their value, one defining a lawful fence of posts, planks, and pickets to be one 4 feet high, so built that hogs could not creep through or go under it without rooting, one authorizing a verdict for the defendant if the jury should find it had given five days' notice of two previous

trespasses by the hogs on the grounds occupied by the defendant inclosed by a lawful fence and a third trespass by the animals after such notice, and another telling the jury as matter of law the defendant's grounds were inclosed by a lawful fence at the time of the alleged trespass.

[4] The interpretation of the evidence underlying these rulings was correct. No connection between the fences and the perpendicular rock wall is shown, if we assume such a wall or cliff can be adopted as part of the fence, a question we do not decide. Again, there is no denial of the existence of a hole in the fence at the embankment, or a footway around the end of the fence. On the defendant's side the testimony on that point is evasion or assumption, while on the plaintiff's it is positive and direct. The extraordinary right of title by forfeiture must be established, if at all, by clear and full proof.

[1-3] The court properly sustained the objection to defendant's special plea No. 1, denying right of recovery because the hogs in the declaration mentioned were unlawfully trespassing on the grounds and premises of the defendant; special plea No. 2, denying right of recovery because the hogs were taken on grounds of the defendant inclosed by a lawful fence; special plea No. 3, denying right of recovery because the hogs were unruly and dangerous and were seized while unlawfully trespassing on the defendant's premises; special plea No. 4, similar to special plea No. 3; and special plea No. 6, alleging nonaccrual of the cause of action within one year next preceding the date of the commencement of the suit. The common law inhibiting the running at large of domestic animals is not in force in this state. *Blaine v. Railway Co.*, 9 W. Va. 252; *Baylor v. Railroad Co.*, 9 W. Va. 270. No statute gives a general right of seizure and detention of such animals found trespassing upon the lands of another, whether inclosed or uninclosed. There is an optional stock law, the provisions of which are embodied in chapter 60 of the Code, giving such right of seizure; but it is not effective until put in actual operation by popular vote, and there is no suggestion in the record of the adoption of that statute in the magisterial district of McDowell county in which the seizure was made. Section 1 of chapter 131 of the Acts of 1882 absolutely prohibits the running at large of any stallion or jack, and conditionally of any bull over one year old, or buck sheep over four months old, or boar over two months old. As to bulls, buck sheep, and boars, the statute is optional, and must be adopted by a popular vote of a county to become effective. The decisions above referred to say the common law is in force as to unruly animals; but obviously it means animals that are dangerous to persons or other animals, not merely such as are likely to tres-

pass upon real estate. Hence there is no warrant of the law in this state for the propositions stated by special pleas Nos. 1, 2, 3, and 4. As the action is for the value of the hogs, the one-year statute of limitations does not apply.

[5] The prayer for an instruction authorizing recoupment or set-off of the damages done by the hogs against their value was properly overruled. The injury to the property was a wrong separate and distinct from the appropriation of the hogs, and the claim therefore did not arise in any sense out of a contract. Recoupment is peculiarly and only a contractual right, and is limited to damages for breach of the identical contract on which the plaintiff sues. *Dillon v. Eakle*, 43 W. Va. 502, 27 S. E. 214; *Logie v. Black*, 24 W. Va. 1; *Railroad Co. v. Jameson*, 13 W. Va. 833, 838, 31 Am. Rep. 775. Debts only, not mere claims for unliquidated damages, can be set off against the plaintiff's demand. *Coal & Coke Co. v. Hull Coal Co.*, 67 W. Va. 503, 68 S. E. 124. The claim as to which right of set-off was urged is one for mere unliquidated damages growing out of a tort.

The judgment is affirmed.

(95 S. C. 127)

STATE v. ELLISON.

(Supreme Court of South Carolina. June 28, 1913.)

1. CRIMINAL LAW (§ 823*)—INSTRUCTIONS—CURE BY OTHER INSTRUCTIONS.

On a trial for homicide, where the court carefully defined each grade of homicide, pointing out distinctly the characteristics of each grade, repeatedly warned the jury that it was the state's duty to prove the offense beyond a reasonable doubt, and that it was its duty to acquit if the state failed to prove accused's guilt, either of murder or manslaughter, beyond a reasonable doubt, it was not error to charge that when the jury went into their room they should first determine whether or not accused had established his plea of self-defense by the greater weight of testimony.

[Ed. Note.—For other cases, see *Criminal Law*, Cent. Dig. §§ 1992-1995, 3158; Dec. Dig. § 823.*]

2. HOMICIDE (§ 308*)—INSTRUCTIONS—MANSLAUGHTER—PROVOCATION.

On a trial for homicide, it was proper to charge that if one person insulted another most grievously by uttering about him and in his presence language calculated to arouse the wrath of an ordinary man, and which did arouse such wrath, in consequence of which, and not because of any preformed purpose, the killing occurred, this was not manslaughter but murder, because, having been done by mere words, there was not sufficient legal provocation, especially where the court carefully defined each grade of homicide, pointing out distinctly the characteristics of each grade, and charged repeatedly that the state was bound to prove the offense beyond a reasonable doubt, and that the jury should acquit if accused's guilt of either murder or manslaughter was not proved beyond a reasonable doubt.

[Ed. Note.—For other cases, see *Homicide*, Cent. Dig. §§ 642-647; Dec. Dig. § 308.*]

3. HOMICIDE (§ 300*)—INSTRUCTIONS—SELF-DEFENSE—DUTY TO RETREAT.

On a trial for a homicide committed in accused's store, an instruction that it was not necessary to define what was known as the "Law of the Castle," because there was no evidence in the case tending to show that accused at the time of the fatal encounter was in his dwelling house or yard, but that the law of the premises might be applicable, and that a man on his own premises was not bound to run, was proper, especially where the charge when read as a whole showed no reversible error.

[Ed. Note.—For other cases, see *Homicide*, Cent. Dig. §§ 614, 616-620, 622-630; Dec. Dig. § 300.*]

Appeal from General Sessions Circuit Court of Anderson County; Geo. E. Prince, Judge.

John O. Ellison was convicted of manslaughter, and he appeals. Affirmed.

The homicide as shown by the evidence was committed in accused's store.

Bonham, Watkins & Allen and T. F. Watkins, all of Anderson, and J. P. Carey, of Pickens, for appellant. P. A. Bonham, Sol., and A. H. Dean, both of Greenville, for the State.

WATTS, J. The defendant was tried at the May term of court of general sessions for Anderson county, 1912, before Judge Prince, on an indictment, which charged him with the murder of R. A. Hunt, and was convicted of manslaughter. A motion for a new trial was made and refused, and defendant was sentenced, and from this conviction and sentence he now appeals and assigns error on the part of trial judge in four exceptions.

[1] The first alleges it was error for the judge to say: "Now Mr. foreman and gentlemen of the jury, when you go into your room first determine whether or not the defendant, in this case, has established his plea of self-defense by the greater weight of testimony." The error is that the first duty of the jury was to determine whether the state had made out its case beyond reasonable doubt, whether the deceased had been killed by the defendant, before the defendant was called upon to prove his plea of self-defense by the preponderance of the evidence. We have examined the entire charge of the circuit judge, and we are pleased to say that he exercised the greatest care in defining each grade of homicide, pointing out distinctly the characteristics of each grade, warning the jury, repeatedly and at intervals, of its being the duty of the state to prove the offense beyond a reasonable doubt, and also of their duty to acquit the defendant, if the state failed to prove defendant's guilt of either the crime of murder, or that of manslaughter, beyond a reasonable doubt in each instance, and the extract from the charge embodied in this ground of appeal is based upon sound law, especially in view of the wholesome defi-

nitions of the crime of murder and manslaughter contained in the general charge of the jury, wherein he was careful to point out what proof was required, and the jury could not have been misled, and this ground is overruled.

[2] The second exception charges error on the part of the judge in saying to the jury: "I meet you on the street. I insult you most grievously by uttering about you and in your presence language calculated to arouse the wrath of the ordinary man, and it does arouse your wrath, and in consequence of the aroused wrath, and not because of any preformed purpose, you strike me dead; the law says that is manslaughter—no, the law says that is murder, where it is done by mere words. That is murder because there is not sufficient legal provocation." This exception is overruled for the purpose stated in overruling the first exception, and for the additional reason that it was in accord with the law, as laid down in *State v. Jacobs*, 28 S. C. 29, 4 S. E. 799; *State v. Levelle*, 34 S. C. 120, 13 S. E. 319, 27 Am. St. Rep. 799; *State v. Davis*, 50 S. C. 424, 27 S. E. 905, 62 Am. St. Rep. 837.

[3] The third exception alleges error on the part of his honor when charging on the proposition of what is necessary to make out the plea of self-defense, in saying to them: "I will not undertake to define to you what is known as the 'Law of the Castle,' because there is no evidence in this case tending to show that the defendant was, at the time of the fatal encounter, in his dwelling house or his yard, but the law of the premises may be applicable in this case, and I charge you that a man on his own premises is not bound to run." This exception is overruled, for the reason the judge's charge when read in full will show no reversible error, and his reasoning is sustained by the principle laid down in *State v. Summers*, 36 S. C. 480, 15 S. E. 369.

The fourth exception alleges error in charging the jury, in reference to manslaughter, in using this language: "The law never recognizes mere words as sufficient provocation to reduce killing to manslaughter. However insulting those words, however calculated to arouse the wrath of the ordinary man, and however the jury may be convinced that those insulting words did arouse the wrath of him who did the slaying, the law says that no words ever amount to a sufficient provocation to reduce a killing to manslaughter." This exception is overruled, for it was a correct proposition of law, when taken with his honor's charge as a whole, and is sustained by the principle laid down in *State v. Davis*, supra, 50 S. C. 424, 27 S. E. 905, 62 Am. St. Rep. 837, and this is not in conflict with the law as laid down in *State v. Beckham*, 24 S. C. 284; *State v. Cobb*, 65 S. C. 325, 43 S. E. 654, 95 Am. St. Rep. 801;

State v. Rowell, 76 S. C. 494, 56 S. E. 23; *State v. Ferguson*, 91 S. C. 235, 74 S. E. 502.

The exceptions are overruled.

Judgment affirmed.

GARY, C. J., and HYDRICK and FRASER, JJ., concur.

(95 S. C. 124)

STEELE v. ATLANTIC COAST LINE R. CO.

(Supreme Court of South Carolina. June 28, 1913.)

1. TORTS (§ 22*)—ACTIONS—PARTIES.

Joint tort-feasors may each be sued separately.

[Ed. Note.—For other cases, see *Torts*, Cent. Dig. §§ 29, 31; Dec. Dig. § 22.*]

2. ACTIONS (§ 38*)—CAUSES—MISJOINDER.

Where the complaint in an employee's action against a railroad company and another for injuries alleged a concurrent chain of negligent acts which combined to produce one injury, charging part of the negligent acts against both defendants jointly, and part against the railroad company alone, there was no misjoinder of causes as against the railroad company.

[Ed. Note.—For other cases, see *Actions*, Cent. Dig. §§ 549, 565; Dec. Dig. § 38.*]

3. PARTIES (§ 91*)—MISJOINDER OF DEFENDANTS—PARTIES ENTITLED TO OBJECT.

Where the complaint in an employee's action against a railroad company and another for injuries alleged a concurrent chain of negligent acts which combined to produce one injury, part of which were charged against both defendants and part against the railroad company alone, if there was any misjoinder of parties, the railroad company, being a proper party, could not demur because of the misjoinder of an improper party.

[Ed. Note.—For other cases, see *Parties*, Cent. Dig. § 149; Dec. Dig. § 91.*]

Appeal from Common Pleas Circuit Court of Florence County; Thos. S. Sease, Judge.

Action by W. M. Steele against the Atlantic Coast Line Railroad Company and another. From an order overruling a demurrer by the defendant named, it appeals. Affirmed.

F. L. Willcox, of Florence, for appellant. Ragsdale & Whiting, of Florence, for respondent.

FRASER, J. In the argument of appellant there is the following statement of its case:

"This is a suit for damages alleged to have resulted from personal injuries to plaintiff, a switchman and car coupler, while in the discharge of his duties on the 23d day of December, 1911, in the Florence yards of Atlantic Coast Line Railroad Company. The complaint alleges the bruising, breaking, and maiming of plaintiff's left hand and wrist. It further alleges that the injury was caused by the negligence and wrongful acts of defendant in several particulars, to wit: First, in the failure of the defendant Atlantic Coast Line Railroad Company to provide safe and

suitable appliances; second, in the willfulness of both defendants, acting through the defendant Crumpler, in requiring plaintiff to go into a position of danger and to use unsafe and defective appliances; third, in the willfulness of the defendant Atlantic Coast Line Railroad Company in causing the cars to be brought together with great force while the coupling devices were out of repair; fourth, in the failure of both defendants, acting through the defendant Crumpler, to open the knuckle on one of the coaches in question before attempting to make the coupling; and, fifth, in the wanton and willful failure of the defendant Atlantic Coast Line Railroad Company to make the coupling as the cars came together. It will be noted that the negligent acts relied upon to create the liability in favor of plaintiff are charged, first, against one defendant alone, and then against the two jointly. The defendant Atlantic Coast Line Railroad Company demurred instead of answering the complaint, basing its demurrer on the ground that several causes of action have been improperly united; this defect in pleading appearing upon the face of the complaint. It charges that a cause of action against it alone for failure to provide suitable appliances, in providing which the defendant Crumpler had no part, cannot be joined in the same complaint with a cause of action against the two defendants for the joint neglect of duties imposed by law upon both of them.

"Upon hearing the demurrer his honor, Judge Sease, made an order, overruling same, whereupon this appeal was taken, upon one exception."

"Exceptions.

"His honor erred, it is respectfully submitted, in not sustaining the demurrer interposed by the defendant Atlantic Coast Line Railroad Company, and in not holding that plaintiff in his complaint had improperly joined two causes of action, one against the defendant Atlantic Coast Line Railroad Company, for negligent, wanton, and willful failure to provide and maintain safe and suitable appliances for coupling together its cars, this cause of action being against the Atlantic Coast Line Railroad Company only, and another against Atlantic Coast Line Railroad Company and the defendant L. L. Crumpler jointly on account of the joint and concurrent negligent, wanton, and willful order and direction of the defendant Atlantic Coast Line Railroad Company as principal. He should have held that two such causes of action cannot properly be united in one complaint, and should have sustained defendant's demurrer."

[1-3] It will be observed that the statement does not show separate acts of negligence, each of which produced separate injuries; but a concurrent chain of negligent

acts which combined to produce one injury. The demurring defendant (the railroad company) is alleged to be negligent in each link of the chain. Where there are several joint tort-feasors, each may be sued separately. If, therefore, the railroad company had been sued separately, its objection would not apply. The objection raised is that it is sued for several causes of action and a joint and several cause of action. The objection therefore is to a misjoinder of parties, rather than to a misjoinder of causes of action. Whether the demurrer be to the one or the other, the demurring defendant must show that he is prejudiced by the misjoinder. The codefendant Crumpler might complain because he might be made to suffer in a general verdict for a negligent act for which it was not ever claimed that he was responsible. The demurring defendant is, according to the statement, alleged to be responsible for each and every act complained of. Crumpler did not demur and the defendant company is not injured. 14 Ency. of Pl. & Prac. 212, 213. "It is well settled that the objection of multifariousness or misjoinder is a personal one, and that only a defendant who is prejudiced thereby can be heard to complain of it. * * * Generally, moreover, a proper defendant can not demur for the misjoinder of an improper one." The case of *Hines v. Jarrett*, 26 S. C. 480, 2 S. E. 393, to which we have been referred, is not authority here. In that case there were separate injuries at different times. Here there was one injury at one time.

The judgment appealed from is affirmed.

GARY, C. J., and HYDRICK and WATTS, JJ., concur.

(34 S. C. 71)

FORE et al. v. BERRY et al.

(Supreme Court of South Carolina. March 18, 1913.)

1. ADVERSE POSSESSION (§ 114*)—EVIDENCE—WEIGHT AND SUFFICIENCY.

In ejectment, where defendant relied on adverse possession under award of arbitrators, and where, although his testimony was of too general a nature to show that his *pedis possessio* extended over the entire tract, he testified that he had been working it ever since, this was some evidence that he went into possession of the arable land, or at least some portion thereof.

[Ed. Note.—For other cases, see *Adverse Possession*, Cent. Dig. §§ 682, 683, 685, 686; Dec. Dig. § 114.*]

2. ADVERSE POSSESSION (§ 104*)—PRESUMPTION OF GRANT—DISABILITY.

To raise the presumption of a grant, there must be 20 years' possession exclusive of the period of infancy of the person against whom the grant is presumed, but the failure of the presumption is personal to the infant, and cannot inure to the benefit of other tenants in common with the infant.

[Ed. Note.—For other cases, see *Adverse Possession*, Cent. Dig. §§ 595-602; Dec. Dig. § 104.*]

3. ARBITRATION AND AWARD (§ 82*)—FORCE AS ESTOPPEL.

An agreement to submit to arbitration a dispute as to the title to land which did not designate the arbitrators, but on which two persons not shown to be those to whom the matter was submitted, indorsed a decision in favor of one of the parties, would not act as an estoppel against the other, since an agreement to submit to arbitration does not constitute an actual submission, and the fact that such persons signed the award was not sufficient evidence that they were the arbitrators selected.

[Ed. Note.—For other cases, see Arbitration and Award, Cent. Dig. §§ 440-450; Dec. Dig. § 82.*]

4. ADVERSE POSSESSION (§ 71*)—COLOR OF TITLE—SUFFICIENCY OF WRITING.

A written agreement to submit a dispute as to the title to land to arbitration, which did not designate the arbitrators, and on which persons not shown to have been the arbitrators, indorsed a decision in favor of one of the parties, was a sufficient written instrument to constitute color of title under Code Civ. Proc. 1902, § 102, providing that whenever it shall appear that a person entered into possession of premises under a claim of title, founding such claim upon a written instrument as being a conveyance of the premises, and that there has been a continued occupancy and possession of the premises included in the instrument, or of some part thereof, under such claim for 10 years, the premises so included shall be deemed to have been held adversely.

[Ed. Note.—For other cases, see Adverse Possession, Cent. Dig. §§ 415-429; Dec. Dig. § 71.*]

5. EVIDENCE (§ 460*) — PAROL EVIDENCE — IDENTIFICATION OF PROPERTY.

A description of land in a written instrument relied on as color of title as a 300-acre tract of land in dispute between parties named was sufficient, and parol evidence could be resorted to, to identify the land.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 2115-2128; Dec. Dig. § 460.*]

6. ADVERSE POSSESSION (§ 68*)—COLOR OF TITLE—PURPOSE.

The object of color of title is not to pass title, but to define the extent of the claim, and extend the possession beyond the actual occupancy to the whole property described in the instrument.

[Ed. Note.—For other cases, see Adverse Possession, Cent. Dig. §§ 387-393; Dec. Dig. § 68.*]

7. LIMITATION OF ACTIONS (§ 76*)—SUSPENSION—INFANCY.

Where limitations against the recovery of real property commenced running in a person's lifetime, the running of the statute was not suspended after his death during the infancy of such person's heir.

[Ed. Note.—For other cases, see Limitation of Actions, Cent. Dig. §§ 417-420; Dec. Dig. § 76.*]

Appeal from Common Pleas Circuit Court of Marion County; S. W. G. Shipp, Judge.

"To be officially reported."

Action by T. L. Fore and others against E. B. Berry and others. Judgment for defendants, and plaintiffs appeal. Affirmed.

The referee's report was as follows:

"By consent this case was referred to me as special referee, by order of this court, dated April 12, 1910, to take the testimony and report my findings of fact and conclusions of

law with leave to report any special matter, and in accordance with this order I have taken all the testimony offered, which is hereto annexed.

"The complaint alleges that Willis Fore was at and before his death seised in fee of a tract of land in Marion county, containing 300 acres, more or less, bounded now or formerly by the lands of the estate of W. Evans, Hugh C. Dew, Gewood Berry, and Charles Haselden, being a tract of land conveyed to the said Willis Fore by A. Q. McDuffie, master; that Willis Fore and his wife, Sarah M. Fore have both died intestate; that the plaintiffs are the only heirs at law of Willis Fore and Sarah M. Fore, and are seised in fee and entitled to the possession of the premises described in the complaint, but that the defendants without right or title withhold the possession from them to their damage in the sum of \$1,000. The defendants, all answering this complaint separately, admit the incorporation of the defendants Tilghman Lumber Company and Marion County Lumber Company, and that the plaintiffs are the heirs at law of Willis and Sarah M. Fore, but they deny all the other allegations of the complaint, and plead the statute of limitations and the presumption of a grant.

"From the testimony I find that Willis Fore acquired fee-simple title to the premises described in the complaint by virtue of a conveyance made to him by A. Q. McDuffie, master, on December 8, 1879, and that Willis Fore went into possession under this conveyance and continued in possession until January 4, 1886. On that date a written agreement was made between E. B. Berry and Willis Fore, the material portion of which is as follows: 'Whereas, there exists a dispute between said parties as to the title to a tract of land containing three hundred acres, more or less; and, whereas, we desire to settle said dispute without resort to law, we, the said E. B. Berry and Willis Fore, hereby agree to leave the point in dispute to arbitration.' The agreement also provides that each party shall select one arbitrator, with the right of the two thus chosen to select a third if necessary, the decision of two arbitrators to be binding. On the back of this agreement is the following indorsement: 'We, the undersigned, S. W. Berry and B. F. Hays, being chosen as arbitrators in the within mentioned case, have decided in favor of E. B. Berry. S. W. Berry. B. F. Hays.'

"Under this instrument the defendant E. B. Berry went into possession on January 4, 1886, and has been in continuous possession up to the present time. The defendants Tilghman Lumber Company and Marion County Lumber Company are both made parties to the action for the reason that they claim certain timber rights under E. B. Ber-

ry. The Tilghman Lumber Company claims its rights by virtue of a deed from E. B. Berry to Tilghman Lumber Company, dated February 20, 1899, and the Marion County Lumber Company by virtue of a deed from E. B. Berry to Cape Fear Lumber Company, dated July 7, 1898, and a deed from Cape Fear Lumber Company, dated August ———, 1904.

[1] "E. B. Berry testifies that he went into possession of the land described in the complaint on January 4, 1888, and that he has been in possession openly, adversely, and exclusive of all other rights and claims. This testimony is of too general a nature to warrant the inference that his *pedis possessio* has extended over the entire tract of land. Section 108 of the Code of Procedure states the necessary elements of an adverse possession under a written instrument, and this testimony of E. B. Berry is rather in the nature of his opinion on a question of law. He says, however, 'I have been working it ever since.' This, therefore, is some testimony that he went into possession of the arable land, or at least some portion of it. There can be no doubt that he went into possession of some of the land in 1888 under this written instrument, and that his possession has been continuous, open, and notorious, and exclusive of all other claims up to the present time. Willis Fore died intestate on October 14, 1891, leaving as his sole heirs at law his wife, Sarah M. Fore, and his children, the plaintiffs in this action, namely, T. L. Fore, born January 5, 1871, Mary J. Fore (Dudley), born June 13, 1872, Tracey E. Fore, born November 17, 1874, Rebecca Fore (Hayes), born November 29, 1878, and W. K. Fore, born January 31, 1880. Sarah M. Fore, the wife, died intestate on August 31, 1906, leaving the plaintiffs as her only heirs at law, and on November 21, 1907, plaintiffs commenced this action for the recovery of the land described in the complaint.

[2] "The defense of a presumption of a grant was not argued and was apparently abandoned, both defendants and plaintiffs doubtless recognizing the rule that, to raise the presumption of a grant, there must be 20 years' possession exclusive of the period of infancy, and also that the failure of the presumption is personal to the infant, and cannot inure to the benefit of the other tenants. *Massey v. Adams*, 3 S. C. 254; *Garrett v. Weinberg*, 48 S. C. 28, 26 S. E. 3. The entire contention is over the statute of limitations and the admissibility in evidence of the arbitration agreement and award under which E. B. Berry went into possession. The plaintiffs contend that the defense of the statute of limitations must fail, because the bar of the statute was not complete when Willis Fore died in 1891, and that it was suspended during the infancy of any of his heirs, they being tenants in common, and that under section 108 of the Code of Pro-

cedure they have 10 years in which to begin this action after the majority of the youngest child, W. K. Fore, born January 31, 1880. The plaintiffs also earnestly object to the admission of the arbitration agreement and award on the ground that it does not contain a sufficient description of the premises, that it does not appear from the writing itself what property is referred to, and that parol evidence of extrinsic circumstances is inadmissible to show what land is referred to. They also object to the paper on the additional grounds that the paper is insufficient as an arbitration agreement, that land is not a proper subject of arbitration, and that title to land cannot be transferred by arbitration.

[3] "The defendants insist that this arbitration agreement and award is a complete bar to this action; that the effect is the same as if a deed had been executed by Willis Fore to E. B. Berry; that, while the agreement and award cannot of itself pass title, yet it will act as an estoppel. This rule is expressly recognized in the case of *Garvin v. Garvin*, 55 S. C. 360, 33 S. E. 458, but I do not think the rule applicable in this case, for the reason that the agreement to submit the dispute to arbitration does not constitute an actual submission, because the instrument does not designate the arbitrators, nor is there any testimony tending to show that the persons who signed the award were really the persons to whom the matter was submitted. The mere fact that they signed the award is not sufficient evidence that they were selected to arbitrate the dispute. This point was considered in the case of *Cothran v. Knox*, 13 S. C. 509, where an arbitration and award were set up in bar of an action. The court said in this case: 'There is also the same uncertainty as to the persons to whom the matters were submitted for arbitration. The only evidence tending to show that Wosmansky was one of the persons selected is the vague impression of Milford that both parties agreed that Wosmansky should assist him in making the settlement, for certainly the mere fact that Wosmansky signed the paper purporting to be the award cannot be regarded as evidence that he was one of the persons selected as arbitrators; while the testimony of Cason, the only other witness relied upon to show the submission, not only fails to show that Wosmansky was agreed upon as one of the arbitrators, but on the contrary, shows that his name was not even mentioned. This testimony is manifestly insufficient to show who were "the judges of the parties' choice," and this, therefore, constitutes another objection fatal to the award.' See, also, the case of *Lynch v. Goodwin*, 6 S. C. 144.

[4, 5] "However, the instrument is good as color of title, and none of the objections urged by plaintiff are valid objections to its use for that purpose. The sufficiency of de-

scription in the writing appears to be the most serious question as to its sufficiency as color of title. 'That the instrument under which a party holds adversely by color of title must define the extent of the claim is perfectly well settled.' *Garvin v. Garvin*, 40 S. C. 444, 19 S. E. 84. It is also equally as well settled that a contract to convey cannot be enforced unless the property is described in the writing. In both cases, rights to certain property being asserted solely by virtue of a writing, it is perfectly clear that the writing must designate the particular piece of property upon which the writing is intended to operate so that it can be found, and no good reason can be suggested why a stricter rule should be applied in one case than the other. In the case of *Kennedy v. Gramling*, 33 S. C. 387, 11 S. E. 1081, 28 Am. St. Rep. 676, the court says: 'Thus, where there is a proposition to sell and an agreement to buy the house in which plaintiff resides, there is no doubt that parol evidence would be admissible to show in what particular house he did reside, as there could not be a shadow of doubt that both of the parties—the one in making the offer and the other in accepting it—had reference to the same property; and that is the great point.' In the arbitration agreement the land is described as a 300-acre tract of land in dispute between Willis Fore and E. B. Berry on January 4, 1886. This is a more specific description than that in *Kennedy v. Gramling*, and there is no reason why parol evidence of extrinsic circumstances should not be resorted to as in *Kennedy v. Gramling*. If the only element of description had been a 300-acre tract of land, then it would have been insufficient. *Humbert v. Brisbane*, 25 S. C. 506.

'The rule in reference to description in a paper asserted as color of title is thus stated in 1 Cyc. 1090, as follows: 'So a description, though indefinite, is sufficient if the court can, with the aid of extrinsic evidence which does not add to, enlarge, or in any way change description, fit it to the property conveyed by the deed. It is necessary, however, that the description be such that it can be rendered certain by such evidence.' See, also, the case of *Eubanks v. Harris*, 1 Speers, 183, cited in note. In a note to the above text of Cyc. will be found a number of examples from decided cases of descriptions held sufficient and others held insufficient. All that appears to be necessary is that there should be such a designation that the land may be identified by the description. *Kirkland v. Way*, 3 Rich. 4, 45 Am. Dec. 752. The paper and the parol evidence in this case sufficiently identify the land.

[8] 'The other objections urged to the paper are without foundation in so far as they attack its validity as color of title. The object of color of title is not to pass title. In that case it would be title, not color of title. The only office of color of title is to define

the extent of the claim and to extend the possession beyond the actual occupancy to the whole property described in the paper. Color of title is thus defined in the case of *Turpin v. Brannon*, 3 McCord, 261: 'I think that in its common acceptance it is understood to mean any semblance of title by which the extent of a man's possession can be ascertained. An actual deed from a person who has no right conveys nothing. It is not exclusive evidence of possession. The possession being proved by other evidence, the deed is only looked to as defining its extent.' It is by no means necessary that the paper should be in the form of a deed. A bond or even a receipt would be sufficient. *Read v. Elfert*, 1 Nott & McC. 374, note; *Simmons v. Parsons*, 2 Hill, 492, note. In *Garvin v. Garvin*, 40 S. C. 435, 19 S. E. 79, a fraudulent deed was held insufficient to constitute color of title, but there can be no doubt as to the sufficiency of a merely invalid paper. 1 Cyc. 1082, and 1084; *Allen v. Johnson*, 2 McMul. 495; *Gourdin v. Davis*, 2 Rich. 488, 45 Am. Dec. 745; *Bank v. Smyers*, 2 Strob. 24; *Lyles v. Kirkpatrick*, 9 S. C. 269; *Duren v. Strait*, 16 S. C. 469; *Kennedy v. Kennedy*, 86 S. C. 497, 68 S. E. 664.

'Under a fair construction of the instrument in this case, it appears to be, in the light of the other testimony in the case, a sufficient instrument of writing as contemplated by section 102 of the Code of Procedure. The defendants have been in possession under this instrument continuously and exclusive of every other right for a much longer time than is necessary to perfect the statute of limitations, and, unless the statute has in some way been suspended, the complaint should be dismissed.

[7] 'Plaintiffs contend that, although the statute might have commenced to run against Willis Fore, yet, not being complete at his death, it was suspended on account of the minority of some of his heirs to whom the property descended. In support of this position reliance is placed upon the case of *Maccaw v. Crawley*, 59 S. C. 342, 37 S. E. 934, and Act 1824, 6 St. at Large, p. 238. Section 5 of the Act of 1824 is as follows: 'And be it further enacted, that the statute of limitations shall not hereafter be construed to defeat the rights of minors, when the statute has not barred the right in the lifetime of the ancestor, before the accrual of the right of the minor.' In 1872 the statutory law of the state was revised by an act of the Legislature; the revision being known as Corbin's Code. This Code was legally adopted, and after setting forth all the general statutes of the state this language is used: 'The following acts, ordinances and resolves, passed in the several years hereinafter enumerated, have expired, or have been, or are hereby, expressly repealed.' Then follows a schedule of these acts by their titles. Among others is the Act of

1824 above quoted. Corbin's Revised Statutes, p. 820.

"It would not be profitable to inquire whether or not the framers of Corbin's Code recommended the repeal of the Act of 1824, because they regarded it as sufficiently embodied in the statute of limitations adopted at that time and the continuance of the Act of 1824 useless. The effect of this repeal can only be gathered from the construction given the statute of limitations by the Supreme Court in cases arising since that time.

"The case of *Maccaw v. Crawley*, 59 S. C. 342, 37 S. E. 934, is not an authority on the point. Although at page 348 of 59 S. C., page 937 of 37 S. E. of this case, Mr. Justice McIver does intimate that the intervention of infancy will arrest the statute when the bar has not become complete during the life of the ancestor, yet the point was in no way involved in the case. The question there under consideration was absence from the state, and the remark of Mr. Justice McIver was purely obiter dictum. Nor was the question in any way involved or decided in the case of *Duren v. Kee*, 28 S. C. 219, 2 S. E. 4. But in the case of *Satcher v. Grice*, 53 S. C. 126, 31 S. E. 3, the identical question was under consideration, and it was decided that infancy would no longer arrest the statute if it had commenced to run during the life of the ancestor. This case is conclusive of the question. See, also, the case of *Sutton v. Clark*, 59 S. C. 440, 38 S. E. 150, 82 Am. St. Rep. 848.

"The bar of the statute of limitations being complete against plaintiffs, the complaint should be dismissed."

W. F. Stackhouse, of Marion, for appellants. Montgomery & Lide and M. C. Woods, all of Marion, for respondents.

GARY, O. J. For the reasons therein stated in the report of the special referee, the judgment of the circuit court is affirmed.

WOODS, HYDRICK, WATTS, and FRASER, JJ., concur.

(95 S. C. 111)

LYKES v. SEABOARD AIR LINE RY.
(Supreme Court of South Carolina. June 28, 1913.)

JUSTICES OF THE PEACE (§ 166*)—APPEAL—WANT OF PROSECUTION—DISMISSAL.

Where plaintiff's attorney endeavored at each term of court to have the appeal taken by defendant from a magistrate's court heard, but defendant failed to prosecute the appeal after opportunities so to do, the court properly dismissed the appeal at the third term of the court after the appeal for want of prosecution.

[Ed. Note.—For other cases, see *Justices of the Peace*, Cent. Dig. §§ 638-646; Dec. Dig. § 166.*]

Appeal from Common Pleas Circuit Court of Hampton County; T. H. Spain, Judge.

Action by F. M. Lykes against the Seaboard Air Line Railway. From an order dismissing an appeal by defendant from the magistrate's court to the circuit court, defendant appeals. Affirmed.

C. B. Searson, of Hampton, for appellant. Lyles & Lyles, of Columbia, for respondent.

FRASER, J. This is an appeal from the magistrate's court. The following appears in the case:

"The appeal was not heard at the regular October term, 1912, and the presiding judge marked the same 'continued' on the calendar, nor was the said appeal heard at the December special term of the court of common pleas for the said county; the presiding judge at that term making no entry upon the calendar as to what disposition was made of the appeal. At February term, 1913, Judge T. H. Spain passed an order dismissing the appeal. From this order notice of intention to appeal to the Supreme Court was duly served, and this appeal is now taken.

"Order of Circuit Judge.

"The above case comes up before me on motion by plaintiff's attorney to dismiss the appeal herein, heretofore rendered on the 16th day of August, 1912, in the court of magistrate M. F. Long, which was rendered on the above date, from which said order awarding plaintiff the sum of money therein named, defendant appealed to this court, and it appearing that the said case has been upon the proper calendar for the third term endeavored to have the said appeal heard, and that the defendant has failed to prosecute the said appeal and have the same disposed of after several opportunities to do so, now, on motion of C. B. Searson, Esq., plaintiff's attorney, it is ordered that the appeal heretofore made in the above-entitled cause be, and the same is hereby, dismissed for want of prosecution upon the grounds above set out, and that the judgment of the magistrate heretofore rendered be, and the same is hereby, confirmed and made the judgment of this court. T. H. Spain, Presiding Judge. Feb. 28, 1913.

"Exceptions.

"(1) It is submitted that his honor, the circuit judge, erred, as a matter of law, in holding and so deciding that it was incumbent upon him to dismiss the appeal after the second term, when the cause had been continued on the calendar at regular October term, and has been passed over at special December term. Lyles & Lyles, Defendant's Attorneys."

In order to sustain the appeal the appellant quotes the following from *York Supply Co. v. Southern Ry. Co.*, 82 S. C. 350, 64 S. E. 337: "'Hearing upon return.' If a return be made, the appeal may be brought to a hearing by

either party. It shall be placed upon the calendar and continue thereon until finally disposed of. But, if neither party brings it to a hearing before the end of the second term, the court shall dismiss the appeal, unless it continue the same by special order for cause shown. At least eight days before the court, the party desiring to bring on the appeal shall file the return and accompanying papers, if any, with the clerk, and the clerk shall thereupon enter the cause on the calendar according to the date of the return, and it shall stand for trial without any further notice." In the York Supply Company Case the court says: "To justify dismissal without a hearing it must appear that the case was called for trial [Italics ours] at the second or some subsequent term, and that neither party, after such opportunity to be heard, brought it to a hearing or had it continued for cause." The court goes on to say: "In this cause it did not appear that the case had ever been called for trial by the court until the term it was summarily dismissed for want of prosecution. The statute never contemplated a summary dismissal without an opportunity to be heard. The usual and orderly way for the court to give such opportunity is to call the docket of cases. With a view to enforce the statute, it might be well for the court, after calling the docket, to make some entry therein indicating that the case had been called and what disposition was made of it, so that the foundation for a summary dismissal may be properly evidenced. The court will not indulge a presumption that cases on appeal from magistrate court were called at the second term and opportunity presented for a hearing."

In this case the circuit judge finds the facts against the appellant when he finds "that plaintiff's attorney has at each term endeavored to have the said appeal heard and that the defendant has failed to prosecute the said appeal and have the same disposed of after several opportunities to do so."

In the case to which we have been referred, the court merely stated what would be the best practice, but did not say it was necessary.

The judgment appealed from is affirmed.

GARY, C. J., and HYDRICK and WATTS, JJ., concur.

(95 S. C. 114)

B. T. RUSHING & CO. v. SEABOARD AIR LINE RY.

(Supreme Court of South Carolina. June 28, 1913.)

Appeal from Common Pleas Circuit Court of Hampton County; T. H. Spain, Judge.

Action by B. T. Rushing & Co. against the Seaboard Air Line Railway. From an order dismissing an appeal by defendant from a magistrate's court, it appeals. Affirmed.

Lyles & Lyles, of Columbia, for appellant. J. W. Vincent, of Hampton, for respondent.

FRASER, J. This case was heard with the case of *Lykes v. Seaboard Air Line Railway*, 78 S. E. 710. The facts are the same, and the judgment herein is affirmed for the reason stated in that case.

GARY, C. J., and HYDRICK, J., concur.

(95 S. C. 113)

In re ROTON'S WILL.

(Supreme Court of South Carolina. June 28, 1913.)

WILLS (§ 191*)—REVOCATION BY MARRIAGE.

The will of a woman who, after making it, marries and then dies before her husband is revoked by the marriage; Civ. Code 1912, § 3570, declaring that if any person making a will shall afterwards marry and die, leaving his widow, it shall be deemed and taken to be a revocation to all intents and purposes, and section 41 providing that words in an act imparting the masculine gender shall apply to females also.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 469-478; Dec. Dig. § 191.*]

Appeal from Common Pleas Circuit Court of Lexington County; J. W. De Vore, Judge.

Will of Annie L. Roton, deceased, was admitted to probate. The decree so admitting it was reversed on appeal of contestant to the circuit court, and the executors appeal. Affirmed.

Efrd & Dreher, of Lexington, for appellants. N. W. Brooker and John T. Seibels, both of Columbia, for respondent.

WATTS, J. This is an appeal from a decree of his honor, Judge De Vore. The facts of the case show that Annie L. Litner, then a widow, on August 20, 1906, made a will and thereafter married Harris Roton and died in February, 1910, leaving the will in question. Her husband, Roton, her mother, a brother, and sister survived her, but no children. On March 15, 1910, the will was presented to the probate court by the executors and on that day admitted to probate in common form. On October 23, 1911, the brother of testatrix, to whom she had given \$10, filed his petition for proof of the will in due and solemn form. In obedience to the order of the probate court the executors filed their summons and petition asking to be permitted to prove the will in due form of the law. The brother of the testatrix alone appeared to contest the will. The probate court admitted the will to probate, holding it valid. From this decree the brother of testatrix alone appealed to the circuit court, and the appeal was heard by Judge De Vore, circuit judge, who reversed the decree of probate court; he holding that the will was revoked by the subsequent marriage of the testatrix. The executors appeal from this judgment, alleging error: (1) In holding that under our statutes the will is revoked

by marriage; and (2) in not holding that, even if the will was revocable by marriage, it should not be declared void at the instance of the brother of testatrix.

There is no dispute, and it was conceded at the hearing of this case by appellants' counsel that under the common law the will of a woman, whatever its provisions, was revoked by her subsequent marriage. Section 3570, Code of Laws 1912, is: "If any person making a will shall afterwards marry, and die, leaving his widow or leaving issue of such marriage, unless the will shall have been made in contemplation of marriage expressed on its face, and shall contain provision for future wife and children, if any, it shall be deemed and taken to be a revocation to all intents and purposes." This act really supplements the common-law rule. On the construction of words, section 41 of Code of Laws 1912, vol. 1, is: "The words 'person' and 'party,' and other word or words, imparting the singular number, used in act or joint resolution, shall be held to include firms, companies, associations, and corporations, and all words in the plural number shall apply to single individuals in all cases, in which the spirit and intent of the act or joint resolution may require it. All words, in any act or joint resolution, imparting the masculine gender shall apply to females also and all words imparting the present tense shall apply to the future also." Under these sections there is no doubt that the will of Annie L. Roton, made while she was a widow, was revoked immediately upon her marriage to Roton, and the will being revoked to "all intents and purposes whatsoever," then she died as if intestate, and her property is to be divided under the statute of distribution, and the exceptions are overruled.

Judgment affirmed.

GARY, C. J., and HYDRICK and FRASER, JJ., concur.

(35 S. C. 120)

REED v. REED.

(Supreme Court of South Carolina. June 28, 1913.)

HUSBAND AND WIFE (§§ 295, 300*)—ACTIONS FOR ALIMONY—TEMPORARY ALIMONY AND COUNSEL FEES.

In a wife's action for alimony, the granting of temporary alimony and counsel fees is within the discretion of the trial court, and will not be disturbed where there has been no abuse of discretion.

[Ed. Note.—For other cases, see Husband and Wife, Cent. Dig. §§ 1084-1088, 1098; Dec. Dig. §§ 295, 300.*]

Appeal from Common Pleas Circuit Court of Richland County; G. W. Gage, Judge.

Action by Mabel Reed against J. W. Reed. From an order granting temporary alimony and counsel fees, defendant appeals. Affirmed.

Robt. Mooriman, of Columbia, for appellant. Pringle T. Youmans and J. Hughes Cooper, both of Columbia, for respondent.

FRASER, J. This is an action for alimony. His honor, Judge Gage, granted temporary alimony and counsel fees. From this order the defendant appealed.

There are two exceptions, as follows: (1) "That upon the showing and countershowning made before him on December 11, 1912, his honor, Judge Gage, erred in holding that plaintiff had made out a prima facie case for temporary alimony and counsel fees." (2) "It is respectfully submitted that his honor, Judge Gage, abused the discretion imposed in him in granting said order for temporary alimony and counsel fees."

These exceptions admit that the matter is in the discretion of the circuit judge, and no abuse of discretion has been shown. See the recent case of Norman v. Norman, 77 S. E. 865, and cases there cited.

It is therefore ordered that the order appealed from is affirmed.

GARY, C. J., and HYDRICK and WATTS, JJ., concur.

(35 S. C. 219)

KLATTE v. McKEAND et al.

(Supreme Court of South Carolina. June 23, 1913.)

1. CORPORATIONS (§ 507*)—PROCESS—EVIDENCE AS TO SERVICE—WEIGHT AND SUFFICIENCY.

Where, on an application to set aside a default judgment against a corporation, there was abundant evidence that the party served with summons was not the corporation's agent, and no evidence that he was such agent, the court did not err in finding that there had been no service on the corporation.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 1971-1974, 1976-2000; Dec. Dig. § 507.*]

2. APPEARANCE (§ 20*)—PROCESS—SERVICE—WAIVER.

A defendant upon whom a summons had not been served did not waive service, where its attorneys asked plaintiff's attorneys for additional time to answer.

[Ed. Note.—For other cases, see Appearance, Cent. Dig. §§ 91-102; Dec. Dig. § 20.*]

3. PROCESS (§ 4*)—NECESSITY TO GIVE JURISDICTION.

No court has jurisdiction to render judgment against a defendant who has not been served with process.

[Ed. Note.—For other cases, see Process, Cent. Dig. §§ 4, 6, 55; Dec. Dig. § 4.*]

4. APPEAL AND ERROR (§ 843*)—REVIEW—ACADEMIC QUESTIONS.

It would not be proper for the Supreme Court to consider questions which have become purely academic.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3331-3341; Dec. Dig. § 843.*]

Appeal from Common Pleas Circuit Court of Dorchester County; R. E. Copes, Judge.

Action by C. U. Klatte against A. W. McKeand and the Coastal Land Development Company. From an order setting aside a default judgment against the Development Company, plaintiff appeals. Affirmed.

W. A. Holman, of Charleston, for appellant. M. Rutledge Rivers, of Charleston, for respondent.

FRASER, J. The appeal in this case is from an order setting aside a judgment by default. The order was made by his honor, Judge Copes, and was granted on the ground that the respondent Coastal Land Development Company was not served with the summons. The order also set aside the judgment as a matter of discretion for excusable neglect. There are seven exceptions; but the appellant reduces the questions to three, as follows:

1. Did his honor err in holding and finding that there had been no service on the defendant Coastal Land Development Company?

[1] The answer to that question is: He did not. There was abundant evidence that H. M. Sanders, who was served as the agent of the company was not such agent, and there was no evidence that he was the agent. There was nothing that his honor could do but to so hold, and as a consequence thereof set aside the judgment by default.

[2] The appellant claims, however, that, inasmuch as the attorneys for the defendant company asked of the attorneys for the plaintiff additional time to answer, it thereby appeared in the cause and waived service. The recent case of *Williams v. Hatcher*, 78 S. E. 615, holds that even a notice of a motion (not made) is not a waiver.

2. Did his honor err in holding that the judgment by default against the Coastal Land Development Company should be vacated and set aside on the ground of excusable neglect and surprise?

This court having held that there was no service on the defendant, this question does not arise. It was proper for Judge Copes to consider both grounds, because, if this court had held that he was in error in setting aside the service of the summons, then the question of discretion would have arisen. The holding, however, that there was no service, eliminated all other questions.

3. Did the court of common pleas for Dorchester county have jurisdiction to render a judgment against the defendants?

[3] No court had jurisdiction to render judgment against the respondent, as it was not served. The defendant McKeand has not appealed, and his rights are not before this court.

[4] The respondent, Coastal Land Development Company, asked to sustain the order on

additional grounds. It would not be proper to consider these questions. They have become purely academic.

The judgment appealed from is affirmed.

GARY, C. J., and HYDRICK and WATTS, JJ., concur.

(140 Ga. 177)

LANCASTER v. JOHNS.

(Supreme Court of Georgia. June 17, 1913.)

(Syllabus by the Court.)

REVIEW ON APPEAL.

While some of the evidence admitted over objection was of doubtful materiality, it was not of such a character as to require a new trial. There were no reversible errors of law committed on the trial, and the evidence supported the verdict.

Error from Superior Court, Dodge County; J. H. Martin, Judge.

Action between Fannie Lancaster and M. J. Johns. From the judgment, Lancaster brings error. Affirmed.

Roberts & Smith and Wooten & Griffin, all of Eastman, for plaintiff in error. W. M. Clements and J. A. Neese, both of Eastman, for defendant in error.

HILL, J. Judgment affirmed. All the Justices concur.

(140 Ga. 127)

HARRELL et al. v. DAVIS WAGON CO.

(Supreme Court of Georgia. June 13, 1913.)

(Syllabus by the Court.)

EXECUTION (§ 136*)—JUDGMENT (§ 132*)—DEFAULT—ENTRY—JURISDICTION—VOID JUDGMENT—REMEDY—ILLEGALITY.

The Davis Wagon Company instituted a common-law action in the superior court against W. H. and E. I. Harrell to recover a stated amount alleged to be due on a promissory note. Defendants were each personally served, and the petition and process were returnable to the May term of court, 1911. Neither defendant appeared, and at that term on the call of the appearance docket the judge marked the case in "default." At the same term the judge also entered a final judgment for the plaintiff, and within 30 days thereafter execution issued and was levied. One of the defendants resisted the enforcement of the execution by affidavit of illegality, attacking the judgment and execution as void on the ground that the judge was without authority of law to render the judgment at the appearance term. By consent of the parties the judge tried the illegality case without the intervention of a jury upon an agreed statement of facts as stated above. A judgment was rendered, ordering the dismissal of the illegality and directing the execution to proceed.

Held, after entry of default, there being no statute specially authorizing a final trial at the first term, the judge was without authority of law to enter final judgment at the first term. Civ. Code 1910, § 5681. See, also, *State v. Gaskill*, 68 Ga. 518. The provisions of the Constitution (Civ. Code 1910, § 6516), and the rules of court in pursuance thereof (Civ. Code 1910, §§ 6295, 6296), for rendition of judgment by the court without a jury in suits on condi-

tional contracts in writing, when considered in connection with Civ. Code 1910, § 5661, merely authorize judgments to be rendered by the court in the class of cases mentioned without the intervention of a jury, and do not qualify the provisions of section 5661 that the trial shall not be had at the first term. It follows that the judgment and execution based thereon were void. The judgment being void, illegality was a proper remedy to resist the enforcement of the execution. *Park v. Callaway*, 128 Ga. 119, 57 S. E. 229; *Hart v. Lazaron*, 46 Ga. 396; *Lott v. Wood*, 185 Ga. 821, 70 S. E. 661.

[Ed. Note.—For other cases, see *Execution*, Cent. Dig. §§ 485, 486; Dec. Dig. § 166; **Judgment*, Cent. Dig. §§ 211-220; Dec. Dig. § 132.*]

Error from Superior Court, Decatur County; Frank Park, Judge.

Action by the Davis Wagon Company against W. H. and E. I. Harrell. Judgment for plaintiff, and defendants bring error. Reversed.

R. G. Hartsfield, of Bainbridge, and A. B. Conger, for plaintiffs in error. J. C. Hale, of Bainbridge, for defendant in error.

ATKINSON, J. Judgment reversed. All the Justices concur.

(140 Ga. 128)

CLOWER et al. v. GODWIN et al.
(Supreme Court of Georgia. June 13, 1913.)

(Syllabus by the Court.)

1. SPECIFIC PERFORMANCE (§ 29*)—BOND FOR TITLE—SUFFICIENCY OF DESCRIPTION.

The following description of the land alleged to have been sold to the plaintiffs by the defendants in the suit for specific performance is found in the bond for title: "All that tract or parcel of land being part of lot of land B. No. 234 in the 2nd land district of originally Irwin, then Wilcox, but now Turner, containing one hundred acres, being in the east side of lot commencing at Buckskin Branch, thence to original line, thence back north far enough, thence running west back far enough to make one hundred acres. Bound on west by lands of Elbert Paulk, on north by lands of Bennett Pate, and on east by Monroe Harvey." *Held*, that it cannot be declared as a matter of law that the description is so lacking in certainty that it may not be made the basis of a decree for specific performance.

[Ed. Note.—For other cases, see *Specific Performance*, Cent. Dig. §§ 69-82; Dec. Dig. § 29.*]

2. SPECIFIC PERFORMANCE (§ 92*)—LACHES OF PURCHASER.

Where a tract of land is sold for \$1,500, and \$350 is paid at the time of the sale, and a note due in 60 days, bearing interest, is given by the purchaser for the balance of the purchase money, and a bond for title is executed by the owner of the land, conditioned to execute a deed upon the payment of the note, and time is not expressly made the essence of the contract, and there is no language employed in the bond importing an intent that it should be of the essence, a mere delay of four years and seven months in tendering the balance of the purchase money will not bar the holder of the bond of his right to specific performance upon making a proper tender.

[Ed. Note.—For other cases, see *Specific Performance*, Cent. Dig. §§ 233-244; Dec. Dig. § 92.*]

Error from Superior Court, Turner County; Frank Park, Judge.

Action by J. M. Clower and W. C. Clower against M. V. Godwin and others. From a judgment dismissing the action, plaintiffs bring error. Reversed.

J. M. Clower and W. C. Clower filed their equitable petition against Mrs. Godwin and Mrs. Robertson, praying for specific performance and other equitable relief. It is alleged in the petition that plaintiffs entered into a contract with the defendant Mrs. Godwin for a sale to them of a certain described tract of land for the sum of \$1,500. The date of the contract was October 31, 1907; the plaintiffs paid \$350 of the purchase price in cash, and for the balance gave their promissory note due in 60 days, and Mrs. Godwin executed a bond to make title in the usual form. It is alleged that on or about the 2d day of August, 1911, plaintiffs tendered to Mrs. Godwin, the owner of the land and the maker of the bond, the balance of the purchase price, Mrs. Godwin being in possession of the land, and is still in possession. It is also alleged that Mrs. Godwin had, on the 27th day of September, 1910, executed to her daughter, Mrs. Robertson, a deed to 25 acres of the tract of land sold by Mrs. Godwin to plaintiffs, and that Mrs. Robertson took this deed with notice of plaintiffs' purchase from Mrs. Godwin. And in addition to praying for specific performance against Mrs. Godwin, plaintiffs prayed that Mrs. Robertson be required to bring in Mrs. Godwin's deed to herself, and that the same be canceled. The petition was demurred to upon the general grounds that it did not state a cause of action, and that there was no equity in it. The court sustained the general demurrer and dismissed the case.

John B. Hutcheson and A. S. Bussey, both of Ashburn, for plaintiffs in error. R. L. Tipton, of Ashburn, for defendants in error.

BECK, J. (after stating the facts as above).

[1] 1. The description of the land involved in this controversy, as set forth in the bond for title from the defendant Mrs. Godwin to the plaintiffs, is as follows: "All that tract or parcel of land being part of lot of land No. 234 in 2nd land district of originally Irwin, then Wilcox, but now Turner, containing one hundred acres, being in the east side of lot commencing at Buckskin Branch, thence to original line, thence back north far enough, thence running west back far enough to make one hundred acres. Bound on west by lands of Elbert Paulk, on north by lands of Bennett Pate, and on east by Monroe Harvey." It is urged that this description is so vague and indefinite that it cannot form a basis of a decree in equity for specific performance, and that for this reason the demurrer was properly sustained. We do not think we can say, as a matter of law, that

the description of the land is so wanting in certainty that a specific performance of the contract for the sale of same should not be decreed. The sale is for a fixed quantity of land, 100 acres, and in the bond for title there is no addition of the terms, very frequently occurring in conveyances, of the clause "more or less." So we have a contract by its terms calling for a deed to 100 acres of land, and the boundaries on the east, north, and west are given. That being true, it is not impossible that, by the aid of parol proof, the southern boundary may be definitely fixed; and in such a case the plaintiffs would be entitled to specific performance, if they did not lose their right thereto by reason of delay in bringing their petition. *Moody v. Vondereau*, 131 Ga. 521, 62 S. E. 821.

[2] 2. Nor do we think that the plaintiffs were barred of their equitable relief by laches. Generally time is not of the essence of a contract for the sale of land. And in the bond for title executed by Mrs. Godwin time was not expressly made of the essence of the contract, and the instrument does not contain any terms a fair construction of which would make time of the essence. This was an ordinary contract for the sale of land, with part payment, and the bond for title in the usual terms; and there was no variance from such usual terms to indicate that both of the parties, or either of them, contended that time should be of the essence. And it would not seem that, although the plaintiffs delayed for a period of nearly five years before making a tender of the balance of the purchase money, this was such an unreasonable delay as to annul the rights which plaintiffs would have had upon making a tender more promptly. The owner of the land was in possession of it, and had possession and use of the \$350 which had been paid at first, and the note which had been given for the deferred payment bore interest. In such a case, especially in the absence of any demand by the defendants that the plaintiffs comply, within some fixed period, with the terms of the contract of sale, and a declaration on the part of the defendant that, unless this demand was complied with by the plaintiffs, the latter's rights under the bond would be forfeited, it would seem that the interest upon the deferred payment would be sufficient compensation for any delay in making payment. *Ellis v. Bryant*, 120 Ga. 890, 48 S. E. 352.

Judgment reversed. All the Justices concur.

(140 Ga. 106)

FLAGG v. STATE.

(Supreme Court of Georgia. June 11, 1913.)

*(Syllabus by the Court.)***SUFFICIENCY OF EVIDENCE.**

The verdict was supported by the evidence, and there was no error in overruling the motion for a new trial.

Error from Superior Court, Bibb County; W. E. Thomas, Judge.

John Flagg was convicted of crime, and brings error. Affirmed.

W. D. McNeil, of Macon, for plaintiff in error. Jno. P. Ross, Sol. Gen., of Macon, and T. S. Felder, Atty. Gen., for the State.

LUMPKIN, J. Judgment affirmed. All the Justices concur.

(140 Ga. 187)

WELLS et al. v. DU BOSE.

(Supreme Court of Georgia. June 17, 1913.)

*(Syllabus by the Court.)***1. CORPORATIONS (§§ 30, 563*)—LIABILITY OF ORGANIZER—ACTION BY RECEIVER.**

"The liability of persons who organize a corporation and transact business in its name, before the minimum capital stock has been subscribed for, is to creditors, and is not an asset of the corporation; and under the ruling in the case of *John V. Farwell Co. v. Jackson Stores*, 137 Ga. 174, 73 S. E. 13, the receiver of the corporation could not maintain a suit against persons falling within the provisions of section 2220 of the Civil Code of 1910, to collect from them, as an asset of the corporation, an amount necessary to pay the outstanding debts of the corporation." *Rigbers v. Hathcock*, 138 Ga. 120, 74 S. E. 834.

[Ed. Note.—For other cases, see *Corporations*, Cent. Dig. §§ 97-100, 2280, 2280½; Dec. Dig. §§ 30, 563.*]

2. DEMURRER TO PETITION.

Applying the ruling above announced to the facts of this case, the court erred in not sustaining the general demurrer to the petition.

Error from Superior Court, Wilkes County; B. F. Walker, Judge.

Action by George M. Du Bose against L. M. Wells and others. Judgment for plaintiff, and defendants bring error. Reversed.

W. A. Slaton, of Washington, Ga., for plaintiffs in error. Colley & Colley, C. E. Sutton, and R. C. Norman, all of Washington, Ga., for defendant in error.

FISH, C. J. Judgment reversed. All the Justices concur.

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

(140 Ga. 165)

CLEMENTS' v. STATE.

(Supreme Court of Georgia. June 16, 1913.)

*(Syllabus by the Court.)***1. CRIMINAL LAW (§ 823*)—INSTRUCTIONS—PRISONER'S STATEMENT.**

The failure to refer to the prisoner's statement while charging on reasonable doubt was not erroneous, especially where in another part of the charge the jury was fully and correctly instructed as to the statutory provisions in reference to such statement. *Hayes v. State*, 114 Ga. 25 (3), 40 S. E. 13; *Cargile v. State*, 137 Ga. 775 (1), 74 S. E. 621.

[Ed. Note.—For other cases, see *Criminal Law*, Cent. Dig. §§ 1992-1995, 3158; Dec. Dig. § 823.*]

2. HOMICIDE (§ 309*)—INSTRUCTIONS—VOLUNTARY MANSLAUGHTER.

Under one phase of the evidence, the law of voluntary manslaughter was involved in the case, and the judge erred in omitting to charge on that subject.

[Ed. Note.—For other cases, see *Homicide*, Cent. Dig. §§ 649, 650, 652-655; Dec. Dig. § 309.*]

Fish, C. J., and Lumpkin, J., dissenting.

Error from Superior Court, Lowndes County; *W. E. Thomas*, Judge.

Warren Clements was convicted of murder, and brings error. Reversed.

Knight, Chastain & Gaskins, of Nashville, and *E. K. Wilcox*, of Valdosta, for plaintiff in error. *J. A. Wilkes*, Sol. Gen., of Moultrie, and *T. S. Felder*, Atty. Gen., for the State.

ATKINSON, J. [1] Warren Clements on trial for murder was convicted; the jury recommending that he be punished by imprisonment in the penitentiary for life. He made a motion for new trial, which was refused. The bill of exceptions assigns error upon the judgment refusing a new trial.

1. After charging the provisions of the Code relative to the statement of the accused, the judge instructed the jury on the subject of reasonable doubt as follows: "A reasonable doubt in the law is one arising out of the case either from want, weakness, insufficiency, or conflict in the testimony, and which leaves the mind of an honest juror wavering and in doubt, a doubt which is not a mere conjecture, but one for which the juror can assign a reason for from having heard the whole case." This charge was assigned as error for the reasons: "(a) It restricted the doctrine of reasonable doubt to the evidence or lack of evidence, and prevented the jury from considering the defendant's statement in determining whether or not the defendant was guilty beyond a reasonable doubt. (b) Because the jury had the right to consider the defendant's statement; and his statement alone, or in connection with the other evidence, may have been sufficient to generate a reasonable doubt in their minds." For the reasons indicated in the

headnote there was no merit in this ground of the motion for new trial.

[2] 2. Complaint was made in the motion for new trial that the judge omitted to charge on the law of voluntary manslaughter. There was conflict in the testimony of the witnesses for the state and the accused. According to some of the evidence for the state, the homicide was murder, without mitigating circumstances, while according to that of the defense it was justifiable. However, according to the testimony of *D. H. Harrell*, a witness for the state, the element of voluntary manslaughter entered into the case. From the testimony of this witness the following appears, among other things: *E. J. Griffin* and several others, including witness and *Warren Clements*, the defendant, started on a journey in *Griffin's* automobile. Several of the party, including the individuals above named, were drinking. After going some distance the automobile was stopped, and all of the party alighted. While on the ground *Clements* fired his pistol. *Griffin* charged him with shooting his automobile. *Clements* denied the charge, and explained that he shot at a tree, but the explanation was not accepted. The men did not appear to be angry, but after the shot and controversy above mentioned, in the immediate presence of witness, they stood facing each other on the same side of the automobile, one at the rear and the other at the front. While in this position, witness turned his eyes away from them for "a little bit, a minute or two," when two pistol shots were fired, whereupon he immediately looked and saw *Griffin* and *Clements* shooting at each other. After an exchange of several shots both parties retired. *Griffin* received a wound, from which, after lingering, he died. Under this evidence the jury might have found that there was an altercation between *Griffin*, the owner of the car, and *Clements*, whom he charged with shooting into it; and, while apparently the men, at the time the first shot was fired and the colloquy about shooting the automobile took place, were not angry, the jury might, from all the circumstances, have inferred that the participants in the affray had their feelings aroused against each other by the charge made by one and the denial made by the other, attended by a mutual display of arms, whereby each was incited under a sudden heat of passion to engage in combat. If the jury should find that the parties were thus led into combat with deadly weapons, by which one of them was killed, they would have been authorized to find the slayer guilty of voluntary manslaughter. This theory of the case might have been accepted by the jury rather than that of murder or justifiable homicide, as presented by the testimony of other witnesses, and though no request was made to charge on the subject, the judge should have given an appropriate charge on

the law of voluntary manslaughter, and the omission to do so necessitates another trial.

Judgment reversed. All the Justices concur, except FISH, C. J., and LUMPKIN, J., dissenting.

LUMPKIN, J. (dissenting). In order to reduce a homicide from murder to manslaughter, there must be some actual assault upon the person killing, or an attempt by the person killed to commit a serious personal injury on the person killing, or other equivalent circumstances to justify the excitement of passion, and to exclude all idea of deliberation or malice, either express or implied. Provocation by words will not work that result. Penal Code, § 65.

Whether it is claimed that the killing was reduced to manslaughter under the exact terms of the section of the Code cited, or on the theory of a sudden quarrel, followed by fighting upon the spot, or presently procuring weapons and fighting, the reducing facts must appear from the evidence or statement of the accused. It is not contended that such facts appeared in this case from the evidence of any of the eyewitnesses to the entire transaction. The only witness from whose evidence the theory of voluntary manslaughter is claimed to arise did not testify to any assault or equivalent acts. He testified to the defendant's shooting a pistol, and that he heard some complaint thereof from the decedent. He looked in a different direction for "a minute or two," and when he turned back both parties were shooting. To reduce the killing to manslaughter on this basis would not be because of any evidence authorizing it, but because of lack of evidence—not on account of anything which the witness saw or heard, but because of what he did not see or hear. A supposition of manslaughter was rather inconsistent than consistent with the state of affairs when the witness looked away. According to his evidence, the defendant had then fired a shot at a tree or the automobile. The decedent was not shown to have drawn his pistol. He had committed no assault, nor had he attempted any. He had merely complained of the shooting which the defendant had done, but the witness said that he heard nothing indicating anger before he looked in another direction. There is no basis in the evidence of this witness for requiring a charge on the subject of voluntary manslaughter, except to surmise what happened when the witness looked away. I do not think a verdict should be upset by such guess work, merely because one of the witnesses did not see or hear the entire transaction.

In *Mann v. State*, 124 Ga. 760, 53 S. E. 324, 4 L. R. A. (N. S.) 934, and numerous cases following the ruling there made, it has been held that, where the evidence showing a killing does not also show that it was less

than murder, the law presumes every homicide to be malicious until the contrary appears from circumstances of alleviation, excuse, or justification. I do not think the witness mentioned showed any such circumstances, so as to require a charge on voluntary manslaughter.

I am authorized to state that Chief Justice FISH concurs in this dissent.

(140 Ga. 128)

COLLIER v. STATE.

(Supreme Court of Georgia. June 13, 1913.)

(*Syllabus by the Court.*)

SUFFICIENCY OF EVIDENCE.

No complaint is made of any ruling of the court on the trial of the case. The evidence warrants the verdict, which has the approval of the trial judge.

Error from Superior Court, Chatham County; W. G. Charlton, Judge.

Frank Collier was convicted of crime, and brings error. Affirmed.

Geo. W. Owens, of Savannah, for plaintiff in error. M. H. Bernstein, of Savannah, W. C. Hartridge, Sol. Gen., of Atlanta, and T. S. Felder, Atty. Gen., for the State.

EVANS, P. J. Judgment affirmed. All the Justices concur.

(140 Ga. 132)

WIMBURN et al. v. FISKE.

(Supreme Court of Georgia. June 13, 1913.)

(*Syllabus by the Court.*)

APPEAL AND ERROR (§ 1015*) — CONFLICTING EVIDENCE.

There being conflicting evidence, and the verdict not being required thereby, the first grant of a new trial will not be reversed. Civil Code 1910, § 6204.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3860-3876; Dec. Dig. § 1015.*]

Error from Superior Court, Richmond County; H. C. Hammond, Judge.

Action by C. C. Wimburn and others against W. M. Fiske. Verdict for plaintiffs. From an order granting a new trial, they bring error. Affirmed.

Isaac S. Peebles, Jr., of Augusta, for plaintiffs in error. Geo. T. Jackson, of Augusta, for defendant in error.

LUMPKIN, J. Judgment affirmed. All the Justices concur.

(140 Ga. 101)

REEVES v. CALLAWAY et al.

(Supreme Court of Georgia. June 11, 1913.)

(*Syllabus by the Court.*)

1. WITNESSES (§ 392*)—IMPEACHMENT—CONTRADICTORY STATEMENTS.

Where the value of property is a relevant fact, and a witness testifies to its value, a letter

written by the witness fixing its value at a different sum, though written as much as two years prior to the transaction inquired about, is competent evidence.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. §§ 1249-1251, 1257; Dec. Dig. § 392.*]

2. PRINCIPAL AND AGENT (§ 69*)—PURCHASE OF PRINCIPAL'S PROPERTY—SETTING ASIDE SALE.

An agent or attorney employed to sell property cannot directly or indirectly become the purchaser without the principal's knowledge and consent. If the agent associates with himself in the purchase another person who has knowledge of the agent's relation to his principal, and the sale is made by the principal in ignorance of the agent's interest in the purchase, such sale will be set aside at the instance of the principal, who is not in laches, upon his offer to restore the status. In such case the law does not inquire whether there was fraud, but gives to the principal the absolute right to repudiate the transaction upon offering to do equity.

[Ed. Note.—For other cases, see Principal and Agent, Cent. Dig. §§ 130-145; Dec. Dig. § 69.*]

Error from Superior Court, Fulton County; Geo. L. Bell, Judge.

Action by J. M. Reeves against E. C. Callaway and others. Judgment for defendants, and plaintiff brings error. Reversed.

E. C. Callaway sued out a warrant to dispossess J. M. Reeves as his tenant, whereupon Reeves filed an equitable petition to enjoin the dispossession process. The case alleged in the original petition was that Reeves owned certain city property and a farm tract; both were incumbered with liens. He applied to H. A. Etheridge for a loan to pay off these incumbrances. Etheridge procured a loan from Callaway, and the plaintiff executed what he supposed to be a deed to Callaway to secure its payment. Etheridge undertook to apply the amount of the loan to the payment of the liens on the plaintiff's property. The plaintiff alleged himself to be an ignorant negro man, without education and unacquainted with legal nomenclature. It turns out that the deed was made to Etheridge, and not to Callaway. He further alleged that on the same day he executed the deed to secure the loan Callaway and he entered into two written agreements, wherein Callaway leased him the property he conveyed to Etheridge for a stated sum payable semiannually, and gave him an option to repurchase it five years from date at a stipulated price. When he signed the instruments, the plaintiff alleged that he understood one of them provided for a written extension of the loan for five years, and that the other was an obligation to pay the difference between this loan and the price at which he could repurchase the land as a bonus for making the loan. About four months after he executed the deed to Etheridge, the latter conveyed the land therein described to Callaway. The plaintiff gave possession of the city property to Callaway for the purpose of collecting the rents to be applied to his in-

debtedness to Callaway; he retaining possession of the farm property. He prayed for an accounting from Callaway and Etheridge as to the disposition of the money loaned to him and for the collection of the rents on the city property, for cancellation of the deeds, and for injunction against the warrant to dispossess him of his farm property.

The plaintiff amended his petition, alleging that neither Callaway nor Etheridge paid out any money for him, but that the whole transaction was a device to vest themselves with the title to his property; that as illustration of such scheme, about four months after he conveyed his land to Etheridge, the latter procured on the land a loan for the same amount he promised to lend to the plaintiff, and then conveyed the land to Callaway; that plaintiff has paid Callaway and Etheridge all he is due them, and that he is willing to have the loan deed which Etheridge put on the land made a valid lien thereon. He renewed his prayer against Etheridge and Callaway for an accounting. A second amendment to the petition was allowed. It was alleged therein that in all the transactions and negotiations which led up to the execution of the papers, under which Callaway claims title to the land, and in the execution of the papers, the plaintiff was represented by Etheridge as his attorney at law and confidential advisor; that at the time of the transaction he did not know that his attorney was to share with Callaway in the profits to be realized from the ownership of the property by Callaway, and was not aware of the fact until after the filing of this suit, and gained the information from an affidavit of Callaway used at an interlocutory hearing; that, if the court should hold the transaction between himself and Callaway and Etheridge to be a sale of his property, he repudiated the sale, offering to pay any money found to be due them on an accounting between them, and prayed that the various papers be canceled.

The defendants, Callaway and Etheridge, answered, denying each and all charges of collusion and fraud. They averred that plaintiff represented to them that the holder of the incumbrance on his property was about to sell him out, and that he would lose everything unless some one would come to his relief. Defendants made it clear to him that they would not loan him any money, but that they would buy the property outright, and give him five years in which to buy it back at an advance price; he in the meantime obligating himself to pay a reasonable rental therefor, and, in the event he should buy it back, he was to reimburse them for all sums expended on the property. The papers were carefully read over and their purport was thoroughly understood by the plaintiff at the time of their execution. The plaintiff is not ignorant, but is a man con-

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

versant with and experienced in transactions of this kind. The plaintiff soon fell behind in his rent; he was indulged in his default, and given every opportunity to repurchase his property. He has allowed the property to go into disrepair so that its market value is less than their investment in it. The trial resulted in a verdict for the defendants which the court refused to set aside.

Daley, Chambers & Smith and Hines & Jordan, all of Atlanta, for plaintiff in error. Westmoreland Bros., of Atlanta, for defendants in error.

EVANS, P. J. (after stating the facts as above). [1] 1. It was relevant to an issue in the case to prove the value of the property at the time of the transaction between the parties. A witness was offered by the defendants to prove the value of the farm land. The plaintiff offered to put in evidence a letter written by the witness to a person not a party to the case about two years before the transaction in issue, in which the value of the land was stated to be of a greater sum than that fixed by the witness. This letter was admissible in evidence as affecting the credit to be given the testimony of the witness in his estimate of the value of the land.

[2] 2. In the last amendment to his petition, the plaintiff alleged that at the time he made the deed to Etheridge and in all the transactions connected therewith the latter was acting as his attorney, and that he did not know that he was to share with Callaway in the profits to be realized from the ownership of the property by Callaway, and was not aware of this fact until after the filing of the present suit. His contention is that, even if Etheridge was not acting as his attorney in procuring a loan, he was acting as his attorney in making a sale of the property in which both he and Callaway were interested in the purchase, and that Callaway knew that Etheridge was acting as attorney for Reeves, but that he (Reeves) did not know of Etheridge's interest in the purchase of the property, and that, under these circumstances, the vendor on discovering that his attorney was interested with the vendee in the purchase could disaffirm the sale by offering to account for what has been paid out for his benefit. The testimony of Callaway and Etheridge, in substance, was that Callaway refused to loan money on the property, but did agree to buy the property and give Reeves the option of buying it back within five years, provided Reeves would pay the rents and keep the premises in repair; that Reeves thoroughly understood the transaction, and that the agreement between Reeves and Callaway was reduced to writing by Etheridge; that Callaway desired the title to be made to Etheridge inasmuch as Callaway was in business, and it was contemplated to borrow the money on the property, and Callaway was apprehensive his credit might be affected

by giving a loan deed. It was for this reason that the deed was taken in the name of Etheridge, who negotiated a loan on the property with Callaway's indorsement, and, after securing the loan by a deed to the lender, Etheridge conveyed the property to Callaway. Etheridge testified that he did not charge Reeves a fee for procuring Callaway to purchase the property, but acted more as a friend to help Reeves in settling the liens against the property so as to save something for him; that he compromised those claims so as to leave \$181 of the purchase money, of which sum he paid \$165 to Reeves to buy for him a mule, and retained \$16 for his trouble in settling up these matters and clearing Reeves' title to the land. Callaway testified: "When I gave him [Etheridge] the check [for the purchase of the land], as to whether he was attorney for me or Reeves, he was just an attorney closing up the deal for both of us. As to whether he was acting as attorney for me or Reeves, he was acting as a party in interest with me. As to my knowing it to be a fact that he was acting as Reeves' attorney, he was transacting the business for Reeves. I think he was acting as Reeves' attorney." The check referred to was made payable to Etheridge as attorney. Both Callaway and Etheridge admitted that the land was bought with the expectation of a resale, under an arrangement between them that Etheridge was to share in the profits of the resale to the extent of one half. Reeves testified that Etheridge was his attorney at law in all the transactions, and that he did not know that he was interested with Callaway in the purchase until after the pendency of the present suit. On this phase of the case the court charged: "If you find that it was a sale, the plaintiff contends that it was such a sale as that he could and does repudiate, and it ought to be declared null and void, by reason of this last amendment filed by him, in which the plaintiff contends that he employed Mr. Etheridge to secure him a loan, and that instead of that he made a sale of his property, and that he was inveigled into the sale, and under the policy of the law, the plaintiff contends, he would not be bound by it, and that the sale would be null and void. If he did not have knowledge at the time of the execution of the papers of what they contained, he could repudiate them and have them set aside." Exception is taken to this charge on the ground that it misstated the plaintiff's contention as alleged in his last amendment; that he was entitled to repudiate the sale upon discovery that his attorney was interested with the purchaser upon restoring the status, which he offered to do; that he was entitled to repudiate this sale because his attorney was secretly interested therein, regardless of his knowledge of the contents of the papers he executed.

The Code declares that, without the ex-

press consent of the principal after a full knowledge of all the facts, an agent employed to sell cannot be himself the purchaser. Civil Code, § 3582. This principle applies as well to a case where the agent joins with a stranger, who has knowledge of the agency, in making the purchase as where the agent is the sole purchaser. In such case the proportion of the purchase money paid by the purchasers is an irrelevant fact. It is immaterial whether the agent's partner in the transaction furnished all or a part of the money, if he knows of the agency and joins with the agent in the purchase of the property on joint account, or for their mutual benefit. The policy of the law forbids an agent employed to sell to place himself in an attitude of antagonism to the interest of his principal by associating himself with another in the purchase of the land, and a sale by an agent without the express consent of his principal to himself in association with another, with knowledge of his agency, will be set aside at the instance of the principal. It will be no defense for the agent and his associate to show that the agent acted in good faith and that the transaction was in fact for the best interest of the principal. The law does not inquire in such a case whether there is any fraud, but gives the principal the absolute right to repudiate the transaction, because it will not allow an agent to take a position which is so inconsistent with his duty to his principal. 1 Clark and Skyles on Agency, § 407. The rule is not otherwise in a case where the agent to sell may be an attorney at law. Indeed, the law requires of an attorney the utmost good faith towards his client. Says Judge Story: "It is obvious that this relation must give rise to great confidence between the parties and to very strong influences over the actions and rights and interests of the client. The situation of an attorney or solicitor puts it in his power to avail himself not only of the necessities of his client, but of his good nature, liberality, and credulity to obtain undue advantages, bargains, and gratuities. Hence the law, with a wise providence, not only watches over all the transactions of parties in this predicament, but it often interposes to declare transactions void, which between other persons would be held unobjectionable." 1 Story, Eq. Jur. § 310; Stubinger v. Frey, 116 Ga. 396, 42 S. E. 713. In affording this right of repudiation to the principal on discovery that his attorney was interested in the purchase of the property in connection with another who knew of the attorney's relation to his principal, equity requires that the principal must do equity by a return of the purchase money and restoration of the status. Ordinarily this is accomplished by a tender of the money. But where the transaction is involved and mutual accounts have sprung out of it, and the exact status cannot

be ascertained except from an accounting, a tender will be excused upon the principal's offering to account for what moneys he may be equitably due as a condition to rescission. The evidence in this case showed mutual accounts with many items and an accounting was prayed. The charge of the court did not correctly state the law applicable to the allegations of the last amendment, and a new trial must result.

Judgment reversed. All the Justices concur.

(140 Ga. 100)

ATKINSON v. OLMSTEAD.

(Supreme Court of Georgia. June 11, 1913.)

(Syllabus by the Court.)

1. APPEAL AND ERROR (§ 329*)—BILL OF EXCEPTIONS—AMENDMENT.

The plaintiff brought an action against the receivers of a railroad company. The defendants filed demurrers to the petition, which were overruled, and exceptions pendente lite were filed by defendants. On the trial, upon the conclusion of the evidence in behalf of the plaintiff, defendants moved for a nonsuit, which was refused. They also filed exceptions pendente lite to this ruling. A verdict was rendered for the plaintiff. The railroad company moved for a new trial, which was overruled; the respondent to the motion at no time raised the point before the trial court that the company, not being a party to the action, was not authorized to make the motion. Upon the call of the case in the Supreme Court, the defendant in error moved to dismiss the bill of exceptions upon the ground that the railway company was not a party to the case and therefore had no right to move for a new trial or to sue out a writ of error complaining of the overruling of such motion. The surviving receiver, in response to the motion to dismiss the bill of exceptions, asked that it be amended so as to insert his name in lieu of the railroad company as plaintiff in error. *Held*: (a) That the motion to amend the bill of exceptions so as to make the receiver the plaintiff in error in lieu of the railroad company is allowed; (b) that the motion to dismiss the bill of exceptions is overruled. See *Gate City Terminal Co. v. Thrower*, 136 Ga. 456 (1), 460, 71 S. E. 908.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 1836; Dec. Dig. § 329.*]

2. APPEAL AND ERROR (§ 1078*)—ASSIGNMENTS OF ERROR—ABANDONMENT.

The assignment of error upon the overruling of the demurrers to the petition, not being referred to in the brief of counsel for the plaintiff in error, is considered abandoned.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4256-4261; Dec. Dig. § 1078.*]

3. INSTRUCTIONS.

The instructions to which exceptions were taken were not erroneous for any reason assigned.

4. PLEADING (§ 377*)—ISSUES—FAILURE TO DENY—PROOF OF VENUE.

The original petition alleged that the cause of action—the burning of the plaintiff's property by the alleged negligent acts of the defendants' employes—originated in Fayette county, where the suit was instituted. This allegation was not denied in the answer of the

defendants, nor was it averred in their answer that the defendants could neither admit nor deny it for lack of information in reference thereto; although the answer did deny that the value of the property of the plaintiff alleged to have been burned was as set forth in the petition, and averred that defendants could neither admit nor deny the allegation as to the ownership of such property. *Held*, that the plaintiff was not bound to prove, on the trial, that the cause of action originated in the county where the suit was brought (Civ. Code, 1910, § 5539), under the general rule as provided in Civ. Code 1910, § 2798.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 1228-1231; Dec. Dig. § 377.*]

5. SUFFICIENCY OF EVIDENCE.

The verdict was authorized by the evidence, and there was no error in refusing a new trial.

Error from Superior Court, Fayette County; R. T. Daniel, Judge.

Action by W. J. Olmstead against H. M. Atkinson, receiver. Judgment for plaintiff, and defendant brings error. Affirmed.

Rosser & Brandon and Colquitt & Conyers, all of Atlanta, and Bialock & Culpepper, of Fayetteville, for plaintiff in error. J. W. Wise, of Fayetteville, and J. M. Graham, of Atlanta, for defendant in error.

FISH, C. J. Judgment affirmed. All the Justices concur.

(140 Ga. 131)

FORT-MIMS & HAYNES CO. v. BRANAN-AKERS CO.

(Supreme Court of Georgia. June 13, 1913.)

(Syllabus by the Court.)

1. PLEADING (§ 85*)—ANSWER—FILING OUT OF TIME.

Where a declaration has been filed in the superior court on an attachment returnable thereto, "the defendant may appear by himself or attorney at law, and make his defense at any time before final judgment is rendered against him." Civ. Code 1910, § 5104.

(a) Accordingly the court did not err in allowing the defendants in such a case to file a proper plea at the trial term, although the case had been marked in default at the return term. See *Fincher v. Stanley Electric Mfg. Co.*, 127 Ga. 362, 56 S. E. 440.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 172-178; Dec. Dig. § 85.*]

2. BANKRUPTCY (§ 418*)—ABATEMENT OF ACTION.

The action in attachment was based upon indebtedness due on promissory notes. It appeared by agreement on the trial, while plaintiffs were submitting evidence, that the defendants, after the filing of the declaration, had been duly adjudicated bankrupts, that in the bankruptcy proceedings the schedules of assets and liabilities were filed as required by law, that the notes held and sued on by the plaintiffs were properly scheduled among the unsecured liabilities of the defendant bankrupts, and that a discharge in bankruptcy had been duly and regularly granted to each of the defendants. *Held*, as it appeared that the indebtedness claimed by the plaintiffs was provable in bankruptcy, the defendants were relieved from liability therefor by the discharge in bankruptcy and a nonsuit was properly granted. Bankr.

Act July 1, 1898, c. 541, § 17, 30 Stat. 550 (U. S. Comp. St. 1901, p. 8428). See *Beck & Gregg Hdw. Co. v. Crum*, 127 Ga. 94 (3), 56 S. E. 242.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 764-771; Dec. Dig. § 418.*]

Error from Superior Court, Fulton County; W. D. Ellis, Judge.

Action between the Fort-Mims & Haynes Company and the Branan-Akers Company. From a judgment for the latter, the former brings error. Affirmed.

Horton Bros. & Burrees, of Atlanta, for plaintiff in error. Jones & Chambers, of Atlanta, for defendant in error.

FISH, C. J. Judgment affirmed. All the Justices concur.

(140 Ga. 131)

LOTHRIDGE v. VARNADORE.

(Supreme Court of Georgia. June 13, 1913.)

(Syllabus by the Court.)

1. INSTRUCTIONS.

The charge in this case was not well arranged, and was in some respects subject to criticism; but, when considered as a whole, in the light of the evidence, it does not furnish ground for a new trial.

2. NEW TRIAL (§ 41*)—INSTRUCTIONS—OBVIOUS ERRORS.

Although at one time in delivering his charge the presiding judge used the word "plaintiff," instead of the word "defendant," yet this will not necessitate a new trial, where the context plainly shows that it was a mere slip of the tongue, and such as was not calculated to mislead the jury. *Southern Ry. Co. v. Merritt*, 120 Ga. 406, 47 S. E. 908.

[Ed. Note.—For other cases, see New Trial, Cent. Dig. §§ 67-71; Dec. Dig. § 41.*]

3. VERDICT—EVIDENCE—NEW TRIAL.

The verdict was supported by the evidence, and there was no error in overruling the motion for a new trial.

Error from Superior Court, Appling County; C. B. Conyers, Judge.

Action between J. E. Lothridge and L. S. Varnadore. Judgment for the latter, and the former brings error. Affirmed.

W. W. Bennett, of Baxley, for plaintiff in error. Parker & Highsmith, of Baxley, for defendant in error.

LUMPKIN, J. Judgment affirmed. All the Justices concur.

(140 Ga. 168)

JAMES v. HAMIL et al.

(Supreme Court of Georgia. June 17, 1913.)

(Syllabus by the Court.)

1. PARTITION (§ 94*)—RETURNS OF COMMISSIONERS—REFERENCE TO PLAT—ADMISSIBILITY OF PLAT IN EVIDENCE.

It appearing that a certain return of partitioners was material to the issues being tried, that the same was introduced in evidence by

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes 78 S.E.—46

the plaintiffs and admitted without objection, and that the description of the land, included in the return and assigned to various parties, one of whom was a predecessor in title of the plaintiffs, concludes with the recital, "All of which will fully appear by reference to the annexed plat of survey, which is a part of the return," the court did not err in admitting in evidence the plat thus referred to, over the objection that the same "did not clearly show the land sought to be conveyed to the several parties named in the partition proceedings by distances, metes and bounds"; it being apparent, from a consideration of the map in connection with the recitals in the return, that the two—that is, the return and the map annexed—show clearly the various parcels of land assigned to the several parties named in the return.

[Ed. Note.—For other cases, see Partition, Cent. Dig. §§ 287-299, 305; Dec. Dig. § 94.*]

2. TRIAL (§ 228*)—INSTRUCTIONS—NAME OF PARTY.

Under the explanation made in the judge's note, his reference to a certain witness and party as "Willie Hamil" was not misleading, nor confusing to the jury; it being manifest that, although the judge should have referred to J. A. Hamil as the party making the agreement, the effect of which was being submitted to the jury in the charge, the jury could not but have understood that the party actually making the agreement was referred to when he mis-called his name and referred to him as "Willie Hamil."

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 509-512, 526; Dec. Dig. § 228.*]

3. TRIAL (§ 281*) — INSTRUCTIONS — OBJECTIONS—GENERAL OR SPECIFIC.

The other portions of the charge complained of were adapted to one phase of the case as presented under the testimony of certain witnesses, and consequently were not open to the objection that such charges were not warranted by nor adjusted to the evidence in the case. If other theories of the case, which the plaintiff in error contends to be the true theories, were made by the evidence, and were not covered by the charge, this should have been excepted to on that ground.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 694; Dec. Dig. § 281.*]

4. DEEDS (§ 38*)—DESCRIPTION—CERTAINTY.

A deed purporting to convey "153½ acres off of lot of land No. 42" was inoperative, because of vagueness and uncertainty of description of the portion of lot No. 42 sought to be conveyed, to convey any portion of that lot of land, although it might be operative to convey other lots of land, or portions of other lots, where the description of such other lots, or portions thereof, were sufficiently definite.

[Ed. Note.—For other cases, see Deeds, Cent. Dig. §§ 65-79; Dec. Dig. § 38.*]

5. SUFFICIENCY OF EVIDENCE.

The evidence authorized the verdict.

Error from Superior Court, Early County; W. C. Worrill, Judge.

Action between V. W. James and W. E. Hamil and others. From a judgment for the latter, the former brings error. Affirmed.

Rambo & Wright, of Blakely, for plaintiff in error. Pope & Bennet, of Albany, for defendants in error.

BECK, J. Judgment affirmed. All the Justices concur.

(140 Ga. 125)

BEASLEY v. PHOENIX INS. CO.

SAME v. ATHENS MUT. INS. CO.

(Supreme Court of Georgia. June 13, 1913.)

(Syllabus by the Court.)

INSURANCE (§ 378*) — FIRE POLICY — ADDITIONAL INSURANCE—WAIVER.

The policies of insurance upon which the respective actions were brought insured a certain stock of goods in stated amounts, and were issued subject to the following, among other, express conditions and stipulations, viz.: "One thousand dollars other insurance permitted." "This entire policy unless otherwise provided by agreement indorsed hereon or added hereto, shall be void if the insured now has or shall hereafter make or procure any contract of insurance, whether valid or not, on property covered in whole or in part by this policy." "This policy is made and accepted subject to the foregoing stipulations and conditions: * * * No officer, agent, or other representative of this company shall have the power to waive any provision or condition of this policy, except as by the terms of this policy may be the subject of agreement indorsed hereon or added hereto, and as to such provisions and conditions no officer, agent, or representative shall have such power or be deemed or held to have waived such provisions or conditions unless such waiver, if any, shall be written upon or attached hereto, nor shall any privilege or permission affecting the insurance under this policy exist or be claimed by the insured unless so written or attached." Held, that the company did not waive its right to plead as a defense that the policies had been rendered void because the insured, in violation of their terms and conditions, without the consent of the company, had taken out additional insurance on the stock of goods in a sum larger than that authorized by the policies; nor was the company estopped from setting up such defense, by reason of the facts, sought to be proved, that the agent, who issued the policies, knew for some ten days prior to the fire which destroyed the goods that the insured had, subsequently to the issuance of the policies sued on, procured such excessive additional insurance, and failed during that time to notify the insured that the policies had been forfeited, and also failed to return the unearned portion of the premiums, but by oral statements led the insured to believe that the policies were then in force, and urged the insured to allow him to write other insurance on the goods. *Morris v. Orient Ins. Co.*, 106 Ga. 472, 33 S. E. 430; *Lippman v. Aetna Ins. Co.*, 106 Ga. 391, 33 S. E. 897, 75 Am. St. Rep. 62; *Id.*, 120 Ga. 247, 47 S. E. 593; *Johnson v. Aetna Ins. Co.*, 123 Ga. 404, 51 S. E. 339, 107 Am. St. Rep. 92; *Athens Mutual Ins. Co. v. Evans*, 132 Ga. 703, 64 S. E. 993; *Civil Code*, § 2489; 2 *Cooley's Briefs on Insurance*, 1045.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 968-997; Dec. Dig. § 378.*]

Error from Superior Court, Mitchell County; Frank Park, Judge.

Actions by Mrs. M. J. Beasley against the Phoenix Insurance Company and against the Athens Mutual Insurance Company. Judgment for defendants, and plaintiff brings error. Affirmed.

Pope & Bennet, of Albany, for plaintiff in error. Slaton & Phillips, of Atlanta, and E. E. Cox, of Camilla, for defendants in error.

FISH, C. J. A nonsuit was properly awarded in each case. Judgment affirmed. All the Justices concur.

(140 Ga. 189)

ALBRITTON et al. v. GIDDINGS et al.

(Supreme Court of Georgia. June 17, 1913.)

(Syllabus by the Court.)

LIMITATION OF ACTIONS (§ 100*)—CANCELLATION OF INSTRUMENTS (§ 34*)—APPEAL AND ERROR (§ 1078*)—DEMURRERS—ABANDONMENT—LACHES.

A. and B. brought their equitable petition against C. and others, heirs at law of D., alleging that in the year 1875 the grandfather of petitioners executed a deed conveying to them certain lands in Pulaski county, Ga.; that, their father having died, their mother intermarried with D., and that afterwards, in the year 1879, D. was appointed as their guardian; that subsequently, in the year 1881, D., as guardian, obtained an order authorizing the sale of the lands in Pulaski county, and did sell the same to one S., and that either with the proceeds of the sale, or in consideration of the lands in Pulaski county, had executed to him a deed by S. to certain described lands in Lowndes county, Ga., which lands are involved in this case; that D. and the mother of petitioners, as well as petitioners, resided for a number of years upon the lands in Lowndes county; that the occupancy of the lands by D. and his wife was permissive, petitioners being "content for the family to have the use and occupancy of said premises in order that their mother might have a home on said land"; that such occupancy continued until 1906, about four years before the bringing of this suit; that these lands were "recognized" by D. as being the lands of petitioners, D. stating on various occasions that the land was theirs, and stating, further, that the deed to the land was executed to him as guardian for petitioners; and this deed, although executed in the year 1881, was not recorded until the year 1907, and petitioners were in entire ignorance of the nature of the deed, believing that it had been executed so as to vest D. as their guardian with the title, until the year 1910, a short time before filing this suit. In the meantime D. had died, and this suit was brought in the latter part of 1910 against the defendants, as heirs at law of D. The petition concludes with the prayer, among others, that the title to the property be declared in petitioners, and that the deed from S. to D. individually be canceled, and for general relief.

Held: (1) That the court properly overruled a general demurrer to this petition, setting up the statute of limitations and laches on the part of petitioners. *Short v. Mathis*, 107 Ga. 807, 33 S. E. 694; *Spence v. Queen*, 139 Ga. 587, 77 S. E. 820.

(2) There were certain special demurrers. These were not referred to in the brief of counsel for plaintiffs in error, and are considered to have been abandoned.

[Ed. Note.—For other cases, see *Limitation of Actions*, Cent. Dig. §§ 323, 480-493; Cent. Dig. § 100;* *Cancellation of Instruments*, Cent. Dig. §§ 49-54; Dec. Dig. § 34;* *Appeal and Error*, Cent. Dig. §§ 4256-4261; Dec. Dig. § 1078.*]

Error from Superior Court, Ben Hill County; W. F. George, Judge.

Suit by John N. Giddings and others against William H. Albritton and others.

A general demurrer to the petition was overruled, and defendants bring error. Affirmed.

J. R. Walker, Dan R. Bruce, and E. K. Wilcox, all of Valdosta, for plaintiffs in error. Haygood & Outts, of Fitzgerald, for defendants in error.

BECK, J. Judgment affirmed. All the Justices concur.

(12 Ga. App. 798)

AUSTIN v. BERLIN SUPPLY CO.

(No. 4,801.)

(Court of Appeals of Georgia. June 10, 1913.)

(Syllabus by the Court.)

LIVERY STABLE KEEPERS (§ 7*)—GOODS DEPOSITED FOR HIRE—DESTRUCTION BY FIRE—LIABILITY.

The keeper of a livery stable is not liable for the loss of goods deposited with him for hire which have been destroyed by an accidental fire, where it appears that he has exercised extraordinary diligence for their preservation.

[Ed. Note.—For other cases, see *Livery Stable Keepers*, Cent. Dig. § 6; Dec. Dig. § 7.*]

Error from Superior Court, Colquitt County; W. E. Thomas, Judge.

Action by G. L. Austin against the Berlin Supply Company. Verdict for defendant, and plaintiff brings error. Affirmed.

Shipp & Kline, of Moultrie, for plaintiff in error. T. H. Parker and James Humphreys, both of Moultrie, for defendant in error.

POTTLE, J. The only question in this case which need be considered is whether a keeper of a livery stable is liable to the owner of goods deposited with him for hire which were destroyed by an accidental fire. While there may be some slight difference among the authorities in reference to the rule existing at common law, it is settled by the great weight of authority that an innkeeper was liable at common law as insurer of goods of his guest, and could limit his liability only by express agreement or notice. It resulted from this that at common law an innkeeper was held liable for the property of his guest which was destroyed by an accidental fire. See *Cutler v. Bonney*, 30 Mich. 259, and numerous authorities cited in the notes to that case in 18 Am. Rep. 127; *Hulett v. Swift*, 33 N. Y. 571, 88 Am. Dec. 405, where it was said that only the negligence or fault of the guest, or the act of God, or the public enemy, would relieve the innkeeper from liability. *Fay v. Pacific Improvement Co.*, 93 Cal. 253, 26 Pac. 1099, 28 Pac. 943, 16 L. R. A. 188, 27 Am. St. Rep. 198, and notes. In 22 Cyc. 1081, the prevailing view is stated to be that an innkeeper is liable, like a common carrier, for loss of goods of his guest, unless the loss was occasioned by the act of God or the public enemy, or by the fault of the owner; though it is stated that according to another view, as announced in a few decisions, the

innkeeper would be excused if the goods were lost without default on the part of himself or his servant or as the result of accidental fire. In this state the liability of the keeper of a livery stable is the same as that of an innkeeper. Civil Code, § 3515. It being settled that at common law an innkeeper was an insurer of goods of his guest, and was liable unless he could show that the loss of the goods was occasioned by the act of God or the public enemy, or the fault of the guest, it remains only to inquire whether or not this rule has been modified by the statutes of this state.

"An innkeeper is a depository for hire, but, from the peculiar nature of his business, his liability is governed by more stringent rules." Civil Code, § 3506. "An innkeeper is bound to extraordinary diligence in preserving the property of his guests, intrusted to his care, and is liable for the same, if stolen, where the guest has complied with all reasonable rules of the inn." Civil Code, § 3508. Section 3510 contains a statutory declaration to the effect that it is reasonable for an innkeeper to provide a safe place for the deposit of valuable articles and require the guests to place such valuable articles therein. This section is, of course, not intended to be exhaustive as to the reasonable rules which may be adopted by an innkeeper. "In case of loss, the presumption is want of proper diligence in the landlord. Negligence or default by the guest himself, of which the loss is a consequence, is a sufficient defense. The innkeeper cannot limit his liability by a public notice; he may adopt reasonable regulations for his own protection, and the publication of such to his guests binds them to comply therewith." Civil Code, § 3511.

The law contained in these sections appeared in the first Code of this state and were codified in the succeeding Codes in the same language. There seems to have been no case in this state which deals with the question of liability of an innkeeper for goods which have been destroyed by accidental fire; but there are several decisions wherein the question of liability for loss of goods of guests by theft or other causes, except accidental fire, have been considered. In *Sasseen v. Clark*, 37 Ga. 242, the goods of a guest were lost while in the custody of an innkeeper. In the opinion in that case Judge Walker stated that both at common law and under our statutes innkeepers were bound to use extraordinary diligence in preserving the property of the guests, but might relieve themselves from liability by showing that the loss was occasioned by negligence or fault of the guest himself. In *Rockwell v. Proctor*, 39 Ga. 105, an innkeeper was held liable to a guest for the loss of an overcoat, upon proof merely that the coat was intrusted to the innkeeper by the guest and was lost without fault on the part of the guest. In *Adams v. Clem*, 41 Ga. 65, 5 Am. Rep. 524,

the rule was stated to be that an innkeeper was bound to extraordinary diligence in preserving the property of his guest, intrusted to his care, where the guest has complied with all the reasonable rules of the inn. In *Murchison v. Sergeant*, 69 Ga. 208, 47 Am. Rep. 754, it was held that "at common law an innkeeper, like a carrier, was an insurer of the goods of a guest. Under the Code the innkeeper is bound to use extraordinary diligence; he may give notice of reasonable regulations; and negligence of the guest himself, of which the loss is a consequence, is allowed as a defense." In that case it appeared that a sum of money and some jewelry were stolen from the plaintiff while lodging at the defendant's hotel. The jury found for the defendant and the Supreme Court held, in substance, in reversing the judgment, that the facts demanded a verdict for the plaintiff. In the opinion, after citing various Code sections, Chief Justice Jackson remarked: "It may be well to say, however, that at common law the rule was perhaps more stringent, yet substantially is very much the same. It was that an innkeeper, like a common carrier, was an insurer of the goods of his guest, and he could only limit his liability by express contract or notice." In *Coskery v. Nagle*, 83 Ga. 696, 10 S. E. 491, 6 L. R. A. 483, 20 Am. St. Rep. 333, the goods of a guest were either lost or stolen by a porter of an innkeeper. The innkeeper was held liable. In the opinion the court said: "The liability of an innkeeper, at common law and in this state, is that of an insurer. We know that this is a harsh rule, but it seems to have been the policy of the law of England—which was adopted by this state—to hold landlords and proprietors of inns or hotels, or houses kept for the accommodation of transient guests, wayfarers, and travelers, to the utmost responsibility and liability for the baggage and goods of such persons intrusted to their care."

As before remarked, the Supreme Court of this state has never had under consideration the question of liability of an innkeeper for loss of goods destroyed by accidental fire. In the decision last cited the court was dealing with the question of liability for loss of goods which had apparently been stolen either by or from the innkeeper's servant. That decision is direct authority for the proposition that in such a case the liability of an innkeeper was that of an insurer. None of the decisions, except *Murchison v. Sergeant*, *supra*, seems to recognize any distinction between the common law and the statutes of this state, although in *Adams v. Clem*, 41 Ga. 65, 5 Am. Rep. 524, the rule was stated to be that an innkeeper was bound to extraordinary diligence in preserving the property of his guest. In the *Murchison* Case, however, a distinction seems to be recognized between the Code of this state and the common law, because it was there held

that, while at common law an innkeeper was an insurer of the goods of his guest, under the statutes of this state he is bound to use extraordinary diligence; although Judge Jackson remarks, in the opinion, that the common-law rule and the statutory rule are substantially "very much the same."

Since the codifiers had no authority to change the common law, the presumption is that they did not do so, unless the language employed requires a contrary conclusion. Giving due effect to this presumption and the decisions of the Supreme Court above referred to, it seems to us that the proper construction of section 3508 of the Civil Code is as follows: Where the property of a guest is shown to have been stolen while in the custody of an innkeeper, and the guest has complied with all reasonable rules of the inn, the liability of the innkeeper is that of an insurer. In all other cases of loss the innkeeper may excuse himself by showing that the loss was due to the negligence or fault of the guest himself, or after the exercise by the innkeeper of extraordinary diligence. By section 3511 it is provided that in case of loss the presumption is want of "proper diligence" in the landlord. Necessarily, as to goods not stolen, "proper diligence" means extraordinary diligence, as provided in section 3508. Unless the sections of the Code are given this construction, the words "extraordinary diligence," as used in section 3508, would be meaningless, because there is a vast difference between liability as an insurer and liability for the failure to exercise extraordinary care. This is illustrated by the liability of a carrier of passengers, which is for a failure to exercise extraordinary diligence, and the liability of a common carrier, which is that of an insurer, who can excuse himself only by showing that the loss occurred on account of the act of God, or the public enemy of the state, or by a breach by the shipper of some reasonable stipulation in the contract of affreightment. "Extraordinary diligence is that extreme care and caution which very prudent and thoughtful persons use in securing and preserving their own property. The absence of such diligence is termed slight neglect." Civil Code, § 3472. If the goods of the guest are destroyed by fire while in the custody of an innkeeper, the presumption is that the innkeeper has failed to exercise extraordinary diligence; but, if he affirmatively shows that he has exercised this degree of care, he will not be liable. Generally this is a question of fact for the jury.

In the present case, without discussing the evidence at length, it is sufficient to say that it fully authorized, if it did not demand, a finding that the keeper of the livery stable had exercised extraordinary care. The fire occurred at 1 o'clock at night. It seems to have been the result of pure accident, with-

out fault on the part of the keeper of the livery stable, and the jury were well authorized to find that, after the fire was in progress, the destruction of the property was not due to the failure of the keeper of the livery stable to exercise that degree of care which the law imposed upon him.

Judgment affirmed.

(12 Ga. App. 700)

LANE v. BRINSON. (No. 4,740.)

(Court of Appeals of Georgia. June 10, 1913.)

(Syllabus by the Court.)

1. COURTS (§ 217*)—JURISDICTION—COURT OF APPEALS.

Where a suit filed in the superior court is, under authority of a legislative enactment, transferred to a city court and there tried, the Court of Appeals has jurisdiction of a bill of exceptions sued out from the latter court by the losing party.

[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 538-538; Dec. Dig. § 217.*]

2. APPEAL AND ERROR (§ 170*)—PRESENTATION BELOW—CONSTITUTIONALITY OF STATUTE.

This court will not request the Supreme Court to pass upon the constitutionality of an act of the General Assembly, the validity of which was not brought in question in the trial court.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1035-1052, 1099, 1100; Dec. Dig. § 170.*]

3. APPEAL AND ERROR (§ 911*)—RECORD—PRESUMPTION—TRANSFER OF CAUSES.

Where the record discloses that a case has been transferred to a city court under authority of a special enactment, it will be presumed, nothing to the contrary appearing, that the requirements of the act authorizing the transfer have been complied with.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3682-3688; Dec. Dig. § 911.*]

4. ATTORNEY AND CLIENT (§ 128*)—MONEY RULE AGAINST ATTORNEY—TRAVERSE OF ANSWER—FILING.

A traverse to an attorney's answer to a money rule may be filed at any time before the rule is discharged.

[Ed. Note.—For other cases, see Attorney and Client, Cent. Dig. §§ 264-273; Dec. Dig. § 128.*]

5. ATTORNEY AND CLIENT (§§ 94, 126, 182, 192*)—GARNISHMENT (§ 7*)—MONEY RULE AGAINST ATTORNEY—GARNISHMENT ON FORECLOSURE PROCEEDING.

A lien foreclosure proceeding being in rem and in no sense a suit in personam, the lien execution cannot be levied by service of summons of garnishment. Where an attorney at law procures for his client a money judgment and causes execution to be issued and placed in the hands of the levying officer, the attorney has a right to control the execution and any fund realized therefrom for the purpose of satisfying his lien for fees. If the attorney should retain from the fund thus realized more than is due him for fees, he may be ruled by the client. The attorney can obtain no greater right against his client by foreclosing his lien and causing summons of garnishment to be served on the sheriff. The client cannot thus be concluded on the question of the amount of fees due, unless he, in some manner provided

by law, unsuccessfully contests the fairness of the attorney's claim.

[Ed. Note.—For other cases, see Attorney and Client, Cent. Dig. §§ 180-183, 264-273, 315, 399-406, 425-427; Dec. Dig. §§ 94, 126, 182, 192;* Garnishment, Cent. Dig. §§ 6-10; Dec. Dig. § 7.*]

Error from City Court of Millen; Thomas L. Hill, Judge.

Money rule by B. L. Lane, Jr., against J. P. Brinson. Judgment for defendant, and plaintiff brings error. Reversed.

W. Van Tyler, of Millen, for plaintiff in error. G. C. Dekle and J. P. Brinson, both of Millen, for defendant in error.

POTTLE, J. A rule was issued in the superior court of Jenkins county against an attorney at law requiring him to show cause why he should not pay over to his client certain moneys which it was alleged he had collected for her. The petition alleged that the attorney had been employed to collect a note for \$289.42 upon an agreed fee of 10 per centum of the recovery; that he collected \$179.15, deducted \$150 for his fee, and failed to pay it over to the petitioner after a written demand as provided by the statute. The petition was filed December 6, 1911, and rule nisi issued the same day, requiring the respondent to show cause in the superior court on the second Monday in March following. On March 11th the respondent filed his answer, admitting the collection of \$179.15, and averring that this sum was not sufficient to pay attorney's fees and court costs. He further averred that in the suit on the note the defendant filed a cross-action claiming the right to recover of plaintiff the sum of \$1,500; that the respondent successfully defended this cross-action, and for this service the plaintiff agreed to pay \$150 attorney's fees; that, after the judgment on the note was obtained, the respondent foreclosed his lien for attorney's fees and "had the same levied by garnishment on the fi. fa., then in the hands of the sheriff, who returned the fi. fa. to the court"; and that after hearing of the garnishment case the court ordered the fi. fa. turned over to the respondent to make the money due on the foreclosure of the attorney's lien; and it is claimed that the judgment thus rendered in the garnishment case estops the plaintiff from claiming the fund. Some time after the filing of this answer the case was transferred to the city court of Millen, under authority of the act of 1912 establishing that court, which provides that "the judge of the superior court of said (Jenkins) county may, by order, transfer to said city court all civil cases standing for trial on the docket of the superior court of said county and which are embraced within the jurisdiction of said city court, which he may deem proper: Provided both parties agree thereto." Acts 1912, pp. 245, 262.

At the January term, 1913, of the city court the plaintiff in the rule traversed the answer which had been filed in the superior court and specifically denied the allegation in reference to her agreement to pay the respondent \$150 for defending the cross-action, and averred that she had employed other counsel to perform this service. She also alleged in the traverse that she had never been served with any notice of the attorney's lien, and that no such lien had been legally established. The respondent demurred to the traverse upon the ground that it was not filed in time, and presented no issue which could be passed upon by the court. The respondent also filed a motion to discharge the rule on the ground that no issue was raised by the traverse or transferred to the city court for trial. The judge of the city court discharged the rule upon the ground that the issues raised thereby were concluded by the judgment on the garnishment which issued in the lien foreclosure proceeding. The plaintiff excepted.

[1] 1. The case having been originally docketed in the superior court, we were in some doubt whether we could take jurisdiction of the writ of error. It was therefore ordered that the record be transmitted to the Supreme Court for such disposition as that court might deem proper. That court has sent the case back, advising that, in its opinion, the Court of Appeals should assume jurisdiction and decide the case on its merits. It becomes our duty, therefore, to deal with the questions made in the record.

[2] 2. No question is raised in the record as to the constitutionality of the act of 1912, authorizing the transfer of civil cases from the superior court to the city court. No attack on the act was made in the trial court, and no objection to it is urged here. The jurisdiction of the Supreme Court and the Court of Appeals is limited to the correction of errors of law in the trial courts. They have authority to determine only those questions which the record discloses were raised and passed upon in the court below. For the purposes of this case, therefore, it must be assumed that the act of 1912 is a constitutional and valid law.

[3] 3. It does not affirmatively appear from the record that the parties consented to the transfer of the case, as is required by the local act; but, since the judge of the superior court passed an order of transfer, it must be assumed that the conditions imposed by the act had been met. This results from the general rule that, as to judgments of courts of general jurisdiction, every presumption of regularity is to be indulged, unless the contrary affirmatively appears.

[4] 4. Attorneys at law are officers of court, and where they retain the money of their clients, after demand, they are subject to rule, as sheriffs are. Civil Code, § 4954. A

verified answer of an attorney to a rule must be taken as true unless traversed. Civil Code, § 5347; Woodward v. McDonald, 116 Ga. 748, 42 S. E. 1030. If the answer sets forth a legal right to retain the money, and there is no traverse raising an issue for determination, the rule should be discharged. Unless the statute requires the contrary, the traverse may be filed at any time before trial. By express enactment, the entry of an officer of court is taken as true, unless traversed at the first term after notice. Civil Code, § 5566. But in garnishment cases the statute provides generally for traversing the garnishee's answer, without providing when the traverse must be filed. Civil Code, § 5283. It has been held that the answer of a garnishee may be traversed at any time before the garnishee is discharged. Smith v. Wellborn, 73 Ga. 131. Section 5347 provides that the movant in a money rule "may traverse the truth of such answer, in which case an issue shall be made up and tried by a jury at the same term, unless good cause of continuance be shown." There is nothing in this section which requires the traverse to be filed at the term at which the answer is filed. The requirement is merely that the case shall be tried at the term at which the traverse is filed, unless continued for good cause. The principle announced in Smith v. Wellborn, supra, is applicable, and the traverse may be filed at any time before the officer ruled is discharged. When the case was transferred to the city court its status in this respect was not changed, and any proceeding could be taken in this court which might have been had in the superior court if there had been no transfer. Rules against officer are, to some extent, governed by the discretion of the court, and do not come within the purview of statutes regulating defaults. Kelly v. Murphy, 135 Ga. 515, 69 S. E. 826.

[5] 5. The answer averred that the plaintiff had agreed to pay the attorney \$150 for his services in defending the cross-action which was brought by the defendant. If this had stood untraversed, the attorney was entitled to be discharged. But this averment was expressly denied in the traverse, and thus an issue of fact was raised. We are bound to assume, nothing to the contrary appearing, that the garnishment and lien foreclosure proceedings were regular in all respects. The trial judge discharged the rule because in his opinion the right of the attorney to retain the money was settled by the judgment in the garnishment case. Had this judgment been valid, or even only voidable, the trial judge's view would have been correct. But the judgment in the garnishment case was absolutely void. The lien foreclosure proceeding was not a suit upon which garnishment could issue. Weston v. Beverly, 10 Ga. App. 261, 73 S. E. 404. The proceeding

was in rem and in no sense an action in personam, so as to authorize a levy of the execution by service of a summons of garnishment.

The execution on the lien foreclosure was issued on the ex parte affidavit of the attorney, and the judgment in that proceeding did not conclude the plaintiff on the question of the amount due. If the execution had been properly levied and the plaintiff had unsuccessfully contested the fairness of the claim for fees, as provided by section 3366 (6) of the Civil Code, or if he, after notice, had allowed his property to sell without filing the counter affidavit authorized by the statute, he would have been estopped. But here there was no lawful levy, and the plaintiff was not bound to contest the question of amount due. He has never had his day in court on this question. Under section 3366 the attorney had a right to control the judgment and *fi. fa.* in favor of his client to satisfy his lien for fees. It would have been the duty of the sheriff to pay over the money to the attorney, who would then have been authorized to retain the amount due him for fees. By foreclosing his lien and having summons of garnishment served on the sheriff, the attorney acquired no greater right against his client than he would have had if the money had been made by the sheriff and paid over to him. The court erred in discharging the rule, and the case should be submitted to a jury on the issues raised by the answer and the traverse.

Judgment reversed.

(13 Ga. App. 790)

McELHENNEY et al. v. JASPER TRADING CO. (No. 4,779.)

(Court of Appeals of Georgia. June 10, 1913.)

(Syllabus by the Court.)

CORPORATIONS (§ 559*)—DAMAGES FOR NON-PAYMENT OF WAGES—RECEIVERS—EMPLOYMENT CONTRACT—DISCHARGE.

Damages are not recoverable against a corporation for its failure to perform an executory contract for the payment of wages to employes, where performance was prevented solely by the act of a court in appointing a receiver for the corporation and in enjoining all creditors and third persons from interfering with its business or property. In such case the contract is discharged because of the legal impossibility of performance by the corporation, and as to the employes the case is *damnum absque injuria*.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 2241-2252, 2259; Dec. Dig. § 559.*]

Error from Superior Court, Jasper County; J. B. Park, Judge.

Action by F. J. McElhenney and others against the Jasper Trading Company. Judgment for defendant, and plaintiffs bring error. Affirmed.

W. S. Florence, of Monticello, for plaintiffs in error. A. S. Thurman, of Monticello, for defendant in error.

HILL, C. J. The Jasper Trading Company, a corporation under the laws of this state, was placed in the hands of a receiver under a bill filed by the stockholders, with the usual restraining order enjoining all creditors from suing the corporation, or from in any manner interfering with the business of the receiver, and especially restraining and enjoining the plaintiffs in error from prosecuting suits which they had brought against the corporation in a justice's court for salaries claimed to be due them for services to have been rendered the corporation under a contract made with the corporation. Notwithstanding this restraining order, the plaintiffs in error prosecuted their suits in the justice's court, and, by consent, their suits were consolidated and an appeal taken to the superior court. In the superior court a stipulation as to the facts was made, and thereupon the suits were dismissed, and a writ of error brings the case here for review. No question is made as to the right of the plaintiffs in the justice's court to prosecute their suits in violation of the restraining order of the superior court in the appointment of the receiver, but the sole question is as to the correctness of the judgment of the superior court dismissing the suits on appeal, on the agreed statement of facts. This statement was to the effect that the plaintiffs were clerks employed by the Jasper Trading Company under a contract for services for stipulated wages, and the suits in question were for wages which would have been due the plaintiffs if the services had been performed after the Jasper Trading Company had been placed in the hands of the receiver. The contracts were for services for the entire year, and the wages were payable monthly.

There was no breach of the contracts for wages by the voluntary act of the corporation. The contracts were discharged by operation of law, in that the corporation was placed in the hands of a receiver. Its business was stopped by injunction, and the receiver was ordered to collect its assets to pay existing creditors. No provision was made for continuance of the business of the corporation by the receiver. Under these facts we do not think the plaintiffs were entitled to recover on their executory contracts for services which they would have performed but for the intervention of the court and the appointment of a receiver. The corporation, by operation of law, was discharged from the performance of its executory contracts. In *Griggs v. Swift*, 82 Ga. 392, 9 S. E. 1062, 5 L. R. A. 405, 14 Am. St. Rep. 176, it is held that "a contract by a partnership with an employé for personal services in the current business of the firm for one year, at a given rate per month, is dissolved by a

dissolution of the firm within the year by the act of God. There can be no recovery on such contract for services never in fact rendered, but which the employé would have rendered had the surviving partner not discharged him after the dissolution." This decision was based by the court upon section 2871 of the Code of 1882. Code of 1910, § 4319. This section declares that if performance is impossible, and becomes so by the act of God, such impossibility is itself equivalent to performance. In the opinion in that case Chief Justice Bleckley said: "There being no one, after the partnership went out of existence, to receive the personal services which the plaintiff had contracted to render as inspector of farms and collector for the partnership, the further execution of the contract was as much impossible as if the plaintiff himself had died before or after a dissolution of the firm had taken place. The survivor transacted no new business on the partnership account, but confined operations to closing up the firm affairs. * * * From the very nature of a contract for the rendition of personal services to a partnership in its current business, where nothing is expressed to the contrary, both parties should be regarded as having by implication intended a condition dependent, on the one hand, upon the life of the employé, and, on the other, upon the life of the partnership, provided the death in either case was not voluntary." In support of the decision *Wood on Master and Servant*, § 163, is cited, as follows: "Where a servant is employed by a firm, a dissolution of the firm dissolves the contract, so that the servant is absolved therefrom, but if the dissolution results from the act of the parties they are liable to the servant for his loss therefrom, but if the dissolution results from the death of a member of the firm, the dissolution resulting by operation of law, and not from the act of the parties, no action for damages will lie. * * * The test is whether the firm is dissolved. So long as it exists, the contract is in force; but when it is dissolved the contract is dissolved with it, and the question as to whether damages can be recovered therefor will depend upon the question whether the dissolution resulted from the act of God, the operation of law, or the act of the parties."

We think the rule announced is much more clearly applicable to a corporation than to a partnership; for, although the partnership might be dissolved, the surviving partner might with more reason be held to carry out the executory contracts of the partnership than would a corporation, where its business and all of its assets have been placed in the hands of a receiver, with direction to wind up the business of the corporation, and an injunction granted against the interference of third persons with the liquidation of the corporation by the receiver. The corporation would no longer be in business, and there-

fore could not be expected to carry out executory contracts dependent upon the existence of the business. While the receiver of the corporation might have an election to carry out such contracts as, in his judgment, would be beneficial to the successful winding up of the corporation business, and under the order of the court, yet he could not be required to perform the executory contracts of the corporation. Some of them might continue long after the receivership had been completed. A legal impossibility to carry out the executory contract of a corporation arises by the act of the court in the appointment of a receiver, and in such cases the contract is discharged by operation of law. Clark on Contracts, § 475. The identical point was decided by the Court of Appeals of New York in the case of *People v. Globe Mutual Life Ins. Co.*, 91 N. Y. 174. In that case a corporation had entered into a contract with a general agent for his services for a specified time and at a stipulated salary. Before the expiration of that time, and while the services were being rendered, the corporation was placed in the hands of a receiver, who did not continue the agent in his employment. He sued for damages. It was held that he could not recover. The company could not employ him, because this would be a violation of the order of injunction. The agent could not meddle in the affairs of the company, for that equally would violate the injunction. It was *damnum absque injuria*. In the case of *Malcomson v. Wappoo Mills (C. C.)* 88 Fed. 680, Circuit Judge Simonton held that "damages are not recoverable against a corporation for its failure to perform a contract for the sale and delivery of merchandise, where performance was prevented solely by the action of a court in appointing a receiver for the corporation, and enjoining all others from interfering with its business or property. In such case the breach of contract is *damnum absque injuria*." This learned jurist in that case held that when a contract cannot be specifically performed, and the only remedy is by way of damages, the court will not inflict such damages on the corporation, if the breach of contract for which damages are sought has been occasioned by the law; the performance of the contract having been made impossible.

We conclude that the judgment in dismissing these suits is supported by authority, and is in thorough consonance with sound reasoning. The right to recover for breach of the contract would arise only from a wrongful discharge. The corporation did not discharge the plaintiffs; and therefore there was no breach of the contract. The contract was discharged by operation of law, since the power to perform executory contracts was taken away from the corporation in the

appointment of the receiver and the granting of the injunction.

Judgment affirmed.

(12 Ga. App. 774)

TREMERE v. BARFIELD.

BARFIELD v. TREMERE.

(Nos. 4,757, 4,758.)

(Court of Appeals of Georgia. June 10, 1913.)

(*Syllabus by the Court.*)

1. CHATTEL MORTGAGES (§ 6*)—SALE DESTINGUISHED.

A vendee of personal property executed an instrument promising to pay the purchase price, and reciting that, in order to secure the same, "I hereby bargain, sell, and convey unto the payees of this note, their heirs and assigns the following property which is expressly to be my individual property, free from any lien whatever." Then follows a description of the property, and a further recital that, in case of a failure to pay the indebtedness at maturity, the payees would have the right to take possession of the property and sell it at public outcry and apply the proceeds to the indebtedness. *Held*, that the instrument was a bill of sale conveying title, and not a mortgage.

[Ed. Note.—For other cases, see *Chattel Mortgages*, Cent. Dig. §§ 23-41; Dec. Dig. § 6.*]

2. SALES (§ 473*)—CONDITIONAL SALE—THIRD PERSON.

Where personal property is sold with the condition affixed to the sale that title is to remain in the vendor until the purchase money is paid, the reservation of title must be in writing and recorded within 30 days from the date of its execution, in order to be valid against a third person, who without actual notice of the reservation of title parts with money or other thing of value upon the faith of the vendee's apparent unconditional ownership of the property, and in consideration thereof receives from the vendee a bill of sale to the property to secure the debt, and records it in the manner prescribed by law. One who, in consideration of the execution of such a bill of sale, surrenders to the vendee a valid mortgage on other property, and cancels the debt evidenced thereby, is a third person within the meaning of section 3818 of the Civil Code 1910.

[Ed. Note.—For other cases, see *Sales*, Cent. Dig. §§ 1377-1390; Dec. Dig. § 473.*]

For other definitions, see *Words and Phrases*, vol. 8, pp. 6860, 6861.]

Error from City Court of Valdosta; J. G. Cranford, Judge.

Action by William Tremere against R. H. Barfield. Judgment for defendant, and plaintiff brings error, and defendant files cross-bill. Reversed on main bill, and affirmed on cross-bill.

J. G. & J. F. McCall, of Quitman, and Whitaker & Dukes, of Valdosta, for plaintiff in error. J. R. Walker and Dan R. Bruce, both of Valdosta, for defendant in error.

POTTLE, J. Cooper purchased from Tremere two mules and executed to the vendor a note and mortgage due in October, 1912, to secure the purchase price. Some time after the execution of this mortgage Cooper

sold the mules without the consent of Tremere. On December 5, 1911, Cooper bought two mules from Barfield and executed a note for the purchase price, containing a reservation of title in Barfield until payment of the purchase money. This note was properly executed and recorded in Lowndes county on December 13, 1911, and was re-recorded in Brooks county on March 11, 1912. On December 6, 1911, Cooper executed to Tremere an instrument in which he promised to pay the purchase price of the two mules which he had bought from Tremere; and to secure the payment of the note it was recited in the instrument that the maker agreed to "bargain, sell, and convey unto the payees of this note, their heirs and assigns the following property, which is expressly to be my individual property, free from any lien whatever." Then followed a description of the two mules which Cooper had bought from Barfield and also other property. It was further recited in the instrument that, in case of the failure to pay the debt at maturity, the payee was authorized to take possession of the property and sell it at public outcry and apply the proceeds of the sale, first, to the payment of the indebtedness and the cost of sale, the balance to be held subject to the order of the debtor. This instrument was properly attested and recorded on December 8, 1911, in Berrien county, and was re-recorded in Brooks county on March 9, 1912. In consideration of the execution and delivery of this instrument, Tremere surrendered to Cooper for cancellation the note and mortgage which Cooper had executed to secure the payment of the purchase price of the two mules which he had purchased from Tremere. At the time of the execution and delivery of the second instrument to Tremere, he had no actual notice of Barfield's claim to the mules therein described. It seems from the evidence that, after the execution of this paper, Cooper moved to Brooks county, and while there the mules which had been purchased from Barfield were levied on by the sheriff of Brooks county under a *f. fa.* in favor of one of Cooper's creditors, and that Barfield filed a claim to the mules, gave bond, and took possession of them. After this was done Tremere brought trover against Barfield, and upon the trial of the trover case the foregoing facts appeared. The judge directed a verdict in favor of Barfield, and Tremere excepted. Barfield filed a cross-bill of exceptions, complaining of the refusal of the court to exclude from the evidence the paper executed by Cooper to Tremere on December 6, 1911, over the objection that this paper was only a mortgage, and did not convey title to the property therein described. Two questions are presented by the record: (1) Whether the instrument relied upon by Tremere to defeat Barfield's claim of title was a mortgage or

bill of sale; and (2) whether, if it was a bill of sale, Tremere is entitled to priority over Barfield because the bill of sale was properly recorded in Berrien county and Barfield's reservation of title was not recorded in that county.

[1] 1. The decision in *Brice v. Lane*, 90 Ga. 294, 15 S. E. 823, settles the question of the character of the instrument relied on by Tremere adversely to Barfield's contention. In that case the instrument in almost the identical language of the one now involved was held to be a deed passing title to the grantee. That decision is conclusive of the question. See, also, *Walker v. Bank of Quitman*, 100 Ga. 88, 26 S. E. 84.

[2] 2. The evidence is undisputed that Cooper resided in Berrien county at the time of the execution of the bill of sale to Tremere; and therefore the sole question under the evidence is whether or not Tremere's diligence in promptly recording his bill of sale in Berrien county entitles him to priority over Barfield, who has never recorded his reservation of title in the county in which the vendee resided at the time of the execution of the instrument. Section 3318 of the Civil Code is as follows: "Whenever personal property is sold and delivered with the condition affixed to the sale that the title thereto is to remain in the vendor of such personal property until the purchase price thereof shall have been paid, every such conditional sale, in order for the reservation of title to be valid as against third parties, shall be evidenced in writing, and not otherwise. And the written contract of every such conditional sale shall be executed and attested in the same manner as mortgages on personal property; as between the parties themselves, the contract as made by them shall be valid and may be enforced, whether evidenced in writing or not." Section 3319 provides: "Conditional bills of sale must be recorded within thirty days from their date, and in other respects shall be governed by the laws relating to the registration of mortgages." Hence a seller of personal property who reserves title in writing until the purchase money has been paid, but who fails to properly record the reservation of title, loses his right to enforce his reservation of title against third persons, who in good faith part with money or other thing of value upon the faith of the apparent unconditional ownership of the property by the vendee, and without actual or constructive notice of the vendor's reservation of title. As to all such persons the vendee is to be treated as having the absolute unconditional title to the property; but as between the parties themselves and persons who have notice the reservation of title is good whether recorded or not. *Hill v. Ludden & Bates*, 113 Ga. 320, 38 S. E. 752. In order, however, for third persons to acquire priority over a vendor who has failed to re-

cord his reservation of title, it must appear that such person has parted with something of value on the faith of the vendee's apparent ownership of the property. A judgment creditor who obtained his judgment before the conditional sale was made is not a third person within the meaning of the statute, and as to him the reservation of title need not be recorded. *American Law Book Co. v. Brunswick Cross-Tie & Creosoting Co.*, 12 Ga. App. 259, 77 S. E. 104, and citations. Where a holder of a mortgage or bill of sale, junior in date to the execution of a note reserving title in the vendor claims priority over the vendor, it must appear that the holder of the junior paper has had it properly recorded and that he had no notice, actual or constructive, of the reservation of title. The recording acts were passed for the benefit of the diligent. If neither paper is recorded, and there is no actual notice, the holders are left where they would have stood regardless of the registry statute, consequently the paper oldest in date would prevail. This rule applies to the case of a vendor reserving title, because the statute puts him upon the same ground as a mortgagee of personalty. *Cottrell v. Merchants' & Mechanics' Bank*, 89 Ga. 508, 15 S. E. 944. If Barfield had recorded his reservation of title in Berrien county within 30 days, he would have obtained priority over all liens created after the date of the execution of the contract of conditional sale, whether executed before or after its record. Or if Tremere had failed to properly record his mortgage in Berrien county, or if he had had actual notice of Barfield's claim, the latter would have been entitled to prevail. But by the prompt record of his bill of sale Tremere perfected his claim to the mules as against Barfield; for in the absence of notice of some sort that Barfield had reserved title in the mules, Tremere had a right to assume that Cooper was the absolute and unconditional owner of the property.

It is contended, however, that Tremere occupied no better position than that of a judgment creditor whose judgment was obtained prior to the conditional sale. The statute provides that in order to be good against third persons the reservation of title must be recorded. This has been construed to apply only to third persons who have parted with something on the faith of the apparent ownership of the vendee upon the theory that it would be inequitable to permit a holder of a pre-existing debt to obtain satisfaction out of property which the debtor did not really own. As to such a creditor it has been said he "is in no wise affected by the non-record of this conditional sale; no right has accrued to him between the making of the conditional sale and the record of the same; he is not hurt by its non-record; and as to him it is the same as

if the sale had been duly recorded." *Conder v. Holleman*, 71 Ga. 93; *Taylor v. National Cash Register Co.*, 8 Ga. App. 283, 68 S. E. 1009. Applying this principle, it was in *Fountain v. Fountain*, 7 Ga. App. 361, 66 S. E. 1020, held that, where a debtor executed a mortgage on a growing crop, the mortgage, although not recorded, would prevail over a creditor whose debt was in existence at the time the mortgage was executed and who had not parted with anything on the faith of the cropper's apparent unincumbered ownership of the property. It appears from the evidence that the original note executed by Cooper to Tremere was not due, and that on the faith of Cooper's apparent unconditional ownership of the mules which he had bought from Barfield Tremere surrendered a mortgage which was a valid lien on the property which Cooper had sold and out of which Tremere could have made his debt. He is thus equitably in the same position as if the bill of sale had been executed to secure a debt which came into existence contemporaneously with the making of the paper. Tremere, having surrendered his security on the faith of Cooper's apparent ownership, is as much entitled to take advantage of Barfield's failure to record his reservation of title as if he had made a loan of money to Cooper and taken a bill of sale to secure its payment. In our opinion Tremere is well within the reason and equity of the rule, and the court erred in directing a verdict in Barfield's favor.

Judgment on the main bill of exceptions reversed; on the cross-bill affirmed.

(12 Ga. App. 743)

SCHUMER v. REGISTER et al. (No. 4,649.)
(Court of Appeals of Georgia. June 10, 1913.)

(Syllabus by the Court.)

1. MASTER AND SERVANT (§ 301*) — PARENT AND CHILD (§ 13*) — TORTS — LIABILITY OF PARENT — AUTOMOBILE ACCIDENT — LIABILITY OF OWNER.

The allegations in the first count of the petition were insufficient to show a cause of action against the owner of the automobile for the negligent operation of the machine by her codefendant, the driver. As to this count the general demurrer was properly sustained as against the owner.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. §§ 1210-1216; Dec. Dig. § 301; * *Parent and Child*, Cent. Dig. §§ 145-151; Dec. Dig. § 13.*]

2. ACTION (§ 50*) — MASTER AND SERVANT (§ 302*) — APPEAL AND ERROR (§ 1172*) — AUTOMOBILE ACCIDENT — LIABILITY OF OWNER — MISJOINDER — DISMISSAL — DISPOSITION OF CAUSE.

Where a petition containing two counts is brought against two defendants, and a general demurrer to the first count is sustained as to one of the defendants and overruled as to the other defendant, and the second count is held to be good as to both defendants, there results a misjoinder of causes of action and of parties, and, on refusal of the plaintiff to amend to meet this objection, it is proper to dismiss the

petition. In view of the fact, however, that the second count of the petition in this case sets forth a cause of action against both defendants as joint tort-feasors, the judgment dismissing the petition is reversed in part, and direction given that the second count be reinstated and the plaintiff be allowed to submit evidence applicable to that count.

[Ed. Note.—For other cases, see Action, Cent. Dig. §§ 511-547; Dec. Dig. § 50;* Master and Servant, Cent. Dig. §§ 1217-1221, 1225, 1229; Dec. Dig. § 302;* Appeal and Error, Cent. Dig. §§ 4555-4561; Dec. Dig. § 1172.*]

Error from City Court of Savannah; Davis Freeman, Judge.

Action by William Schumer against Mrs. M. E. Register and another. Judgment for defendants, and plaintiff brings error. Affirmed, with directions.

Morris H. Bernstein and Chas. D. Russell, both of Savannah, for plaintiff in error. Travis & Travis, of Savannah, for defendants in error.

HILL, C. J. A suit to recover damages for personal injuries was brought against Mrs. M. E. Register and H. M. Sledge, Jr. The petition contained two counts. In the first count it was alleged that Mrs. Register is a widow, having the exclusive control and custody of Miss Tillie Register, her minor unmarried daughter; that Mrs. Register is the owner of a certain automobile; and that Miss Tillie Register was riding in said automobile, having authority and command over the movements thereof, and it was being driven by H. M. Sledge, Jr., when it negligently ran down and collided with and injured the plaintiff in the manner described in the petition. In the second count it was alleged that the defendant Mrs. M. E. Register was the owner of an automobile therein described, and that H. M. Sledge, Jr., was there employed and acting as driver and chauffeur of the automobile for and on behalf of Mrs. Register, and in such capacity as her agent, and that while so acting as chauffeur and driver, with the said automobile he ran down and collided with the plaintiff, causing the injuries described in the petition. The defendants demurred generally and specially to the petition, and the trial judge sustained the general demurrer to the first count, so far as it related to Mrs. Register, and overruled it as to the other defendant, and also sustained several of the special grounds of the demurrer. The general demurrer and all the special grounds, except two, were overruled as to the second count. One of these special grounds was met by an amendment, which was allowed. The paragraph of the second count, to which the special demurrer was sustained, is immaterial as affecting the cause of action set forth in the count as a whole. The plaintiff offered to amend the first count by adding the allegation "that said automobile was kept for the comfort and pleasure of the family, who were authorized to use it at any

time for such pleasure." Exception is taken to the refusal to allow this amendment. The order containing the various rulings on the demurrer concluded as follows: "As petition stands, case cannot proceed as to this defendant with first count in. If first count is stricken, the case, if amended, will be good against both defendants; and so, also, if this defendant is eliminated from second count and first count retained, case, if amended, will be good against H. M. Sledge, Jr. Amendments as to essentials indicated to be made by October 21, 1912, or case will stand dismissed as of that date." The amendments were not made as indicated, and the petition was dismissed in pursuance of this order; and to this judgment the plaintiff excepts.

We gather from the different rulings on the demurrer that the petition was dismissed because, no cause of action being stated against Mrs. Register in the first count, and this count not being stricken from the petition to meet the order of the judge, and the demurrer as to the second count being overruled and Mrs. Register not being eliminated from the second count, a misjoinder of causes of action and of parties resulted.

[1] The general demurrer to the first count of the petition as to Mrs. Register was properly sustained. No allegation thereof connected her with the alleged injuries caused by the running of the automobile by the other defendant, Sledge, and there was no allegation showing any legal liability against her for the negligence of Sledge; the fair inference from the allegation being that Sledge was running the automobile at the instance of Miss Tillie Register, the minor daughter of Mrs. Register. There was no allegation in this count that Miss Tillie Register, the daughter, or Sledge, the driver of the automobile, sustained any relation to Mrs. Register in the running of the automobile, at the time the injuries were received, that would render Mrs. Register responsible for their negligence. It is conceded by counsel for the plaintiff that the first count was defective, but it is insisted that the amendment offered by the plaintiff, which was disallowed, would have shown a cause of action against Mrs. Register in the first count, and that therefore the court erred in not allowing it. Even if the amendment had been allowed, in our opinion the first count would have shown no cause of action against Mrs. Register. This amendment attempted to hold Mrs. Register responsible because she, as the owner of the automobile, kept it for the comfort and pleasure of her family, including Miss Tillie Register, who was authorized to use it at any time for such purpose. If Miss Tillie Register had been driving the automobile herself at the time of the collision, Mrs. Register, under several decisions cited by learned counsel for the plaintiff, would have been liable for the negligence of her minor daughter.

ter; this on the theory that the automobile was kept by Mrs. Register (who was a widow) for the pleasure and convenience of her family, and at the time of the collision her minor daughter was carrying out the general purpose for which the machine was kept; she was engaged in the execution of her mother's business, that of supplying recreation and pleasure to herself as a member of her mother's family.

This seems to be in accord with the view of the Court of Appeals of Kentucky in the case of *Stowe v. Morris*, 147 Ky. 386, 144 S. W. 52, 39 L. R. A. (N. S.) 224. In the case of *Daily v. Maxwell*, 152 Mo. App. 415, 133 S. W. 351, the owner of the automobile had given his consent for his young son to take some of his young friends automobile riding. It was the boy's party, and the father had nothing to do with it, except to give his consent to the use of the car for the pleasure of his son and his son's friends. The court said: "The evidence discloses that the machine was devoted to the use of the family of which Ernest (the son and driver) was a member. It was a pleasure vehicle, and, when used for the pleasure of one of the minor children of the owner, how can it be said that it was not being used on business of the owner? It is the practice of parents to provide their children healthful and innocent amusements and recreations, and certainly it is as much the business of parentage to supervise and control the pleasures of their children as it is to give them nurture and education." These decisions seem to be based upon the theory that the minor child was driving the machine when the accident occurred; none of them go to the extent of holding that a parent would be liable for the result of an accident caused by the negligence of a driver who had been selected to drive the machine, not by the parent, but by the minor child.

We think, however, under the statute of this state and the construction given to it by the Supreme Court, relative to the liability of parents for the torts of minor children, that a parent would not be responsible for a tort of a minor child if the tort was committed when the child was engaged merely in pleasure and not in the business of the parent. In other words, the liability of a parent for the tort of a minor child, under the law of this state, is analogous to the liability of a master for the tort of a servant while employed in the master's business and in the scope of his employment. The Civil Code (1910) § 4413, provides: "Every person shall be liable for torts committed by his wife, and for torts committed by his child, or servant, by his command or in the prosecution and within the scope of his business, whether the same be by negligence or voluntary." In construing this section of the Code, in the case of *Chastain v. Johns*, 120 Ga. 977, 48 S. E. 343, 66 L. R. A. 958, the Supreme Court

holds that the liability of a parent for the torts of a child is like his liability for those of a servant, arising only when the commission of the tort was by his command or in the scope of his business. The general rule is that the parent is not liable in damages for the torts of a minor child, even though the child lives with his parent and is under his control, when such acts were done without his authority, knowledge, or consent, had no connection with his business, were not ratified by him, and were of no benefit to him; or, as has been more briefly stated, a parent is never liable for the wrongful acts of his minor child, unless such acts were performed with the parent's consent or in connection with the parent's business. Where, however, the tort complained of was committed while the child was engaged in the parent's service, within the scope of his employment, or where the circumstances show that it was done with the parent's knowledge and by his authority, or with his consent, he is liable. See, in this connection, *Vaughan v. McDaniel*, 78 Ga. 98; *Lockett v. Pittman*, 72 Ga. 817; 21 Am. & Eng. Enc. L. (2d Ed.) 1057, and cases cited in the notes. It seems, from these decisions, that the rule of the parent's liability for the torts of a minor child is put exactly upon the same basis as that of the liability of a master for the act of a servant. Under this rule we do not think it can reasonably be held that the fact a father should provide, and has provided, for the pleasure of his minor child makes him responsible for a tort of the child committed merely in the pursuit of pleasure. To render the father liable, the tort must have been committed by the minor while actually engaged in the father's business, or with the knowledge, authority, and consent of the father, or must have been ratified by him. *Fielder v. Davison* (Sup.) 77 S. E. 618.

We conclude, therefore, that even if the amendment had been allowed the first count in the petition would have set forth no cause of action against Mrs. Register, for the allegations would simply show that the widowed mother had provided an automobile for the pleasure of her minor daughter, and that the tort was not actually committed by the minor child, but was committed by Sledge, the driver of the automobile, who, in so far as the first count is concerned, held no relation to the mother, but was driving the automobile under the direction and control of the minor daughter. Of course, the count was good as against Sledge, for it was his individual tort that caused the injury, and minors are liable for torts committed by them, so we think the ruling of the trial judge as to the first count was clearly correct.

[2] The judgment overruling the demurrer as to the second count as to both defendants was also correct. The allegations of this count showed very clearly a case of liability

against Mrs. Register, as the owner of the automobile, because it was being driven by Sledge as her servant and agent at the time of the injury, in the performance of his business as driver and servant, and in pursuance of his agency. But the failure of the plaintiff to conform to the order of the learned trial judge and strike from the petition the first count, or eliminate from the second count of the petition Mrs. Register, so as to make the counts in harmony, both as to parties and cause of action, left the petition subject to the criticism that there was in the two counts a misjoinder of the parties and causes of action, the first count setting up a cause of action against Sledge alone, and the second count setting up a cause of action against Mrs. Register and Sledge; and the jury trying the issue made by these two counts would at the same time have been trying a cause of action against Sledge in both counts, and a cause of action against Mrs. Register alone in one count. This confusion of pleading is not permissible, and the final order dismissing the petition because of a failure of the plaintiff to meet the ruling of the court as to the situation thus presented was the only legal action that could properly have been taken. We think, however, that the plaintiff should be allowed to have the cause of action stated in the second count against both defendants submitted to a jury, for this count sets forth a good cause of action against both, under the ruling of the trial judge on the general demurrer, and the material ground of the special demurrer sustained was met by an amendment. We have therefore concluded that a proper disposition of the case will be to affirm the judgment, with direction that the first count of the petition be stricken, but that the second count be reinstated, and that the plaintiff be allowed to submit proof in support of the allegations of the petition, as set out in the second count.

Judgment affirmed, with direction.

(18 Ga. App. 23)

McMILLAN v. FIRST NAT. BANK OF VALDOSTA. (No. 4,811.)

(Court of Appeals of Georgia. June 25, 1913.)

(Syllabus by the Court.)

BILLS AND NOTES (§§ 343, 517, 518*)—BONA FIDE PURCHASER—NOTICE OF DEFENSES—FRAUD—EVIDENCE.

There was no evidence which would have authorized a finding, either that the consideration of the note sued on had failed, or that the plaintiff was not a bona fide purchaser for value before maturity. The verdict in favor of the plaintiff was properly directed.

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. §§ 853-855, 864, 865, 1807-1815, 1816-1820; Dec. Dig. §§ 343, 517, 518.*]

Error from Superior Court, Colquitt County; W. E. Thomas, Judge.

Action by the First National Bank of Val-

dosta against A. M. McMillan. From a judgment for plaintiff, defendant brings error. Affirmed.

Shipp & Kline, of Moultrie, for plaintiff in error. Patterson & Copeland, of Valdosta, for defendant in error.

POTTLE, J. This was an action on a promissory note executed prior to the passage of the act approved August 17, 1912. Acts 1912, p. 153. The defendant pleaded non est factum; that the note was executed in payment of certain mining stock which was worthless, and for this reason the consideration of the note had wholly failed; and that the plaintiff was not a bona fide purchaser for value. The court directed a verdict in favor of the plaintiff, and overruled the defendant's motion for a new trial.

It appears, from the evidence, that Stump, the payee of the note, sold to the maker a number of shares of mining stock in the Georgia-Nevada Mining Company, and that the defendant executed the note sued on in payment for this stock. The note was discounted by the plaintiff bank before its maturity; the bank paying for the note the face value thereof, less a discount of 8 per cent. At the time the note was discounted, Stump was indebted to the bank on a promissory note, and the proceeds of the note sued on were applied as follows: \$200 to Stump's indebtedness to the bank; \$300 in cash to Stump; and \$500 by check made payable to Stump, which was later indorsed over to and collected by one Scott, who was jointly interested with Stump in the mining company. The defendant testified that at the time of the execution of the note Stump represented to him that the mining stock was valuable, and that in a short time it would pay \$1,000 in dividends, and would keep on paying dividends regularly; and he testified that he had never received any dividends on the stock. Some two or three months prior to the execution of the note the plaintiff bank, through its president, Ashley, was informed by an attorney who represented the maker of a similar note that Stump was engaged in selling worthless mining stock, and advised Ashley not to discount the note of his client. Ashley knew that the consideration of the note sued on was mining stock, but did not know of any agreement made between Stump and the maker of the note in reference to the payment of dividends, and did not know that the consideration of the note had failed. The note was payable to Stump, who received the proceeds of the same, and the bank had no knowledge in reference to any agreement as to the disbursement of the proceeds of the note.

The case turns on the question whether or not the consideration of the note had failed, and whether the bank was an innocent purchaser for value before maturity.

There was no evidence which would warrant the inference that the bank knew the consideration of the note had failed, nor that it had knowledge of any circumstances which would place a prudent person upon his guard in purchasing negotiable paper. Civil Code 1910, § 4291. Knowledge by the bank that the note was given for mining stock was not sufficient to put it upon inquiry in reference to the failure of consideration. *Brooks v. Floyd*, 12 Ga. App. —, 77 S. E. 877. The statement made to Ashley by the attorney was no more than an expression of the attorney's opinion, without stating any facts or information which would bring home to Ashley knowledge of the worthless character of the note, being no more than a loose statement by the attorney that Stump was engaged in the business of selling worthless mining stock. It does not even appear that the stock sold to the defendant by Stump was of the same character of stock referred to by the attorney in his conversation with Ashley. But the discussion in reference to whether the plaintiff bank knew that the consideration of the note had failed is really unimportant, because the evidence wholly fails to show that the stock was worthless. There is no evidence in this record from which the jury could rightly infer that the stock was not worth the amount the defendant agreed to pay for it, and for which he gave his note. It does appear that there was a mining company known as the Georgia-Nevada Mining Company, in which both Scott and Stump were interested; that this company owned a large number of acres of land in the state of Nevada, which it had bought for the purpose of developing a mine; that Scott had gone to Nevada and engaged in an effort to develop the property and make it pay; and there is no testimony nor any circumstance proved from which it could legitimately be inferred that the stock was worthless. One who buys mining stock must necessarily know that his venture is to a large extent speculative in character. He cannot defeat a note given for the purchase price merely because the venture has turned out badly and was not as profitable as he thought it would be. In order to sustain a plea of failure of consideration, he must show that the payee of the note acted in bad faith; that the stock was worthless at the time the note was given; and that the payee knew this fact when the sale was negotiated. Nothing of this sort appears in the evidence in the present case; nor was it even shown that the stock was worthless at the time of the date of the trial. No other verdict could properly have been found than the one directed by the court, and the defendant's motion for a new trial was properly overruled. In the foregoing discussion we have treated the alleged newly discovered evidence as though it had been introduced

and admitted at the trial. It could not have produced a different result. Proof of the execution of the note made a prima facie case for the plaintiff, and there was no evidence which would have warranted a contrary finding.

Judgment affirmed.

(13 Ga. App. 20)

FIDELITY MUT. LIFE INS. CO. v. GOZA.
(No. 4,804.)

(Court of Appeals of Georgia. June 25, 1913.)

(Syllabus by the Court.)

INSURANCE (§§ 349, 392*)—FORFEITURE—NON-PAYMENT OF PREMIUM NOTE—WAIVER.

All the questions raised in this case are controlled adversely to the plaintiff in error by the decisions of this court in *Arnold v. Empire Insurance Co.*, 3 Ga. App. 685, 60 S. E. 470, and *Williams v. Empire Insurance Co.*, 8 Ga. App. 303, 68 S. E. 1082, which, upon review thereof, are adhered to.

[Ed. Note.—For other cases, see *Insurance*, Cent. Dig. §§ 891, 895-902, 913, 1041-1056, 1058-1070; Dec. Dig. §§ 349, 392.*]

Error from City Court of Savannah; Davis Freeman, Judge.

Action by G. M. Goza against the Fidelity Mutual Life Insurance Company. From a judgment from plaintiff, defendant brings error. Affirmed.

W. L. Clay, of Savannah, for plaintiff in error. Osborne & Lawrence, of Savannah, for defendant in error.

POTTLE, J. The plaintiff in error issued a policy of insurance upon the life of one Goza, payable to his wife as beneficiary. The policy recited that it was issued in consideration of the payment in advance of \$81.72—the agreed annual premium. In the application, which was a part of the policy, the insured agreed that no agent of the insurer, except certain named officers, should have the power to extend the time for the payment of any premium or to waive any forfeiture of the policy. The policy was issued March 15, 1911, at which time the insured made a cash payment of \$20 upon the premium, and gave his note for \$81.72, dated March 22, 1911, and due 90 days after date. There was a recital in this note that, if not paid at maturity, the policy "shall be ipso facto null and void, without notice to the maker hereof and without any act on the part of the company, and shall remain so until restored as provided by its terms." There was no provision in the policy for its forfeiture for the nonpayment of any obligation given in settlement of the premium, but the policy did provide that, in the event of default in the payment of any premium or obligation given for the premium, the policy might be revived at any time within three years upon production of satisfactory evi-

dence to the company of the payment of all overdue premiums. Shortly before the maturity of the note, the insured paid \$15 in cash, which was received by the company and credited on the note. On June 19th the company's manager wrote the insured, stating that the note would mature the next day, and inclosed a renewal note with the amount left blank, stating that the writer did not recall exactly what amount the insured desired to pay at the maturity of the note. This renewal note was never executed or returned to the company. On July 4th another letter was addressed to the insured by the company's manager, acknowledging the receipt of the \$15 and inclosing another renewal note, which the insured was requested to sign and return. On August 2d the manager again wrote the insured, requesting the new note, "so as to keep your insurance in proper shape." On September 11th another letter was written by the manager to the insured, expressing regret that no reply had been made to the several previous communications, and stating that the writer hoped that it was not the insured's intention to permit the policy to remain lapsed. The note executed by the insured for the balance of the premium was payable to certain named agents of the company, was accepted by it, and entered on its books to the credit of the insured, with the notation that it was held for the balance of the premium. Matters remained in this condition until after the death of the insured on October 1, 1911; and on October 23d the note was charged on the books to the account of the managing

agent to whom it was payable. The company never surrendered or offered to surrender the note to the insured after its maturity. Suit was brought on the policy, and the company defended on the ground that by the nonpayment of the note at maturity the policy had been forfeited. There were demurrers to the petition as amended, which were overruled; and after the introduction of evidence, from which the foregoing facts appeared, the court directed a verdict for the plaintiff.

All the material questions of law raised in the record are controlled adversely to the plaintiff in error by the decisions of this court in the cases of *Arnold v. Empire Insurance Co.*, 3 Ga. App. 685, 60 S. E. 470, and *Williams v. Empire Insurance Co.*, 8 Ga. App. 303, 68 S. E. 1082. There was no stipulation in the policy of insurance that it would be void for nonpayment of the note. The conduct of the company in holding the note and endeavoring to collect it after its maturity amounted to a waiver of its right to insist upon a forfeiture. It was so ruled expressly in the decisions above cited. We are requested to review and overrule these decisions. They were very carefully considered, and in our opinion state correctly the principles of law applicable to the cases then being dealt with, and these principles are controlling in the case now under consideration. We decline to overrule these decisions. There was no error in any of the rulings of the court of which complaint is made.

Judgment affirmed.

(35 S. C. 114)

STATE v. PUCKETT.

(Supreme Court of South Carolina. June 30, 1913.)

1. BURGLARY (§ 4*)—WHAT CONSTITUTES.

As common-law burglary is the breaking and entering of the dwelling house of another in the nighttime with intent to commit a felony, it is not a burglary for accused to enter the piazza attached to a house, even though the piazza was protected by a balustrade and low picket gates used to keep out dogs and chickens; it not appearing that accused attempted to enter the dwelling proper or attempted to commit any felony therein.

[Ed. Note.—For other cases, see Burglary, Cent. Dig. §§ 14-18; Dec. Dig. § 4.*]

For other definitions, see Words and Phrases, vol. 1, pp. 908-911; vol. 8, p. 7593.]

2. BURGLARY (§ 11*) — PROSECUTION — ATTEMPTED.

An attempted burglary is indictable at common law.

[Ed. Note.—For other cases, see Burglary, Cent. Dig. § 4; Dec. Dig. § 11.*]

Appeal from General Sessions Circuit Court of Laurens County; Geo. E. Prince, Judge.

Rich Puckett was convicted of burglary, and he appeals. Reversed.

Ferguson, Featherstone & Knight, of Laurens, for appellant. R. A. Cooper, of Laurens, for the State.

WATTS, J. The defendant appellant was tried and convicted in the court of general sessions for Laurens county in January, 1913, on a charge of burglary. He was charged with breaking and entering the dwelling house of W. R. Richey in the nighttime, with intent of committing a felony, on September 22, 1912. After conviction, a motion for a new trial was made by appellant, which was overruled, and after sentence appellant appeals and alleges ten specifications of error on the part of his honor. The first five exceptions allege error on the part of his honor in overruling the motion for a new trial in that there was no testimony to sustain the verdict, as the evidence showed that the portion of the house entered was the piazza, unprotected and uninclosed, and was not such a place to be legally the subject of burglary, and there was no evidence that the defendant broke and entered a dwelling house as alleged in the indictment, and in holding that picket gates, in contemplation of law, put on the piazza outside of the house, constituted a protection or security to the habitation of the dwelling, when the evidence showed that the gates were not put there for any such purpose but to keep out dogs and chickens and in holding that under the indictment the appellant could be convicted of burglary in breaking out of said dwelling house when there was no evidence of such breaking, and for the further reason there was no evidence of any breaking or entering in the house to

steal, no breaking out, and no evidence at all of any theft or other felony committed by the appellant in consequence of such entry. The ninth and tenth exceptions raise the point there was no evidence to sustain the verdict. The facts, as developed at the trial in brief, are: That the dwelling house of Mr. Richey is on West Main street, in the city of Laurens; that the house is surrounded on the front and on the east and west ends by a piazza, with balustrade 2½ feet high. From the top of balustrade to the overhead ceiling of the piazza is an open space of 6 or 7 feet. On the front there was an opening on the piazza of 12 feet through the balustrade. On the east and west ends there was an opening of 8 feet from the back yard on each end of the piazza. There was a picket gate to each end, opening of the same height as the balustrade, leaving the open space above the ceiling. It was the custom to keep these gates closed to keep out chickens, dogs, etc. The evidence shows the defendant appellant was familiar with the premises. On the night in question it was damp and raining; during the night Puckett was found on the piazza of the house under suspicious circumstances. There is no question about that, and there was sufficient testimony to go to the jury as to whether the gates to the piazza were closed or not. He did not enter the dwelling house proper at all, and there is no evidence that he stole anything or made any overt act to commit a felony. The sole question is whether the piazza was such a part of the dwelling house in this case, under the facts as proven, as to make it a subject of burglary, and, if so, did the appellant break and enter it in the nighttime with intent to steal, or did he enter it without breaking in the nighttime, with intent to steal, and then break out.

[1] Common-law burglary is the breaking and entering the dwelling house of another in the nighttime, with intent to commit a felony. There must be a breaking and entering. It must be a dwelling house; it must be in the nighttime; and it must be with the intent to commit a felony. There must be a breaking of "the inclosing parts of a dwelling house." 2 Bishop, § 91; State v. Sampson, 12 S. C. 568, 32 Am. Rep. 513; 2 Wharton (11th Ed.) 1190, § 971; Clark's Criminal Law, § 100.

The evidence shows the appellant only on the piazza, and under the facts, as proven, it does not show that the piazza was such a part of the dwelling house as was contemplated by law to make it an offense to enter in the nighttime against the security of the dwelling house. In the case of Henry v. State, 39 Ala. 679, the accused was charged with larceny under the statute imposing a penalty upon "any person, who shall commit larceny in any dwelling house." Cer-

tain clothes had been stolen from the piazza in front of the dwelling house and attached to it. The court held: "Such a piazza is not a house and cannot be a dwelling house. It may be attached to the house. * * * A larceny, committed in the piazza, cannot be said to have been committed in or inside of the house."

The entry of a piazza, attached to the house outside of the house, the place where callers are accustomed to wait until some one in the house responds to a ring or knock, or to enter and sit on the piazza to get out of the rain, or sun, or to rest, may be a trespass or bad taste, but it is quite different from opening the closed doors of a house and intruding in the sanctity of the dwelling.

A careful examination of all the evidence in the case convinces us that there was not sufficient testimony to convict the appellant of the offense charged, and his honor was in error in not setting the verdict aside.

[2] The appellant was not indicted for an attempt to commit a burglary, although 2 Wharton (11th Ed.) 1041, says, "An attempt at burglary is indictable at common law;" but appellant was indicted for burglary, not an attempt to commit burglary.

Judgment reversed.

GARY, C. J., and HYDRICK and FRASER, JJ., concur.

(95 S. C. 131)

STATE ex rel. OULP et al. v. CITY COUNCIL OF UNION.

In re HOLDING ELECTION FOR ALDERMAN IN WARD 1, IN CITY OF UNION.

(Supreme Court of South Carolina. June 28, 1913.)

MUNICIPAL CORPORATIONS (§ 138*) — ALDERMEN—QUALIFICATIONS — "QUALIFIED ELECTOR."

One to be a "qualified elector" of a ward of a city, so as to qualify him, under Civ. Code 1912, § 2924, to be alderman thereof, must be registered, so as to entitle him, under section 221, to vote at the election.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. § 313; Dec. Dig. § 138.*

For other definitions, see Words and Phrases, vol. 7, pp. 5875, 5876.]

Appeal from Common Pleas Circuit Court of Union County; Thos. S. Sease, Judge.

Petition by F. B. Culp and others for mandamus to the City Council of Union and its members in respect to the holding of an election for aldermen in ward 1 of said city. Judgment for relators, and respondents appeal. Affirmed and remanded, with instructions.

J. Ashby Sawyer, of Union, for appellants. Young & Beaty, of Union, for respondents.

WATTS, J. This is a petition filed by the relators, praying for a writ of mandamus requiring the respondents (appellants here) to

order and hold an election in ward 1 of the city of Union for the election of an alderman from said ward. The petition exhibited verified, and accompanied by affidavits set forth: That at an election on June 4, 1912, in the city of Union, J. E. Kirby received a majority of votes cast for alderman for ward 1 and was declared elected to that office. That the said Kirby was not at the time of said election "a qualified elector, nor was he a registered voter in the said election," and was not therefore qualified to hold public office under the Constitution and laws of this state. That they are informed and believe that said Kirby is undertaking to act as alderman for said ward. That they called upon the mayor and aldermen from the other wards, and through petition demanded that an election be ordered. That they have the right to be represented in said council by some one who is duly qualified elector, and that it is the official duty of the city council to order elections to fill vacancies, and that the respondents are the officers of the city.

Upon the petition and affidavits, Judge Sease issued a rule requiring the respondents to show cause before him why the writ prayed for should not issue. Return was made, as required, and after argument Judge Sease on December 7, 1912, made an order directing the writ of mandamus to issue as prayed for, and the formal writ was issued. Appeal was made from the order of Judge Sease.

The undisputed facts in the case show that, at the time of the election for mayor and alderman for the city of Union in 1912, J. E. Kirby had been, for at least four years prior thereto, a bona fide resident of the said ward and had paid all taxes due and assessed against him for the preceding fiscal year and held a registration certificate, duly issued by the board of registration for the county of Union, as a registered elector of ward 1 of Union, S. C. That he had been elected and served as an alderman from that ward in 1908 and 1910 and had been duly nominated by his party in 1912 and duly elected, but that he failed to register for the municipal election, 1912.

The city of Union is divided into wards and is operated under charter for cities of over 5,000 population, and charter is issued by Secretary of State. The original act providing for the incorporation and government of cities of more than 5,000 inhabitants is found in volume 23, Statutes at Large, as Act 377, p. 648, passed in 1901. Section 2 thereof was incorporated in Code of 1902 as section 1965, vol. 1, and as part of the Code of 1912, vol. 1, § 2924, and reads as follows: "Said city shall be governed by a mayor and alderman, or, in case of municipalities being divided into wards, one alderman from each ward, who shall be and be known as the city council of said city. Said mayor and

alderman shall be qualified electors of this state and of the county in which said city is situated, and they shall have resided in the corporate . . . city, at least six months immediately preceding the day of election. If the city be divided into wards, the alderman from each ward shall be a qualified elector thereof, and shall be elected by the qualified electors thereof."

Section 221, Code of Laws 1912, vol. 1. provides for the registration for municipal elections, in substance, that 90 days before holding the regular election, etc., a supervisor of registration shall be appointed," whose duty it shall be to register all qualified electors within the limit of the incorporated city or town. The names of all qualified electors of such municipalities shall be entered in a book of registration," etc. "Provided, that twenty days prior to any special election to be held as aforesaid the books of registration shall be opened for the registration of the names of qualified electors therein, and shall remain open for a period of ten days. . . . Immediately preceding any municipal

election to be held in any incorporated city or town in this state, the supervisor or supervisors of registration (as the case may be) shall prepare for the use of the managers of election of each polling precinct in such city or town, containing the names of all electors entitled to vote in such polling precinct at said election." This clearly shows that, in order to vote in a municipal election, a municipal registration is necessary, and it is a necessary qualification, in order to hold the office of alderman, that the party elected is not only a qualified elector and entitled to vote in the state and county elections but he must be a resident of the ward from which he is elected and duly qualified to vote in the municipal election that elects him. In this election Mr. Kirby was not a qualified elector and could not be elected in it to the office of alderman and is not entitled to that office, and that office is vacant, and his honor, Judge Sease, committed no error in so holding and in issuing the writ of mandamus.

All of the exceptions are overruled, and judgment appealed from affirmed, and case remanded, with instructions that the city council of Union order an election to fill the vacancy within 30 days after remittitur is sent down to circuit court.

GARY, C. J., and HYDRICK and FRASER, JJ., concur.

(95 S. C. 158)

MIDDLETON et al. v. ELLISON et al.
(Supreme Court of South Carolina. June 30, 1913.)

1. INJUNCTION (§ 136*) — TEMPORARY INJUNCTION—GROUND FOR ISSUANCE.

In an action to enjoin defendants from interfering with church property, a temporary

injunction will be granted where there are substantial questions to be decided, and the status of affairs existing at the commencement of the action should be preserved.

[Ed. Note.—For other cases, see Injunction, Cent. Dig. §§ 305, 306; Dec. Dig. § 136.*]

2. RELIGIOUS SOCIETIES (§ 24*)—ORGANIZATION—POWER OF CIVIL COURTS.

Where there is a schism in a church, the courts will not undertake to inquire into the ecclesiastical acts of the several parties, but will determine the property rights in favor of the party or division maintaining the church organization as it previously existed.

[Ed. Note.—For other cases, see Religious Societies, Cent. Dig. §§ 154-157; Dec. Dig. § 24.*]

3. RELIGIOUS SOCIETIES (§ 25*)—ORGANIZATION—RIGHT TO QUESTION.

Where defendants originally took their pulpits under the authority of the plaintiff bishop, they cannot subsequently question his authority, and a temporary injunction will be issued to restrain them from interference in all cases, except where the congregation practically unanimously adopted the theories of defendants.

[Ed. Note.—For other cases, see Religious Societies, Cent. Dig. §§ 154-157; Dec. Dig. § 25.*]

Appeal from Common Pleas Circuit Court of Charleston County; Geo. E. Prince, Judge.

An action by E. Russell Middleton, as bishop of the Reformed Methodist Union Episcopal Church, and the Reformed Methodist Union Church, a corporation under the laws of the state of South Carolina, commonly known as the Reformed Methodist Union Episcopal Church, against J. A. Ellison and others. From an order granting a temporary injunction, defendants appeal. Affirmed.

The opinion of the trial judge is as follows:

"This is a suit for injunction brought by E. Russell Middleton, as bishop of the Reformed Methodist Union Episcopal Church and by the Reformed Methodist Union Church, a South Carolina corporation commonly known as the Reformed Methodist Union Episcopal Church. The action is brought against certain individuals, named as defendants herein, who it is alleged, are claiming and assuming to be the regular church, are using the corporate name of the church, and are conspiring to injure and destroy the church and church government of the plaintiffs; it is further alleged that the defendants are creating disturbances and have caused conflicts to take place in some of the churches and congregations of the plaintiff corporation, and are interfering with and undertaking to take possession of certain of the church property; it is also alleged that the defendants have undertaken to hold meetings in the name of the plaintiff corporation and have called a meeting for November 4, 1912, to consider making certain changes in its charter.

"The matter comes before me now on an application for a restraining order pendente lite under a rule to show cause issued by me

and duly served on the defendants, and under the return of the defendants and sundry affidavits submitted by both sides.

[1] "Many points and questions of fact have been raised at the hearing before me which I do not consider it necessary or proper for me to pass upon at the present time. The action being for injunction, the matter to be decided here is whether under the showing made by the affidavits submitted and by the pleadings the plaintiffs have shown that there are substantial questions to be decided, and that the status of affairs existing at the commencement of the action should be preserved.

"Without going into a discussion of the facts or of the questions involved, I am satisfied that the plaintiffs under the showing made are entitled to a temporary restraining order. The question which requires more consideration is as to what property the restraining order should apply, and on this point there is great conflict between the statements made by the contending parties. The controversy concerns itself with a schism in the Reformed Methodist Union Episcopal Church, which is a religious organization made up of numerous congregations and with a large membership in this state and in Georgia. Each side claims to be in possession of certain of the churches and to have certain congregations with it, and affidavits are submitted by each party to sustain its respective contention.

[2] "While there seems to be a dispute that plaintiffs represent the original organization, yet prior to the spring of this year the defendants were acting as a part of the plaintiff organization under Bishop Middleton. The organization has been known as the Reformed Methodist Union Episcopal Church for many years during which defendants were members of and identified with it. Under these circumstances, the defendants will not be heard now to question its right to use this name nor will the court undertake to inquire into its ecclesiastical acts. In such cases the courts of law are accustomed to inquire which party or division maintains the church organization as it existed and to recognize this party. While not undertaking to decide finally this question at the present time, it has become necessary to consider the matter from this point of view, in view of the conflicting statements of the affidavits submitted.

[3] "It appears that several of the defendants who now claim to be in possession under the defendant Ellison were appointed to these charges by the plaintiff bishop and took possession under him. Since the schism in the church, many of the congregations under these defendants have been rent in twain, and dissension and division exist amongst them. Having been appointed and having entered into possession under the bishop, those of

the defendants whose congregations are divided cannot claim to be in peaceable possession as against the bishop and against that portion of their congregation who still support him. On the contrary, these pastors having been placed there by the bishop, he and his supporters are to be regarded as still in possession under the circumstances disclosed at the hearing, unless full and legal possession is shown to have been obtained by the opposing faction. In all cases, therefore, except those in which complete or entirely peaceable possession is shown, the plaintiffs are entitled to be free from interference during the pendency of this action.

"In the churches of St. James in the St. James circuit in Clarendon county and of St. Peter's and Zion in the Lake City circuit, the plaintiffs concede the fact that all or practically all of the members of the congregations have sided with the defendants and that the latter are practically in complete possession. In the case of St. Mark's Church in St. Andrew's parish, Charleston county, it would also appear from the statements made that, although plaintiffs claim that certain of the members are opposed to defendants, the large majority are with Ellison and his associates and no disturbances have occurred with reference to their possession. In these cases I shall not interfere with the defendants, and they may continue in their possession and control. With reference to the churches and congregations in the state of Georgia, I shall also not undertake to pass any order.

"With these exceptions, however, I think plaintiffs are entitled to a temporary restraining order against the defendants. It is therefore ordered that during the pendency of this action and until further order of the court the defendants and all acting under them be and they are hereby restrained and enjoined from interfering with plaintiffs in the exercise of their rights, privileges, and in performing their duties as a corporation as bishop thereof, respectively, in connection with the government of the said church and the direction and control of the congregation and places of worship thereof.

"It is further ordered that the defendants and all acting under them be and they hereby are during the pendency of this action and until further order restrained and enjoined from entering or interfering with the property, books, or records of the following churches and congregations of the Reformed Methodist Union Church, commonly known, as the Reformed Methodist Union Episcopal Church, to wit: Mt. Hermon Church, Charleston, S. C.; Central Church, Charleston, S. C.; Zion Church, Dorchester Road, S. C.; St. Mary's Church, Charleston, S. C.; Payne Church, James Island, S. C.; St. Mary's Church, John's Island, S. C.; St. Peter's Church, John's Island, S. C.; Jerusalem Church,

Maryville, S. C.; Bethlehem Church, Edisto Island, S. C.; Cedar Grove Church, Lambs, S. C.; Zoar Church, Lincolnville, S. C.; Jerusalem Church, Seabrook, S. C.; St Paul Church, Grays Hill, S. C.; Bethel Church, Paris Island, S. C.; Mt. Olivet Church, Puyresburg, S. C.; St. Stephen's Church, Bellinger, S. C.; Mt. Pisgah Church, Mouliden, S. C.; St. James Church, Mouliden, S. C.; Emanuel Church, Gifford, S. C.; Palmerville Church, St. Stephens, S. C.; McClellanville Church, McClellanville, S. C.; New Hope Church, Calvary, S. C.; Antioch Church, Remni, S. C.; Mt. Pleasant Church, Panola, S. C.; St. Philip's Church, Elmwood, S. C.; Mt. Moriah Church, Brogden, S. C.; Keels Chapel, Greeleyville, S. C.; St. John's Church, Effingham, S. C.; St. Luke's Church, Georgetown, S. C.; Gallilee Church, Winyah, S. C.; Lanes Creek Church, Lanes Creek, S. C.; New Hope Church, Sampsit, S. C.; St. Mary's Church, St. James, Santee, S. C.; St. Matthews Church, Elliott, S. C.; St. James' Church, Marion, S. C.; Orange Hill Church, Wedgefield, S. C.; Beulah Church, Privateer, S. C.; Elizabeth Church, Bloom Hill, S. C.; St. Michael's Church, Statesburg, S. C.; Good Hope Church, Providence, S. C.; St. Mary's Church, Indian Town, S. C.; Goodwill Church, Cades, S. C. It is further ordered that the defendants and all acting under them be and they hereby are, during the pendency of this action, restrained and enjoined from claiming and assuming to be the Reformed Methodist Union Church or from using the name of the Reformed Methodist Union Church or of the Reformed Methodist Union Episcopal Church, and from holding any meetings or in any manner attempting to transact any business in the name thereof.

"Defendants are entitled to be protected against loss in the event that this controversy should eventually be determined in their favor. The plaintiffs shall therefore give bond in the usual form for \$1,000, with sufficient surety to be approved by the clerk of this court. Let this bond be filed with the clerk within 10 days from the date hereof.

"And it is so ordered."

Herndon & Monash, of Charleston, and Davis & Wideman, of Manning, for appellants. John D. Cappelmann, N. B. Barnwell, and F. Wm. Cappelmann, all of Charleston, for respondents.

WATTS, J. For the reasons given by the circuit judge, the Hon. Geo. E. Prince, it is the judgment of this court that the order made by the circuit court be affirmed.

GARY, C. J., and HYDRICK and FRASER, JJ., concur.

(35 S. C. 120)

STOKES et al. v. MURRAY.

(Supreme Court of South Carolina. June 28, 1913.)

1. ADVERSE POSSESSION (§ 114*)—BURDEN OF PROOF.

Where the question is whether a party has acquired title to real estate by adverse possession for a period of 10 years, such possession must be clearly proved and shown.

[Ed. Note.—For other cases, see Adverse Possession, Cent. Dig. §§ 682, 683, 685, 686; Dec. Dig. § 114.*]

2. ADVERSE POSSESSION (§ 115*)—QUESTION FOR JURY—CHARACTER OF POSSESSION.

The character of adverse possession is a question for the jury.

[Ed. Note.—For other cases, see Adverse Possession, Cent. Dig. §§ 314, 691-701; Dec. Dig. § 115.*]

3. TRIAL (§ 139*)—TAKING CASE FROM JURY—NONSUIT.

Where there is any competent relevant testimony to go to the jury, a nonsuit cannot be granted.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 332, 333, 338-341, 365; Dec. Dig. § 139.*]

Appeal from Common Pleas Circuit Court of Lee County; Henry Mullins, Special Judge.

Action by J. L. Stokes and others against William M. Murray. From an order granting a nonsuit, plaintiffs appeal. Reversed and remanded.

See, also, 94 S. C. 18, 77 S. E. 712.

The following are the exceptions of appellants:

"His honor erred in granting the motion for nonsuit, it is respectfully submitted, in the following particulars. (1) Having established, prima facie, a legal title to the premises in question, the plaintiffs were presumed to have been possessed of the same within the time required by law. (2) Section 109 of the Code of Civil Procedure of 1902 has no application to this case: (a) Because not enacted for 40 years; (b) because enacted after the cause of action accrued, if the view taken by attorneys for defendant is correct. (3) Section 98 of the Code of Civil Procedure of 1902 has no application in this suit, as the same was enacted after the cause of action arose, if the contention of defendant be correct. (4) Section 161 of the Code of Civil Procedure of 1870 is not applicable to this case because a prima facie legal title having been established, the plaintiffs are presumed to have been possessed within the time then required by law, to wit, 20 years. (5) The statutes of limitation have no application to this case, as no right of action ever accrued to the plaintiffs, or their ancestor, until the death of F. L. Stokes. (6) The statutes of limitation do not apply in this case, as the ancestor of the plaintiffs was laboring under the marital disability imposed by law, and the law cannot, at the same time, prescribe a limitation to run during

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

the continuation of the disability the law had imposed, as this would be depriving a person of property without due process of law. (7) No adverse holding was or could be shown, as the plaintiffs' ancestor had no right to the possession, and therefore no mere holding of possession could be adverse to her rights which did not include possession. (8) Section 101 of the Code of Civil Procedure of 1902 raises the presumption of possession within the time required by law, and this alone would require the trial judge to send the case to the jury. (9) The evidence introduced by the plaintiffs was insufficient, under the law, to sustain a verdict for them, and said evidence did make out a prima facie case."

L. D. Jennings, of Sumter, and McLeod & Dennis, of Bishopville, for appellants. Thos. H. Tatum, of Bishopville, and J. B. McLaughlin, of Columbia, for respondent.

WATTS, J. This was an action for the recovery of real property heard before Special Judge Hon. Henry Mullins, and a jury, at the spring term of the court of common pleas for Lee county in 1910. At the close of the evidence in the case, upon motion of defendant's attorneys, his honor granted a nonsuit. The plaintiffs gave notice of intention to appeal from this order, but before they perfected their appeal, Judge Mullins signed an order, setting aside his order of nonsuit, and appeal was taken from this last order, and that order was reversed in an opinion recently filed by this court (94 S. C. 13, 77 S. E. 712), with leave to the plaintiffs (appellants here) to perfect their appeal from the order granting the nonsuit. The order of nonsuit appealed from is as follows: "Upon the close of plaintiffs' testimony in the above-stated case, the defendant moved for nonsuit, upon the various grounds stated in the record. It appearing to my satisfaction that the plaintiffs have failed to show that they, or any one of them, their ancestors, predecessors, or grantors, were seised or possessed of the premises in question, or any part of such premises, within 10 years, or within 20 years, or within 40 years, before the commencement of this action, and it further appearing that the evidence, as offered by the plaintiffs, is insufficient to sustain a verdict for them, and totally fails to make out their case, it is ordered that the nonsuit in said case be, and is hereby, granted." The appellants by their exceptions (nine in number, which should be set out in the report of the case) question the correctness of this holding by his honor. A careful examination of the evidence in the case forces us to the conclusion that his honor was in error in not submitting the case to the jury to pass upon the evidence in the case. The order of nonsuit was based

mainly upon the statute of limitations and adverse possession. There was a scintilla of evidence to go to the jury on these questions, as well as that of common source of title.

[1-3] Chief Justice Melver, in *Thomas v. Dempsey*, 53 S. C. 218, 31 S. E. 232, says: "The rule is well settled that where the question is whether a party has acquired title to real estate by adverse possession for a period of 10 years, such possession must be clearly proved and shown." *Holmes v. Rochell*, 2 Bay, 487; *Harrington v. Wilkins*, 2 McCord, 269, where it is said the character of possession is a question for the jury; *Cantey v. Platt*, 2 McCord, 260; *Porter v. Kenny*, 1 McCord, 208; *Hill v. Saunders*, 6 Rich. 62; *Abel v. Huttee*, 8 Rich. 42. The law is so well settled that quotation of authority is unnecessary, that where there is any competent relevant testimony to go to the jury, a nonsuit cannot be granted. We cannot escape the conclusion that there was evidence to go to the jury upon all of the issues that the judge based his order for nonsuit, and that he was in error, and order appealed from should be reversed.

Judgment reversed.

GARY, C. J., and HYDRICK and FRASER, JJ., concur.

(5 S. C. 106)

BETHEA v. WESTERN UNION TELEGRAPH CO.

(Supreme Court of South Carolina. July 2, 1913.)

TELEGRAPHS AND TELEPHONES (§ 66*)—DELAY IN TRANSMISSION OF MESSAGES—ACTIONS—EVIDENCE—WILLFULNESS.

In an action for damages for a telegraph company's delay in the transmission of a death message, evidence held to show reckless disregard of plaintiff's rights.

[Ed. Note.—For other cases, see *Telegraphs and Telephones*, Cent. Dig. §§ 61-63; Dec. Dig. § 66.*]

Appeal from Common Pleas Circuit Court of Dillon County; John S. Wilson, Judge.

Action by G. F. Bethea against the Western Union Telegraph Company. From a judgment for plaintiff, defendant appeals. Affirmed.

Geo. H. Fearons, of New York City, Willcox & Willcox and J. S. Mitchell, all of Florence, L. W. McLemore, of Sumter, and Henry Buck, of Marion, for appellant. Townsend, Rogers & McLaurin, of Dillon, for respondent.

GARY, C. J. This is an action for damages, alleged to have been sustained by the plaintiff through the wrongful acts of the defendant in failing to deliver the following telegram within the time required by law: "Florence, S. C., August 27, 1910. Wesley Bethea, Dillon, S. C.: I will be in with

corpse to-night. G. F. Bethea." The corpse mentioned in the telegram was that of Ella Bethea, sister of the plaintiff and daughter of Wesley Bethea, to whom the message was sent.

The fourth and sixth paragraphs of the complaint are as follows:

"IV. That plaintiff is informed and believes that the said message was not received at Dillon until 9:45 o'clock a. m. on the 28th day of August, 1910, and was not delivered to the addressee, Wesley Bethea, until the morning of the 29th day of August, 1910, although the said Wesley Bethea lived within a few hundred yards of the Dillon office of the said defendant, and was in and about his home continuously, from the time said message was delivered to the defendant at Florence on the afternoon of the 27th of August, 1910, to the time when same was delivered to him in the morning of the 29th day of August, 1910."

"VI. That the failure of the defendant to transmit and deliver said message promptly, as it was in duty bound to do, was willful, wanton, and gross negligence of a plain duty, which it owed to this plaintiff, and by reason of the willful, wanton, and gross negligence and failure of the defendant to transmit and deliver said message no one was at the depot to meet the mortal remains of his said sister with conveyances, and carry them to the home of his father, and the corpse of his said sister was obliged to lie unprotected and unattended at the depot in Dillon for a considerable length of time."

The jury rendered a verdict in favor of the plaintiff for \$650, and the defendant appealed.

The appellant's attorneys in their argument say: "The principal question presented by the appeal is whether the presiding judge erred in refusing to direct a verdict in favor of the defendant at the close of all the evidence, on the ground that there was no evidence sufficient to take the issue of willfulness to the jury." We will proceed to the consideration of that question.

H. W. Seig, the telegraph operator at Florence, to whom the message was delivered for transmission, thus testified: "Q. Do you recall any conversation that took place between you and the sender of that message? A. Yes, sir; I told him there would be some delay, on account I was there by myself. The manager was called out of town on account of his wife being sick, and it was piled up around there. Q. You told him that, at the time you accepted the message? A. Yes, sir; I told him I didn't know how much it would be. Q. Did you make an effort to send it to Dillon that night? A. Yes, sir. Q. Why couldn't you send it? A. I was busy on other wires around there, and I didn't have very much time to get in a call. The wire, I think, from Wilmington to Augusta, it was always piled up pretty near, and I

didn't have the time I should have had to call him, on account of the manager being out of town. Q. Was the Dillon office on that wire you speak of? A. Yes, sir. Q. When you called him, you were not able to get him? A. No, sir; I didn't have very much time to call him; five or six times each time I called. Q. At any time you attempted to call him, did you find him busy, or the wire busy otherwise? A. I found him busy once, and the wire was busy otherwise. Q. Are there not a number of offices on that same wire? A. Yes, sir."

Cross-examination: "Q. Mr. Seig, you saw by the terms of this message that it was a death message? A. Yes, sir. Q. Did you make any special effort to deliver that message? A. Well, I made all I could under the circumstances. Q. And it was some time the next day before you were able to get that message through? A. Yes, sir; on account of my being there by myself. Q. Do you or not, as a usual rule, try to give death messages preference to others? A. They are very common. Q. So you don't make special effort? A. Yes, sir; they are supposed to go first. They have preference over the other business. Q. This one didn't? A. We can't give them all preference. Q. How many death messages did you have that day? That afternoon from that time until this was transmitted? A. I don't think I had none. Q. None at all? A. I don't think so. Q. And still they are very common? A. Yes, sir. Q. You say the business on that wire was very much congested? A. Yes, sir. Q. As a matter of fact, Mr. Seig, if you had made special effort, could you have gotten that message through here before that time the next day? A. No, sir; if I had let all the other business go, and then there would be suits for other business (interrupted)—Q. Don't tell that. If you had made special effort to get that message through, couldn't you have gotten it here before that time the next day? A. No, sir. Q. Not even if you let it take preference over the other business? A. No, sir. Q. Do you mean to say, Mr. Seig, as a matter of fact, if you had taken this message and given it preference to any other business, that you could not have got it here before that time? A. The offices at Wilmington and Augusta, they are not going to allow you to keep the wires all day, on account they are piled up. Q. Was there any other message sent from Florence to Dillon? A. No, sir; that was the only one sent. Q. Do you mean to say that you told this plaintiff here, Garfield Bethea, that you couldn't get that message through right away? A. Yes, sir. Q. You remember that? A. Yes, sir; and told the manager the same thing when he came to town, and I answered the statement on the papers."

This testimony tends to show upon its face that there was a reckless disregard of the plaintiff's rights, in failing to transmit a

message from Florence to Dillon, a distance of about 40 miles, when the operator had more than two hours within which to send it before the office at Dillon closed, and failed simply because there were other messages to be sent, but over which death messages were entitled to precedence in transmission. The jury evidently did not believe this witness.

Judgment affirmed.

HYDRICK, WATTS, and FRASER, JJ., concur.

(95 S. C. 185)

KNIGHT v. KNIGHT.

(Supreme Court of South Carolina. June 30, 1913.)

1. APPEAL AND ERROR (§ 866*) — REVIEW — QUESTIONS OF FACT.

In passing on the refusal of the circuit judge to grant a nonsuit, the Supreme Court may consider all the testimony in the case.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3467-3475; Dec. Dig. § 866.*]

2. TRIAL (§ 142*) — QUESTION OF LAW OR FACTS—INFERENCES FROM EVIDENCE.

Where there is more than one inference deducible from the evidence in the case, it is error for the trial court to direct a verdict.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 837; Dec. Dig. § 142.*]

3. EVIDENCE (§ 273*)—SELF-SERVING DECLARATIONS—OWNERSHIP OF LAND.

Declarations in favor of one's own title to lands, made in the absence of one whose title is thereby disparaged, were inadmissible in support of such title.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 1108-1120; Dec. Dig. § 273.*]

Appeal from Common Pleas Circuit Court of Laurens County; R. W. Memminger, Judge.

Action by William B. Knight against John L. Knight. Judgment for plaintiff, and defendant appeals. Reversed, and a new trial granted.

Richey & Richey, of Laurens, for appellant. Simpson, Cooper & Babb, of Laurens, for respondent.

WATTS, J. This was an action for the recovery of real estate by respondent against the appellant, tried before his honor, Judge Memminger, and a jury, at the fall term of court for Laurens county, 1912, and resulted in a verdict in favor of plaintiff, respondent here. At the close of plaintiff's testimony, the defendant made a motion for nonsuit, which was refused at the close of all the testimony in that case. Defendant moved that a verdict be directed for defendant, which was refused, and after verdict a motion for new trial was made and refused. After entry of judgment, appellant appeals, and asks reversal on eight exceptions, alleging error on the part of his honor in admitting, over

objection, incompetent testimony on the part of respondent, in not granting a nonsuit, or directing a verdict for the appellant, and challenging the correctness of his honor's law, as laid down to the jury.

[1, 2] As to whether he should have granted a nonsuit, or directed a verdict, as asked for, in favor of the appellant, it is sufficient to say that under the testimony admitted by the trial judge there was sufficient testimony to carry the case to the jury, and in passing on refusal of circuit judge to grant a nonsuit this court may consider all the testimony in the case, and there being more than one inference deducible from the evidence in the case it would have been error to direct a verdict. Dupuy v. Williams, 91 S. C. 185, 74 S. E. 381; Davis v. Reynolds, 91 S. C. 440, 74 S. E. 827.

The appellant's second exception is: "That his honor erred in admitting in evidence over the objection of the defendant as much of the testimony of plaintiff's witness, Mrs. Eddie Ballentine, as related to the declarations of B. E. Knight, that the land in dispute was his; that he let the rent go for the taxes; that the land was all he had; and he intended for his two boys to have it. The said B. E. Knight being then dead, the testimony was incompetent as hearsay and as self-serving declaration of B. E. Knight, and declarations in favor of his own title, and should not have been admitted in support of his own title to said land."

The third exception is: "That his honor erred in admitting in evidence, over the objection of defendant, as much of the testimony of plaintiff's witness, Mrs. Laura Knight, as related to declarations of B. E. Knight, that the land was his, and he intended to do as he pleased with it; that he offered the land for sale once to Mrs. Alewine; that B. E. Knight and his wife showed Mrs. Alewine over the place, and said that if he sold to Mrs. Alewine he would move John L. Knight down on his place, near his home. The said B. E. Knight being then dead, the said testimony was incompetent, hearsay and self-serving declaration of B. E. Knight, and declarations in favor of his own title, and should not have been admitted in support of his own title to said land."

[3] We are of the opinion that these exceptions should be sustained. So much of testimony of Mrs. Lou Knight, which detailed the conversations of B. E. Knight and John L. Knight, was competent; but the declarations of B. E. Knight, as to the ownership of the land in dispute, made in the absence of John L. Knight, were clearly incompetent, and as to the testimony of Mrs. Ballentine there is no claim that John L. Knight was present at all, at any time the claim of ownership or declarations in reference thereto were made by B. E. Knight. This testimony was admitted over the objection of ap-

pellant's counsel. It is true he cross-examined the witness, but that was subject to his objection to the admissibility of her testimony, which objections the court overruled, and admitting it, and allowing these declarations to go to the jury was prejudicial to the appellant. In *Wingo v. Caldwell*, 36 S. C. 593, 15 S. E. 382, the court says: "There can be no doubt of the correctness of appellant's claim that our decisions fully sustain the doctrine that declarations in favor of one's own title are not admissible in support of such title."

In *Ellen v. Ellen*, 18 S. C. 494, this court held that the circuit judge was in error in "admitting the declarations of David Ellen in support of his title as independent testimony in reply to his declarations in disparagement thereof introduced by the defendant. If these declarations had been part of the same conversation * * * or had been explanatory of some special act, then they might have been admissible as part of the *res gestæ*, but the declarations of a party interested can never, per se, be admitted as evidence of his right." This error on the part of circuit judge will necessitate a new trial, and it is unnecessary to consider the other exceptions undisposed of.

Judgment reversed, and a new trial granted.

GARY, C. J., and HYDRICK and FRASER, JJ., concur.

(36 S. C. 163)

WYLIE v. JEFFERSON STANDARD LIFE INS. CO.

(Supreme Court of South Carolina. July 5, 1913.)

1. INSURANCE (§ 387*)—FORFEITURE—NONPAYMENT OF PREMIUMS.

Where a life insurance company through its duly authorized agents a few days before an annual premium became due wrote insured calling his attention to such premium and stating that the company granted 30 days extension in which to pay it, and insured died within such 30 days, the policy was not forfeited and the company was liable thereon.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. § 1025; Dec. Dig. § 387.*]

2. INSURANCE (§ 350*)—FORFEITURE—NONPAYMENT OF PREMIUMS.

The statute of North Carolina extending the time of forfeiture of life insurance policies in certain cases, by its express provisions, does not apply to a policy of term insurance for one year.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 892, 893; Dec. Dig. § 350.*]

Appeal from Common Pleas Circuit Court of York County; R. C. Watts, Judge.

Action by Ida M. Wylie against the Jefferson Standard Life Insurance Company.

From a judgment for defendant, plaintiff appeals. Reversed and remanded.

J. S. Brice and Witherspoon & Spencers, all of Yorkville, for appellant. Wilson & Wilson, of Rockhill, for respondent.

GARY, C. J. [1] This is an action on an ordinary annual premium policy, issued on the 11th day of October, 1905, by the Carolina Mutual Life Insurance Company, a domestic corporation, on the life of plaintiff's husband, payable at his death to her. Payment of the policy was subsequently assumed by the Southern Life Insurance Company, and then by the defendant Jefferson Standard Life Insurance Company, corporations of North Carolina.

The original policy contained the provision that: "In case the insured shall at any time fail to pay his dues and premiums in advance, in accordance with his policy, as therein provided for, his policy shall thereby lapse, and become null and void, and have no binding force against the association."

The insured died on the 10th day of November, 1909, having paid all annual premiums, except the one which was due on the 11th day of October, 1909.

On the 8th day of October, 1909, the Carolina Mutual Life Insurance Company, through S. L. Miller & Sons, its duly authorized agents, wrote the following letter to the insured: "We beg to call your attention to the premium of \$16.00 on your policy in this company, which will be due on October 11th, but the company grant thirty days extension in which to pay the same, with interest at 5 per cent. Hoping to hear from you with remittance we remain. * * *"

At the close of the plaintiff's testimony, the defendant's attorneys made a motion for nonsuit, upon which his honor the presiding judge ruled as follows: "I would like very much not to grant a nonsuit in this case, but under the law I don't see how I can do otherwise. This premium was due on the 11th day of October, and he had 30 days from that time to pay it in, and he died within that time. He should have paid it within that time, or it ought to have been tendered, somebody ought to have tendered it from him. He had 30 days from the 11th day of October to pay that in. Sicknes is no excuse under that authority cited by Mr. Wilson, and Mr. Wylie had until midnight on the night he died, to have paid this premium, and having failed to do it, it is gone by the board, according to my notion."

The effect of this ruling was to deprive the plaintiff of the extension which was granted to the insured by the company. As the insured died within the time extended by the company for payment of the premium, the policy was in as full force and effect as it was at any time before the 11th day of October, 1909, when the premium fell due.

* Reported in full in the Southeastern Reporter; reported as a memorandum decision without opinion in 36 S. C. 598.

The insured was entitled to the full 30 days' extension, and, therefore, at his death the policy had not been forfeited. If, however, he had died after the 30 days had expired, without payment of the premium, the policy would have been forfeited.

[2] His honor the presiding judge also ruled that the statute of North Carolina extending the time of forfeiture in certain cases was not applicable to this case. The policy in question is what is known as "a term insurance for one year," which kind of insurance is expressly excepted from the provisions of the North Carolina statute.

It is the judgment of this court that the judgment of the circuit court be reversed, and the case remanded to that court for new trial.

FRASER, J., concurs. HYDRICK, J., concurs in the result. WATTS, J., disqualified.

(73 W. Va. 436)

OLIKER v. WILLIAMSBURGH CITY FIRE INS. CO.

(Supreme Court of Appeals of West Virginia. May 6, 1913. Rehearing Denied June 30, 1913.)

(Syllabus by the Court.)

1. EVIDENCE (§ 441*)—INSURANCE (§ 283*)—WARRANTIES AGAINST CHATTEL MORTGAGES—PAROL EVIDENCE.

If the property insured by a policy be personal property, and at the time of the contract no written application is required, and none made, and no information or notice is given the insurer or its agent, and there was no inquiry of or representation by the insured respecting the existence or nonexistence of chattel mortgages or deeds of trust on the property, and the insurer at or before the delivery of the policy has had no information concerning the same, and the insured accepts the policy, with the affirmative warranties therein against such incumbrances, which by the terms of the policy will render it void, the contract will be enforced according to its terms, unless such warranties be waived, as provided therein, and oral evidence of prior or contemporaneous oral agreements will not be received to vary or contradict the terms of the policy.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 1719, 1723-1763, 1765-1845, 2030-2047; Dec. Dig. § 441; Insurance, Cent. Dig. §§ 636-651; Dec. Dig. § 283.*]

2. INSURANCE (§ 283*)—WARRANTIES AGAINST CHATTEL MORTGAGES—BREACH—WHAT CONSTITUTES.

Though an existing chattel mortgage or deed of trust be void, as to creditors, being good as between the parties, it will constitute a breach of the warranty in such policy against incumbrances, voiding it, unless waived by the insurer as provided in the policy.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 636-651; Dec. Dig. § 283.*]

Error to Circuit Court, Marion County.

Action by Rebecca B. Olikier against the Williamsburgh City Fire Insurance Company. Judgment for plaintiff, and defendant brings error. Reversed and rendered.

Davis & Davis and E. B. Templeman, both of Clarksburg, for plaintiff in error. W. S. Meredith, M. M. Neely, and R. J. Abbaticchio, all of Fairmont, for defendant in error.

MILLER, J. In an action on a policy of fire insurance the court below, on demurrer to the evidence by defendant, pronounced judgment for plaintiff, for \$2,138.67, the damages found by the jury, with interest and costs.

Among the questions presented are those touching, alleged want of notice of the loss in writing by the assured to the defendant after the fire; alleged waiver thereof by defendant; alleged failure to furnish proper proofs of the loss as required by the terms of the policy; error in admitting and rejecting certain evidence; but the ruling question, and the one mainly relied on, and covered by defendant's specifications of defense, and to which the decision of the case may be properly narrowed, is, was there a breach by plaintiff of any of the affirmative or promissory warranties contained in the policy, depriving her of right of recovery thereon? If there was, that will be decisive of the case and no other question is fairly presented.

The policy sued on, dated August 6, 1907, was originally issued to Olikier & Epstein, a firm composed of plaintiff, Mrs. R. B. Olikier, and Andrew J. Epstein, on a stock of merchandise, at Fairmont, West Virginia. On May 20, 1908, this policy, defendant by indorsement thereon consenting thereto, was assigned by said firm to plaintiff. The sale and transfer by Olikier & Epstein to Mrs. Olikier of the stock of goods covered by the policy occurred on January 1, 1908, and on January 15, following, Mrs. Olikier and her husband executed a deed of trust thereon to Martin, trustee, to secure Epstein's wife payment of a note of Mrs. Olikier, for \$2,000.00.

The provisions of the policy, the standard form prescribed by sections 68 and 69, chapter 34, Code Suppl. 1909, relied on in defense, are as follows: "This entire policy, unless otherwise provided by agreement indorsed hereon or added hereto, shall be void * * * if the interest of the insured be other than unconditional and sole ownership; or if the subject of insurance be personal property and be or become incumbered by a chattel mortgage; * * * or if any change, other than by the death of the insured, take place in the interest, title or possession of the subject of insurance (except change of occupants without increase of hazard) whether by legal process or judgment or by voluntary act of the insured. * * *

The breaches assigned are as follows: "Defendant states that the interest of the insured in the subject of the insurance was other than unconditional and sole ownership;

that the subject of insurance was personal property, and that the same was and became incumbered by a deed of trust or chattel mortgage, executed by the said R. B. Oliker, by the name of Rebecca B. Oliker and David B. Oliker, her husband, to F. T. Martin, Trustee, on the 15th day of January, 1908, to secure unto Ida Epstein, or order, the sum of Two Thousand Dollars. Which said deed of trust was admitted to record in the Office of the Clerk of the County Court of Marion County, West Virginia, on the 20th day of January, 1908, in Trust Deed Book No. 24, page 75. That a change other than by the death of the insured, took place in the interest and title to the subject of insurance, by voluntary act of the insured. By reason of which and according to the provisions of the policy sued upon, said policy was and became void, and of no effect, nothing contrary to the provisions of the said policy having been provided by agreement endorsed thereon, or added thereto." It is proven that the policy sued on was the renewal of a policy issued August 6, 1906, at which time the interest of Andrew J. Epstein in the property was also covered by a deed of trust in favor of his wife, Ida J. Epstein, and which continued unreleased until the execution of the new trust by plaintiff on January 15, 1908.

On the trial some attempt was made to sustain the defense that the insured's interest in the subject of insurance was other than the unconditional and sole ownership. Some evidence tended to show that while the business was nominally in her name, the property in fact belonged to her husband. We think this defense failed of proof. At all events, on demurrer to the evidence, we cannot say the evidence was sufficient, if good, to sustain the defense.

As to the defense of prior and subsequent incumbrances by deeds of trust, plaintiff pleads: (1) Waiver by defendant; (2) that the deed of trust of January 15, 1908, was void per se, as against creditors, and constituted no lien or incumbrance on the property insured, wherefore no breach; and (3) that by defendant's consent in writing to the assignment of the policy by Oliker & Epstein to Mrs. Oliker, a new contract of insurance was consummated, the equivalent of a new policy then issued to her, the warranties against incumbrances then existing being thereby converted into affirmative warranties, all waived by failure of defendant to require a written application, or to otherwise inquire concerning the same, all upon the rules and principles enunciated in *Wolpert v. Northern Assur. Co.*, 44 W. Va. 734, 29 S. E. 1024, *Cleavenger v. Franklin Fire Ins. Co.*, 47 W. Va. 595, 35 S. E. 998, and *Medley v. German Alliance Ins. Co.*, 55 W. Va. 342, 47 S. E. 101, 2 Ann. Cas. 99.

[1] Without undertaking to decide the exact question, whether consent in writing by an insurance company to an assignment of

one of its policies amounts to a new and independent contract with the assignee, a proposition seemingly well fortified by the authorities cited by counsel, particularly when the assignee is a stranger to the policy assigned, we may, for the purposes of this case, accept the proposition as true, and dispose of the case on that theory, for we have concluded that the broad proposition that, by omitting to take a written application for a policy of insurance, or make inquiry, an insurance company thereby waives breaches of warranties against incumbrances, supposed to be affirmed by the cases cited, is opposed to correct legal principles, as well as to the great weight of authority, and that so far as the same finds support in those cases they ought to be modified or limited so as to conform to the rules and principles governing contracts generally, including insurance contracts.

Having reached this conclusion it is immaterial whether we treat the breach of the warranty against incumbrances, as affirmative, that is against existing incumbrances, or as promissory, against breaches occurring subsequently to the date of the policy, for the same rule is applicable, we think, to both forms of warranty, so far as the question of waiver or estoppel is concerned. That rule, sustained by the weight of authority and reason, is that, in the absence of fraud or actual knowledge on the part of the insurer or its agent, at the time, of the facts constituting the breach, waiver can only be effected in the manner provided in the policy.

The second point of the syllabus of *Wolpert v. Northern Assur. Co.*, supra, is: "If an insurance company elects to issue its policy of insurance against a loss by fire without any regular application, or without any representation in regard to the title to the property to be insured, it cannot complain, after a loss has occurred, that the interest of the insured was not correctly stated in the policy, or that an existing incumbrance was not disclosed."

The broad proposition affirmed in this point then found support in *Insurance Co. v. Rodefer*, 92 Va. 747, 24 S. E. 393, 53 Am. St. Rep. 846, the only authority cited in support thereof, and which has since then been overruled and repudiated as contrary to sound principles, by the Virginia court, in *Westchester Fire Ins. Co. v. Ocean View Co.*, 106 Va. 633, 56 S. E. 584; *Virginia Fire & Marine Ins. Co. v. Case Threshing Machine Co.*, 107 Va. 588, 59 S. E. 369, 122 Am. St. Rep. 876. The proposition may also find some support in our case of *Cleavenger v. Franklin Fire Ins. Co.*, and it is claimed in *Medley v. German Alliance Ins. Co.*, supra; but the latter case does not support the proposition. That case involved the knowledge of the agent of the true state of the title of the insured, communicated to him before the

policy was issued, and fraud or mistake on his part to insert it in the policy, estopping defendant from setting up a different state of the title as a defense to the action on the policy, in the absence of notice to the insured, prior or contemporaneously, of want of authority in the agent to waive the condition of the policy. Moreover, in the Wolpert Case, also, while no written application was required, it is implied at least, from one or more of the instructions to the jury, that the agent issuing the policy was informed and had actual knowledge of the existing incumbrance, and with such knowledge issued the policy, without indorsing waiver of the breach, an act of bad faith, if not fraud, on his part, bringing the case perhaps within the rule of the Medley Case; and as counsel argue, this presented a question, not of waiver by implication, but of express waiver or estoppel, wherefore the clear legal question which is presented here may not have been presented in that case.

The Cleavenger Case also involved a question of bad faith on the part of the agent. Although a written application was required, and was addressed to one company, after being signed, it was changed without authority of the assured to another company whose policy was issued. The court held the policy so issued was as if upon no written application, and that the assured was not bound by the affirmative warranties in the application and policy. While fraud was not charged, and seemingly the case was not made to turn on that question, nevertheless it had that element in it, not present in the case at bar. The exact point decided in the Medley Case, and distinguishing it from this case and covered by point 2 of the syllabus, was: "When an insurance agent, entrusted with blank policies and authorized to fill up, countersign and deliver them, *is correctly informed*, by the person whose property he undertakes to insure, *as to the state of the title and other facts material to and affecting the inception of the contract*, so far as inquiry is made respecting them, and takes no written application for the insurance, and then issues a policy embodying, as warranties therein, *facts different from those which were given to him by the insured*, the company is estopped from defending a claim for loss under the policy on the ground of such false recitals, unless it is shown that the insured has prior or contemporaneous notice of want of authority in the agent to waive conditions." We call special attention to the words italicised.

In our case of Maupin v. Insurance Co., 53 W. Va. 557, 45 S. E. 1003, the general rule of evidence, applicable to contracts generally, was in point four of the syllabus applied, by a divided court, with all its force, to insurance contracts, as follows: "It is a fundamental rule in courts of law and equity that oral evidence of a prior or contempo-

aneous oral agreement or conversation can not be received to vary or contradict a valid written contract, unless in case of fraud or mutual mistake. This rule is applied to policies of fire insurance." This case involved a breach of the warranty contained in the so called "iron safe" clause, a promissory warranty, which it was claimed had been subsequently waived by the oral agreement of defendant's agent, and not evidenced by any indorsement on the policy. Judge Poffenbarger, who wrote the opinion in the Medley Case, dissented, for practically the same reasons by which the majority through him reached its conclusion in that case. The rule of the Maupin Case, modifying, if not tacitly overruling the Wolpert and Cleavenger Cases, pro tanto, was predicated mainly on Northern Assurance Co. v. Grand View Building Association, 183 U. S. 308, 22 Sup. Ct. 133, 46 L. Ed. 213, a decision by a divided court, and which is criticised and distinguished by Judge Poffenbarger, with reference to the decisions of other states, refusing to follow it, in its entirety, in his opinion in the Medley Case, and in his dissenting opinion in the Maupin Case. It is wholly unnecessary in this opinion to again review and reconsider the many conflicting decisions of the courts on this important subject. It suffices to say that the law of this state now is that affirmed in the Maupin Case, limited or modified by the decision in the Medley Case, the words italicised in the point of the syllabus of the latter case, above quoted, showing the limitation or modification intended and distinguishing the one from the other.

As applicable to the case at bar, and where the property insured is personal property, that rule, briefly stated, is that if at the time of the contract for insurance, no written application is required, and none taken, and no information or notice is given the insurer or its agent, and there was no inquiry or representation made by the insured, respecting the existence or nonexistence of chattel mortgages or deeds of trust on the property, and the insurer at or before the delivery of the policy has had no knowledge or information concerning the same, and the insured accepts the policy, with the affirmative warranties therein against such incumbrances, which by the terms of the policy will render it void, the contract will be enforced according to its terms, unless the warranties be waived, as provided therein, and oral evidence of prior or contemporaneous oral agreements will not be received to vary or contradict the terms of the policy.

Assuming, on the trial, that defendant's consent to the assignment of the policy to plaintiff constituted a new and independent contract freed of all vices or infirmities of the old and unaffected by any prior breaches by the assignors, plaintiff undertook to bring her case within the rule of the Medley Case. She undertook to show by the testimony of her husband, D. B. Olliker, who transacted

the business for her, that at the time the agent indorsed on the policy the consent of the company to the assignment thereof to her, he had informed him of the existence of the deed of trust of January 15, 1908, in favor of Mrs. Epstein. But if the rule of the Medley Case be applicable to assignments of insurance policies, we think the evidence wholly fails to show such notice, or information to the agent. The agent flatly denies it, and on cross-examination, Olikier was asked: "Q. Are you willing to swear that you mentioned deeds of trust to Mr. Holbert at that time? A. I don't know; not positively sure." Two witnesses, Holbert and Horkheimer, one the agent, the other an insurance adjuster, swear that when interrogating Olikier after the fire, as to why he had not notified the company or its agent of the deed of trust, answered, that it was because he did not want to protect Epstein, that if Epstein wanted protection, he wanted him to take out insurance for himself. On this and other evidence in the case a verdict for plaintiff, dependent thereon, could not have been allowed to stand.

[2] The second reply of plaintiff to defendant's specifications of defense, remains to be disposed of, namely, that the deed of trust was void on its face as to creditors, wherefore no breach of the warranty of title, or against incumbrances. A sufficient answer to this proposition is that the deed of trust, though it may have been void as to creditors, was good between the parties, wherefore there was a breach, denying recovery.

For these reasons we are of opinion to reverse the judgment, and, on the demurrer to the evidence, to enter judgment here for defendant.

(72 W. Va. 580)

RENNIX v. HARDMAN et al.

(Supreme Court of Appeals of West Virginia.
June 17, 1913.)

(Syllabus by the Court.)

JOINT ADVENTURES (§ 4*)—CONTRACT—INCONSISTENT RIGHTS—ELECTION.

An election once made between inconsistent alternative clauses of a contract, by one party thereto, with full knowledge of the facts essential to a reasonable exercise thereof, becomes final and irrevocable when communicated by him to the other, and cannot be subsequently withdrawn without the consent of both contracting parties.

[Ed. Note.—For other cases, see Joint Adventures, Cent. Dig. §§ 3-6; Dec. Dig. § 4.*]

Appeal from Circuit Court, Randolph County.

Suit by Howard Rennix against Shannon Hardman and others. Judgment for plaintiff, and defendant N. G. Keim appeals. Affirmed.

W. B. & E. L. Maxwell, of Elkins, for appellant. Claude W. Maxwell and Samuel T. Spears, both of Elkins, for appellee.

LYNCH, J. In a suit to enforce judgment liens against lands of Hardman, the chief contention is between him and his codefendant Keim. It relates to certain interests in real estate, the title to which was conveyed to both of them jointly, pursuant to an agreement dated September 22, 1906. They thereby agreed to form a partnership for the purpose of exploiting certain lands in which Hardman claimed he had discovered valuable mineral deposits. Keim was to furnish, and subsequently he did furnish, the funds necessary to purchase the lands and test them to determine the existence, quality, and quantity of the minerals therein.

The fourth and fifth clauses of the contract, in substance, provide that if upon investigation Keim became satisfied with the quantity and value of the minerals, if any, within the lands so designated by Hardman, the title thereto should thereafter be owned by them jointly and equally; but that if, after such investigation, Keim became dissatisfied therewith, Hardman agreed, upon demand, to execute to him his notes for one-half of the purchase money, payable within three years with interest, secured by a lien on Hardman's moiety, or, should he so elect, Hardman agreed, on demand, to execute to Keim his notes for all the purchase money, payable within the same period with like interest, and secured by a lien on all the lands, in which event Keim was to convey to Hardman his moiety therein.

Immediately after the date of the contract, and pursuant to its terms, Keim and Hardman acquired title to the lands. Some of the deeds therefor bear date as early as October 1, 1906; none later than December 12th of the same year. With equal promptness they employed assayers, by them deemed competent, to examine and test the ores and report their character and commercial value. These reports, 19 in number, bearing date in October, November, and December, 1906, and January, 1907, indicate values varying from a few cents to \$252 per ton. While somewhat meager, the evidence is sufficient to warrant the finding, as it must be assumed the circuit court did find because in issue, that Keim became satisfied in December, 1906, with his investigations and the findings of the assayers, and so informed Hardman, as he and other witnesses not interested testify. In fact, according to these witnesses, he expressed a willingness at that time to purchase additional lands upon the same conditions. Keim, as a witness on his own behalf, not only does not deny these affirmative statements, but tacitly and in effect admits the same; for, when asked if he had so expressed himself to Hardman, he replied: "No, sir; not (as) fully satisfied." It is true that in January, 1908, but not earlier, he did inform Hardman, by a formal notice served January 9th, of his dissatisfaction,

and thereby demanded the latter to elect between the alternative provisions of the fifth clause of the contract, and promised compliance therewith on his part, as therein also provided.

But, having once chosen between two inconsistent provisional terms, his choice became irrevocable, and therefore final. The rule applicable to election between legal remedies is, by analogy, likewise applicable, where by the terms of a contract a similar choice may be made between inconsistent provisions therein. "Election is the obligation imposed upon a party to choose between two inconsistent or alternative rights or claims in cases where there is a clear intention of the person from whom he derives one that he should not enjoy both." *Allison v. Allison*, 99 Va. 472, 39 S. E. 130. And, when once made, with full knowledge of the facts essential to an intelligent choice, the exercise thereof "is irrevocable and conclusive, irrespective of intent, and constitutes an absolute bar to the assertion of a right or maintenance of a claim in conflict with that first selected." 15 Cyc. 262, 264; 35 Id. 289, 290; *Sangster v. Com.*, 17 Grat. (Va.) 124; *Hite v. Long*, 6 Rand. (Va.) 457, 18 Am. Dec. 719. Where an insurance company, which under the policy might in case of loss elect either to pay the full value or reinstate the premises, elected the latter, it became bound thereby and required to perform the contract according to its election, or pay damages for failure to do so, although performance may have become inconvenient, even impossible, or more expensive than it had anticipated. *Queen v. Governors*, 120 Eng. Rep. (Reprint) 1138; 9 Cyc. 648. The same rule is applied to the variant facts of the following cases: *Plummer v. Keaton*, 17 Tenn. (9 Yerg.) 27; *Latham v. Bausman*, 39 Minn. 57, 38 N. W. 776; *Penn v. Guggenheimer*, 76 Va. 839, 850; *Baker v. Todd*, 6 Tex. 273, 55 Am. Dec. 775. Hence the conclusion that, having in December, 1906, assured Hardman of his satisfaction, Keim cannot be permitted in 1908 to change his attitude towards the property to the prejudice of Hardman and his creditors.

It is therefore immaterial whether the judgments of which Keim complains were or were not docketed. He is not in any sense prejudiced thereby. Judgments of justices, unless barred by limitation, are liens against the real estate of the judgment debtor, even though not docketed. *Nuzum v. Herron*, 52 W. Va. 499, 44 S. E. 257. The manifest purpose of section 6, c. 139, Code 1906, and Supplement 1909, as appears from its express terms, is to protect purchasers for value without notice from the lien of such judgments, unless docketed. But for his election this provision of the statute may have inured to Keim's benefit; for, while not a purchaser within the strict meaning of the term, he may otherwise have come within the spirit and purpose of the act. If so, he

could then, with more force, have invoked the relief which under the circumstances must now be denied him. His expressed satisfaction with the existence, quantity, quality, and commercial value of the minerals in the lands purchased, made absolute Hardman's title to a moiety therein, to which the liens of the judgments at once attached.

The circuit court therefore did not err in its rulings upon Keim's exceptions to the report of the commissioner to whom the cause was referred to ascertain and report the liens against Hardman's real estate.

Finding no error in the rulings of the circuit court, its decree is affirmed.

(72 W. Va. 610)

LANHAM v. MEADOWS.

(Supreme Court of Appeals of West Virginia.
June 17, 1913.)

(Syllabus by the Court.)

1. CONTRACTS (§ 138*)—ACTION ON CONTRACT—ILLEGALITY—EVIDENCE.

If a party to an illegal agreement, by proof of part of the facts constituting the transaction out of which it grew, make a prima facie case for recovery against the other party, without disclosing the illegality, the defendant's guilty participation in the transaction does not preclude him from proving as matter of defense the illegal part of the contract.

[Ed. Note.—For other cases, see *Contracts*, Cent. Dig. §§ 681-700; Dec. Dig. § 138.*]

2. GIFTS (§ 33*)—GIFT INTER VIVOS.

A promissory note may be the subject of a gift inter vivos from the promisee to the promisor. Surrender of the note with intent to forgive the debt is a sufficient delivery.

[Ed. Note.—For other cases, see *Gifts*, Cent. Dig. §§ 66, 67; Dec. Dig. § 33.*]

3. APPEAL AND ERROR (§ 1002*)—REVIEW—SUFFICIENCY OF EVIDENCE.

A verdict founded upon conflicting oral testimony cannot be set aside by the court.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 3935-3937; Dec. Dig. § 1002.*]

Error to Circuit Court, Braxton County.

Action by Charles Lanham against Eva I. Meadows. Judgment for defendant, and plaintiff brings error. Affirmed.

Charles G. Coffman, of Clarksburg, for plaintiff in error. C. F. Greene, Morrison & Rider, and Hall Bros., all of Sutton, for defendant in error.

POFFENBARGER, P. In this case, the jury denied by its verdict right in the plaintiff to recover any portion of the demands stated in his declaration and bill of particulars, amounting to nearly \$5,000, consisting of three promissory notes and numerous sums of money alleged to have been paid out by him for her and at her request.

Under the general issue raised by her plea of non assumpsit, the defendant adduced evidence tending to prove a long period of illicit sexual intercourse between her and the plain-

tiff, induced on her part by the advancement and payment of the money demanded in the declaration, and, in connection with her testimony, introduced a formal agreement for such intercourse and relation, acknowledging the receipt, prior to the date thereof on account of the same, of the sum of \$2,000. The plaintiff denied the execution of this contract and objected to its introduction. On this branch of the case, he supplemented his own testimony by that of five expert witnesses who expressed the opinion that the signature was not in his handwriting. Other papers bearing his signature, and put in evidence, were before the jury for comparison. Two of the notes sued on, one for \$600 and another for \$340, bear date prior to that of the agreement. With very few exceptions, the defendant admits the advancements of money to her and payment of money in discharge of her debts and obligations. She also claims the plaintiff had surrendered to her the three notes specified in the bill of particulars, including the two just described. She does not claim, in her testimony, to have paid any of these notes or the money delivered to her or paid out by the plaintiff in discharge of her debts and obligations, but she nevertheless produced a receipt for the sum of \$1,000, bearing date June 12, 1906, and declaring said sum to be in full of account up to that date.

The formal assignments of error go to the admission of defendant's testimony to her immoral conduct and relations with the plaintiff, and the alleged contract or agreement for sexual intercourse between them, and the overruling of the motion to set aside the verdict.

[1] Having shown an apparently valid debt by the introduction of the notes of the defendant and proof of payment of indebtedness for her and at her request, the plaintiff denies the right of the defendant to set up her own immoral and illegal relation with him as a consideration for the moneys paid to her and for her, on grounds of public policy. This position is untenable. The consideration for the payment of the money is part and parcel of the transaction, and if it could not be given in evidence to defeat the action, money paid upon an illegal consideration could always be recovered back in violation of that principle of public policy which forbids it. In order to evade this principle of law, it would only be necessary to prove one side of the contract. That illegality of the consideration may be set up as a defense to a debt *prima facie* valid is well settled by authority. *Calfee v. Burgess*, 3 W. Va. 279; *Slifer v. Howell*, 9 W. Va. 391; *Hope v. Park Association*, 58 N. J. Law, 627, 34 Atl. 1070, 55 Am. St. Rep. 614; *Embrey v. Jemison*, 131 U. S. 336, 9 Sup. Ct. 776, 33 L. Ed. 172; *McMullen v. Hoffman*, 174 U. S. 639, 19 Sup. Ct. 839, 43 L. Ed. 1117.

If the court were at liberty to deal with

the case as jurors, a conclusion might be reached different from that of the verdict; but the law accords to the jury its province which cannot be invaded by the court. As to the relation between the parties, the evidence consists almost wholly of their oral testimony, and it is directly and positively conflicting. There are circumstances tending to sustain the testimony of each of them. Correspondence introduced shows a relation of close intimacy, and it is not denied by the plaintiff. They differ only as to the issue of illicit intercourse. The defendant charges it and the plaintiff denies it. The latter delivered to the former money and paid notes, bills, and other demands for her, throughout a period of time extending from May 1, 1901, to June, 1908, and possibly later. The financial transactions between them began in Harrison county at a place called Marshville, where the defendant was then conducting a small grocery store and at or near which the plaintiff resided. Having obtained considerable money from him for the purpose, and, as she says, at his suggestion, she purchased with it a small tract of land somewhere in Braxton county, on which she built a house. Later, she and her husband and family removed to Braxton county, and the plaintiff occasionally visited her at that place. In the house so built, a room was provided especially for him. On one of his periodical visits to that place in September, 1909, the defendant and her husband claim the latter entrapped and caught him in the act of having sexual intercourse with the wife. He admits his presence there and an altercation or controversy between him on the one side and the husband and wife on the other, but denies the improper conduct attributed to him. According to his testimony, this transaction was an effort on the part of the defendant and her husband to extort money from him on a false charge or accusation. He went home a day or two after this occurrence, and the husband of the defendant at a later date approached him near his home and attempted to have an interview with him. As to what then occurred between them, their testimony is conflicting, the plaintiff saying there was a renewed demand for money and the husband denying it. On leaving the Meadows home, the plaintiff failed to take with him his trunk which was later sent to him. In it, he says, were the three notes mentioned in the bill of particulars and put in evidence. The defendant insists he had delivered over to her all of the notes she had executed to him, but that they had been left where he could have found them, without intent that he should again repossess them, and he must have taken them clandestinely and without her consent. How they got back into his possession, she is unable to say. The plaintiff denies not only the conduct with which he is charged, but also his ability to engage in sexual inter-

course. He was about 70 years old when his relations with the defendant began and had had a severe stroke of paralysis in the year 1886. He suffered another attack of the disease in 1906. At the date of his last visit to the Meadows home and the alleged discovery of his immoral relations by the husband, he was about 78 years old. The immoral written contract was put in evidence as an admission of his illicit relations with the defendant, and the evidence of five witnesses was adduced to prove that the signature thereto was not in his handwriting. One of these was familiar with his handwriting, and the others testified merely as experts. All were of the opinion that the signature was not in his handwriting. The jury had before them numerous checks, receipts, and letters for purposes of comparison, and the expert witnesses were unable to show any very marked difference between the signature to the contract and the genuine signatures upon other papers. To set forth here, in addition to these salient facts and circumstances, the minute details of the testimony would subserve no good purpose.

The vital question in issue depends, as has been stated, upon the credibility of two witnesses. The admitted facts and circumstances have no controlling probative force or effect. A long period of intimacy is admitted as well as proven. On the question of its character, its purpose, and incidents, the record discloses nothing, but their oral testimony and the controverted written admission. As to the latter, there is nothing decisive in the evidence. In the opinion of five men, the signature to that paper was a forgery, but the jury, consisting of 12 men, compared it with numerous genuine signatures of the plaintiff and were of the opinion that it was genuine. On the evidence as disclosed by the record, its genuineness or spuriousness was largely a matter of opinion. A verdict thus dependent upon conflicting oral testimony cannot be disturbed by the court. *Coalmer v. Barrett*, 61 W. Va. 237, 56 S. E. 385; *Fulton v. Crosby & Beckley Co.*, 57 W. Va. 91, 49 S. E. 1012.

As two of the notes sued on bear dates prior to that on which the defendant says the immoral relation between them began and the date of the alleged contract for such relation, and the defendant admits the receipt of the money evidenced by them, it is said the illegal consideration could not have entered into them. This position is well sustained by law. A valid debt cannot be invalidated by proof of a subsequent, separate, and distinct illegal transaction between the parties. But this is not conclusive of the issue as to these notes. The defendant swears positively that the money was given to her without any expectation of its repayment, and that the notes were executed and delivered as a mere pretense of indebtedness,

to the end that their relation might be shielded from discovery by members of plaintiff's family.

[2] Another legal principle, that a written instrument cannot be contradicted by parol testimony, would sustain plaintiff's claim against this theory of defense, but the record discloses an additional fact in avoidance of the application of this legal rule, if the defendant's testimony is to be taken as true, a question for jury determination, namely, that these notes were bestowed upon the defendant as gifts. She swears positively that they were delivered up to her as gifts, and then subsequently abstracted from her possession by the plaintiff. A gift of a chose in action can be made in that way. A creditor can forgive a debt by way of gift, by delivery to the debtor of the evidence thereof. *Beach v. Endress*, 51 Barb. (N. Y.) 570; *Hathaway v. Lynn*, 75 Wis. 186, 43 N. W. 956, 6 L. R. A. 551; *Larkin v. Hardenbrook*, 90 N. Y. 333, 43 Am. Rep. 176; *Albert v. Ziegler*, 29 Pa. 50. Taken in connection with all the circumstances attending the transactions between the parties and bearing upon the motive of the plaintiff, the testimony of the defendant to the gift of these notes is sufficient to sustain the jury's finding as to the intent with which they were delivered to her. His possession of them is a circumstance raising a presumption against donation, but this presumption is rebutted by her testimony, if the jury believed it, as they could and did.

Upon these principles and conclusions, the judgment will be affirmed.

Affirmed.

(73 W. Va. 603)

STATE v. PISHNER.

(Supreme Court of Appeals of West Virginia.
June 17, 1918.)

(Syllabus by the Court.)

FALSE PRETENSES (§ 12*) — DELIVERY OF CHECK—INSUFFICIENT FUNDS.

The making, issuance and delivery of a check on a bank in payment of a pre-existing debt, to his creditor, by one who has no funds or insufficient funds to his credit in such bank to pay the same, is not an offense under section 34, chapter 145, Code, a section added by chapter 78, Acts 1911.

[Ed. Note.—For other cases, see *False Pretenses*, Cent. Dig. § 16; Dec. Dig. § 12*]

Robinson, J., dissenting.

Error to Circuit Court, Tucker County.

Nick Pishner was convicted of crime, and brings error. Reversed and entered.

D. E. Cuppett, of Thomas, and Charles D. Smith and J. P. Scott, both of Parsons, for plaintiff in error. A. A. Lilly, Atty. Gen., John B. Morrison, of Sutton, and J. E. Brown, of Bluefield, for the State.

MILLER, J. Defendant was indicted, tried and found guilty of a violation of section 34, chapter 145, Code 1906, a section added to that chapter by chapter 76, Acts 1911, and the judgment complained of was that he be confined in the penitentiary for one year.

The statute provides that, "If any person make, issue and deliver to another for value any check or draft on any bank, and thereby obtain from such other any credit, money, goods or other property of value, and have no funds, or insufficient funds, on deposit to his credit in said bank with which such draft or check may be paid, he shall be guilty of a misdemeanor, if the amount of such check or draft be under twenty dollars, and upon conviction thereof be fined not exceeding one hundred dollars and confined in the county jail not less than one day nor more than thirty days, and if the amount of such check or draft be twenty dollars or over he shall be guilty of a felony and confined in the penitentiary not less than one nor more than two years, and the drawer of such check or draft shall be prosecuted in the county in which he delivers the same. Provided, however, that if the person who makes, issues and delivers any such check shall, within twenty days from the time he receives actual notice, verbal or written, of the protest of such check, pay the same, he shall not be prosecuted under this section, and any prosecution that may have been instituted within the time above mentioned, shall, if payment of said check be made as aforesaid, be dismissed at the cost of defendant."

The indictment, substantially in the form prescribed by this statute, charges that defendant "on the — day of —, nineteen and twelve, in the county aforesaid did unlawfully and feloniously issue and deliver unto Joe De Polla, for value, his certain check of the words and figures as follows: (describing a check for \$240.56) when he, the said Nick Pishner had insufficient funds on deposit with said bank, the Miners & Merchants Bank, with which to pay the same."

The undisputed evidence is that the check in question was given to De Polla on account of a pre-existing debt incurred at a general store kept by him.

There is clearly no merit in the constitutional question attempted to be raised.

The sole question of merit presented by the several rulings of the court below, on the evidence, and on the instructions to the jury given and refused, is, did the giving of the check in question, for a pre-existing debt, constitute a violation of the statute? Our opinion is that it did not. It is contended by the Attorney General that unless the statute be so construed as to affirm the proposition, it accomplished nothing, and was a useless enactment. True by section 23, of the same chapter, one may be indicted and

convicted of obtaining money or property by means of a false and fraudulent check given therefor, accompanied with the necessary knowledge and *animo furandi*. *State v. Hurst*, 11 W. Va. 54; *Anable v. Commonwealth*, 24 Grat. (Va.) 563, 567, 568; *Fay v. Commonwealth*, 28 Grat. (Va.) 912; *Trogdon v. Commonwealth*, 31 Grat. (Va.) 862. Under that statute, according to these cases, it is necessary to allege and prove the essential elements constituting the offense, namely, (1) intent to defraud; (2) actual fraud; (3) false pretence used to accomplish the object, and, (4) that the fraud was accomplished by means of the false pretence made use of; that is they must be in some degree the cause, if not the controlling cause, which induced the owner to part with his property. See especially *Anable v. Commonwealth*, *supra*.

What was the object and effect of the new section 34 added by the Act of 1911? Was it to make it an offense simply to make, issue and deliver a check when the maker had no funds or insufficient funds to his credit to meet it, regardless of its effect upon the rights and property of the recipient or payee of the check? We think not. To constitute the offence the maker must *thereby* obtain "credit, money, goods or other property of value" from another. It is not pretended that defendant obtained either of these by means of the check in question, unless, as it is insisted the entry of the check as a credit on the book of De Polla, or an extension of the time of payment, amounted to the kind of credit intended by the statute. But no extension of time was agreed upon, and though De Polla says he gave defendant credit for the check on his account, clearly that is not the kind of credit meant by the statute. It is true the word "credit" is often applied to an entry on the credit side of an account, but the "credit" meant by the statute clearly applies to an entry on the debit side of the ledger, or to the thing actually parted with on the faith of the false pretence. The "credit" intended by the statute according to the very terms thereof must be a thing "of value," acquired by means of the check. Of what value is a mere entry on a book? Neither the check, nor entry would amount to payment. The creditor could still sue on the original account. He does not lose it by accepting a bogus check; nor does the mere entry of a check on the book of a creditor amount to a thing of value to the maker of the check.

But what was the purpose of enacting the new section? We think it quite clear that the object was to constitute the making, issuance and delivery of a check, and to thereby to obtain credit, money, goods or other property of value of another, a crime, regardless of the intent, or knowledge of the maker of the condition of his account, and to burden him with the duty of knowing the

fact, before issuing a check, but relieving him from the offense, which under section 23 he would not be, if within the time prescribed by the proviso of the act he shall actually pay or make good the check so made and issued. This view is strengthened by the form of indictment prescribed, and which contains no averments of guilty knowledge and intent to defraud, usually required in indictments for obtaining goods, money or property by false pretences. *State v. Hurst*, supra.

A motion of defendant to exclude the State's evidence, which ought to have been sustained, and an instruction to the jury to find for defendant, which was denied, but which ought to have been given, would have ended the case in the court below. As we can clearly see that a different case can not be made on another trial we are of opinion to enter judgment here for defendant non obstante veredicto, and that he go hence without day, and be forever discharged from further prosecution in this behalf.

ROBINSON, J., dissents.

(72 W. Va. 606)

BOOKER v. JARRETT et al.

(Supreme Court of Appeals of West Virginia.
June 17, 1913.)

(Syllabus by the Court.)

1. EXECUTORS AND ADMINISTRATORS (§ 175*)—
WIDOW'S RIGHTS BEFORE DOWER ASSIGNED
—“CURTLAGE.”

A small store room, located substantially within the yard and garden enclosing the mansion house, its front and side constituting a part of such enclosure, once occupied by the husband with a small stock of merchandise, but for a year prior to and at the time of his death used and occupied by him as a storage room for lumber, and domestic supplies, and all constituting a part of his home farm, is a part of the curtilage, of which by section 8, chapter 65, Code 1906, the widow, until dower assigned, is entitled to the undisturbed possession, as against an heir entering without her consent and against her protest, and of which she is entitled in unlawful detainer to recover the possession.

[Ed. Note.—For other cases, see *Executors and Administrators*, Cent. Dig. §§ 655-660; Dec. Dig. § 175.*]

(Additional Syllabus by Editorial Staff.)

2. EXECUTORS AND ADMINISTRATORS (§ 175*)
—CURTLAGE.

The word “curtilage,” used in Code 1906, c. 65, § 8, relating to dower, was borrowed from the English statutes, meaning the enclosed space surrounding a dwelling and contained within the same enclosure; the dwellings and outhouses of all kinds in England being generally surrounded by a fence enclosing a small piece of land embracing the yards and outbuildings near the house.

[Ed. Note.—For other cases, see *Executors and Administrators*, Cent. Dig. §§ 655-660; Dec. Dig. § 175.*]

For other definitions, see *Words and Phrases*, vol. 2, pp. 1798, 1799.]

Error to Circuit Court, Kanawha County.
Action by Elizabeth Booker against Levi Jarrett and others. Judgment for plaintiff, and defendants bring error. Affirmed.

A. M. Belcher, of Charleston, for plaintiffs in error. Shirkey & Lively, of Charleston, for defendant in error.

MILLER, J. In an action of unlawful detainer, on appeal from the judgment of a justice, the plaintiff obtained judgment for the possession of the property sued for, to-wit: “That certain messuage and tenement situate on Pinch Creek in Elk District, Kanawha County, West Virginia, and being the store house formerly occupied by Wm. L. Booker, deceased, as a store house and on the road in front of the residence of the late Wm. L. Booker, deceased, and being a part of the estate of Wm. L. Booker, deceased, and \$10.00 damages for the unlawful detention thereof.”

Plaintiff is the widow of Wm. L. Booker; the defendant Henrietta Jarrett is his niece, a daughter of deceased's brother, and who, with her husband and co-defendant Levi Jarrett, forcibly entered the store room in controversy, with claim of right as such heir, and have brought the case here to reverse the judgment against them. Plaintiff claims the property by right of possession and of her widowhood, and as part of the mansion house and curtilage, before dower assigned. The statute, section 8, chapter 65, Code 1906, governing the subject, is as follows: “Until her dower is assigned, the widow shall be entitled to demand of the heirs or devisees, one-third part of the issues and profits of the other real estate which was devised or descended to them, of which she is dowerable, and in the meantime may hold, occupy and enjoy the mansion house and curtilage, without charge; and if deprived thereof, may on complaint of unlawful entry or detainer, recover the possession, with damages for the time she was so deprived.”

[1] The sole question, regardless of the character of the entry, whether forcible or not, if against plaintiff's will or objection, is whether the store room in question is a part of the curtilage. If it is, the judgment below is right and should be affirmed.

Our conclusion from the evidence is in accord with the finding and judgment of the circuit court, that said store building does constitute a part of the curtilage, and that plaintiff has been unlawfully deprived thereof by defendants. The evidence shows that this store room is located substantially within the yard and garden enclosing the mansion house and other out buildings, the front of the building and one of the sides thereof, to which the fence is joined, constituting a part of the enclosure. For several years and up until about a year prior to his death this building had been occupied by plaintiff's hus-

band as a general store for merchandising. After that and up until his death it was used as a place of storage for lumber, paints, oils, vegetables and other supplies for domestic use, and continued to be so occupied by the widow, under lock and key, until defendants entered, against her protest, and after her refusal to surrender the keys. Defendants succeeding in forcing the lock either with other keys or in some way made entry. The mansion house, store building, barn, and other out buildings constituted a part of the home farm of deceased.

The section of the Code in question is not a criminal statute. It was evidently intended to give the widow, until dower should be assigned, the right to use and occupy the dwelling-house and curtilage, as it was used and occupied by her and her husband at the time of his death, and that until that time she should not be disturbed therein by any one.

[2] The word curtilage used in the statute was borrowed from English statutes where its meaning was well understood. Bouvier defines it, "The enclosed space immediately surrounding a dwellinghouse, contained within the same enclosure." In *People v. Taylor*, 2 Mich. 250, 251, the court says: "In England, the dwellings and out-houses of all kinds, are usually surrounded by a fence or stone wall, enclosing a small piece of land embracing the yards and out-buildings near the house, constituting what is called the court. This wall is so constructed as to add greatly to the security of the property within it; but as such precautionary arrangements have not been considered necessary in this country, they have not been adopted." The same court, in the same case, further says: "It is perhaps unfortunate that this term, which is found in the English statutes, and which is descriptive of the common arrangement of dwellings, and the yards surrounding them, in England, should have been perpetuated in our statutes. It is not strictly applicable to the common disposition of enclosures and buildings constituting the homestead of the inhabitants of this country, and particularly of farmers." So in Maine, where it was contended that the barn was not within the curtilage, it was held that the curtilage of a dwelling house is a space necessary and convenient and habitually used for family purposes, the carrying on of domestic employments; and that it includes the garden, if there be one, and that it need not be separated from the other lands by fence. *State v. Shaw*, 31 Me. 523, 527. In Massachusetts "curtilage in law means a fence or enclosure of a small piece of land around a dwelling-house, usually including the buildings occupied in connection with the house, and this enclosure may consist wholly of a fence, or partly of a fence and partly of the exterior side of buildings so within

the enclosure." *Commonwealth v. Barney*, 10 Cush. (Mass.) 480. In Alabama, upon an indictment under a statute prohibiting the use of abusive, vulgar or insulting language in the dwelling-house of another, or upon the curtilage thereof, or upon the public highway near such premises and in the presence of the family of the owner or possessor thereof, or of any member of his family, or of any female, the court said: "Whatever may have been the signification of the word curtilage, as employed at common law in reference to burglary, we can not doubt that in this statute, it includes the yard, or garden, or field, which is near to and used in connection with the dwelling. It is not necessary either should be surrounded by an enclosure. It is the propinquity to the dwelling, and the use in connection with it for family purposes, which the statute regards, and not the fact of its enclosure." *Ivey v. State*, 61 Ala. 58, 61. And in a later case the same court held that "the curtilage usually includes the yard, garden, or field, which is near to, and used in connection with the dwelling; and in some cases it may be affirmed, as matter of law, on the undisputed facts, that a particular building is, or is not, within the curtilage; but, where the building burned, a barn, is situated seventy-five yards from the dwelling-house, in a grove which is separated from the front yard by a cross fence, through which there is a connecting gate, the entire premises being inclosed by a fence, and containing between two and three acres, it can not be affirmed, as matter of law, that it was not within the curtilage, and the question is properly submitted to the jury." *Cook v. State*, 83 Ala. 62, 3 South. 849, 3 Am. St. Rep. 688.

In the light of these and other authorities we conclude that the store house in controversy must be regarded as within the curtilage, and that the judgment below was right and should be affirmed.

LYNCH, J., absent.

(72 W. Va. 573)

HALL et al. v. PHILADELPHIA CO.

(Supreme Court of Appeals of West Virginia.
May 27, 1913.)

(Syllabus by the Court.)

1. MINES AND MINERALS (§ 79*)—CONTRACTS (§ 152*)—CUSTOMS AND USAGES (§ 15*)—OIL AND GAS LEASE—CONSTRUCTION—"DOMESTIC PURPOSES"—"DOMESTIC."

A clause in a lease for oil and gas purposes, securing to the lessor "free gas for domestic purposes," read in the light of an established usage or custom known by the parties to the contract, is construed as conferring upon the lessor right to have gas for heat and light in his dwelling house, and for the maintenance of one light at such a point as he may designate within the curtilage.

[Ed. Note.—For other cases, see Mines and Minerals, Cent. Dig. § 209; Dec. Dig. § 79;*

Contracts, Cent. Dig. §§ 732, 733, 738; Dec. Dig. § 152;* Customs and Usages, Cent. Dig. §§ 30-33; Dec. Dig. § 15.*

For other definitions, see Words and Phrases, vol. 3, pp. 2164-2166.]

2. MINES AND MINERALS (§ 79*) — OIL AND GAS LEASE—CONSTRUCTION.

Though, at the date of the lease, it was customary and usual for lessors to maintain, under such clause, what is known as an open, storm, or flambeau light in their yards, the clause is construed, in view of the wastefulness and extravagance in the use of gas by such means, as conferring upon the lessor right to maintain only an inclosed or economical burner for light in the yard.

[Ed. Note.—For other cases, see Mines and Minerals, Cent. Dig. § 209; Dec. Dig. § 79.*]

3. SPECIFIC PERFORMANCE (§ 64*)—COVENANT OF OIL AND GAS LEASE — REMEDY FOR BREACH.

The legal remedy for violation of such a covenant being inadequate, equity will enforce specific performance thereof by appropriate remedies.

[Ed. Note.—For other cases, see Specific Performance, Cent. Dig. §§ 191-195, 198; Dec. Dig. § 64.*]

4. WORDS AND PHRASES—"MESSAGE."

A "message" is a dwelling house, with the adjacent buildings and curtilage, and the adjoining lands appropriated to the use of the household.

[Ed. Note.—For other definitions, see Words and Phrases, vol. 5, pp. 4497, 4498.]

Appeal from Circuit Court, Harrison County.

Bill by Fabius E. Hall and others against the Philadelphia Company, a corporation. From decree for defendant, plaintiffs appeal. Affirmed.

Charles G. Coffman, of Clarksburg, for appellants. Davis & Davis, El. Bryan Templeman, and Osman E. Swartz, all of Clarksburg, for appellee.

POFFENBARGER, P. The appellants, Hall and wife, complain of a decree dismissing their bill for the enforcement of the alleged obligation imposed upon the assignee of their lessee in an oil and gas lease, by a provision thereof, securing to them gas from the wells on the premises for domestic purposes free of charge, upon condition that they make their own connections with the lessee's lines or wells.

The extent of the right conferred by this clause and the mode of its enjoyment are the matters in controversy. A large well having been completed on the premises, the appellants connected with it a service pipe leading to their dwelling house, through which gas for heating and lighting the building and maintenance of an open or flambeau light in the yard, about 20 feet in front of the house, was furnished. Denying right in the lessors to maintain an outside light, the appellee cut off the gas from this pipe. The appellants restored the connection, and it was again cut off. By way of concession and as a matter of compromise, it is claimed the

appellee expressed its willingness to furnish gas for a light in the yard if the appellants would dispense with the open storm burner and use a modern inclosed light, such as the Welsbach lamp. If there was such a negotiation, it failed, and the appellee restored gas for use inside of the dwelling house only. The bill has for its purpose a mandatory injunction compelling the appellee to furnish gas to maintain the open light in the yard.

[3] The demurrer to the bill was properly overruled. Though there may be no legal duty, as contradistinguished from a contractual duty, on the part of the appellee to furnish gas, and the relation of the parties differs in this respect from that which ordinarily confers upon a consumer of gas or water right to compel restoration of the service by mandamus or injunction, when it has been wrongfully discontinued, there is another element in their relation upon which the right may be consistently based, and perhaps more safely and firmly. The prayer for relief is founded upon a covenant of the lease, made for the benefit of the property. In view of the manifest inadequacy of the legal remedy for violation of a covenant in a lease other than for the payment of money, courts of equity seldom refuse to enforce them when their jurisdiction is invoked for the purpose. *Gas Co. v. Oil Co.*, 58 W. Va. 402, 49 S. E. 548; 26 A. & E. Enc. L. 104. Contracts of sale of mere commodities procurable in the market are never subjects of specific performance for obvious reasons, but this contract is not within that class. Natural gas is not obtainable in the general markets as is wheat, corn, flour and live stock, and presumptively the supply of gas in question is obtainable only from the lessee. Principles declared in *Hogg v. McGuffin*, 67 W. Va. 456, 68 S. E. 41, 31 L. R. A. (N. S.) 491, sustain the jurisdiction on this additional ground.

[1, 2] The clause involved reads as follows: "First parties to have free gas for domestic purposes by making their own connections to any gas well drilled on this lease." On the interpretation or construction of such a clause, no direct authority is shown by the briefs or has been discovered. On the one hand, argument is submitted in support of a strict and narrow construction, imposing obligation or duty on the part of the lessee to furnish gas only for use within the walls of the dwelling house. On the other hand, the term "domestic purposes" is given a very broad and liberal construction, requiring the lessee to furnish gas not only within the walls of the dwelling house, but for lighting all the outbuildings within the curtilage or premises immediately connected with the dwelling house.

As the definitions of the term "domestic," wherever found, clearly show, its meaning depends upon the connection in which it is used. A domestic servant is one who resides

or works in the master's house. Domestic animals are tame animals, as contradistinguished from wild ones. The domestic trade, commerce, or industry of a country is that which is confined within its borders, as contradistinguished from trade with foreign countries. Derived from the Latin "domus," it means of a house, or pertaining or belonging thereto, or to a household, home, or family, when used as an adjective. In some sense domestic animals are connected with the homes or the habitations of men. Domestic commerce, industry, trade, production, and consumption are such as are within the boundaries of our home country. In a remote sense they are connected with our homes or houses.

[4] Of course, words in a contract or other instrument are to be accorded their primary meaning or sense, in the absence of anything in the context showing a contrary or different intention. *Williams v. Oil Co.*, 52 W. Va. 181, 43 S. E. 214, 60 L. R. A. 795. But the word "domestic" is a derivative one. It expresses some relation to house or home, as the examples already given will show, and is not descriptive of the house or home itself. This relation extends to things outside of the house as well as within it. A house has an exterior as well as an interior, and things connected with it on the outside are clearly things of or pertaining to it. Moreover, outbuildings and appliances are accessories of the interior rather than the exterior, because constantly used by the inmates of the house and contributing to their comfort. The family sheltered by a house, or making their home within it, are of course related to it, and persons and things brought within the family circle are connected with it by reason of their inclusion within the family. Logically, the curtilage and messuage including buildings, pertain to the house and residence, because connected with it and used for residential purposes. The curtilage and messuage are domestic premises. A messuage is "a dwelling house, with the adjacent buildings and curtilage, and the adjoining lands appropriated to the use of the household." *Webster's Dict*; *Bouvier's Law Dict*; *Marmet Co. v. Archibald*, 37 W. Va. 778, 17 S. E. 299; *Gibson v. Brockway*, 8 N. H. 465, 470, 31 Am. Dec. 200; *Davis v. Lowden*, 56 N. J. Eq. 126, 38 Atl. 648.

The authorities relied upon as showing the word "domestic," used as an adjective, relates to the interior of a house or dwelling do not sustain that position. In *Wakefield v. State*, 41 Tex. 556, and *Richardson v. State*, 43 Tex. 456, it was used in a criminal statute, falling under the rule of strict construction, and moreover, its meaning was indicated by the context. It was an exception from the statute of burglary in these words, "When the same is done by a domestic servant or other inhabitant of such house." The word "other" manifested plain legislative in-

test to except no person as a servant, unless he was also an inhabitant or inmate of the house. In the statute construed in *Ex parte Meason*, 5 Bin. (Pa.) 187, the word "servant" was not qualified by the word "domestic"; nor did the court say the servant must be one whose work was within the walls of the home. The decision excluded from the protection or operation of the statute workmen in iron mills and other places wholly disconnected from the home, and by an obiter dictum let in servants connected with the home, or "whose employment is about the house or its appurtenances, such as the stable, etc., or who, residing in the house, are at the command of the master, to be employed at his pleasure, either in the house or elsewhere." Now, as always in the past, many house servants actually reside in outbuildings or servants' quarters in the curtilage, or constituting part of the messuage, and are popularly known as domestic servants nevertheless.

Nor, on the other hand, do the authorities relied upon by counsel for the appellant, as defining the terms "domestic purposes," warrant an interpretation of those words as used in the lease, extending them to all purposes for which gas can be beneficially used on the premises of a farmer, or even throughout the curtilage and messuage. Relating, as they do, to contracts and laws pertaining to water rights, these authorities have adopted what may be called a legal or judicial definition of the terms as used in that connection. The rights of riparian owners and persons through whose lands streams of water run to make use of the water, not only for household, but for all proper agricultural purposes, is termed in the law books a domestic use thereof or use for domestic purposes, to distinguish it from use for manufacturing and commercial purposes or navigation. In this connection the terms have a well-defined common-law signification.

A clearer and more satisfactory index to the meaning of the terms than the definitions in any of the authorities cited is found in the usage or custom shown by the evidence to obtain in oil and gas regions. Oil and gas leases generally provide for free gas for the lessor's dwelling house, or one or more dwelling houses on the premises. Such a provision is usual and customary. It is found in most of the printed forms of lease. The free gas clause either stipulates for an outside light, or is generally construed by the parties as authorizing it. Nearly all lessors of improved lands on which they reside have free gas for heat and light within the dwelling, and also for a light in the yard. Advised of this well-nigh universal practice, the parties may well be supposed to have contracted with reference to it, and it affords a safer guide for interpretation of the clause than the definitions furnished us. A custom or usage is not allowed to control or vary the meaning of words, when they

have a definite legal signification. *Bowyer v. Martin*, 6 Rand. (Va.) 525. But if they are uncertain or have not a fixed legal signification, a particular custom may be proved as having been within the knowledge of the parties at the time and impliedly adopted as a part of the contract. *Bowyer v. Martin*, cited; *Johnson v. Burns*, 39 W. Va. 658, 20 S. E. 686; *Cobb v. Dunlevie*, 63 W. Va. 398, 407, 60 S. E. 384; *Anderson v. Lewis*, 64 W. Va. 297, 61 S. E. 160; *Lumber Co. v. Wilson*, 69 W. Va. 593, 72 S. E. 651.

As to the mode of use, the contract is silent. It contains not a word respecting the sort of burners to be used for light or stoves or fires for culinary and heating purposes. For outside lights inclosed burners were not generally used, if at all, at the date of the lease, and this usage or custom is relied upon as defining, for the purposes of the contract, the mode of use. That the flambeau light involves an extravagant and wasteful consumption of gas is fully established by the evidence. In a given time it will consume about 100 times as much gas as an inclosed mantel burner, and gives no better light. The practice usual and customary at the date of the lease may have been determinative of the mode of use at that time, but it cannot be regarded as having settled it for all time; for it did not cover the future. Its observance at the date of the contract was not inconsistent with intent to adopt in the future such measures as economy in the use of gas might suggest or dictate. In the early development of the use of natural gas the instrumentalities for its application for practical purposes were crude and unscientific and not productive of the best results. Time has changed all this by the disclosure of new and more scientific appliances. Here, as elsewhere, we think the law recognizes and assumes, in the absence of proof to the contrary, intent on the part of the lessee and lessor to carry the contract into execution in such manner as to avoid useless and unnecessary waste. This question arose in *Gas Co. v. Saltsburg*, 138 Pa. 250, 20 Atl. 844, 10 L. R. A. 193, and the contract there involved would have been construed by the court as requiring the use of economical burners, if the evidence had established their efficiency and practicability of their use. That case was decided in 1890, since which time great progress has been made in the improvement of the methods of use of natural gas. As to the efficiency of inclosed gas lights for outside use, the evidence in this case leaves no room for doubt, and it puts beyond all question the extravagance and wastefulness in the use of gas by the maintenance of open lights.

These principles and views result in the conclusion that the contract entitled the plaintiffs, the lessors, to the customary one light at such place within the curtilage and

outside of the house as they may designate; but they must use for that purpose an economical burner, to be provided by themselves.

The course of the examination of some of the witnesses suggests an inquiry as to whether the principle of economy, here adopted and applied in the construction of the contract, may be carried so far by the lessee as to compel the lessors to use a particular kind of stove or fire in heating their dwelling. As to that, of course, we decide nothing, since it is not involved; but it is not inappropriate to say, in this connection, that the principle is not to be applied or enforced to an unreasonable extent. There may be much less room or cause for complaint on the ground of wastefulness in the use of a crude or improvised inside burner than in the maintenance of an open outside light, and the cost of approved stoves or open fires is relatively much greater than the provision of a small burner for light.

In its dismissal of the bill the court properly found for the defendant on the single issue whether the plaintiffs were entitled to gas for an open light in the yard, arising upon the single cause of action stated in the bill; wherefore the decree complained of will be affirmed.

ROBINSON, J., concurs in result only.

(72 W. Va. 600)

BYRNE v. WHEELING CAN CO.

(Supreme Court of Appeals of West Virginia.
June 17, 1913.)

(Syllabus by the Court.)

1. MUNICIPAL CORPORATIONS (§ 671*) — STREETS AND ALLEYS — RESTRAINING OBSTRUCTION.

When it is proposed to occupy permanently a public street or alley for private use, an abutter who would be injured by such occupancy may prevent the same by injunction.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. §§ 1447-1450; Dec. Dig. § 671.*]

2. MUNICIPAL CORPORATIONS (§ 657*)—PUBLIC ALLEYS—VACATION.

The power of a municipal corporation to vacate a public alley can be exercised in the public interest only, and not for the sole purpose of benefiting a private person.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. §§ 722, 844, 1429, 1496; Dec. Dig. § 657.*]

3. MUNICIPAL CORPORATIONS (§ 658*)—ALLEYS—NATURE OF AS PUBLIC "HIGHWAYS."

Public alleys are highways, and, in general, are governed by the legal rules applicable to streets.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. § 1430; Dec. Dig. § 658.*]

For other definitions, see *Words and Phrases*, vol. 4, pp. 3291-3306; vol. 8, p. 7678.]

Appeal from Circuit Court, Ohio County. Suit by William Byrne against the Wheeling Can Company. From a decree for plaintiff, defendant appeals. Affirmed.

Russell & Russell, of Wheeling, for appellant. Joseph Handlan, of Wheeling, for appellee.

ROBINSON, J. The council of the city of Wheeling passed an ordinance granting to defendant certain portions of two public alleys. The ordinance expressly states that the grant is made for the purpose of enabling defendant to enlarge its manufacturing plant. Thus the ordinance plainly shows on its face that the alleys were ordered vacated, not in the interest of the public, but in the interest of a private manufacturing concern. Defendant, relying on this ordinance, began the work of building its plant on the alleys. Plaintiff, owning property immediately adjoining, sought an injunction against such occupancy of these public ways by defendant. Defendant appeared on the application for the injunction and filed its answer. It admitted that it was proceeding to build on the alleys, but claimed that the ordinance gave it the right. It denied that plaintiff would be injured, since the ordinance provided that defendant should make a new alley on a different location. The injunction was granted. Defendant's motion to dissolve was overruled. From the order refusing to dissolve the injunction, we have this appeal.

Notwithstanding the general denial of injury in the answer, it appears rather self-evident that plaintiff would be injured by the proposed occupancy of the alleys by defendant. As an abutter plaintiff has a peculiar interest in the alleys, which afford access, view, light, air, and other conveniences to his property. He can not be deprived of these conveniences without injury. The proposed new alley will not relieve the injury. It can not make up for a massive wall of a factory being placed immediately against the side of plaintiff's property, where once were light, entrance, view, air, and appropriate distance from other property. Plaintiff has a peculiar right to the public alleys as he found them when he purchased his property and built upon it. Deprivation of such right is a direct injury to him. He may be deprived of that right for the public use, but not for a mere private use. When it is proposed to take the same for private use, he is clearly entitled to injunctive process. *Pence v. Bryant*, 54 W. Va. 263, 46 S. E. 275.

[1, 2] The order refusing to dissolve the injunction is right. It was quite proper to continue the injunction. The grant of the alleys to defendant by the city is, on its face, absolutely void. It affords no protection to defendant as against plaintiff's suit to enjoin. Public streets and alleys can not be granted by municipal corporations to private persons. In the interest of the public they may be vacated, but they can not be given over merely for private use. "The power to vacate a street or public place is to be ex-

ercised in the public interest, and not for the sole purpose of benefiting a private party." *Dillon on Municipal Corporations*, sec. 1160. "Highways can not, in any event, be discontinued for the purpose of devoting them to private and inconsistent uses." *Elliott on Roads and Streets*, sec. 875. The ordinance in this case declares its own invalidity. The end to be accomplished is declared on the face of the ordinance, and thereby shown to be one not within the power of the council. *Pence v. Bryant*, supra. There has been no legal vacation of the alleys.

[3] Defendant says that though streets may not be vacated for private uses, yet alleys may be. No such distinction can be made. The reason underlying the principle that a vacation can be made only in the interest of the public, applies as strongly in the case of alleys as in that of streets. "If the alley is a public one, it is a highway, and, in general, is governed by the rules applicable to streets." *Elliott on Roads and Streets*, sec. 23.

The order overruling the motion to dissolve the injunction will be affirmed.

(71 W. Va. 720)

SOUTH PENN OIL CO. v. HAUGHT et al.
(Supreme Court of Appeals of West Virginia.
Feb. 4, 1913.)

(Syllabus by the Court.)

JOINT TENANCY (§§ 8, 10*)—MINES AND MINERALS (§§ 55, 73*)—OIL AND GAS—DEED—LEASE—WASTE—ACCOUNTING—INJUNCTION.

S. grants to S. P. O. Co. "the undivided one-fourth of all the oil and gas in and under" a tract of land, subject to an oil and gas lease then held by the grantee from the grantor on the same land, which provided that in case of production the lessor was to receive one-eighth as royalty. The grant also provided that, if the land was operated under the lease, the grantee should receive one-fourth of the royalty provided in the lease to be delivered to the lessor. There were no operations under the lease and it expired. Oil was later produced from the land by a lessee of a subsequent grantee of the land, both of whom had knowledge of S. P. O. Co.'s claim of title to one-fourth of the oil and gas. In a suit by S. P. O. Co. for an accounting and to enjoin further development, *Held*:

I. The grant vested S. P. O. Co. with title to one-fourth of the oil and gas under the land.

II. That the production of oil without its consent constituted a waste and gave it the right to an accounting.

III. That, under the circumstances of the case, the fair and equitable basis for accounting is the $\frac{1}{32}$ of the entire output of oil delivered to it in the pipe line.

IV. That it has a right to have any further development of the oil and gas enjoined.

[Ed. Note.—For other cases, see *Joint Tenancy*, Cent. Dig. §§ 5-11, 13; Dec. Dig. §§ 8, 10;* *Mines and Minerals*, Cent. Dig. §§ 153-165, 201, 210; Dec. Dig. §§ 55, 73.*]

Poffenbarger, P., and Miller, J., dissenting.

Appeal from Circuit Court, Monongalia County.

Action by the South Penn Oil Company against A. P. Haught and others. From judgment for defendants, plaintiff appeals. Reversed and remanded.

A. B. Fleming, Charles Powell, and Kemble White, all of Fairmont, for appellant. Dille & Dille and Moreland, Moreland & Guy, all of Morgantown, for appellees.

WILLIAMS, J. Claiming to be the owner of the one undivided fourth of the oil and gas in place under a certain tract of land containing 62 acres, situated in Battelle district, Monongalia county, owned by the defendant Joseph S. Smith, plaintiff brought this suit against A. P. Haught, lessee of said Smith, and others, for an accounting for its alleged share of the oil produced from the land, and to enjoin further boring of wells. The court refused relief and dismissed plaintiff's bill, and it has appealed.

[1] It is important first to determine whether plaintiff is a joint tenant with said Smith of the oil, and that question depends upon the effect of the following deed made to plaintiff, by Joseph S. Smith's father and grantor, viz.: "This deed made the 28th day of October, in the year A. D. 1897, between Japheth Smith of Wadestown, Monongalia county, West Virginia, party of the first part, and South Penn Oil Company, a Pennsylvania corporation, party of the second part: Witnesseth, that in consideration of one dollar, first party does hereby grant and convey, with covenants of general warranty, unto the said party of the second part, its successors and assigns, the undivided one-fourth of all the oil and gas in and under the following described lands situate in Battelle district, Monongalia county, and state of West Virginia, namely; lying on the waters of Dunkard creek bounded substantially as follows: [Here follows the description.] Subject however to a certain lease for oil and gas purposes made by Japheth Smith to South Penn Oil Company, dated the ____ day of ____, 18__, and recorded in ____ county in ____ Book ____ at page _____. And so long as said premises are operated under said lease the party of the second part hereto shall be entitled to receive one-fourth of the royalty provided therein to be delivered to the party of the first part, together with the right of ingress and egress to, upon and from said lands for oil and gas purposes, subject to the lease aforesaid. And further when the lease above recited shall expire or become void the party of the first part does hereby demise and lease unto the party of the second part, its successors and assigns, the land above described for the purpose of operating for and producing therefrom the remaining undivided one-fourth of the oil and gas contained in and under said land (being the undivided one-fourth of said oil and gas not hereby sold) for the term of twenty years from the

expiration of said lease, and as long thereafter as oil or gas is found in paying quantities and the party of the second part hereby agrees to pay therefor, while the lease of said one-fourth interest shall remain in force and effect, the one thirty-second part of all the oil produced and saved from said land and fifty dollars per year for each and every gas well while the product therefrom is being sold and utilized off the premises. This grant shall bind the parties, their heirs, executors, administrators and assigns. Witness the following signatures and seals. Japheth Smith. [Seal.] Attest: A. A. J. Gaskill."

The lease referred to in the foregoing deed was dated the 13th of April, 1896, and was to remain in force for five years, and as long thereafter as the land was operated for the production of oil and gas. No operations were ever had under that lease, and it expired on the 13th of April, 1901.

There is no doubt that the purpose of the grantor in the foregoing deed was to invest the grantee with a present estate in fee simple, in and to the undivided one-fourth of all the oil and gas under the 100 acres of land, and that the legal effect of the language used fully accomplishes that purpose. Counsel for defendants insist that the intention was to grant a one-fourth of the royalty interest only. We do not think so. In order to arrive at the purpose the whole instrument must be read together, and its various parts made to harmonize if possible. That part leasing a fourth, not sold, is not material. It does not conflict with grantor's purpose to convey one-fourth in place, nor does it shed any additional light upon the granting clause. The deed is clearly divisible into two separate and distinct parts: (1) A grant for one fourth, and (2) the lease of another fourth. And, inasmuch as plaintiff claims nothing under the lease, it may be eliminated altogether.

The first part of the deed is, in form and effect, an absolute grant of an undivided one-fourth of all the oil and gas in place. The language could not be plainer to signify an intention to convey such an estate; read alone, it is too plain to admit of construction. No other part of the deed indicates any different intention, because there is nothing that conflicts with the granting clause. At the date of the deed, the grantee held an oil and gas lease on the land, but that did not prevent the lessor from granting what he had. He simply granted "subject to the lease." That was not a restriction upon the grant; it was simply to preserve the rights of the parties to the lease. No development had been made at that time, and hence the lessee had acquired no vested interest in the oil and gas in place; it had only the right of exploration, and, on finding oil or gas, the right to extract it. The title to those minerals was still in Smith, because they were

then parts of the realty. And the existence of the lease did not prevent him from parting with his title to those minerals in place. The following provision harmonizes well with the purpose to grant title to one-fourth of the oil and gas in place, viz., "and so long as said premises are operated under said lease the party of the second part hereto shall be entitled to receive one-fourth of the royalty provided therein to be delivered to the party of the first part." This shows a purpose, not only to vest the grantee with title to so much of the oil and gas in place as the grantee would have acquired a right to under the terms of the lease, if it had developed the property, but also title to so much of the royalty oil as the grantor would have been entitled to receive on account of the undivided one-fourth, to wit, $\frac{1}{32}$ of the oil. So that, whether the lease was worked or not, it was clearly the grantor's purpose to part with all his title and interest so far as it related to the undivided one-fourth. Plaintiff therefore became the joint tenant of Japheth Smith in the oil and gas, at the same time that it was his lessee. Of course, the rights acquired in the one-fourth by the lease were merged in its greater estate. But the lease was still operative as to the remaining three-fourths owned by its grantor. The expiration of the lease did not operate to divest plaintiff of its title to the one-fourth.

The real consideration paid to the grantor was not \$1, as the deed recites, but \$500, and the receipt signed by him on the day the deed was executed states that it was given for "the undivided one-fourth ($\frac{1}{4}$) of all oil and gas in and under my farm of 100 acres situated in Battelle district, Monongalia county, West Va." This is in harmony with his deed.

In 1899 Japheth Smith granted to his two sons, Joseph S. and James F. Smith, the said 100 acres of land, in severalty, granting to the defendant Joseph S. Smith 62 acres thereof, which is the land from which the oil now in controversy is being produced. And on the 24th of April, 1907, J. S. Smith executed to A. P. Haught an oil and gas lease upon it, in consideration of the delivery to him in the pipe line, of one-eighth of the oil produced; and \$100 a quarter, payable in advance, for each gas well. Joseph S. Smith and Haught both had knowledge, actual and constructive, of the deed from Japheth Smith to plaintiff, before boring for oil. In December, 1908, Haught began preparations for drilling a well, and in two or three months completed the first well at a cost of about \$10,000. He continued drilling, until he had put down four wells, all of which proved to be flowing wells.

Joseph S. Smith was the joint tenant of plaintiff in the oil and gas, and the sole owner of all other parts of the land. But he had no right to extract the oil without his cotenant's consent, and could confer no

such right upon another. The extraction, by one joint tenant, of oil and gas without the consent of his cotenant, constitutes waste; it is a trespass for which he is liable to account to his cotenant. *Cecil v. Clark*, 49 W. Va. 459, 39 S. E. 202; *Stewart v. Tenant*, 52 W. Va. 559, 44 S. E. 223.

Plaintiff's bill prays for an injunction to prevent further waste, and for an accounting for the value of the one-fourth of the oil that has been, and is being produced from the four flowing wells.

The question that has given us most trouble to decide is: What is the proper basis of accounting? Should plaintiff receive one-fourth of the oil in gross, or should it be charged with one-fourth of the cost of production? Neither J. S. Smith nor his lessee Haught were ignorant of plaintiff's claim of title. At the time he was making preparations to drill the first well, and before he had erected his derrick, to wit, on the 22d of December, 1908, Haught was served with the following notice, viz.: "Pittsburg, Penn'a, December 22, 1908. South Penn Oil Company—Mr. A. P. Haught: We understand that you are starting a well on what is known as the Joseph Smith farm, Battelle district, Monongalia county, West Virginia. We are the owners in fee of one-quarter of the oil and gas in said property and will look to you to account to us for one-quarter of the entire product of any wells drilled on this property without cost to us. Yours very truly, [Signed] E. E. Crocker, Vice President."

Furthermore, in his testimony he admits that he was aware of plaintiff's claim. And again, after the first well was drilled, Mr. Haught had prepared a division order, by which the pipe line company was authorized to deliver to plaintiff $\frac{1}{32}$ of the oil; it refused to sign the order, and again notified Mr. Haught, on the 3d of April, 1909, that it claimed one-fourth of all the oil produced from said farm, and demanded that that much be delivered to it. On cross-examination Mr. Haught was asked if he had not contracted for about all the materials for wells Nos. 2, 3, and 4, after this last notice was served upon him, and his reply was: "I want to say, I tell you, brother, I didn't pay no attention to their notice." Mr. Haught was not ignorant of his cotenant's claim. His mistake lay in giving a wrong construction to the deed under which plaintiff claimed title, a mistake of law, against which the law itself gives no relief. But should not the plaintiff, who has invoked the aid of a court of equity, be also required to do equity? And would it not be both a severe punishment to Haught and his associates for the trespass, and an enormous profit to plaintiff, to require them to account to it for the one-fourth of all the oil produced? Would not a fair compensation for the wrong be the value in place of plain-

tiff's one-fourth of the oil; and is that any more than the value of the royalty oil after it is produced? Plaintiff, by its own lease which it had suffered to expire, estimated the oil in the ground as being equivalent to one-eighth of the same oil above ground. It could not be utilized while in the earth; it had to be brought to the surface before it could be marketed. It had only a speculative value in the ground. In view of the facts and circumstances of this case it is just and equitable to require the defendants to account to plaintiff for the royalty, or the $\frac{1}{32}$ of the oil produced, and to be produced from the four wells, as being a just compensation for the wrong, the waste committed. Plaintiff's equities are no greater because of the notice it served on Haught; it only informed him of the amount of oil it would claim from any producing wells he might drill on the property, and, in contemplation of law, he knew that already. The notice did not warn him to cease drilling; and it is possible, and perhaps highly probable, that plaintiff wished that he might continue to drill, in order to test the property, knowing full well that it could not be held liable, in the absence of an agreement to that effect, for any part of the expense of sinking a dry well. The notice is artfully drawn, and is almost as significant for what it fails to say, as for what it in fact does say. Plaintiff took no active steps to prevent drilling until after Haught had sunk four producing wells at a total cost of about \$40,000. It then waited nearly five months after it had been presented with the division order prepared by Haught, conceding to it only a $\frac{1}{32}$ part of the oil produced, before bringing this suit. In view of these facts, we do not think it has any better reason to demand its one-fourth of the oil, free from cost of production, than did Jones, in the case of *Williamson v. Jones*, 43 W. Va. 562, syl. pt. 18, 27 S. E. 411, 38 L. R. A. 694, 64 Am. St. Rep. 891. Under the circumstances of that case it was held that: "A party taking petroleum oil unlawfully is allowed all costs of production, including costs of boring productive wells, as a set-off against rents and profits." The same principle was again announced and applied in *Stewart v. Tennant*, 52 W. Va. 559, 44 S. E. 223, and in *Cecil v. Clark*, 49 W. Va. 459, 39 S. E. 202, which was a suit by one cotenant against another for the unlawful extraction and sale of coal from under the land. In that case the tenant committing the waste was required to account to his cotenant only for his share of the profits, which was his share of the royalty on the coal. The principle applied in the two classes of cases is the same, the fact

that property, in the last case cited, was coal, and the royalty so many cents per ton, could make no difference in the application of the principle. It was as much waste to extract coal as oil, and, if the court had applied the rule for accounting in that case that plaintiff asks to have applied in this, the trespasser would have been held to account, not simply for a share of the royalty paid by the lessee, but for the full value of the cotenant's share of the coal, after it had been mined.

It appears, in this case, that the gross amount of oil produced amounts to about \$16,000, while the cost of producing it amounts to near \$40,000. Therefore, to charge plaintiff with one-fourth the actual cost of production would be to bring it in debt, which is inequitable. It would extinguish its interest. It would be, in effect, forcing it to operate its property at a loss. Haught, however, in the division order signed by him, conceded to plaintiff $\frac{1}{32}$ of the oil, and, in view of that concession, and in view of the fact that plaintiff had formerly leased the property from Japheth Smith and had agreed to deliver to him the one-eighth of the oil to be produced, as royalty, we think that $\frac{1}{32}$ delivered in the pipe line to the credit of plaintiff, is a fair basis of accounting for the value of its one-fourth of the oil in the ground. Says Judge Holt, in *Williamson v. Jones*, 39 W. Va. at page 264, 19 S. E. at page 445, 25 L. R. A. 223: "I should think that a co-owner, who has expended so large a sum, entirely at his own risk, but with the knowledge of the other co-owners, in so hazardous an enterprise as developing oil in an unexplored field, ought not to do more than account to them for their proportion of a customary royalty, proper and fair under all the circumstances."

One joint tenant of oil and gas, having no right to extract it from the earth without the consent of his cotenant, cannot confer such right upon his lessee. Plaintiff had a right, at any time, to enjoin the drilling of additional wells, and its bill prays for such injunction. It was therefore error to dismiss plaintiff's bill, and to deny it a perpetual injunction against Joseph S. Smith and those defendants claiming under him, mediately or immediately, from drilling any other oil or gas wells upon said property. The decree of November 1, 1910, is reversed, and the cause remanded for further proceedings to be therein had according to the principles herein announced, and further according to the principles governing courts of equity.

POFFENBARGER, P., and MILLER, J., dissent.

(140 Ga. 155)

CHARLESTON & W. C. RY. CO. v. COBB.
(Supreme Court of Georgia. June 14, 1913.)*(Syllabus by the Court.)*1. MASTER AND SERVANT (§ 258*)—INJURIES
TO SERVANT—PLEADING—SUFFICIENCY.

The petition was not demurrable.

[Ed. Note.—For other cases, see Master and
Servant, Cent. Dig. §§ 816-836; Dec. Dig. §
258.*]2. TRIAL (§ 89*)—RECEPTION OF EVIDENCE—
STRIKING OUT.

Where one ground of negligence is alleged to be the violation of a rule promulgated by the company, and parol evidence is offered to show the existence of such rule as applicable to all employes, it is not error to refuse to exclude such evidence on the ground that one of the witnesses, though testifying generally as to the rule, may have said in one part of his testimony that such rule was for the protection of a class of employes to which the plaintiff did not belong.

[Ed. Note.—For other cases, see Trial, Cent.
Dig. §§ 228-234; Dec. Dig. § 89.*]

3. SUFFICIENCY OF EVIDENCE.

The verdict is supported by the evidence and none of the assignments of error require a new trial.

Error from Superior Court, Richmond County; H. C. Hammond, Judge.

Action by Willie Cobb against the Charleston & Western Carolina Railway Company. From a judgment for plaintiff, defendant brings error. Affirmed.

W. K. Miller, of Augusta, for plaintiff in error. A. L. Franklin, of Augusta, for defendant in error.

EVANS, P. J. [1] 1. The case made by the petition is that the plaintiff, employed by the defendant railroad company as a car greaser, whose duty required him to help in making slight repairs to cars placed on a track alongside the Central Railway Company depot, while under a car "placed" on the track at such depot, engaged in the performance of his duty and without fault on his part, was injured by the sudden, violent, and negligent shifting of a switching engine moving heavily laden cars against the car under which the plaintiff was working. It was alleged that the defendant was negligent in moving the switching engine on the track where the "placed cars" were standing and against them without giving him warning, when the agent of the company in charge of the engine knew, or in the exercise of ordinary care could have known, that plaintiff was working under one of the "placed" cars. The railroad company was further alleged to be negligent in the violation of a rule of the company providing that cars "placed" on a depot track should not be moved without giving notice, and that the injury was the proximate result of the violation of this rule. The court overruled a demurrer to the petition, and we think the foregoing general statement of the plain-

tiff's petition makes it clear that his honor was right.

[2] 2. The plaintiff testified that he was informed by the chief yard inspector that the rules of the company forbade the switching of cars on the depot track; that he was performing his work according to the general directions which he had followed for four or five years; and that he had never seen cars switched on the depot track during that period. He offered a witness who testified that there was a rule of the company that when cars were placed on the depot track they should not be moved without first notifying the men on the platform "so they could pick up the boards and get out of the way." He also testified that it was against the rules of the company to move cars "placed" on the depot track. A motion was made to exclude all testimony relating to the rule, because such rule was promulgated for the protection of truckers or warehouse employes engaged in loading and unloading cars, and not for the protection of car greasers. The motion was denied. No objection was made to the parol proof of the rule, nor did it appear that the rule was in writing. The plaintiff had alleged the existence of the rule and testified that the chief inspector of the yards had promulgated it to him. The rule which the inspector promulgated to the plaintiff did not limit its application to truckers or warehousemen or to any particular class of employes, according to his testimony. While the other witness referred to the rule as requiring a warning to the men on the platform, yet in another place in his testimony he gave the rule as contended by the plaintiff without any limitation. If the rule was a written one, the defendant could have required the production of the writing and objected to verbal proof of it. But it raised no objection to the mode of proof, and the testimony of the witness tended to establish a rule applicable to all employes, and there was no error in refusing to exclude the testimony on the ground stated.

[3] 3. We think the verdict is supported by the evidence, and that none of the assignments of error require a new trial.

Judgment affirmed. All the Justices concur.

(140 Ga. 107)

PAXSON BROS. v. BUTTERICK PUB. CO.
(Supreme Court of Georgia. June 12, 1913.)*(Syllabus by the Court.)*SALES (§ 168½*)—ACTION FOR PRICE—DE-
FENSES.

Under the facts of this case, the purchaser of the goods, for the price of which the action was brought, did not have the right to return them to the vendor and to receive credit therefor.

[Ed. Note.—For other cases, see Sales, Cent.
Dig. §§ 406-421; Dec. Dig. § 168½.*]

Error from Superior Court, Wilcox County; W. F. George, Judge.

Action by the Butterick Publishing Company against Paxson Bros. Judgment for plaintiff, and defendant brings error. Affirmed.

This was an action brought by the Butterick Publishing Company against Jesse B. Paxson and Omar F. Paxson, composing the firm of Paxson Bros., on an account for the purchase price of goods sold by the plaintiff to the defendants in accordance with the terms of a written contract between the parties. So much of the contract as is here material is, in substance, as follows: The agreement was dated February 22, 1910. It was in the form of an order given by the defendants to the plaintiff for a certain quantity of patterns, which order the plaintiff accepted. The contract was to continue in force for a term of three years from date and from year to year thereafter until it should be terminated by either party giving the other a three months' terminating notice in writing at the expiration of any contract period or within 30 days thereafter; the contract to remain in force during said three months. The defendants agreed to purchase and to keep on hand for sale at all times during the term of the contract the patterns of the plaintiff to an amount not less than the original stock of patterns purchased; the purchase price of the original stock being \$100, to be paid \$5 cash, \$45 on May 25, 1910, and the balance, \$50, to remain unpaid until the termination of the contract, with 3 per cent. interest from date, payable semiannually on January 15th and July 15th each year. Defendants further agreed to purchase each month during the contract patterns to the amount of \$7.50, to be paid for on or before the 15th of the month following their shipment. The patterns discarded from the plaintiff's catalogue were to be exchangeable during the months of January and July for new patterns at nine-tenths of the sum paid for them, and all patterns which defendants might have on hand at the expiration of the term were to be returnable for repurchase at three-fourths of cost in cash, if delivered to the plaintiff's New York office in good condition, payable within one month from date of delivery. Defendants further agreed to permit the company, or its representative, to count the stock of patterns at any time and to accept patterns sent to fill up any shortage; to receive and distribute gratuitously, regularly as issued, the Butterick fashion sheet and quarterly catalogue during the term of the contract; to keep the patterns on the ground floor of the defendant's building; to give, or cause to be given, proper attention to the sale of Butterick patterns; to use best endeavors to advance their sale; not to sell, or permit to be sold, on the premises of the defendants, during the term

of the contract, any other make of patterns; not to sell Butterick patterns except at labeled prices; to conserve the interests of the plaintiff at all times; and not to remove the pattern stock from its original location without the written consent of the plaintiff. The contract contained the stipulation that: "Failure or neglect by either party to perform any provision of this order will, at the option of the other, release the other party from all obligations hereunder."

The plaintiff furnished to the defendants the original stock of patterns and continued to supply the defendants with goods under the contract until defendants became indebted to the plaintiff in a stated amount; the defendants having several times defaulted in making payments. Defendants subsequently ordered more patterns which the plaintiff refused to furnish unless defendants settled their past indebtedness. Afterwards, on September 1, 1910, defendants notified plaintiff, in writing, that the latter's refusal to furnish the patterns last ordered was such failure on the plaintiff's part to comply with the contract as released defendants therefrom, and that they therefore elected to declare the contract terminated. In the same communication defendants informed the plaintiff that they had "shipped back" to the plaintiff certain patterns, literature, and a cabinet. These the plaintiff declined to receive, and the action was thereupon brought for the price of the goods previously furnished, less the amount that had been paid by defendants. By consent the case was submitted to the judge for determination without a jury; it being agreed by counsel for both sides that the only question to be decided was whether the defendants were entitled to credit for the goods which they offered to return and which the plaintiff refused to accept. The judge decided that such credit should not be allowed and rendered judgment against the defendants in the amount for which the action was brought. Defendants moved for a new trial, which, being overruled, they excepted.

M. B. Cannon, of Abbeville, for plaintiff in error. Hal Lawson, of Abbeville, for defendant in error.

FISH, C. J. (after stating the facts as above). The trial judge properly decided that the defendants were not entitled to credit for the goods which they sought to return. The contract expressly stated that it was to continue in force for the term of three years from date and from year to year thereafter until it should be terminated by either party giving to the other the written notice therein prescribed. Moreover the contract, considered as a whole, clearly indicated that it was not the intention of the parties that it should be speedily or abruptly terminated. It was agreed that "all patterns on hand at

the expiration of the term of this order will be returnable for repurchase at three-fourths of cost in cash if delivered at your [the plaintiff's] New York office in good condition, payable within one month from date of delivery." Another term of the agreement was: "Failure or neglect by either party to perform any provision of this order will, at the option of the other, release the other party from all obligations thereunder." This last stipulation, however, was but the statement of a well-recognized legal principle which would have been operative had it not been expressed in the contract. See *Savannah Ice Co. v. American Transit Co.*, 110 Ga. 142, 85 S. E. 280, where it was held that failure to make payments for articles delivered under a contract during a series of years, to be delivered in installments and paid for monthly, entitles the vendor to rescind the contract. See, also, *Paxson v. Butterick Publishing Co.*, 136 Ga. 774-775, 71 S. E. 1105. Clearly it was the intention of the parties to the contract that the defendants should have the privilege of returning to the plaintiff at a stated price such patterns as the defendants might have on hand at the expiration of the term of the contract, which was fixed as three years, and longer, if not terminated by three months' written notice by either party. Surely it was never intended by the parties that the defendants had the right, under the contract, to capriciously refuse to comply with their agreement to make payments as specified for goods bought, thus committing a breach themselves, and thereby cause the plaintiff to refuse to furnish more goods until those already supplied had been paid for, and in this way enable the defendants to reap the benefit from their own default and wrong by terminating the contract and giving the defendants the right to return the goods they then had on hand and for which they had not paid and to get credit therefor.

Judgment affirmed. All the Justices concur.

(140 Ga. 132)

GEORGIA COAST & P. R. CO. v. JONES.
(Supreme Court of Georgia. June 13, 1913.)

(Syllabus by the Court.)

1. CARRIERS (§ 321*)—INJURY TO PASSENGERS—INSTRUCTIONS.

In a suit against a railroad company to recover damages for a personal injury, where there is evidence to show that the plaintiff applied to the agent of the defendant railroad company to purchase a ticket, and the agent sold him a ticket, informing him that the train was about an hour late, and that the plaintiff went to a nearby restaurant for supper and on his return to the depot, while walking upon a public street over which the public were accustomed to travel in approaching the depot, and as he was passing the tender of the engine attached to the train which he intended to board, he heard some one exclaim "Look out," and saw

the fireman on top of the tender which was loaded with wood for fuel, and just at that time a piece of wood fell from the tender, striking the plaintiff on the head, it was not erroneous to instruct the jury "that a railroad company shall be liable for any damage done to persons, stock, or other property by the running of the locomotives or cars or other machinery of such company, or for damage done by any person in the employment of such company, unless the company shall make it appear that their agents have exercised all ordinary and reasonable care and diligence; the presumption in all cases being against the company."

[Ed. Note.—For other cases, see *Carriers*, Cent. Dig. §§ 1247, 1326-1336, 1343; Dec. Dig. § 321.*]

2. INSTRUCTIONS.

Though some of the instructions were not strictly accurate, yet, when taken in connection with the whole charge, they were not prejudicial to the defendant.

Error from Superior Court, Liberty County; W. W. Sheppard, Judge.

Action by Jesse Jones against the Georgia Coast & Piedmont Railroad Company. Judgment for plaintiff, and defendant brings error. Affirmed.

Hitch & Denmark and John Taylor Chapman, all of Savannah, for plaintiff in error. H. H. Elders and Way & Burkhalter, all of Riedsville, for defendant in error.

EVANS, P. J. The action is by Jesse Jones against the Georgia Coast & Piedmont Railroad Company to recover damages for a personal injury. Testimony was submitted tending to show that the plaintiff, late in the afternoon and a few minutes before the time the defendant's train was scheduled to arrive at Ludowici, applied to the defendant's agent to purchase a ticket from there to another point on the road. The agent sold him the ticket, and informed him that the train was reported to arrive an hour late. Whereupon the plaintiff betook himself to a nearby restaurant for supper. Upon finishing his meal, he proceeded along a public street, where the public was accustomed to travel, and alongside the track, which occupied a portion of the street. The train on which he intended to ride had reached the depot, and just as he was passing the engine and tender on his way to board the cars he heard some one exclaim, "Look out!" The person who uttered the exclamation was the fireman, and he was on top of the tender. Just then a piece of wood fell off the tender, striking the plaintiff on the head, rendering him unconscious for a time. The fuel used for this engine was wood, and it was piled high upon the tender. The court instructed the jury "that a railroad company shall be liable for any damage done to persons, stock, or other property by the running of the locomotives or cars or other machinery of such company, or for any damage done by any person in the employment of such company, unless the company shall make it appear that their agents

have exercised all ordinary and reasonable care and diligence; the presumption in all cases being against the company." Complaint is made of this charge.

[1] The charge is in the language of the Code (Civil Code, § 2780), and the exception is that the code section is inapplicable to the facts of the case; that the code section only applies to injuries caused by the running of trains or by persons in the employment of the company. Counsel for the plaintiff in error earnestly contends that the present case comes within the ruling made in the case of Savannah, etc., Ry. Co. v. Flaherty, 110 Ga. 335, 35 S. E. 677, and is controlled by that case. In the Flaherty Case it appeared that the railroad company for the purpose of rolling trucks across its passenger depot in the city of Savannah, the floor of which was elevated above the railroad tracks, had constructed a crossing, at each end of which was a steep incline from the level of the floor to that of the tracks. A train for the reception of passengers was so placed in the depot that the steps of the ladies' car thereto attached were immediately over the incline at one end of the crossing. The plaintiff undertook to enter the ladies' car as a passenger, her right foot encountered the unexpected slope at the moment she was raising her left foot to place it on the step of the car; her right foot slipped from under her, and she fell. It was held that the injury was not caused by the running of the cars, nor by any person in the employment of the company. Even if it be conceded that no reasonable differentiation can be made between the ruling that a coach placed in the initial depot for the reception of passengers is not to be regarded as a part of the operation of the running of the cars, and a holding that the temporary stoppage of a train at an intermediate station for the purpose of discharging and receiving passengers is included in the running of the cars so as to bring the case within the purview of the statute, nevertheless the jury was authorized in the present case to find that the piece of wood which struck the plaintiff was dislodged by the fireman on top of the tender, and that the plaintiff's injury was due to an act of a person in the employment and service of the company. It was therefore not error to give the instruction to which exception is taken.

[2] 2. Exceptions are taken to certain excerpts of the charge. Some of the instructions criticised were not strictly accurate, but they were not prejudicial to the defendant. For instance, the jury were instructed that the plaintiff could not recover unless he was blameless. When the various excerpts which are segregated from the charge for the purpose of criticism are read in connection with their context, we do not think that the instructions as a whole were preju-

dicial to the defendant, or that the law applicable to the case was expounded unfavorably to the railroad company.

Judgment affirmed. All the Justices concur.

(140 Ga. 110)

STATEN et al. v. STATE.

(Supreme Court of Georgia. June 12, 1913.)

(Syllabus by the Court.)

1. CRIMINAL LAW (§ 1131*)—WRIT OF ERROR—ESCAPE—DISMISSAL OF WRIT.

Two of the plaintiffs in error, Miller and Mathis, having escaped from custody before the hearing of their case in this court, and having failed within the time fixed in an order duly passed to surrender themselves to the proper authorities, the bill of exceptions is dismissed as to the parties named above, in pursuance of the provisions of the order referred to that unless by the date named therein the parties referred to should surrender themselves the case would be dismissed.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2971-2979, 2985; Dec. Dig. § 1131.*]

2. CRIMINAL LAW (§ 673*)—TESTIMONY OF ACCUSED—SEVERAL DEFENDANTS—CONSIDERATION.

Where three defendants jointly indicted are jointly tried, and each of the three are permitted, without objection on the part of the state, to testify under oath, their testimony should be treated as evidence under appropriate instructions from the court, and should not in the court's charge be treated as evidence so far as it refers to the other defendants in the case, but merely as an unsworn statement with reference to the defendant actually giving the testimony.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1597, 1872-1876; Dec. Dig. § 673.*]

Error from Superior Court, Whitfield County; A. W. Fite, Judge.

Ben Staten and others were convicted of rape, and they bring error. Reversed as to defendant Staten, and dismissed as to the other defendants.

Geo. G. Glenn, of Dalton, and F. W. Copeland, of Rome, for plaintiffs in error. Saml. P. Maddox, Sol. Gen., of Dalton, and T. S. Felder, Atty. Gen., for the State.

BECK, J. [1] 1. Ben Staten, Pink Miller, and Joe Mathis were tried for the offense of rape and convicted, and the jury trying the case recommended them to the mercy of the court. All of the defendants filed their motion for a new trial. At the hearing of the case in this court affidavits were submitted showing that Miller and Mathis had escaped from custody, and as to these two plaintiffs in error it was ordered that unless they should surrender themselves to the proper authorities on or before the 14th day of May, 1913, the case should be dismissed as to them in this court, of which order their counsel was duly notified. The time within which they

should so surrender having expired, and the plaintiffs in error just named having failed to surrender themselves as provided in the order, and a proper showing having been made by the officer into whose custody they should have surrendered themselves, an order was passed dismissing the case as to them.

[2] 2. The plaintiffs in error, Staten, Miller, and Mathis, were tried jointly, each reserving the right, without objection on the part of the state, to testify in the case on oath, and each did testify fully upon the trial. Except in giving testimony under oath, none of the defendants made any statement. In the course of his instructions to the jury the court charged the jury as follows: "The law authorized the defendants to make to the court and jury such statement as they may deem proper in their defense. They are not under oath, nor subject to cross-examination, as far as their statements go, without their consent. The defendants have each been sworn for the other, and what each says for himself is to be received as a statement; but what each says for the other defendants is to be received and weighed by you under the same rules as other evidence in the case." Subsequently, while instructing the jury, the court said to them: "You take all the facts and circumstances along with the statements of the defendants." Whereupon counsel for the defendants addressed the court and said: "They did not make a statement, your honor." And then the court, continuing his charge, said: "What each said for himself is a statement, and what each said for the other is evidence. You may give the statements such weight as you think they are entitled to. You may believe them [in preference] to the sworn testimony in the case." Defendants complained that the instructions which we have set forth in effect instructed the jury that the testimony of the witnesses, the defendants, could and should be treated in part as a statement merely; and, moreover, that as the defendants had a right not to make any statement, and made none, the court should not have made any reference whatever to the statements, and that the charge as given "tended to injure the defendants before the jury, by confusing them as to what was evidence in their own behalf testified to by them and by each of them."

We are of the opinion that, as the defendants were permitted to testify in the case without objection on the part of the state, although under the law they were neither competent nor compellable to testify, the testimony given by them should have been treated as evidence throughout, and no reference as to their testimony as a "statement" should have been made by the court. What each of them said under oath was evidence, and they made no statement to the jury that was not under oath. The effect

of the instructions set forth above in reference to statements made on the trial by an accused in a criminal case was, or might have been, to minimize in the minds of the jury the weight of the evidence given by the defendants when they were testifying. Especially is this observation true when we consider the fact that what each of the witnesses said in denial of the testimony with reference to himself given by the woman upon whom the crime is alleged to have been committed would necessarily, if believed by the jury and received by them as evidence, tend to break down the case made in her testimony against the other two defendants. To illustrate: After the woman referred to had testified that each of the three men, the plaintiffs in error here, had on the occasion referred to had carnal connection with her, and when each, speaking for himself, denied this and pronounced it false, primarily he was speaking for himself; but the testimony, if credited by the jury, also had the effect of breaking down the case against the other two, and what was said by all of the defendants upon this point, if permitted to testify without objection, should have been permitted to go to the jury as evidence to be considered by them, and given its proper weight as such, without any reference to it as a statement merely, not having the sanction of an oath. We are not convinced that the error pointed out was harmless, and therefore a new trial must be granted to that one of the plaintiffs in error who has not lost his right to a hearing on appeal by voluntarily escaping from the custody of the law and refusing to surrender when given full opportunity to do so.

Judgment reversed as to Ben Staten. All the Justices concur.

(140 Ga. 187)

HIGDON v. WILLIAMSON et al.

(Supreme Court of Georgia. June 17, 1913.)

(Syllabus by the Court.)

1. APPEAL AND ERROR (§ 299*)—NEW TRIAL (§ 18*)—GROUNDS—REFUSAL TO STRIKE PLEA.

The court's refusal to strike a plea as being insufficient in law is reviewable by direct exception, and cannot be made a ground of a motion for a new trial. *Brandon v. Akers*, 134 Ga. 78, 67 S. E. 540.

[Ed. Note.—For other cases, see Appeal and Error, Dec. Dig. § 299; * New Trial, Cent. Dig. §§ 24-29; Dec. Dig. § 18.*]

2. TRIAL (§ 25*)—RIGHT TO OPEN AND CLOSE —ACTION ON NOTE.

Where a payee of a note sues the maker, and the defendant in his plea admits the execution of the note and that the plaintiff is the legal holder, and sets up a defense to the same, the burden is upon the defendant to establish his defense, and he is entitled to open and conclude. *Martin v. Hale*, 136 Ga. 228, 71 S. E. 133. This rule is not changed in a case where the defendant, in his plea admitting the execution of the note, avers that certain words

relating to a mortgage had been interpolated therein, where such alteration is not material to the defense set up, and is not pleaded as a defense, but the averment is made merely as a part of the history attending the execution of the note.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 44-75; Dec. Dig. § 25.*]

3. NEW TRIAL (§ 21*)—WITNESSES (§ 240*)—GROUNDS—LEADING QUESTIONS.

Most of the questions objected to as leading were not open to that criticism. The court in his discretion may allow a leading question to be propounded to a witness, and unless that discretion is abused the allowance of a leading question is not ground for a new trial. *Roberts v. DeVane*, 129 Ga. 604, 59 S. E. 289.

[Ed. Note.—For other cases, see New Trial, Cent. Dig. §§ 30-33; Dec. Dig. § 21;* Witnesses, Dec. Dig. § 240.*]

4. TRIAL (§ 278*)—INSTRUCTIONS—GENERAL EXCEPTIONS—SUFFICIENCY.

A general exception that the court's charge as a whole is inapt and incorrectly presents the law, with no specific error pointed out, is not ground for new trial, where the charge contains any pertinent and correct principle of law.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 686, 689; Dec. Dig. § 278.*]

5. VERDICT AND DENIAL OF NEW TRIAL SUSTAINED.

The evidence authorized the verdict, and the court did not abuse his discretion in refusing a new trial.

Error from Superior Court, Fannin County; *N. A. Morris*, Judge.

Action between *W. T. Higdon* and *M. B. Williamson* and others. From the judgment, Higdon brings error. Affirmed.

A. S. J. Hall, of Blue Ridge, *Geo. F. Gober*, of Atlanta, and *Chas. H. Griffin*, of Marietta, for plaintiff in error. *J. Z. Foster*, of Marietta, and *Wm. Butt* and *Thos. A. Brown*, both of Blue Ridge, for defendants in error.

EVANS, P. J. Judgment affirmed. All the Justices concur.

(140 Ga. 134)

DENSON v. KEYS et al.

(Supreme Court of Georgia. June 13, 1913.)

(Syllabus by the Court.)

1. HOMESTEAD (§ 113*)—CONVEYANCE—TO WHOM MADE.

Where a homestead was set apart to the head of a family, under the Constitution of 1877, in land belonging to him, he could not, pending the existence of the homestead, make a valid conveyance of the land, without any order of court; and a deed so made was void, although made to one of the two beneficiaries as trustee for the other.

[Ed. Note.—For other cases, see Homestead, Cent. Dig. § 182; Dec. Dig. § 113.*]

2. JUDGMENT (§ 243*)—APPEAL AND ERROR (§ 1149*)—CONFORMITY TO PLEADINGS—MODIFICATION OF JUDGMENT.

Under the pleadings and evidence, it was error to direct so much of the verdict as declared that the land in controversy belonged to the head of the family and his wife, with

equal interests. But this can be corrected without reversing the whole judgment.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. § 428; Dec. Dig. § 243;* Appeal and Error, Cent. Dig. §§ 4483-4496; Dec. Dig. § 1149.*]

3. APPEAL AND ERROR (§ 1052*)—HARMLESS ERROR—ADMISSION OF EVIDENCE.

If certain evidence was of doubtful admissibility, its admission was not such as to injure the plaintiff, who had no title in any event, and the ruling will not require a reversal at her instance.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4171-4177; Dec. Dig. § 1052.*]

Error from Superior Court, Oatoosa County; *A. W. Fite*, Judge.

Action by *Alma L. Denson* against *J. M. Keys* and others. From a judgment for defendants, plaintiff brings error. Affirmed.

In 1893 *J. M. Keys*, as the head of a family consisting of his wife and daughter, had certain land belonging to him set apart as a homestead, under the Constitution of 1877. In 1897, he, while the homestead was in force, conveyed the land to his wife in trust for their daughter. In this deed it was recited that the husband had only paid half of the purchase money with his own funds, and had used money of the wife in making payment of the balance. No order of court for any sale and reinvestment appears. In 1907 the wife executed a deed to the husband of the daughter, the latter having married in the meantime. In 1911 the daughter, who alleged herself to be still a minor, and brought suit by her next friend, filed an equitable petition, alleging that the deed from her mother to her husband was made without any authority or consideration, and that her father, after making the trust deed, mutilated it by erasing the name of her mother therefrom and inserting his own. She prayed to have her father enjoined from interfering with the property, that it be declared to belong to her, and that the deed from her mother to her husband be canceled. It does not appear from the record that either the plaintiff's mother or husband filed any answer. The father filed an answer and cross-petition, in which he set up that the deed made by him to his wife in trust for their daughter was void, being made after the property had been set apart as a homestead and while such homestead was in force. He prayed that both deeds be canceled as clouds upon his title. On the trial the presiding judge directed a verdict canceling both deeds and declaring that the husband and wife were joint owners of the property in dispute. The plaintiff moved for a new trial, which was refused, and she excepted.

Maddox, McCamy & Shumate, of Dalton, and *Foust & Payne*, of Chattanooga, Tenn., for plaintiff in error. *W. E. Mann*, of Dalton, for defendants in error.

LUMPKIN, J. (after stating the facts as above). [1] 1. It has been held that, where a head of a family took a homestead in certain land, under the Constitution of 1868, he could, without any order of court, make a deed which would operate as a valid conveyance to what was called, for want of a better name, "the reversionary interest;" that is, his title to the land after the homestead should terminate. *Aiken v. Weldon*, 76 S. E. 359, and citations.

After the adoption of the Constitution of 1877, it was held that its language was different from that of the former Constitution, and worked a change in this respect. Hence, it was declared that, under the latter Constitution, the land could not be conveyed by the head of the family, pending the homestead, except by order of court, as prescribed in the statute; and that an effort to sell it did not result in a conveyance of the "reversionary interest," but was simply invalid. *Huntress v. Anderson*, 110 Ga. 427, 428, 35 S. E. 671, 78 Am. St. Rep. 105; *Clifton v. Northern*, 106 Ga. 21, 31 S. E. 782. In *Walker v. Hodges*, 113 Ga. 1042, 39 S. E. 480, the exemption under consideration was not the constitutional homestead, but the statutory one, colloquially termed the "pony homestead." In *Anderson v. Hall*, 114 Ga. 1016, 41 S. E. 593, the rule just stated as applicable under the Constitution of 1877 was recognized, but was held not to apply to a conveyance by an heir of his interest, after the death of the head of the family.

The deed from Keys to his wife as trustee was made after the setting apart of a homestead under the Constitution of 1877, and during the continuance thereof. While counsel for plaintiff in error argued in their brief that the head of the family had recognized the title as being in his daughter, by allowing her to pay taxes on the land after the termination of the homestead, there is no evidence in the record tending to show that it had terminated at the time of the trial, by reason of a divorce, except a vague, hearsay statement.

It will appear from the above that the presiding judge committed no error in the direction of a verdict to the extent of canceling the deed made by the head of the family, to his wife as trustee for his daughter, and the one later made by the wife to the husband of the daughter.

[2] 2. The direction that the husband and wife should be declared to own a half interest each in the land was not authorized by the pleadings or the evidence. The daughter was the plaintiff. She claimed that the deed to her mother as her trustee

had been altered by her father after it was made, and that the deed made by her mother to her husband was without authority. She prayed that her father be enjoined from interfering with the land, be ejected therefrom, and declared to have no rights therein, and that the deed made by her mother be canceled. So far as the record in this court shows, the father alone answered. He attacked the deeds as void because they depended on an effort to convey land which had been set apart as a homestead under the Constitution of 1877. He prayed that they be canceled. No answer or cross-petition of the wife appears. She did not set up any claim to any interest in the land, or pray any declaration of title or other relief. On the contrary, while in her testimony she stated that she had paid half of the purchase money by means of her work in a dairy conducted by herself and her husband, she admitted having sought to get out of the family contention by conveying to her son-in-law after knowledge of a question as to the validity of the deed to her as trustee. She also brought suit against her husband for money, and dismissed it, as he testified without contradiction, upon payment to her of \$800. While the deed made by her husband to her as trustee for the daughter recited that she had paid half of the purchase money for the land, she could not have recovered both the land and the money; and she was not entitled to any decree in this case, under the state of the pleadings and the evidence. The finding in her favor is not consistent with the other finding. The plaintiff attacked the deed made by the mother. She also complained of the verdict as directed. We accordingly direct that the verdict and judgment be so modified as to strike from them the declaration that she and her husband each owned one-half interest in the land.

[3] 3. Error was alleged on the admission in evidence of a former suit for money brought by the wife against the husband, and its dismissal. The description of this suit in the record is very meager. But we infer that she sued him to recover money in lieu of the land, thus electing not to claim title to the land as an implied trust. If so, and there had been an assertion of such a trust, it would have been admissible to show an inconsistent claim. At any rate, whatever ruling might be made as to this evidence, it could not give the plaintiff a good title. Nor does the ruling furnish any ground for a reversal at her instance.

Judgment affirmed, with direction. All the Justices concur.

(13 Ga. App. 1)

INTERNATIONAL HARVESTER CO. OF AMERICA v. DAVIS. (No. 4,812.)

(Court of Appeals of Georgia. June 25, 1913.)

*(Syllabus by the Court.)***1. ALTERATION OF INSTRUMENTS (§ 8*)—CHATTEL MORTGAGES—AFFIXING NAME OF WITNESS.**

The affixing of the name of an attesting witness to a mortgage on personalty after delivery and without the consent of the mortgagor is not such a material alteration as will invalidate the mortgage.

[Ed. Note.—For other cases, see *Alteration of Instruments*, Cent. Dig. §§ 40-46; Dec. Dig. § 8.*]

2. CHATTEL MORTGAGES (§ 47*)—EVIDENCE (§ 460*)—PAROL—DESCRIPTION OF PROPERTY—SUFFICIENCY.

The description of property in a mortgage as "all my shop tools and fixtures * * * in my possession" is not void for indefiniteness and may be aided by parol evidence.

[Ed. Note.—For other cases, see *Chattel Mortgages*, Cent. Dig. §§ 87, 88, 96-100; Dec. Dig. § 47; * *Evidence*, Cent. Dig. §§ 2115-2128; Dec. Dig. § 460.*]

Error from City Court of Sandersville; E. W. Jordan, Judge.

Action by the International Harvester Company of America against W. P. Davis. Judgment for defendant, and plaintiff brings error. Reversed.

Goodwin & Wood, of Sandersville, for plaintiff in error. Hardwick & Wright, of Sandersville, for defendant in error.

POTTLE, J. Davis executed to the International Harvester Company a mortgage upon the following described property: "One bay horse, about nine years old, named Bill; one top buggy, made by Bull Buggy Company; also all my shop tools and fixtures * * * in my possession." The mortgage was attested by one Carroll, a notary public. To the levy of a *fi. fa.* based on the foreclosure of the mortgage Davis interposed an affidavit of illegality, setting up that the description of the property in the mortgage was too indefinite, and especially the description of the shop tools and fixtures. It is further averred in the illegality that the mortgage and the *fi. fa.* issued thereon were void because the mortgagee, without the consent or knowledge of the mortgagor, altered the mortgage by having Carroll, as notary public, attest the mortgage as a subscribing witness, with intent to injure and defraud the mortgagor. Upon the trial the defendant admitted the execution of the mortgage, assumed the burden of proof, and testified that when the mortgage was executed he told the agent of the mortgagee that there was no need of a notary public, as he did not expect to give a second mortgage and did not want the mortgage put on record, and that he had never at any time requested Carroll to witness any paper for him. Another witness testified that Carroll was not present when the mortgage was

executed. Carroll testified that Davis told him he wanted him to witness a paper; that later the mortgage was brought to him at his office, and, being familiar with Davis' signature, he attested the mortgage in the absence of Davis. The jury found in favor of the illegality and the plaintiff's motion for a new trial was overruled. Error is assigned upon the following charge of the court: "If the plaintiff, after the signing of the mortgage, fraudulently procured a witness to attest the mortgage, not in his presence, and without the consent, express or implied, of the maker, then it would be a material alteration, and the instrument would be void; if, on the other hand, you believe that the mortgage was attested, not in the presence of the maker, but with his consent or by his direction to the officer, or under his authority, then the alteration would not be material, and the mortgage would be good between the parties." Error is further assigned upon the following instruction of the court: "I charge you that the mortgage is insufficient in law as regards the shop tools, but good as to the other property therein described, provided there is no material alteration."

[1] 1. Prior to the Code the rule in reference to the alteration of written instruments was very strict. In *Broughton v. West*, 8 Ga. 248, the law was stated as follows: "If a bill or note be altered, without the consent of the parties, in any material part, it will be void as to all parties not consenting to the alteration, even in the hands of an innocent holder, as in the date, sum, time when payable, or consideration. Nor does it matter by whom made; the alteration is fatal whether made by a party or a stranger, whether innocently or fraudulently." It was further held that: "Anything will be material * * * which varies the rights and obligations of the parties in the minutest particular." The court held, however, that the cutting off of the name of a surety to a joint and several note, with the consent of the payee, was not such a material alteration as would invalidate the note, since the obliteration of the name of the surety in no wise affected the principal. See, also, *Lowe v. Argrove*, 30 Ga. 129, where it was held that changing the consideration in a note was a material alteration and avoided the whole note. Under the Code, before an alteration in a written instrument will vitiate the whole instrument, three things must appear. The alteration must be material; it must have been made by a person claiming a benefit under it, and must have been made with intent to defraud. Unless all three of these things appear, the contract as originally executed will be enforced, if it can be discovered and is still capable of execution. Civil Code, § 4296; *Hotel Lanier Co. v. Johnson*, 103 Ga. 604, 30 S. E. 558; *Burch v. Pope*,

114 Ga. 334, 40 S. E. 227; *Shirley v. Swafford*, 119 Ga. 43, 45 S. E. 722.

In *Yowry v. McLain*, 75 Ga. 372, where the name of a partnership was changed in a printed form containing a reservation of title and the name of an agent of the partnership substituted, it was held that, as title retained by an agent as such remains in the principal, the defendant's rights were the same as if no alteration had taken place, and hence it could not be said that the alteration was material. See, also, *Pritchard v. Smith*, 77 Ga. 463.

The following have been held to be material alterations: The addition of the words "or bearer" were added to a note after the name of the payee (*McCauley v. Gordon*, 64 Ga. 222, 37 Am. Rep. 68); the insertion of the name of a bank as the place of payment and 6 per cent. as the rate of interest (*Gwin v. Anderson*, 91 Ga. 827, 18 S. E. 43). On the question of burden of proof, see *Wheat v. Arnold*, 36 Ga. 479; *Thrasher v. Anderson*, 45 Ga. 538, 544; *Winkles v. Guenther*, 98 Ga. 472, 25 S. E. 527.

In some of the earlier decisions it was held that, where a note not before witnessed was attested by a person not present at the signing, the attestation was a material alteration of the contract and destroyed its validity. But these decisions were put upon the ground that a note not witnessed was barred by the statute of limitations sooner than one thus attested, and that for this reason the paper as altered was a different contract from the one executed. See *Smith v. Durham*, 8 Pick. (Mass.) 246; *Brackett v. Mountfort*, 11 Me. 115; *Homer v. Wallis*, 11 Mass. 309, 6 Am. Dec. 169. In later cases it was held that such an alteration would not void the contract unless it was fraudulently made, with a view of obtaining some improper advantage. *Adams v. Frye*, 3 Metc. (Mass.) 103; *Milbery v. Storer*, 75 Me. 69, 46 Am. Rep. 361; *Church v. Fowle*, 142 Mass. 12, 6 N. E. 764; *Ford v. Ford*, 17 Pick. (Mass.) 418. In two early cases in Pennsylvania it seems to have been held broadly that the addition of the name of a witness for the purpose of authenticating a contract, the witness not being present at the execution, would invalidate the writing. *Marshall v. Gougler*, 10 Serg. & R. (Pa.) 164; *Henning v. Werkheiser*, 8 Pa. 518. In an early North Carolina case it was held that the mutilation of a note by cutting off the name of an attesting witness was a material alteration which would vitiate the note. *Sharp v. Bagwell*, 16 N. C. 115. In *Fuller v. Green*, 64 Wis. 169, 24 N. W. 907, 54 Am. Rep. 600, a decision rendered in 1885, it was held: The "affixing" of "the name of an attesting witness to a promissory note is not a material alteration." In the opinion it was said: "The affixing of the name of Fredericks as an attesting witness to the note in question does not change the liability of the maker thereof

in any respect. It has no effect in extending his liability under the statute of limitations, nor does it under our laws facilitate or interfere in any way with its proof. Under our law the production of the note proves its execution, unless the signature be first denied under oath by the maker. When there is no dispute as to the genuineness of the maker's signature, and therefore no necessity for the person claiming under it making proof of its execution, the fact that the note has or has not an attesting witness is wholly immaterial." See *Mersman v. Werges*, 112 U. S. 139, 5 Sup. Ct. 65, 28 L. Ed. 641, where it was held that the addition of the signature of a surety to a promissory note without the consent of the maker does not discharge him, since the ultimate liability of the maker was neither increased nor diminished by the alteration. See, also, *Ogden on Negotiable Instruments*, § 144; *Joyce on Defenses to Negotiable Paper*, § 177.

In this state a mortgage is good inter partes, without any witness, and the only purpose of having an official witness to such a paper is to admit it to record. *Smith v. Camp*, 84 Ga. 117, 10 S. E. 539; *Benton v. Baxley*, 90 Ga. 296, 15 S. E. 820. As between the parties it is wholly immaterial whether the mortgage is admissible to record or not. Even if in the present case the mortgagee held the burden of showing that the so-called alteration was innocently made, and even if the evidence sufficiently shows that it was made at the instance of the mortgagee, the finding of the jury cannot be sustained because the addition of the name of the subscribing witness was wholly immaterial as between the parties to the instrument; the execution of the mortgage having been admitted. The liability of the mortgagor was in no wise changed, nor could it have been affected in any way by the attestation. If the mortgagee agreed to withhold the mortgage from record, and the agreement was valid as having all the elements of a contract, and the mortgagor was damaged by its breach, he might recover damages in a suit brought for that purpose, or he might in equity, if there was a sufficient reason for so doing, set off his damages against the mortgage foreclosure. But the mere addition of the name of the subscribing witness, even without the consent of the mortgagor, and even though the attestation itself was invalid because the maker did not sign in the presence of the witness, was not a material alteration of the mortgage as would invalidate it under our Code. On this issue a verdict should have been directed in favor of the plaintiff, and the instructions complained of were erroneous.

[2] 2. We think the court erred also in holding that the description of the property contained in the mortgage was too indefinite. The maxim, "That is certain which can be made certain," was applicable, and it was competent to aid by parol the indefinite and

uncertain description in the mortgage of "all my shop tools and fixtures in my possession." See *Pepper v. James*, 7 Ga. App. 518, 67 S. E. 218.

The court erred in overruling the motion for a new trial. Judgment reversed.

(13 Ga. App. 35)

BUTLER et al. v. FIRST NAT. BANK OF GREENVILLE, TENN. (No. 4,637.)

(Court of Appeals of Georgia. June 10, 1913.)

(Syllabus by the Court.)

1. BILLS AND NOTES (§ 480*)—ACTION BY INDORSEE—PROOF OF INDORSEMENT—PLEA.

Where plaintiff sues as the indorsee of a negotiable note, and then introduces the note in evidence, with the indorsement of the payee regularly written thereon, he is not required to prove the execution of the indorsement, unless the defendant has filed a plea of non est factum as to the indorsement. Civil Code 1910, § 4299; *Gray v. Oglesby*, 9 Ga. App. 358, 71 S. E. 605.

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. §§ 1526-1529; Dec. Dig. § 480.*]

2. BILLS AND NOTES (§ 480*)—ACTION BY INDORSEE—PLEA OF NON EST FACTUM.

A plea denying the allegation of the petition that plaintiff is the bona fide holder of the note, for value and before maturity, is not the equivalent of a plea of non est factum as to the indorsement, although such plea is sworn to.

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. §§ 1526-1529; Dec. Dig. § 480.*]

3. BILLS AND NOTES (§§ 370, 497*) — BONA FIDE HOLDER—DEFENSE—PRESUMPTION.

A bona fide holder of a negotiable promissory note, purchased for value and before maturity, is protected against a defense that the note was without consideration; and where a negotiable note payable at a future date is indorsed by the payee to the plaintiff, in the absence of proof to the contrary, the law will presume that the plaintiff took before maturity, for value, and without notice. Civil Code 1910, § 4288; *Morgan v. Cedar Rapids Bank*, 7 Ga. App. 699, 67 S. E. 1048.

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. §§ 963, 1448, 1675-1681, 1683-1687; Dec. Dig. §§ 370, 497.*]

4. BILLS AND NOTES (§ 537*)—ACTION—TRIAL—DIRECTION OF VERDICT.

Where the maker's only defense to a negotiable note was a denial of the allegation that the plaintiff was in good faith the purchaser of the note for value and before maturity, and there was no evidence to sustain the plea, on the introduction of the note in evidence, showing the transfer to the plaintiff regularly written thereon by the payee, there was no error in directing a verdict for the plaintiff. *Parr v. Erickson*, 115 Ga. 873, 42 S. E. 240.

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. §§ 1862-1893; Dec. Dig. § 537.*]

5. INTEREST (§ 17*)—ON INSTALLMENTS OF INTEREST.

Where the note, as in the present case, stipulates that the interest shall be paid annually, this stipulation renders the past-due interest a liquidated demand, which itself bears interest. *Union Savings Bank v. Dottenheim*, 107 Ga. 606, 614, 34 S. E. 217; *Ellard v. Scottish Mort. Co.*, 97 Ga. 329, 22 S. E. 893; *Till-*

man v. Morton, 65 Ga. 386; *Merck v. Am. Freehold Land Mort. Co.*, 79 Ga. 213, 7 S. E. 265.

[Ed. Note.—For other cases, see Interest, Cent. Dig. §§ 30, 31; Dec. Dig. § 17.*]

Error from City Court of Zebulon; E. F. Dupree, Judge.

Action by the First National Bank of Greenville, Tenn., against E. L. Butler and others. Judgment for plaintiff, and defendants bring error. Affirmed.

B. H. Manry and Henry O. Farr, both of Barnesville, for plaintiffs in error. C. J. Lester, of Barnesville, for defendant in error.

HILL, C. J. Judgment affirmed.

(13 Ga. App. 15)

MOORE v. STATE. (No. 4,800.)

(Court of Appeals of Georgia. June 25, 1913.)

(Syllabus by the Court.)

1. LARCENY (§ 40*)—IDENTITY OF PROPERTY—SUFFICIENCY OF EVIDENCE.

A conviction of theft of property described in the indictment as "one set of single black-leather buggy harness" is not supported by proof of the larceny of a set of harness not in any way identified in the evidence as being either black in color or made of leather. The mere fact that the prosecutor identified the harness found by him in the possession of the accused as the harness he had lost could not serve to identify it as the harness described in the indictment, in the absence of testimony indicating that the harness lost and the harness recovered was black leather, buggy harness.

[Ed. Note.—For other cases, see Larceny, Cent. Dig. §§ 102-126, 160; Dec. Dig. § 40.*]

2. LARCENY (§ 40*)—IDENTITY OF PROPERTY—PLEADING AND PROOF.

Though, in an indictment charging larceny, minute description of the property alleged to have been stolen may not be necessary in the first instance, the description as alleged must be proved, whenever a failure of the evidence to conform with the descriptive averments might tend to put the accused again in jeopardy for the same offense.

[Ed. Note.—For other cases, see Larceny, Cent. Dig. §§ 102-126, 160; Dec. Dig. § 40.*]

Hill, C. J., dissenting.

Error from Superior Court, Mitchell County; Frank Park, Judge.

Sam Moore was convicted of simple larceny, and brings error. Reversed.

J. J. Hill, of Pelham, and E. E. Cox, of Camilla, for plaintiff in error. J. H. Tipton, Sol. Gen., pro tem., of Sylvester, and R. C. Bell, Sol. Gen., of Cairo, for the State.

RUSSELL, J. [1, 2] The defendant was indicted for simple larceny. In the indictment it was alleged that he had stolen, of the personal goods of J. G. Hare, "one set of single black-leather buggy harness." On the trial it appeared that the prosecutor hitched his mule under the shed of a ginhouse in the town of Pelham. When he came back to get his mule, after dark, he found that all the harness had been taken off her, except the collar. The collar was still upon the mule.

A week later, on coming back to the town of Pelham, he received information that the defendant had been seen with a part of a set of harness like the one which had been taken from his mule. In company with two policemen, he went to the home of the defendant, and told the defendant that they were looking for a part of a set of buggy harness, and wanted to search his house. The defendant readily assented to this, and took the party into a room where he showed them, lying on a pile of cotton seed, that part of the set of harness which he had. The bridle was not with that part of this harness, and, after the prosecutor described the bridle, the defendant stated that it was hanging on the fence in his lot, though he had changed the bits. The defendant stated that he had bought the harness from another negro; and, according to the prosecutor, he did not try to hide the harness, but readily showed it to the party as soon as they asked for it. The testimony of one of the policemen, as to the finding of the harness and the willingness of the accused to produce them, corresponded with that of the prosecutor. The defendant introduced three witnesses who swore they were present at the time he purchased the harness and saw him pay for it; and the defendant, in his statement, gave substantially the same account of the origin of his possession. The jury found the defendant guilty; and, the court having overruled the defendant's motion for a new trial, the writ of error brings the case to this court for review.

The only question presented is whether the property recovered by the prosecutor was sufficiently identified by the evidence as the property described in the indictment; for, while it is impossible for us not to entertain grave doubts of the defendant's guilt of larceny (even though he be guilty of the statutory offense of receiving stolen goods), still the verdict of the jury upon this point is conclusive.

We pass by the point insisted upon by counsel for the plaintiff in error, that, as it is undisputed that the collar was not stolen, the proof fails to show the theft of a set of harness; for, in our opinion, the accused, under an indictment charging a theft of a whole set of harness, could be convicted, if it clearly appeared that he stole only a part of the set, just as one charged with the theft of property alleged to be worth \$100 could be convicted if it appeared upon the trial that the property in question was worth but \$75. But since it nowhere appears in the evidence that the harness of which the accused was in possession was either single harness, black harness, or leather harness, we do not think the mere evidence that the prosecutor lost and recovered *some* harness, which, so far as it appears from the evidence, may have been part of a set of double harness, or may have been tan colored, or even made of cotton or hemp, sufficiently conforms

to the descriptive averments of the indictment to authorize a conviction. Under a rule well settled, and frequently stated by the Supreme Court, the state simply failed to carry the burden devolving upon it of proving the material averments of the indictment as laid. In *Johnson v. State*, 119 Ga. 257, 45 S. E. 960, the judgment of the lower court, refusing a new trial, was reversed (though the Supreme Court held that the indictment was not subject to demurrer), because the indictment charged the defendant with stealing "one hundred and twenty dollars in paper money, to wit, two twenty dollar bills, five ten dollar bills, and six five dollar bills," meaning thereby, under the decision in the *Allen Case*, 86 Ga. 399, 12 S. E. 651, that the money stolen was bank bills, and the testimony failed to show whether the money was greenbacks, treasury notes, bank bills, or gold or silver certificates. The prosecutor swore he did not know to which class of paper money the \$120 (which was stolen from him and which he recovered) belonged. See, in this connection, *Crenshaw v. State*, 64 Ga. 449; *Thompson v. State*, 92 Ga. 448, 17 S. E. 265; *Berry v. State*, 92 Ga. 47, 17 S. E. 1006; *Haupt v. State*, 108 Ga. 58, 34 S. E. 313, 75 Am. St. Rep. 19; *Hardy v. State*, 112 Ga. 18, 37 S. E. 95; *Paulk v. State*, 5 Ga. App. 573, 63 S. E. 659.

The Solicitor General relies upon the rulings in *Crawford v. State*, 94 Ga. 772 (2), 21 S. E. 992, *Williams v. State*, 61 Ga. 417, 34 Am. Rep. 102, and *Patterson v. State*, 122 Ga. 587 (4), 50 S. E. 489, in support of the proposition that the proof sufficiently conformed to the descriptive averments of the indictment to authorize the conviction of the defendant. The cases of *Crawford* and *Williams*, *supra*, were cases involving the violation of the statute forbidding the carrying of concealed weapons. These rulings are not in point, because it is readily to be seen that in carrying out one of the main purposes of the statute against carrying deadly weapons concealed, to wit, the preservation of the public peace, and incidentally the protection of human life, it is important that it shall be applied to the carrying of an inefficient pistol as well as to the carrying of one which is thoroughly effective and of the latest improved model. One who is carrying a broken pistol may know it is harmless; but, if he should have a difficulty with another person, the latter, in all probability, would not know that the pistol could not shoot, and, for this reason, if he saw the carrier of the pistol with it in a threatening attitude, he might, as a matter of self-preservation, commit some act which he otherwise would not. The ruling in *Patterson v. State*, *supra*, is not in conflict with any of the decisions we have cited above; for, though the proof in *Patterson v. State* showed that the case and the works of the watch alleged to have been stolen had been temporarily separated by the

jeweler who was repairing it, the accused took both the watch and the case, and therefore the proof of the property taken conformed with the descriptive averments of the indictment, which was "one double-case silver watch."

Any confusion which exists in the case now before us is due to the fact that the prosecutor more than once testified that the harness he recovered was the same as that which he lost; and, as is natural, the mind seeks the description furnished by the indictment, to ascertain the character of the harness alleged to have been stolen. However, the proposition that the allegations of the indictment are not evidence is so elementary and palpable as to make even a statement to this effect superfluous; and yet there is nothing in this record which shows what kind of harness was stolen, except the description contained in the indictment. It is true the prosecutor says the harness recovered was identical with the harness he had lost. But he does not say that the harness he lost was a single harness, black harness, or leather harness. It might have been sufficient if the state had described the stolen property simply as a "set of harness," though we are inclined to the opinion that in that event the defendant might by demurrer have demanded a fuller description. But certainly, having elected to identify the harness by terms of description, the state was required to prove the marks of identification which it had itself selected. "Where there is a necessary allegation which cannot be rejected, yet the pleader makes it unnecessarily minute in the way of description, the proof must satisfy the description as well as the main part, since the one is essential to the identity of the other." Bishop's Crim. Pl. §§ 324, 325.

In *Johnson v. State*, 127 Ga. 277, 56 S. E. 420, the accusation charged the defendant with unlawfully assaulting and beating the person of one B. with a pocket knife. The evidence showed that the accused tore B.'s clothing and held him with his left hand (thus committing the offense of assault and battery), but did not strike him with a knife; and the Supreme Court held that the evidence did not authorize a finding that the defendant was guilty of the offense of assault and battery. The ruling was based upon the decision in *Fulford v. State*, 50 Ga. 591, in which Judge McCay, after quoting the rule as laid down in *Starkie on Evidence*, and by Bishop, Chitty, and Phillips, holds that averments of an indictment may be rejected as surplusage only when they concern facts disconnected with the offense. To the same effect was the prior ruling of the Circuit Court of the United States in *U. S. v. Brown*, 3 McLean, 233, Fed. Cas. No. 14,666. In that case the indictment charged the postmaster with stealing a letter containing certain bank notes. It was held that the averments as

to the bank notes might have been omitted, and that the offense could have been properly charged without those words, but that, being in, they must be proved. In the *Fulford* Case Judge McCay says: "Take this case. It was not necessary that the pleader should have stated the acts of the defendant which constituted his 'aiding and abetting,' or to define how it was done. The 'aiding and abetting' was an essential averment. The defendant was charged with so doing 'by pushing, striking, assaulting and threatening the said J. A. Conway.' He was put on notice that it would be proved on him that he did these things. He proposes to meet the charge and show that he did not push, strike, assault, or threaten the said Conway. The aiding and abetting may be made out by proving may other ways in which it may be done, totally foreign to those set forth in the indictment. The prosecution, knowing this, proposes to strike out all these descriptive averments and leave an open field for any and all proof of any and all forms or ways in which the aiding and abetting may be shown. This would be permitting a defendant to be called upon to meet a charge specifically made in one form and then to allow him to be convicted by a change of the indictment on proof of acts totally distinct from those of which he was notified."

In the case at bar the defendant was called upon to meet the charge of stealing a set of single, black leather harness. Construing the evidence most favorably to the state, he is convicted of stealing some harness, which, so far as appears from the record, may be double, white cotton harness; and, as was said by Judge McCay in the *Fulford* Case, supra, "we do not think it can be done on principle or authority."

Judgment reversed.

HILL, C. J. (dissenting). I think the set of harness, as described in the indictment, was sufficiently identified by the evidence. There was no variance between the description given of the harness in the indictment and the description in the evidence, and there could be no reasonable mistake as to the identity.

(12 Ga. App. 32)

MOORE v. STATE. (No. 4,910.)

(Court of Appeals of Georgia. June 25, 1913.)

(Syllabus by the Court.)

APPEAL AND ERROR (§ 627*) — DELAY IN TRANSMISSION—DISMISSAL.

Since it appears that the clerk of the trial court failed to transmit to the Court of Appeals, within the time prescribed by law, the bill of exceptions and a transcript of record, and it appearing that the attorney for the plaintiff in

error directed and procured the delay in transmission, the writ of error must be dismissed.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2744-2749, 3126; Dec. Dig. § 627.*]

Error from Superior Court, Laurens County; J. H. Martin, Judge.

Freeman Moore was convicted of crime, and brings error. Writ of error dismissed.

T. E. Hightower, J. B. Green, and H. P. Howard, all of Dublin, for plaintiff in error. E. L. Stephens, Sol. Gen., of Wrightsville, for the State.

RUSSELL, J. There is a motion to dismiss the writ of error because the bill of exceptions and transcript of record were not transmitted by the clerk of the trial court within the time prescribed by law. The case is clearly within the rulings of the Supreme Court in Brunswick Book Co. v. Torsch, 112 Ga. 537, 37 S. E. 737; Wheeler v. Crawford, 135 Ga. 148, 69 S. E. 22; Wilson v. State, 124 Ga. 80, 52 S. E. 81; Budden v. Brooks, 123 Ga. 832, 51 S. E. 727; Earnhart v. A. & W. P. R. Co., 133 Ga. 59, 65 S. E. 138; Wheeler v. Mozley, 136 Ga. 586, 71 S. E. 790, and the decisions of this court in Easterling v. State, 9 Ga. App. 464, 71 S. E. 774, and De Loach v. Kicklighter, 11 Ga. App. 74, 74 S. E. 717, all of which are based upon the provisions of the Civil Code 1910, §§ 6185, 6186, the latter reading: "No person shall be entitled to the benefit of the provisions of the preceding section, who by his own act or that of his counsel, has been the cause of the delay or failure to send up said bill of exceptions or a copy of the record, by consent, direction, or procurement of any kind."

In the present case the clerk of the trial court certifies that the counsel for the plaintiff in error objected to his sending up in the transcript the parts of the record that he had, because certain other parts were lost. There was no effort by counsel for the plaintiff in error to establish copies of the lost originals. We are always extremely reluctant to dismiss a writ of error. In the opinion of this court it is far preferable to deal with the merits of every case if from the bill of exceptions or the record, or both together, the court can understand the point upon which an adjudication is asked. In the present case, however, we dismiss the writ without qualms or compunction, because the only point insisted upon in the brief of counsel for the plaintiff in error is an alleged error in overruling a motion for continuance, in which it was not made to appear to the lower court that the continuance was not asked for the purpose of delay. And, even if the showing was not subject to even that fatal defect, it does not appear prima facie to have been otherwise meritorious.

Writ of error dismissed.

(13 Ga. App. 31)

GRUBBS v. STATE. (No. 4,863.)

(Court of Appeals of Georgia. June 25, 1913.)

(Syllabus by the Court.)

1. HOMICIDE (§ 200*)—DYING DECLARATIONS. Where, about 20 or 30 minutes after the decedent had been shot in the stomach with a pistol, he was heard to be moaning and praying, "Lord, have mercy on me!" and "Lord, help me!" and was asked who shot him, and in reply stated that the accused shot him, and he died in 15 or 20 minutes after making this statement, praying up to the time of his death, the statement thus made by the decedent was prima facie a dying declaration, and was properly allowed to go to the jury. In the present case, however, it was immaterial, as the accused admitted that he did shoot the decedent with a pistol.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. §§ 425-427; Dec. Dig. § 200.*]

2. HOMICIDE (§ 309*)—INSTRUCTIONS—EVIDENCE—VOLUNTARY MANSLAUGHTER.

The evidence for the state demanded a conviction of murder. There was no evidence in behalf of the accused, and the jury could have inferred, from the statement made by him, that he shot the decedent in self-defense. There was no theory of the evidence or of the statement upon which the verdict of voluntary manslaughter could have been founded; and, following the repeated decisions of the Supreme Court and of this court, a charge on the law of voluntary manslaughter was not authorized. The verdict must therefore be set aside as contrary to law.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. §§ 649, 650, 652-655; Dec. Dig. § 309.*]

Error from Superior Court, Jenkins County; B. T. Rawlings, Judge.

Simmy Grubbs was convicted of murder, and brings error. Reversed.

A. S. Anderson and Chas. G. Reynolds, both of Millen, for plaintiff in error. R. Lee Moore, Sol. Gen., of Statesboro, for the State.

HILL, C. J. Judgment reversed.

(13 Ga. App. 63)

MANGUM et al. v. MANOS. (No. 4,848.)

(Court of Appeals of Georgia. July 8, 1913.)

(Syllabus by the Court.)

HUSBAND AND WIFE (§ 235*)—CONTRACTS—SURETYSHIP—INSTRUCTIONS.

This was a suit upon a contract of lease, against a husband and wife as joint makers. The wife pleaded that she signed the contract as surety for her husband. There was sufficient evidence to authorize a finding that she executed the contract as a principal. The trial judge distinctly instructed the jury that under the law of this state a married woman cannot become security or bind her estate by any contract of suretyship, and that if they should believe that the wife was a surety, and not a principal, upon the contract sued on, she would not be liable, and they should so find. This instruction sufficiently covered the issue involved; and if a more specific charge was desired, it should have been requested in writing. The evidence authorized the verdict.

[Ed. Note.—For other cases, see Husband and Wife, Cent. Dig. §§ 589, 549-552, 982; Dec. Dig. § 235.*]

Error from City Court of Atlanta; H. M. Reid, Judge.

Action by Jim Manos against Susie Mangum and others. Judgment for plaintiff, and defendants bring error. Affirmed.

Jno. A. Boykin, of Atlanta, for plaintiffs in error. W. O. Wilson, of Atlanta, for defendant in error.

POTTLE, J. Judgment affirmed.

(13 Ga. App. 79)

CRAFT v. STATE. (No. 4,968.)

(Court of Appeals of Georgia. July 8, 1918.)

(Syllabus by the Court.)

ADULTERY (§ 12*) — MARRIAGE — EVIDENCE — SUFFICIENCY.

Under the ruling in *Zackery v. State*, 6 Ga. App. 104, 64 S. E. 281, the evidence in the present case was not sufficient to show that the female with whom the accused was alleged to have committed adultery was a married woman.

[Ed. Note.—For other cases, see *Adultery*, Cent. Dig. §§ 24-27; Dec. Dig. § 12.*]

Error from City Court of Hall County; G. A. Johns, Judge.

Tobe Craft was convicted of crime, and brings error. Reversed.

Johnson & Johnson, of Gainesville, for plaintiff in error. A. C. Wheeler, Sol., of Gainesville, for the State.

POTTLE, J. The only evidence that the woman was married consisted of testimony that, about a year before the act took place, she said she was married, and of general statements from witnesses that she had the reputation of being married, having for some time, previous to about a year before the criminal act was alleged to have been committed, lived with a man who had since left for parts unknown. Under the ruling in the case cited in the headnote, the conviction was not authorized.

Judgment reversed.

(13 Ga. App. 80)

McGARR v. STATE. (No. 4,971.)

(Court of Appeals of Georgia. July 8, 1918.)

(Syllabus by the Court.)

LANDLORD AND TENANT (§ 253*) — SALE BY CROPPER.

The evidence was not sufficient to support the conviction.

[Ed. Note.—For other cases, see *Landlord and Tenant*, Cent. Dig. §§ 1031-1033; Dec. Dig. § 253.*]

Error from Superior Court, Tattnall County; W. W. Sheppard, Judge.

Forest McGarr was convicted of disposing of a portion of his crop without his landlord's consent, and brings error. Reversed.

H. H. Elders, of Reidsville, for plaintiff in error. N. J. Norman, Sol. Gen., of Savannah, for the State.

POTTLE, J. The conviction of the accused has resulted in a miscarriage of justice, which we can correct without in any wise interfering with the well-established rule that the reviewing court cannot disturb a finding of fact which is supported by any evidence.

The accused was convicted of violating section 729 of the Penal Code of 1910, by disposing of a portion of the crop without the landlord's consent and before paying him in full for advances made to aid in making the crop. The landlord advanced \$200 during the year. After the maturity of the crop repayments were made, and in December the landlord claimed a balance of \$67.42. On cross-examination he testified: "After the division of the fodder, corn, and cotton seed, that left me and the defendant even." There was a dispute between them, and arbitrators were selected to adjust it. The arbitrators say, but the landlord denies, that he stated to them that the only matter in controversy between him and his cropper was a mule, and that when this was adjusted the cropper would owe him nothing. The arbitrators awarded the mule to the landlord, and the cropper acquiesced. Thereafter the cropper sold a small quantity of cotton seed grown on the landlord's premises, estimated by the landlord to be worth \$8 or \$10. After the sale, to settle the dispute, the cropper offered the landlord \$2 for his part of the seed, and the landlord refused to accept it. The next day the accused offered the landlord the amount claimed by him to be due him from the seed. The landlord accepted it and agreed for the cropper to keep the balance. This is the state's case.

Without in any wise intending to reflect on the jury, or on the trial judge who reviewed their finding, we cannot refrain from expressing surprise that a conviction could be had or allowed to stand under the evidence disclosed by the record. The gist of the offense was the sale of the crop before settling in full with the landlord, and before he received his part of the crop, and without his consent. Here, under the landlord's own admission, while he did not expressly authorize the sale in the first instance, he did subsequently consent to it and accepted his half of the proceeds. It is shocking to common justice to allow him to prosecute the cropper to conviction after ratifying the sale and taking his half of the money. Having received the fruits of and ratified the sale, the law indulges the inference of consent in the first instance. While fraudulent intent is not an element in this offense, the wrong to the landlord and the offense against the state are identical. If there has been no

wrong to the landlord, there has been no crime committed against the state.

Without discussing other questions which might arise, we hold, on the point under consideration, that proof of a sale by a cropper of a part of the crop raised by him, without the landlord's express consent, and before payment in full for advances made to the cropper by the landlord, will not authorize a conviction, where the landlord makes no objection to the sale, ratifies it after it is made, and, before any prosecution is instituted, accepts the proceeds of the sale from the cropper. Criminal laws were intended to punish criminal offenders, and here the essential elements of a crime are wanting.

Judgment reversed.

(13 Ga. App. 79)

MEEKS v. MAYOR, ETC., OF CARROLLTON. (No. 4,958.)

(Court of Appeals of Georgia. July 8, 1918.)

(Syllabus by the Court.)

INTOXICATING LIQUORS (§ 236*) — ILLEGAL SALE—EVIDENCE.

The evidence was sufficient to authorize a finding that the accused stored two barrels of intoxicating liquor, in which he was interested either as owner or agent, in a house in the country, and that he removed from one of the barrels several bottles of whisky and carried them to a house in the city. No sale was shown, but the secretive methods employed by the accused, and the circumstances surrounding the transaction, in connection with the fact that unusual numbers of persons were seen to go into his house and sometimes return with packages, warranted the inference that he brought the liquor into the corporate limits of the city for the purpose of illegal sale, and justified his conviction of the violation of a municipal ordinance charging that offense.

[Ed. Note.—For other cases, see Intoxicating Liquors, Cent. Dig. §§ 300-322; Dec. Dig. § 236.*]

Error from Superior Court, Carroll County; R. W. Freeman, Judge.

A. J. Meeks was convicted of selling liquors in violation of an ordinance of the City of Carrollton, and brings error. Affirmed.

J. O. Newell, of Carrollton, for plaintiff in error. C. E. Roop, of Carrollton, for defendant in error.

POTTLE, J. Judgment affirmed.

(13 Ga. App. 66)

DANIELS v. STATE. (No. 4,896.)

(Court of Appeals of Georgia. July 8, 1918.)

(Syllabus by the Court.)

INTOXICATING LIQUORS (§ 236*) — ILLEGAL SALE—EVIDENCE.

No error of law is complained of, and the jury were authorized to infer guilt from the undisputed facts.

[Ed. Note.—For other cases, see Intoxicating Liquors, Cent. Dig. §§ 300-322; Dec. Dig. § 236.*]

Russell, J., dissenting.

Error from Superior Court, Worth County; Frank Park, Judge.

Gus Daniels was convicted of selling intoxicating liquors, and brings error. Affirmed.

Perry, Foy & Monk, of Sylvester, for plaintiff in error. R. C. Bell, Sol. Gen., of Cairo, for the State.

HILL, C. J. Plaintiff in error was convicted of the offense of selling intoxicating liquor, and, his motion for a new trial, based upon the general grounds alone, being overruled, he brings error. The evidence is very brief, and is as follows: The first witness for the prosecution, who was a police officer, testified that he saw the accused go out of the back door of a store, "and take from his bosom a pint of whisky and deliver it to Homer Strong, and I saw Homer Strong deliver the defendant 75 cents in money. I arrested defendant, and found on him five pints of whisky like that delivered to Homer Strong; it was at night, and I was standing about 30 feet away." Homer Strong, being introduced by the state, testified as follows: "I remember the occasion testified about by Mr. Crow, and it is true that the defendant delivered to me a pint of whisky, and I delivered him 75 cents in money. Defendant gave me the whisky, however, and afterwards, while I was standing there, I paid him 75 cents that I owed him for borrowed money which he had lent me about a month before that time. Defendant knew at the time that the money I gave him was to pay him the debt I owed him for borrowed money; he asked me if I could pay him the money I owed him and I taken the money from my pocket and gave it to him." This was all the evidence, and the accused made no statement to the jury. While the general rule is that the jury should not arbitrarily refuse to believe the evidence of an unimpeached witness, in the absence of conflict, yet a witness may be impeached by the unreasonableness of his evidence, or by proper inference drawn from his evidence of the existence of a mere pretext or subterfuge. Here the repayment of the loan coincident with the receipt of the pint of whisky is calculated to raise more than a grave suspicion of the existence of a subterfuge, and that the witness was endeavoring to shield the accused. Indeed it strongly suggests a transparent pretext. Courts will not encourage criminal ingenuity by accepting as the truth of a transaction a statement which constitutes a reasonable foundation for an inference that the statement is a mere pretext for the purpose either of evading the law or of protecting another in its violation. We cannot say that the practical sense of the jury was not wisely exercised, under the facts of the present case, and that the statement made by the second witness was not too great a tax

upon their credulity. An explanation of this character should not be readily accepted as sufficient to remove the inference of guilt arising from unusual and most suspicious circumstances. If it should be accepted as sufficient, the door would be opened wide for those who violate the prohibition law in the sale of liquor to escape. The evidence of the witness that the 75 cents was the repayment of a debt, and not a payment for the pint of whisky, strongly suggests afterthought. It also seems to be unreasonable that the accused should be carrying around concealed on his person pints of whisky for the purpose of presenting them to his friends. The fact that they were concealed is a strong indication that his purpose was to sell, and not to make gifts. The jury saw the witness and heard the testimony, and the trial judge approved the verdict. A majority of this court is not willing to hold that the jury's deduction of guilt from the suspicious circumstances surrounding the conduct of the accused was not warranted, and the judgment is therefore affirmed.

RUSSELL, J., dissents.

(18 Ga. App. 35)

LUKE v. LIVINGSTON. (No. 4,296.)

(Court of Appeals of Georgia. July 8, 1913.)

(Syllabus by the Court.)

APPEAL AND ERROR (§§ 663, 1002*)—GAMING (§ 49*)—REVIEW—CONFLICTING EVIDENCE—CERTIFICATE OF JUDGE.

The evidence authorized the verdict, and there was no material error on the trial.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2853-2855, 3935-3937; Dec. Dig. §§ 663, 1002.* Gaming, Cent. Dig. §§ 100-102; Dec. Dig. § 49.*]

Error from City Court of Ocilla; H. E. Oxford, Judge.

Action by J. K. Livingston against J. C. Luke. Judgment for plaintiff, and defendant brings error. Affirmed.

Haygood & Cutts, of Fitzgerald, for plaintiff in error. H. J. Quincey, of Ocilla, and Elkins & Wall, of Fitzgerald, for defendant in error.

RUSSELL, J. When this case was here before (Luke v. Livingston, 9 Ga. App. 116, 70 S. E. 596), this court ruled: (1) that the acceptance of an offer to sell may be shown by proof that the person to whom the offer was made had paid a portion of the purchase price, and (2) that parol evidence is competent to show that the written contract, apparently relating to an actual sale of cotton, was in fact entered into merely for the purpose of allowing the parties to deal in cotton futures, and that the transaction was not bona fide, but a speculative and gaming contract. The case afterwards went to trial upon its merits, and it appears from the

record that there was evidence that Livingston's agent paid Luke the \$1 mentioned in the contract. It is true there was positive testimony on the part of the defendant that no money whatever was paid; but, the jury having settled the truth of this matter, we must assume that the part of the purchase price to which we referred in our former decision was paid. Assuming this to be true, the only other question is whether the evidence shows that the contract was a mere subterfuge to cloak and cover an illegal transaction in cotton futures. As to this point, too, the evidence is directly in conflict, and the jury preferred the testimony of the plaintiff rather than that of the defendant. There being evidence sufficient to authorize a finding in favor of the plaintiff upon both of the vital issues in the case, this court is without jurisdiction to set aside the finding of the jury, unless the record discloses such material and prejudicial error upon the trial as to raise the inference that but for that error the verdict would have been different.

The fourth ground of the motion for a new trial was not argued in the brief of counsel for the plaintiff in error, and must therefore be treated as having been abandoned.

Error is assigned upon the refusal of the judge to charge the jury to the effect that: "The law favors compromises and settlements of disputes, and hence it is against the policy of the law to allow evidence to be given of any effort of settlement made with a view of compromise." "I therefore charge you that if it appears that any effort of settlement was made by the defendant, if it was made with a view of a compromise, you could not consider or act upon it as evidence against the party offering the compromise," without qualifying this instruction by immediately adding the following language: "If it has been admitted, it has not been admitted as an admission on the part of the defendant that he was due any amount, but merely as illustrating whether or not the defendant intended to deliver actual cotton, or illustrative whether or not it was a speculative contract or a chance in futures." It is insisted that this qualification of the charge which had been requested was erroneous because it contradicted and nullified the charge requested, and because the effect of the qualification of the charge is to allow statements made of any compromise to be received against the defendant as to the original intent with which the contract was made, and therefore as bearing upon the principal issue in the case. It is of course well settled that evidence of an effort to compromise, or testimony tending to show an attempt to compromise, is generally inadmissible, and yet we find no error in the instruction of the court in this case, because one of the main issues in the action was, What was the

intention of the parties as to actual delivery of real cotton? In other words, the jury had to determine whether it was the intention of the parties to deliver "spot" cotton, or to settle upon the basis of the difference between the market price of cotton mentioned in the contract and the market price of cotton on the date fixed by law for its delivery, and the fact that either of the parties had offered or agreed to take a sum of money in lieu of the fulfillment of the precise terms of the contract might be a circumstance from which the jury could infer that the sale of actual cotton was not intended.

The instruction of the trial judge in regard to the different modes in which Livingston might accept the contract is not erroneous, nor could the admission of the plaintiff's testimony, to the effect that in a written power of attorney he gave James authority to act for him, be prejudicial. The question between the parties in this case was, not whether Livingston's power of attorney was properly executed, according to the strictness of the law, but rather whether James was authorized by Livingston to enter into the contract with Luke, and the very fact that Livingston sued Luke upon a contract made by James in his behalf is conclusive evidence of Livingston's ratification of James' signature to the contract.

The judge declined to approve the ground of the motion for a new trial based upon the alleged absence of the judge from the courtroom during the trial, and hence this ground cannot be considered. The statements of parties contained in such a ground of a motion for a new trial cannot be ascertained by taking testimony. The judge must remember for himself what occurred, and his certificate as to what did actually occur is final.

The controlling principles involved in this case were ruled when it was heretofore before us for consideration. The jury would have been authorized to find for the defendant upon both of these issues. They preferred to give superior weight and credit to the testimony in behalf of the plaintiff; and, there being no material error of law, it cannot be held that the trial judge abused his discretion in refusing new trial.

Judgment affirmed.

(13 Ga. App. 61)

MCCORMICK v. TRIBUNE-HERALD CO.
(No. 4,844.)

(Court of Appeals of Georgia. July 8, 1913.)

(Syllabus by the Court.)

ATTACHMENT (§§ 342, 373*)—WRONGFUL ATTACHMENT—DAMAGES—REMEDY OF DEFENDANT—REMEDY OF THIRD PERSON.

The remedy of a defendant in attachment to recover actual damages is upon the attachment bond. An action of trespass cannot be maintained by such a defendant against the

plaintiff for the recovery of either actual or punitive damages, without alleging malice and want of probable cause in suing out the attachment. *Sledge v. McLaren*, 29 Ga. 64; *Wilcox v. McKenzie*, 75 Ga. 73; *Porter v. Johnson*, 96 Ga. 145, 148, 23 S. E. 123; *Fourth Nat. Bank v. Mayer*, 96 Ga. 728, 24 S. E. 453. The rule is otherwise where the party injured has no remedy upon the attachment bond, as where the goods of one person have been seized and converted or damaged, under process of attachment issued against another person. *Williams v. Inman*, 1 Ga. App. 321, 57 S. E. 1009; *Speth v. Maxwell*, 6 Ga. App. 630, 65 S. E. 580; *Maxwell v. Speth*, 9 Ga. App. 745, 72 S. E. 292. The decisions of this court do not conflict with the decisions of the Supreme Court above cited, but recognize the distinction in the rule existing between the parties to the attachment case and that between the plaintiff and a third person whose property has been seized. The decision in *Speth v. Maxwell*, supra, is, in *Maxwell v. Speth*, supra, so explained as to harmonize with the rule laid down by the Supreme Court.

[Ed. Note.—For other cases, see Attachment, Cent. Dig. §§ 1233, 1235-1237; Dec. Dig. §§ 343, 373.*]

Error from City Court of Floyd County; J. H. Reece, Judge.

Action between W. A. McCormick and the Tribune-Herald Company. From the judgment, McCormick brings error. Affirmed.

Harris & Harris and McHenry & Porter, all of Rome, for plaintiff in error. Rowell, Kelly & Davis, of Rome, for defendant in error.

POTTLE, J. Judgment affirmed.

(13 Ga. App. 61)

MAYOR, ETC., OF SAVANNAH v. DUFOUR.
(No. 4,842.)

(Court of Appeals of Georgia. July 8, 1913.)

(Syllabus by the Court.)

1. DAMAGES (§ 216*)—PERSONAL INJURIES—INSTRUCTIONS.

Where, in a suit for damages for personal injuries, it appeared from the testimony that the plaintiff caught her foot in a hole which had been negligently left exposed on a public sidewalk by the defendant municipality, as a result of which she fell, wrenched her shoulder and back, had one of her teeth knocked out, had her lips and nose cut and bruised, that several months afterward, at the time of the trial, plaintiff was still suffering from the injuries which she had received, and that her health had been impaired as a result of the injuries, and that she was unable to do her household duties, which she had been accustomed to perform before the injuries, it was not erroneous to charge the jury as follows: "She [the plaintiff] also sued for pain and suffering, which she claims to have sustained, and that she will [still] continue to endure this pain, and that her general health has been impaired. Now, that comes under the general head of pain and suffering. There is no mathematical measure given by law for this. The jury ascertains from the evidence if defendant is liable, how much pain and suffering has been undergone by plaintiff, and how much she will undergo, if the evidence discloses it. Then they will find for her what their enlightened consciences, as impartial jurors, would find from the evidence to be fairly compensatory to

her, and, at the same time, fair to the defendant." The foregoing instruction was adapted to the evidence as disclosed by the testimony of the plaintiff, and was not subject to any of the objections made thereto in the motion for a new trial.

[Ed. Note.—For other cases, see Damages, Cent. Dig. §§ 548-555; Dec. Dig. § 218.*]

2. APPEAL AND ERROR (§ 731*)—ASSIGNMENTS OF ERROR—SUFFICIENCY.

An assignment of error that the verdict is contrary to a specific charge of the court is equivalent to a complaint that the verdict is contrary to law, and raises no question for decision in the reviewing court.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3017-3021; Dec. Dig. § 731.*]

3. DAMAGES (§ 132*)—PERSONAL INJURIES—EXCESSIVE RECOVERY.

Under the testimony of the plaintiff it cannot be held that a verdict in her favor for \$1,150 is legally excessive.

[Ed. Note.—For other cases, see Damages, Cent. Dig. §§ 372-385, 396; Dec. Dig. § 132.*]

4. VERDICT SUSTAINED.

The evidence authorized a verdict.

Error from City Court of Savannah; Davis Freeman, Judge.

Action by Mrs. E. S. Dufour against the Mayor, etc., of Savannah. Judgment for plaintiff, and defendant brings error. Affirmed.

John Bourke, Jr., and David S. Atkinson, both of Savannah, for plaintiff in error. Twiggs & Gazan, of Savannah, for defendant in error.

POTTLE, J. Judgment affirmed.

(13 Ga. App. 80)

CUNNINGHAM v. STATE. (No. 4,909.)

(Court of Appeals of Georgia. July 8, 1913.)

(Syllabus by the Court.)

1. WITNESSES (§ 52*)—HUSBAND AND WIFE—COMPETENCY OF WIFE.

Where, on the trial of an accusation under section 116 of the Penal Code of 1910, which makes it a misdemeanor for a father willfully and voluntarily to abandon his child, leaving it in a dependent condition, the sole issue was as to his marriage to the mother, she was a competent witness to prove, not only the abandonment, but also the marriage. *Murphy v. State*, 50 Ga. 150.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. §§ 124, 128-136, 165, 415, 416, 417, 419, 424; Dec. Dig. § 52.*]

2. PARENT AND CHILD (§ 17*)—ABANDONMENT—PROSECUTION—EVIDENCE.

Where a marriage in this state is in question on a trial for violation of section 116 of the Penal Code of 1910, proof by one witness of the marriage in fact is sufficient, without evidence as to the authority of the person officiating, or of a compliance with the statutory requirements on the subject of marriage. *Dale v. State*, 88 Ga. 552, 556, 15 S. E. 287.

[Ed. Note.—For other cases, see Parent and Child, Cent. Dig. §§ 176-181; Dec. Dig. § 17.*]

3. SPECIFIC ERRORS OF LAW—ASSIGNMENT.

No specific error of law is complained of, and the evidence supports the verdict.

Error from City Court of Elberton; Geo. C. Grogan, Judge.

W. D. Cunningham was convicted of willfully and voluntarily abandoning his child and leaving it in a dependent condition, and he brings error. Affirmed.

Thos. J. Brown, of Elberton, for plaintiff in error. Boozer Payne, Sol., of Elberton, for the State.

Hill, C. J. Judgment affirmed.

(13 Ga. App. 47)

ROUNTREE & LEAK v. LEWIS.

(No. 4,632.)

(Court of Appeals of Georgia. July 8, 1913.)

(Syllabus by the Court.)

BROKERS (§ 42*)—RIGHT TO COMMISSIONS—REGISTRATION.

This was a suit brought by a real estate broker to recover commissions arising upon a contract to sell real estate. The undisputed evidence showed that, while the plaintiffs had paid to the tax collector the tax of \$10 imposed by Civil Code 1910, § 971, they had not registered with the ordinary of the county, as required by Civil Code 1910, § 978. *Held*, a nonsuit was properly granted. The case is fully controlled by the decision of this court in *Jord & Pruett v. Thomason*, 11 Ga. App. 359, 71 S. E. 269, and the request that this court review and overrule that decision is denied. This ruling disposes of the case, and renders unnecessary a decision on the other questions made in the bill of exceptions.

[Ed. Note.—For other cases, see Brokers, Cent. Dig. § 43; Dec. Dig. § 42.*]

Error from City Court of Thomasville; W. H. Hammond, Judge.

Action by Rountree & Leak against L. W. Lewis. Judgment of nonsuit, and plaintiffs bring error. Affirmed.

Theodore Titus, of Thomasville, for plaintiffs in error. Roscoe Luke and Louis Moore, both of Thomasville, for defendant in error.

HILL, C. J. Judgment affirmed.

(13 Ga. App. 52)

LOCKETT v. RAWLINS. (No. 4,808.)

(Court of Appeals of Georgia. July 8, 1913.)

(Syllabus by the Court.)

SALES (§ 176*)—KNOWLEDGE OF DEFECTS—WAIVER—PAYMENT OF RENEWAL OF PURCHASE—MONEY NOTE.

Ordinarily, when a purchaser pays a note with knowledge of defects in the property purchased, or renews a note with knowledge of such defects, he cannot thereafter be heard to complain of the defects as a defense. Where the note is paid or the renewal note made upon the distinct promise of the seller that he would remedy the defect if the note is paid or a renewal made, and a guaranty is given to the purchaser to remedy or repair the defects in consideration of the payment or the giving of the renewal note, this rule of law is not applicable, and the failure to keep such promise, or make good such guaranty with the purchaser, which results in injury to the maker of the re-

newal note, would constitute a good defense, either of total or partial failure of consideration, according to the facts.

[Ed. Note.—For other cases, see Sales, Cent. Dig. §§ 436-444; Dec. Dig. § 176.*]

Error from City Court of Albany; Clayton Jones, Judge.

Action by H. W. Rawlins against W. T. Lockett. Judgment for plaintiff, and defendant brings error. Reversed.

This was a suit in trover to recover possession of an automobile. The evidence, briefly stated, is as follows: Rawlins, plaintiff, sold the defendant, Lockett, an automobile. Lockett paid cash \$900, and gave Rawlins three notes of \$300 each for the balance of the purchase price. The title was reserved by Rawlins until payment of the notes. The automobile appeared to be in good condition when purchased. It "ran along all right for about 250 or 300 miles, when the engine would not run the car." This was before any of the notes had been paid. Lockett notified Rawlins of the defects in the car, and Rawlins thereupon put another engine in the car. This second engine appeared to be all right, and Lockett thought the defect was remedied, and paid the first of the notes that had become due. After the automobile had been run about the distance it had run with the first engine, the second engine broke down in the same manner as the first. As soon as Lockett discovered this he notified Rawlins, and Rawlins put another engine in the automobile. This third engine, after running about the same length of time and distance as the other two, also broke down, and Lockett refused to pay the outstanding note. Rawlins then told Lockett that he would put in another engine in place of the defective one, and would guarantee that it would make the automobile all right, provided Lockett would take up the outstanding note and give him a new note in renewal which he could put in the bank. Upon this guaranty by Rawlins, Lockett took up the outstanding note and gave a renewal note. Lockett testified positively that he was induced to give this note, notwithstanding the defects in the engine, because of the positive promise that he would put in a new engine, accompanied by his guaranty that it would be all right. In his own language: "I gave them that note after they said they would guarantee that the third engine would be all right, and because I believed they would do what they said they would and make good."

Jas. Tift Mann and Thos. H. Milner, both of Albany, for plaintiff in error. Peacock & Gardner, of Camilla, for defendant in error.

HILL, C. J. (after stating the facts as above). We think the direction of a verdict for the plaintiff under this testimony, was unauthorized. The evidence should have

been submitted to the jury. The general rule is that the giving or renewal of a note, with knowledge of defects, constitutes a waiver of such defects, or of any breach of warranty arising therefrom; but the facts in proof here make an exception to this general rule. It is true, according to the evidence, that the defects existed when the renewal note was given by the defendant, and he had knowledge of these defects; but the plaintiff promised, as a consideration for the renewal, that he would make good his warranty, and would guarantee that the defects complained of would be completely remedied, and it was on this promise and guaranty that the renewal note was made by the defendant. In *McDaniel v. Mallary Bros. Mach. Co.*, 6 Ga. App. 848, 66 S. E. 146, the second headnote states the general rule, with the exception, as follows: "Ordinarily, when a purchaser renews a note or other obligation given for the purchase price of property, and knows at the time of the renewal that the property is defective, he cannot thereafter be heard to complain of the defects as a defense. The rule is subject to exceptions, and is not applicable where a renewal note is given under such circumstances as to indicate that it was given and taken with a contrary understanding." The testimony of the defendant, above quoted, seems to us to have presented at least a partial failure of consideration, and was sufficient to have been submitted to the jury in proof of such failure of consideration, and to this extent, at least, to establish the defense relied upon. *Atlanta City St. Ry. Co. v. American Car Co.*, 103 Ga. 254, 29 S. E. 925.

Judgment reversed.

(13 Ga. App. 50)

CENTRAL OF GEORGIA RY. CO. v. WOODALL (No. 4,775.)

(Court of Appeals of Georgia. July 8, 1918.)

(Syllabus by the Court.)

1. APPEAL AND ERROR (§ 1064*)—HARMLESS ERROR—INSTRUCTIONS.

In charging the jury, the court (probably by a slip of the tongue) stated that the jury were to use the Carlisle Tables to determine the probable age of the plaintiff. It is apparent from the context that the jury should readily have understood that the court meant that the tables were to aid them in arriving at the probable duration of his life; but even if this was not true, the error was harmless.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4219, 4221-4224; Dec. Dig. § 1064.*]

2. TRIAL (§§ 191, 198*)—INSTRUCTIONS—EXPRESSION OF OPINION—GROUND FOR REVERSAL.

A leading issue in the trial was whether the plaintiff was injured at all. Error is assigned upon each of the following excerpts from the judge's charge to the jury, on the ground that each amounted to an intimation of opinion that an injury had been sustained by the plaintiff: (a) "Now, in this case the only damage alleged is the infliction of mental and physical

pain and suffering, as caused by the injury they sustained." (b) "If you believe this plaintiff, under the rules of evidence and law I have given you, and the evidence that has been adduced to you, has suffered mental and physical pain, and has been caused mental and physical pain and suffering, caused by this injury, then it will be for you to say how much the damage is." (c) "If you should find, under the rules I have given you, she was entitled to damages at the time and up to now, but that there were no future damages involved, you would find a sum for that amount; and if you should conclude, from the rules I have given you and the evidence adduced to you in the case, that she would suffer in the future, caused from this injury, then you would say what amount, and add that amount to the other amount. In other words, you will find a lump sum, if you should find for the plaintiff in the case." While it is reversible error for a judge, in charging the jury, to assume the existence of any fact which is in contest, and, under section 4863 of the Civil Code a new trial must be awarded when there is an intimation of opinion; even though the verdict be right, the foregoing excerpts whether considered alone or in connection with various other parts of the charge (in which the jury were expressly told that it was for them to determine whether the plaintiff had been injured), are not fairly subject to criticism on the ground that the judge therein expressed or even intimated the opinion that the plaintiff had in fact been injured.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 420-431, 435, 436-438; Dec. Dig. §§ 191, 193.*]

Error from City Court of Houston County; A. C. Riley, Judge.

Action by Mrs. W. A. Woodall against the Central of Georgia Railway Company. Judgment for plaintiff, and defendant brings error. Affirmed.

Ellis & Jordan, of Macon, for plaintiff in error. S. A. Nunn, of Atlanta, and Hall & Roberts, of Macon, for defendant in error.

RUSSELL, J. The plaintiff sued the Central of Georgia Railway Company for damages for personal injuries. The evidence was in conflict, but authorized the finding in favor of the plaintiff.

[1] 1. The special exceptions relate to errors in the charge of the court, which, it is insisted, require the grant of a new trial. The assignment of error predicated upon the use by the trial judge of the word *age* instead of "expectancy," is sufficiently dealt with in the headnote. It is only necessary to say that, between the two excerpts to which exception is taken, the judge made the usual explanation as to the manner in which the tables should be used to aid in making calculations, and, therefore, it is very clear that the jury understood the judge to mean *expectancy*, although he said "age."

[2] 2. The real contest in this case arises upon the point as to whether the judge, in his charge to the jury, intimated or expressed the opinion that the plaintiff had been injured. The headnote sets out each of the excerpts upon which the plaintiff in error places that construction. A reading of the

charge discloses that several times in the course of his instructions the judge told the jury that it was a question of fact, for their sole determination, as to whether the plaintiff received the injury alleged. At the close of the charge, in instructing the jury upon the subject of negligence, he again told them that it was for them to say whether the defendant exercised extraordinary care and diligence in avoiding the accident, "if you believe any was sustained." We refer to these portions of the charge merely as illustrative of any apparent ambiguity in the excerpts to which exception was taken, and to ascertain whether there is any ground for criticism of those particular excerpts. Of course, if the trial judge, in charging the jury, was guilty of an expression of opinion, or even by intimation conveyed to the jury his opinion as to a material fact in the case, it is doubtful if such error could be corrected at all. While it is reversible error for a trial judge, in charging the jury, to assume the existence of any fact which is in contest, it is perfectly plain to our minds that the reference of the judge to the injury sustained, in each of the excerpts, is qualified by the conditional statement at the beginning of each of them, "if the jury finds," or "if they believe"; and this qualifying statement controls and limits all that follows in the subsequent statement.

Judgment affirmed.

(13 Ga. App. 68)

FORD v. STATE. (No. 4,916.)

(Court of Appeals of Georgia. July 8, 1913.)

(Syllabus by the Court.)

1. CRIMINAL LAW (§ 1077*)—WRIT OF ERROR—DISMISSAL.

There is no merit in the motion to dismiss the bill of exceptions.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2718, 2719; Dec. Dig. § 1077.*]

2. CRIMINAL LAW (§ 562*)—REVIEW—SUFFICIENCY OF EVIDENCE.

It cannot be affirmed that a verdict finding one guilty of a crime is, for want of evidence, contrary to law, unless no credible evidence in support of the verdict was adduced.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1253, 1263; Dec. Dig. § 562.*]

3. CRIMINAL LAW (§ 558*)—WEIGHT OF EVIDENCE.

Jurors are the judges of the credibility of witnesses. They may wholly disregard testimony which is at variance with the universal experience of humankind, or which is contrary to and in conflict with the evidence of the human senses, but the uncontradicted testimony of an unimpeached witness should not be disregarded merely because the fact or transaction testified to by him would ordinarily be considered improbable.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 1250; Dec. Dig. § 558.*]

4. WITNESSES (§ 367*)—TESTIMONY OF DETECTIVE.

The fact that a witness is also a detective, whose payment depends upon the conviction of the accused, goes to his credibility as a circumstance to be considered by the jury in passing upon the credence to be given to his testimony, but it is nevertheless within the power of the jury to believe such a witness.

[Ed. Note.—For other cases, see *Witnesses*, Cent. Dig. §§ 1184, 1185; Dec. Dig. § 367.*]

Error from Superior Court, Worth County; Frank Park, Judge.

Joe Ford was convicted of violating the prohibitory law, and brings error. Affirmed.

Payton & Nottingham, of Sylvester, for plaintiff in error. R. C. Bell, Sol. Gen., of Cairo, for the State.

RUSSELL, J. [1] 1. A motion is made to dismiss the bill of exceptions on the ground that there is no assignment of error upon any judgment of the court, and that the defendant has not filed the affidavit in forma pauperis required by law. An inspection of the record shows that there is a proper assignment of error and exception to the judgment of the court refusing a new trial. As to the second ground of the motion it appears as a matter of fact that the defendant filed an affidavit stating that because of his poverty he was unable to pay the costs of the case, but even if this had not been done it would not have concerned the defendant in error. Questions affecting the payment of costs in the reviewing court are passed upon only when brought to the attention of the court by the clerk under the rule. It is true as insisted, that there is also an affidavit in which defendant in error alleges inability to give bond for the eventual condemnation money, but this does not affect the other affidavit in forma pauperis. There is therefore no merit in the motion to dismiss the bill of exceptions, and it is overruled.

[2] 2. The defendant was convicted in the lower court of a violation of the law prohibiting the sale of intoxicating liquors. He excepts to the judgment overruling his motion for new trial. It is insisted, in the motion for a new trial, that the testimony, taken as a whole, does not warrant the conviction of the accused. The state's witness was shown to be a loafer and a gambler, and there was evidence that he was actuated by ill will toward the accused growing out of a previous difficulty. Furthermore, the state's witness stated that he had been hired by the chief of police for the specific purpose of obtaining evidence against the accused. However, it is conceded that, the testimony of this witness, if credible, would authorize a verdict of guilty. The point is made that, under the facts appearing from the record, the jury should not have believed the witness, and for that reason the verdict was contrary to law, as being unsupported by any evidence. We have no hesitation in say-

ing that the proof was very weak, and yet we must hold that the trial judge did not err in overruling the fourth ground of the amended motion for new trial, nor in refusing to grant the motion upon general grounds. A verdict finding one accused of crime guilty cannot be said to be contrary to law for want of evidence unless there is no credible evidence in support of the jury's finding.

[4] 3, 4. This statement of the rule is not questioned in the argument for the plaintiff in error, but the point is made that in this case the evidence in support of the verdict is not credible. Of the credibility of testimony the jury are the exclusive judges. In the present case they had the right to believe the witness in spite of his admitted interest, and to attach no importance to the testimony as to his ill will toward the accused. Both circumstances went to his credit, and either might have authorized the jury to discredit his testimony. But since men very seldom prosecute their close friends, it frequently happens that one may prosecute another toward whom he entertains the unkindest of feelings, and still his testimony be true; and the bias of one who has a pecuniary interest in a conviction is to be considered by the jury in the light of the same rule. Personally, the writer would hesitate a long time before he would convict one accused of crime upon the testimony of one admitting that he had no interest in the public good, and who had procured testimony or (as in this case), manufactured a case by inducing his fellow citizen to violate one of the laws of the state; but in every such case the question of the credibility of such a witness is one addressed peculiarly to the jury. The interest of the witness goes to his credibility. If the jury believe his testimony is the truth, without regard to his interest, they are authorized to give it full credence, and it is only when the jury believes that his interest has induced him to swear falsely that they are authorized to wholly disregard it. However, the decision of this question may involve the mind of the jury in such reasonable doubt as would require an acquittal, if the case be one in which there was no other testimony than that delivered by the detective or hired witness.

It is alleged in the fourth ground of the amended motion for new trial that the character of the evidence is not such as would carry conviction to the minds of reasonable jurors, and "that at this particular time, owing to the prejudice which exists against the handling of liquors, juries are too willing to convict on the slightest circumstance accompanied by a paper called an indictment, and while it is true that this is a heinous offense, innocent people should not be convicted of violating the prohibition laws." This court can know nothing of the conditions referred to, and the contention of this

ground of the motion, therefore, can only be considered as addressed to the trial judge. He has overruled it. This court can only consider the case in the light of the ordinary rules governing the admissibility and weight of testimony, keeping in view the great underlying fact that the jury, and not the court, must determine what is the truth in every case, civil or criminal.

[3] Conceding, as ably argued by counsel for plaintiff in error, that the testimony as to the circumstances of the sale of intoxicating liquor, involved in this case, is highly improbable, still the verdict cannot for that reason be set aside. A jury may believe testimony relating to an occurrence which would ordinarily be deemed to be improbable. The first question for the jury to determine is whether the witness testifying to these facts is credible. If this question is settled in the affirmative, then testimony of a witness who is unimpeached, and whose testimony is uncontradicted by other testimony, cannot be arbitrarily disregarded by a jury merely because it is improbable. Very frequently it is the unexpected which happens. Of course, the jury is not required to believe the testimony of a witness to facts which are wholly at variance with the universal experience of mankind, or directly in conflict with human observation as derived from the five human senses. The mere fact that the occurrence which is related to have transpired did not take place in the manner usual in similar occurrences is not of itself a reason why the testimony upon that subject should be cast arbitrarily aside and disregarded.

Judgment affirmed.

(13 Ga. App. 65.)

SCOTT v. VALDOSTA, M. & W. R. CO.
(No. 4,887.)

(Court of Appeals of Georgia. July 8, 1913.)

(Syllabus by the Court.)

1. APPEAL AND ERROR (§ 1064*)—TRIAL (§ 206*)—INJURY TO PASSENGER—INSTRUCTIONS—ISSUABLE FACTS.

A trial judge may, in his discretion (and at his peril), state, in his charge to the jury, that a certain fact which is admitted or wholly undisputed has been proved; but he is not required, even though so requested, to state to the jury that an issuable fact is true, or has been sufficiently proved, even though it is undisputed in the evidence. The better practice is to allow the jury to determine even the question as to whether any issuable fact proved by either party is uncontradicted or undisputed.

(a) In stating the contentions of the parties the trial judge used the following language: "It being contended by the plaintiff that he was a passenger upon one of the trains of the defendant company." Held, that generally such language cannot be held to be erroneous or prejudicial to the plaintiff, nor, viewing this excerpt with its context in the charge in the present instance, was it prejudicial to the plaintiff, although the evidence showed without

contradiction that the plaintiff was in fact a passenger.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4218, 4221-4224; Dec. Dig. § 1064.* Trial, Cent. Dig. § 500; Dec. Dig. § 206.*]

2. TRIAL (§§ 171, 193, 206*)—DIRECTION OF VERDICT—INJURY TO PASSENGER—INSTRUCTIONS.

The requested instructions to the jury, so far as they were pertinent and legal, were sufficiently covered in the charge given, and the court could not have given the instructions in the form in which they were presented in the requests, without a palpable violation of the provisions of section 4863 of the Civil Code. It is not error for a judge, on the trial of an action to recover for damage alleged to have been caused by a railway company, to decline to instruct the jury that the company has not attempted to rebut the presumption of negligence, no matter what may be the state of the record with reference to that fact, since it is never error to refuse to direct a verdict.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 396, 436-438, 500; Dec. Dig. §§ 171, 193, 206.*]

3. TRIAL (§ 233*)—INSTRUCTIONS—CONTENTIONS OF PARTIES.

The defendant's plea was signed only by its attorney, and in one portion is subject to the construction that the defendant, if guilty of negligence at all, was only guilty of slight negligence, though in another portion of the plea all negligence was denied. Since the plea was signed by the defendant's attorneys, it was not error requiring a new trial that the court (in stating the contentions of the parties) said that "the defendant, by its attorney, further says that, if the defendant was guilty of any negligence at all, such negligence was slight negligence, and it says, further, that if the plaintiff in the case was injured at all, he was not injured with a hernia as the result of any injury received while upon the train of the defendant company, but if injured at all the injury was a slight injury." In charging the jury it is error for the court to designate mere argument of counsel as a contention of a party; but in the present case the court, in connection with the foregoing statement, referred the jury to the pleadings to ascertain the exact issues between the parties, and it is not prejudicial error for the court to state the contention of the party as being made by his attorney, if the pleadings support that statement.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 527-530; Dec. Dig. § 233.*]

4. NEW TRIAL (§ 70*)—GROUNDS—EVIDENCE.

The credibility of witnesses is so exclusively within the prerogative of the jury that, since the evidence authorized the verdict, the trial judge did not err in refusing a new trial.

[Ed. Note.—For other cases, see New Trial, Cent. Dig. §§ 142, 143; Dec. Dig. § 70.*]

Error from Superior Court, Colquitt County; W. E. Thomas, Judge.

Action by J. J. Scott against the Valdosta, Moultrie & Western Railroad Company. Judgment for defendant, and plaintiff brings error. Affirmed.

Shipp & Kline, of Moultrie, for plaintiff in error. James Humphreys and J. A. Wilkes, both of Moultrie, and E. K. Wilcox, of Valdosta, for defendant in error.

RUSSELL, J. Judgment affirmed.

(72 W. Va. 491)

CLARK v. BANK OF UNION et al.

(Supreme Court of Appeals of West Virginia.
May 13, 1913. Rehearing Denied
June 30, 1913.)

*(Synopsis by the Court.)***1. BANKS AND BANKING (§ 77*)—INSOLVENCY—ASSETS IN HANDS OF TRUSTEE.**

The liability of a bank's officers for gross neglect of duty and willful mismanagement of its affairs, and the double liability of stockholders, are both assets in the hands of the trustee of an insolvent bank, to be administered for the benefit of its creditors.

[Ed. Note.—For other cases, see Banks and Banking, Cent. Dig. §§ 165-176½; Dec. Dig. § 77.*]

2. BANKS AND BANKING (§ 77*)—INSOLVENCY—ADMINISTRATION OF ASSETS.

It is proper to administer both of said assets in a suit brought by the trustee against the bank, its stockholders and creditors.

[Ed. Note.—For other cases, see Banks and Banking, Cent. Dig. §§ 165-176½; Dec. Dig. § 77.*]

3. BANKS AND BANKING (§ 77*)—INSOLVENCY—ENFORCEMENT OF LIABILITY OF OFFICERS.

If the trustee, by his bill, does not seek to enforce the officers' liability, the defendant stockholders may do so by answers in the nature of cross-bills.

[Ed. Note.—For other cases, see Banks and Banking, Cent. Dig. §§ 165-176½; Dec. Dig. § 77.*]

4. BANKS AND BANKING (§ 77*)—INSOLVENCY—LIABILITY OF OFFICERS AND STOCKHOLDERS.

In such suit to which all the parties interested are parties, in order that the court may do complete equity, the extent of the officers' liability should be ascertained before assessing any portion of the double liability upon the stockholders.

[Ed. Note.—For other cases, see Banks and Banking, Cent. Dig. §§ 165-176½; Dec. Dig. § 77.*]

Appeal from Circuit Court, Monroe County.

Suit by R. L. Clark, Trustee, against the Bank of Union, A. E. Johnson, and others. From a decree for plaintiff, defendant Johnson and others appeal. Reversed and remanded.

John W. Arbuckle, of Lewisburg, for appellants. J. H. Crosier, of Ronceverte, R. Kemp Morton, of Charleston, T. N. Read, of Henton, and Rowan & Meadows, of Union, for appellee.

WILLIAMS, J. The Bank of Union becoming insolvent, its stockholders met on the 29th of February, 1908; and passed a resolution authorizing and empowering the president of the bank to make a conveyance of all of its assets to R. L. Clark, trustee, for the benefit of its creditors. Pursuant to the resolution, the president, on the same day, made a conveyance of all the assets to said trustee. In August following the trustee brought this suit, in the circuit court of Monroe county, making the bank, its stockholders and creditors, parties defendant to his bill. He avers the bank's insolvency, and the conse-

quent necessity of requiring the stockholders to pay a portion of their double liability in order to procure funds with which to pay the creditors. He later filed an amended bill. Among other things, he prays that the assets of the bank in his hands be collected, administered, and disbursed under the order and direction of the court, that the stockholders, who are liable, be assessed in the manner directed by law, and that a sufficient amount of money be thereby raised to pay off the indebtedness of the bank, and for general relief. A. E. Johnson, John Osborne, and a few other stockholders filed answers, in the nature of cross-bills, charging the directors and officers of the bank with gross neglect and mismanagement of the corporation's affairs, as the cause of its failure, and prayed that the amount of their liability might be ascertained and enforced. They aver that the cashier was a defaulter for a number of years prior to the bank's assignment, and that this fact was known to the directors, and charge that the directors had made no examination of the affairs of the bank from 1891 to 1905, and that they negligently permitted a system of bookkeeping which showed that the bank had on hand a surplus, when in reality there was a deficit. They also charge that the president of the bank was permitted to discount paper at the bank without security, or with less security than the by-laws of the bank allowed; that Allen Caperton, another director, was permitted to borrow large sums of money in the same manner, and to overdraw his account more than \$5,000, and that the president was permitted to indorse paper for the cashier, and the cashier for the president, with full knowledge of the directors, and in violation of the by-laws of the bank. Insolvency of the bank is not denied. The court sustained a demurrer to the original and amended bills, and held them bad in so far as they sought to enforce the double liability of the stockholders, and also sustained a demurrer to the cross-bill answers filed by A. E. Johnson, John Osborne, and others, and dismissed them. From that decree they have appealed.

When the court pronounced its decree, there was pending in the same court a suit brought by H. B. and L. B. Dunn, the two largest creditors of the bank, for the purpose of enforcing the double liability against the stockholders. These creditors had been made parties defendant to the original bill, but had not appeared. They brought their suit more than a year after the trustee's suit was brought. The same parties were parties to both suits. The trustee and a number of the stockholders filed their several pleas in abatement to the bill in the second suit, setting up the pendency of the former suit by the trustee. The court struck out these pleas, and heard the two causes together, and re-

ferred them to a master commissioner for an accounting. The decree sustaining the demurrers and dismissing the cross-bills settles the principles of the cause. It is therefore an appealable decree. What is thereafter done will only be done in carrying out or executing the court's decrees.

[1] The bank being insolvent, the double liability of the stockholders was properly enforceable by the trustee, for the benefit of the creditors, and it was error to sustain the demurrer to the trustee's bill because it sought to enforce that liability.

If the directors and officers of the bank had incurred liability on account of gross neglect and willful mismanagement of the bank's business, that liability was also an asset of the bank, enforceable by the trustee for the benefit of creditors, and it was error to dismiss the cross-bill answers of those stockholders who asked that it be ascertained and administered for the benefit of the creditors.

Both of the points, above stated, were decided by us in the recent case of *Benedum v. Bank*, 78 S. E. 656, not yet officially reported, and an elaborate discussion of them will be found in the opinion prepared by Judge Poffenbarger in that case. We, therefore, deem an extended discussion of them here unnecessary. The officers' liability is a primary asset which the bank itself, or its stockholders, may enforce, even for the benefit of the bank. The stockholders, therefore, had a right to have such liability ascertained and enforced in order that they might be relieved, pro tanto, from the payment of their double liability, which is only a secondary or conditional asset, and never enforceable by the bank for its own benefit. It becomes an asset only in case of insolvency of the corporation, and is enforceable only for the benefit of creditors.

[2, 4] Having all parties interested before it, a court of equity will generally administer complete relief. It could have done so in this case by ascertaining the extent of the directors' liability, if any in fact should be shown to exist, and applying it, together with other assets belonging to the bank, to the payment of its debts; and, if they were found to be insufficient to satisfy the creditors, the stockholders could then be assessed a sufficient amount to pay off the debts, not to exceed the par value of their stock.

Says Justice Bradley in *Graham v. Railroad Co.*, 102 U. S. 161, 26 L. Ed. 106: "When a corporation becomes insolvent, it is so far civilly dead that its property may be administered as a trust fund for the benefit of its stockholders and creditors."

The liability upon holders of bank stock, created by section 78, chapter 54, Code 1906,

serial number 2,894, commonly called their "double liability," is not an asset in the hands of a solvent, going bank. So long as a bank is doing business, and is able to pay its debts, there is no double liability upon the stockholders in favor of the bank. The bank cannot enforce it for its own purpose or benefit. But when a bank becomes insolvent, the double liability of stockholders becomes an asset, in the hands of the receiver, or trustee, and he may enforce it for the benefit of the bank's creditors. Bolles, in his recent valuable work on *Modern Law of Banking*, vol. 2, pages 821, 822, classifies both the liability of the directors for gross mismanagement, and the double liability of stockholders, as assets in the hands of an insolvent bank for the benefit of its creditors.

[3] We perceive no reason why the receiver, or trustee, of an insolvent bank, who represents both the creditors and the corporation (*Alderson on Receivers*, § 539) should not be permitted to enforce both of these liabilities for the benefit of creditors. The trustee did not ask to have the liability of the officers enforced against them, and therefore the stockholders had a right, being vitally interested, to file their answers in the nature of cross-bills praying for it to be done.

The decisions by the courts of the various states are not uniform on the question of the right of a trustee, or receiver, to enforce the double liability of stockholders. But we think the better reasoning is in favor of their right to do so, in the absence of a statute defining the manner in which it may be done. We so held in the case of *Benedum v. Bank*, supra. In addition to the authorities cited in the opinion in that case, we cite the following, supporting the proposition: *Brown v. Brink, Receiver*, 57 Neb. 606, 78 N. W. 280; *Howarth v. Angle*, 162 N. Y. 179, 56 N. E. 489, 47 L. R. A. 725; *Howarth v. Ellwanger (C. C.)* 86 Fed. 54; *Howarth v. Lombard*, 175 Mass. 570, 56 N. E. 888, 49 L. R. A. 301.

By the dismissal of their cross-bill answers, appellants were denied the opportunity to prove the alleged liability of the bank's officers. It was error to deprive them of that right.

Their cross-bills were defective for not specifically naming the officers charged with liability, but that was a formal defect, curable by amendment, and it was error to dismiss them without leave to amend.

We reverse the decrees appealed from, and remand the cause, with leave to appellants to amend their cross-bill answers, and for further proceedings.

(72 W. Va. 632)

SMITH v. BOYER.(Supreme Court of Appeals of West Virginia.
June 24, 1918.)*(Syllabus by the Court.)***VENDOR AND PURCHASER (§ 190*)—TAX TITLE—RIGHTS OF VENDEE.**

A vendee in possession cannot thereafter acquire a tax title to the land and claim thereunder adversely to his vendor.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. §§ 384-392; Dec. Dig. § 190.*]

Appeal from Circuit Court, Kanawha County.

Bill by H. B. Smith against Lulu D. Boyer. Decree for plaintiff, and defendant appeals. Affirmed.

W. S. Laidley, of Charleston, for appellant.
B. C. Harrison, of Charleston, for appellee.

WILLIAMS, J. Harrison B. Smith, grantor, sues Lulu D. Boyer, grantee, to enforce a vendor's lien reserved in a deed to her for a lot on Brooks street, in the city of Charleston. From a decree in favor of plaintiff, defendant has appealed.

The court sustained plaintiff's exceptions to defendant's answer and struck it out, and this is assigned as error. Plaintiff conveyed to defendant in April, 1904, by deed with covenant of general warranty. The answer avers that M. F. Clarke was the owner of the lot in 1902, and in February, 1903, sold it to M. D. Farley; that Farley sold and conveyed it to Harrison B. Smith in May, 1903; that in that year it was returned delinquent in the name of M. F. Clarke for nonpayment of taxes of 1902, and sold in February, 1904, and purchased by Wm. Shoemaker, who, in April, 1905, obtained a tax deed, and then conveyed the lot to R. S. Spilman, the partner of plaintiff; that it was returned delinquent, in the name of Farley, for the nonpayment of the taxes of 1903, and sold in December, 1904, and purchased by defendant; and that she received a tax deed in June, 1908.

Defendant contends that plaintiff's failure to discharge the taxes assessed on the land in the name of the former owner gave her the right to buy at the tax sale to protect her title, and that by her tax deed she acquired an adverse title which defeats plaintiff's lien. This position is untenable. Defendant took possession under her deed from plaintiff, and in contemplation of law has not been even constructively ousted. Smith's breach of his covenant of warranty in failing to pay off the pre-existing taxes entitled defendant to damages, but it did not give her the right to set up an after-acquired tax title to defeat his suit. She does not seek to recoup damages, as she might have done, but insists that the Shoemaker tax title operates to extinguish both her title and Smith's lien, and that, by the subsequent tax sale and deed, she acquired an adverse title to the lot.

After her purchase from Smith, defendant had 10 months in which she could have redeemed from Shoemaker. Her answer does not explain why she did not do so. There was no outstanding title, at the time she purchased from Smith, which she was compelled to buy in for her protection. It is a well-settled rule that if one, having the right of redemption, buys at a tax sale, his purchase amounts only to a payment of the taxes. 1 Blackwell on Tax Titles, § 566; Callihan v. Russell, 66 W. Va. 524, 66 S. E. 695, 26 L. R. A. (N. S.) 1176.

"A vendee cannot acquire a title adverse to his vendor by the purchase of the land at a tax sale." Lamborn v. County Commissioners, 97 U. S. 181, 24 L. Ed. 928. It is a rule of universal application that neither party to a mortgage can destroy the right of the other by buying the property at a tax sale, if he objects thereto. The relation of the parties to this suit is essentially the same in equity as mortgagor and mortgagee, Mrs. Boyer being regarded as the mortgagor in possession of the land. If there had not been a second tax sale, and Mrs. Boyer, instead of Spilman, had acquired the tax title from Shoemaker, she could recoup damages to the extent of her reasonable expenses in acquiring the title; but she would not be permitted to claim under it adversely to plaintiff. Bigelow on Estoppel (5th Ed.), page 545; Bush v. Marshall, 6 How. 284, 12 L. Ed. 440.

The same rule is applicable in this suit as would be applied if Mrs. Boyer had paid the full purchase price, and had brought an action for breach of plaintiff's covenant. It is well settled that, in such case, her recovery would be limited to the amount of her expenses in buying in the adverse title. Leffingwell v. Elliott, 8 Pick. (Mass.) 455, 19 Am. Dec. 343; Roller v. Effinger's Executor, 88 Va. 641, 14 S. E. 337; Sanders v. Wagner, 32 N. J. Eq. 506; Cowdry v. Cuthbert, 71 Iowa, 733, 29 N. W. 798. The case last cited is very similar to the present one, and stronger, if any odds, in favor of the vendee, because he had notified his vendor to pay the taxes and he failed to do so. Cuthbert, the vendee, did not buy at the tax sale, but bought from the tax purchaser after he had received his tax deed. In a suit by Cowdry, the vendor, it was held that Cuthbert, the vendee, was entitled to have the amount paid for the tax title treated as a payment on his bond to Cowdry, but that he could not claim adversely to him under the tax title. The same question was decided in Orran v. Banks, 123 Mich. 594, 82 N. W. 247; in Simons v. Rood, 129 Mich. 345, 88 N. W. 879; and in Eaton v. Tallmadge, 22 Wis. 526.

Defendant's obligation as plaintiff's vendee is not affected by her purchase at a subsequent tax sale. The tax title which she acquired, being for taxes assessed in the name of a subsequent owner of the lot, operates to defeat the Shoemaker title.

The contention of defendant's counsel that the Shoemaker tax title extinguished her title, and also the lien of plaintiff, and that by her subsequent tax deed defendant acquired the land discharged of the lien, and is, therefore, under no obligation to make further payment, is not supported by the law. The lien of a vendor cannot be thus defeated.

The court sustained plaintiff's exceptions to defendant's answer on 21st of May, 1910, and allowed 10 days in which to file further answer. On June 6th an order was entered filing further answer. But the final decree, made on June 10, 1910, recites that the order of June 6th was improvidently entered, and set it aside, and brought the cause on to be heard upon bill and exhibits, without further pleading. This action of the court is complained of, but it does not appear why it should be considered as error. The court has control over all interlocutory orders, even after the adjournment of the term at which they were entered, and, until adjournment of the term, has control also of its final orders and decrees. We must assume that the court properly set aside the order. Error must affirmatively appear. Only one answer appears in the record, and its averments constitute no defense to plaintiff's suit. It was not error, therefore, to exclude it.

Defendant did not ask to have the money expended by her in acquiring the tax title credited on plaintiff's lien, and it was not error to decree the full amount claimed by plaintiff.

The decree is affirmed.

(73 W. Va. 685)

KENNEDY v. GLEN ALUM COAL CO.
(Supreme Court of Appeals of West Virginia.
June 24, 1913.)

(Syllabus by the Court.)

DAMAGES (§ 132*)—REVIEW—INADEQUATE DAMAGES.

A verdict for \$200, in a tort action for negligently causing plaintiff's personal injury, whereby he lost half of a foot, will not be set aside for inadequacy, when no pecuniary loss is shown.

[Ed. Note.—For other cases, see *Damages*, Cent. Dig. §§ 372-385, 396; Dec. Dig. § 132.*]

Error to Circuit Court, Mingo County.

Action by Lorenzo Dow Kennedy, by his next friend, against the Glen Alum Coal Company. Judgment for defendant, and plaintiff brings error. Affirmed.

Cook, Litz & Howard, of Welch, and Sanders & Crockett, of Bluefield, for plaintiff in error. Sheppard, Goodykoontz & Scherr, of Williamson, and Marcum & Marcum, of Huntington, for defendant in error.

WILLIAMS, J. Plaintiff, an infant under the age of 14 years, was employed as trapper in defendant's coal mine, and received

an injury, for which he sued, and recovered a judgment for \$200. He moved to set the verdict aside on the ground that it was wholly inadequate, and the court overruled his motion, and entered judgment on the verdict, and he obtained this writ of error.

Section 15 of chapter 181 of the Code of West Virginia (1906), permits a new trial to be granted as well when the damages recovered are too small as when they are excessive. The only question we need consider is: Did the court err in refusing to set aside the verdict because too small?

Plaintiff was employed to trap in the main entrance, about 200 yards from the mouth of the mine. He had ridden out of the mine on the trip about noon, as he says, to get his lunch, which his sister was to bring to him at the mouth of the mine. As the motor was returning into the mine, he attempted to get on it at the front end, and his foot slipped and passed under one of the wheels, and was so badly mashed that a portion of it had to be amputated. He was taken to the hospital and treated at defendant's expense until he got well. He was three weeks in the hospital. He says about half of his foot is gone, but just what part is gone does not appear. Whether it was cut off square across the foot, or along one side, does not appear from the record. It does not appear what plaintiff's earning capacity was at the time of the injury, or what he has been able to earn since. He does say, however, that he has worked on his grandfather's farm since his injury, that he plowed occasionally, and sometimes engaged in playing ball. In view of these facts and circumstances, no pecuniary loss being shown, we are not justified in saying that the court erred in refusing to set aside the verdict and grant plaintiff another trial.

In actions for personal injuries the law fixes no definite rule for measuring compensation. From the very necessity of the case, the jury are made the judges of what is a proper compensation in such actions. In considering a motion to set aside the verdict of a jury for insufficiency, the same rule applies as on a motion to set aside a verdict, because it is excessive. *Dowd v. Westinghouse Air Brake Co.*, 132 Mo. 579, 34 S. W. 493; 4 Sedgwick on Damages (9th Ed.) § 1368, and cases cited in note 225. But, says the author, in the same section: "The forbearance of the court to interfere with the jury is so great that, in actions of tort, the general rule was once said to be that a new trial will not be granted for smallness of damages. And it is still true that a new trial will not ordinarily be granted for this reason, especially where there is no pecuniary standard for the estimate of damages, as where they are given for pain and suffering, because juries seldom underestimate the amount of damages. So clearly is this felt

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

to be the case that courts are sometimes forbidden by statute to set aside verdicts in personal injury cases on the ground of inadequacy."

If it were our province to ascertain the damages, we would fix a larger sum than \$200. But the law places that duty upon the jury, and the court is justified in setting aside their finding, only when their verdict is so small as to evince passion, partiality, prejudice, or mistake. We do not feel warranted in saying that they were thus influenced. Of course, if plaintiff had shown an actual pecuniary loss, and the verdict had not been large enough to cover such loss, we could then see that the verdict would be wholly inadequate, and it would be our duty to set it aside. But plaintiff proved no pecuniary loss; he was put to no expense in effecting his cure. So the verdict must have been intended to compensate him only for his pain and suffering and permanent injury. We cannot say that it is wholly inadequate for that purpose. The following cases are in point, viz.: *Morrissey v. Westchester Electric Ry. Co.*, 30 App. Div. 424, 51 N. Y. Supp. 945; *Robinson v. Waupaca*, 77 Wis. 544, 46 N. W. 809; *Kalembach v. Michigan Central R. R. Co.*, 87 Mich. 509, 49 N. W. 1062; *Dowd v. Westinghouse A. B. Co.*, 182 Mo. 579, 34 S. W. 498; *Marcus v. Omaha & C. B. R. & B. Co.*, 142 Iowa, 84, 120 N. W. 469; *De Freitas v. Nunes*, 180 Ill. App. 195. In the last-cited case a verdict for \$400, for the loss of an eye, was set aside; but the proof showed that the verdict did not amount to as much as one-half the actual pecuniary loss proven.

We affirm the judgment.

MILLER, J., absent.

(72 W. Va. 630)

RYAN v. PINEY COAL & COKE CO.

(Supreme Court of Appeals of West Virginia.
June 24, 1913.)

(Syllabus by the Court.)

PROCESS (§ 163*)—AMENDMENT OF SUMMONS. Under section 15, c. 125, Code 1906, a summons in assumpsit, served on defendant, may be amended so as to correct the variance between it and a declaration in trespass on the case.

[Ed. Note.—For other cases, see Process, Cent. Dig. §§ 224-238; Dec. Dig. § 163.*]

Error to Circuit Court, Raleigh County.

Action by C. C. Ryan against the Piney Coal & Coke Company. Judgment for defendant, and plaintiff brings error. Reversed and remanded.

See, also, 69 W. Va. 692, 73 S. E. 330.

A. A. Lilly, of Charleston, and T. N. Read, of Hinton, for plaintiff in error. Watts, Davis & Davis, of Charleston, for defendant in error.

LYNCH, J. The plaintiff, while employed in defendant's coal mine, received the injury for which he seeks recovery in this action. The summons issued and served on defendant required it to answer plaintiff "of a plea of trespass on the case in assumpsit," while the declaration required it to answer "of a plea of trespass on the case." The defendant, having appeared specially for the purpose within the time fixed by statute, tendered its plea in abatement, because of the variance between the writ and the declaration.

While the record does not show, except by implication, plaintiff's motion for leave to amend the writ, the final order recites that the court "doth decline to permit the plaintiff to amend the writ in this action to make the same correspond with the declaration in trespass on the case, * * * and doth therefore consider that the plaintiff's suit be abated (without prejudice, however, to the institution of another suit by plaintiff for the same cause of action, should he so desire), except in so far as the adjudication in this case in sustaining the plea in abatement and refusing the amendment asked for may affect it, if such action herein may do so," to which ruling plaintiff excepted.

Giving effect to the explicit language of section 15, c. 125, Code 1906, it is apparent that the court erred in its refusal to permit plaintiff to amend the writ in this action. It provides that "the defendant on whom the process summoning him to answer appears to have been served shall not take advantage of any defect in the writ or return, or any variance in the writ from the declaration, unless the same be pleaded in abatement; and in every such case the court may permit the plaintiff to amend the writ or declaration so as to correct the variance, and permit the return to be amended, upon such terms as to it shall seem just." See *Barnes v. Grafton*, 61 W. Va. 408, 410, 56 S. E. 608; *Ryan v. Coal & Coke Co.*, 69 W. Va. 692, 73 S. E. 330.

For the reasons stated, the judgment of the circuit court is reversed, leave to amend the writ granted, and the case remanded.

(73 W. Va. 640)

ROSS' ADM'X v. ROSS et al.

(Supreme Court of Appeals of West Virginia.
June 24, 1913.)

(Syllabus by the Court.)

1. EQUITY (§ 148*)—BILL—MULTIFARIOUSNESS.

A bill by the widow as administratrix praying that the land of the decedent be subjected to the payment of his debts because of insufficient personalty, and in her own right praying that dower be assigned her before sale of the land, is not bad on demurrer for multifariousness.

[Ed. Note.—For other cases, see Equity, Cent. Dig. §§ 341-367; Dec. Dig. § 148.*]

2. EQUITY (§ 194*)—BILL—DEMURRER—RULE TO ANSWER.

On the overruling of a demurrer to the bill, if the defendant does not answer or waive his right to do so, a rule to answer must be given him before any decree affording the plaintiff relief can be taken.

[Ed. Note.—For other cases, see Equity, Cent. Dig. §§ 443-445; Dec. Dig. § 194.*]

3. DOWER (§ 99*)—ADMEASUREMENT—NOTICE TO HEIR.

The heir should have notice of the time when commissioners appointed to lay off dower will act. If they act without notice to him and in his absence, their report will be set aside upon his exception.

[Ed. Note.—For other cases, see Dower, Cent. Dig. §§ 345-347; Dec. Dig. § 99.*]

Appeal from Circuit Court, Monongalia County.

Suit by Alexis Hugh Ross' administratrix against John Ross and others. Decree for complainant, and defendant John Ross appeals. Reversed and remanded.

Chas. E. Hogg, of Morgantown, for appellant. Donley & Hatfield, of Morgantown, for appellee.

ROBINSON, J. Alexis Hugh Ross died intestate leaving a widow and two sons. He was possessed of land but no personalty. His widow became the administratrix of the estate. As administratrix, and in her own right as widow, she brought this suit in chancery, praying that the real estate of the decedent be sold for the payment of his debts, after the assignment of dower to herself. The cause proceeded to such a decree as that sought by plaintiff. One of the sons, John Ross, claiming to be aggrieved by the decree, has appealed.

[1] Appellant says that the bill is bad because the widow sues in both representative and individual capacity. But we readily conceive that the demurrer to the bill was rightly overruled. Of course the administratrix can maintain a suit to subject the realty to the payment of debts when the personalty is insufficient, as in this case. In such a suit the dower of the widow must be assigned before a sale of the land for the debts of the decedent. The widow as a necessary defendant in the suit would ordinarily ask by answer that dower be assigned her. Now, when it happens, as we have it here, that the administratrix and widow are one and the same party, why can not she sue as she has? May she not thus reach by direction what she could readily do by indication? Formally she should bring the suit as administratrix and make herself a defendant, individually as widow. But surely the same practical end is reached by appearing as plaintiff administratrix for one purpose and as plaintiff widow for another purpose inherently connected with the former. The charge of multifariousness is by no means tenable. Plaintiff in the one capacity is not setting up a cause of action distinct

and independent from that which she asserts in the other capacity. Both the matter that pertains to plaintiff as administratrix and the matter that pertains to plaintiff as widow properly belong to the same suit, as we have said. It is required that they be disposed of in the same suit. "If the bill accomplishes the desired end in a convenient way for all concerned, and the mode adopted is not so injurious to any one as to render it unjust for the suit to be maintained in that form, it will not be deemed to be multifarious." *Johnson v. Black*, 103 Va. 477, 49 S. E. 633, 68 L. R. A. 264, 106 Am. St. Rep. 890. The bill herein comes plainly within this principle.

[2] On the overruling of the demurrer to the bill, the court immediately entered a decree directing an order of reference in relation to the assets and liabilities of the estate of the decedent, adjudging that the widow was entitled to dower in the land, and appointing commissioners to go upon the land and lay off the dower. Thus merits of the suit were passed upon. Appellant says it was error so to decree without ruling him as defendant to answer pursuant to Code 1906, ch. 125, sec. 30. Under our decisions, this point is well taken. 1 Enc. Dig. Va. & W. Va. 398-395; Hogg's Equity Procedure, sec. 314. It is established in this state that when the court overrules a demurrer to a bill, if the defendant does not answer or waive his right to do so, there must be a rule on him to answer the bill before any decree affording the plaintiff relief can be taken against the defendant, and that it is reversible error to decree without such rule. Yet the rule need not be served, and amounts only to an order that the defendant answer within a certain time, which may be regulated according to the circumstances of the particular case. So the statute has long been interpreted. From our examination into the origin and history of this statute we doubt whether it has always been rightly understood and interpreted. It would seem that it should not apply in favor of a defendant who, as appellant here, is in default by a bill taken for confessed against him at rules. *Brent v. Washington's Adm'r*, 18 Grat. 526; *Reynolds v. Bank*, 6 Grat. 174. Such a defendant has already neglected a rule to plead. Why should another be given him? But no distinction has ever been made in our cases. They apply the statute to any defendant, whether one in default or not. This statute as long construed gives a defendant a rule to answer on the overruling of his demurrer whether, in view of Code 1906, ch. 125, sec. 53, it will avail him or not. *McLaughlin v. Sayers*, 78 S. E. 355. Is not this a matter for legislative notice? See Virginia Code 1904, section 3273.

[3] Should the heir have notice of the time of the laying off of dower by the commis-

sioners appointed for that purpose? By appellant's exception to the report of the commissioners, this question is raised. It does not appear that appellant was present or had notice. He asserts by his exception to the report that he had no notice and that dower was assigned in his absence. Yet the court confirmed the report and decreed upon it. Under the authority of *Wamsley v. Coal and Lumber Co.*, 56 W. Va. 296, 49 S. E. 141, we must view this action of the court as erroneous. That precedent it is true relates to partition of land between owners in fee, but there is nothing to differentiate the principle in its application to the assignment of dower. If it is sound in the one case, it certainly is in the other. The rule appears to be a wholesome one indeed, though not sanctioned in some jurisdictions. We approve it herein. Dower should not be laid off in the absence of the heir, unless, after notice he fails to attend. The court should have sustained appellant's exception.

In view of the reversal which must be ordered it is unnecessary to notice the other assignments of error, further than to say that the record which we have before us does not show that the claim to which appellant excepted is barred by the statute of limitations.

The decrees complained of will be reversed and the cause remanded for further proceedings.

MILLER, J., absent.

(72 W. Va. 635)

BOWLING v. WALLS.

(Supreme Court of Appeals of West Virginia.
June 24, 1913.)

(*Syllabus by the Court.*)

1. SET-OFF AND COUNTERCLAIM (§ 27*)—ACTION ON NOTE—BREACH OF CONTRACT.

In an action on a note given as consideration for the sale of a store the maker of the note may claim recoupment for damages arising from breach by the vendor of his agreement made in the transaction of the sale not to go into the mercantile business as a competitor of the vendee for a stipulated period, though the agreement is contained in a separate writing.

[Ed. Note.—For other cases, see Set-Off and Counterclaim, Cent. Dig. §§ 45, 46; Dec. Dig. § 27.*]

2. DAMAGES (§ 189*)—BREACH OF CONTRACT—EVIDENCE.

In such an action the proof of the extent of the damages under the notice of recoupment need not be definite and specific; the jury may find the amount of damages necessary to compensate the injury proved by resorting to reasonable inferences from the facts, circumstances, and data furnished by the evidence.

[Ed. Note.—For other cases, see Damages, Cent. Dig. §§ 288, 512; Dec. Dig. § 189.*]

Error to Circuit Court, Raleigh County.

Action by F. C. Bowling against D. B. Walls and others. Judgment for defendants, and plaintiff brings error. Affirmed

Farley & Ward, of Beckley, for plaintiff in error. File & File, of Beckley, for defendant in error.

ROBINSON, J. Bowling sold his store to Walls and agreed to stay out of the mercantile business for a period of four months. Part of the consideration for the sale was represented by notes. The agreement not to compete was a part of the transaction of sale but was contained in a separate writing of the same date as that of the notes. When Bowling sued on one of the notes, Walls claimed recoupment for breach of the agreement, and produced evidence at the trial tending to prove that within the four months Bowling went into the mercantile business in the name of his brother, as a competitor of Walls. The jury found for defendant, thus recognizing that Walls had been injured by Bowling's breach to the extent of the balance due on the note for which the suit was brought. Bowling seeks to reverse the judgment entered on this verdict.

[1] Plaintiff submits that a breach of the agreement on his part does not afford matter of recoupment as against one of the notes given in the sale of the store. That damages for a breach of the agreement may be made matter of recoupment by defendant in this suit, we have no doubt. Those damages arise out of the very transaction which affords a basis of plaintiff's action. They grow out of the contract for the sale of the store, as fully as plaintiff's cause of action grows therefrom. The case comes clearly within the principle of recoupment as stated by a well known author: "The right of the defendant to recoup must necessarily arise out of contract, and this defense is only available when the basis of the plaintiff's action is a contract, and his complaint is that there has been a breach thereof by the defendant; in which case the defendant may recoup any damages which may have resulted to him by a breach of another portion of the contract or of a contract made at the same time and constituting a part and parcel of the same transaction, whether contained in one writing or in two separate writings, or one in writing and the other in parol, provided, however, they are all one transaction." Hogg's Pleading and Forms (2d Ed.) sec. 262.

[2] Another point of error is that the damages allowed by way of recoupment against the note are excessive and not supported by evidence. From the evidence the jury were warranted in finding that plaintiff violated the agreement that he made in connection with the sale of the store. Moreover, there is evidence amply tending to prove injury to defendant. Facts, circumstances, and data appear from which the jury were warranted in finding the amount of damages they did. In cases of this character it is not required that proof of the extent of the damages be

definite and specific. There must be proof of injury, but the jury may find the amount of damages by drawing reasonable inferences from the facts, circumstances, and data furnished by the evidence. This subject of the measure of damages for the violation of good will contracts like the one involved in this case is fully discussed in 3 Sutherland on Damages, at section 658.

It seems wholly unnecessary to discuss other points assigned. They involve no doubtful propositions of law.

An order affirming the judgment will be entered.

MILLER, J., absent.

(72 W. Va. 656)

SHIPLEY v. JEFFERSON COUNTY COURT.†

(Supreme Court of Appeals of West Virginia, June 24, 1913.)

(Syllabus by the Court.)

1. BRIDGES (§ 38*)—DEFECTIVE BRIDGE—LIABILITY FOR PERSONAL INJURIES—PROOF.

The administrator of an employé of a county court, killed by the falling of a public county bridge, under the weight of a traction engine and stone crusher on which he was riding, while acting within the scope of his employment, has a statutory right of action under section 53 of chapter 43 of the Code, and need not ascertain or show any defect in the bridge, causing it to give way.

[Ed. Note.—For other cases, see Bridges, Cent. Dig. §§ 97, 109; Dec. Dig. § 38.*]

2. STATUTES (§ 184*)—CONSTRUCTION.

A statute is always construed in the light of its purpose and the evil it was designed to remedy.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. § 262; Dec. Dig. § 184.*]

Error to Circuit Court, Jefferson County.

Action by Fonrose Shipley, administrator, etc., against the County Court of Jefferson County. On a demurrer to the evidence the jury rendered a conditional verdict for plaintiff, and, the court having sustained the demurrer and dismissed the action, plaintiff brings error. Reversed, and judgment rendered on conditional verdict.

George M. Beltzhoover, Jr., of Shepherdstown, and Faulkner, Walker & Woods, of Martinsburg, for plaintiff in error. Forrest W. Brown, George D. Moore, and James M. Mason, Jr., all of Charlestown, for defendant in error.

POFFENBARGER, P. On a demurrer to the evidence in this case, the jury rendered a conditional verdict of \$2,000 for the plaintiff, and, the court having sustained the demurrer and dismissed the action, the plaintiff obtained a writ of error to the judgment.

The action has for its purpose recovery of damages for the wrongful death of the plaintiff's decedent, occasioned by the breaking and falling of a highway bridge, under

the weight of a traction engine and stone crusher while passing over it, on which the deceased was, at the time, riding.

[1, 2] As the decedent, at the time of his death, was engaged in the service of the county court and sustained the injury from which he died by reason of an alleged defect in the bridge while in the course of his employment, the evidence tending to prove defectiveness of the bridge must be dealt with specially. This relation raises a highly important question. If his cause of action, in view of this relation, is founded upon the common law, imposing upon the master the duty to exercise reasonable care to provide his servant a safe place in which to work, it was incumbent upon the plaintiff to prove the defect in the bridge and omission of inspection to discover it and make repairs. But, if it rests upon the statute making the county court liable for injuries to any person by reason of a defect in a public road or bridge, or by reason of any such road or bridge being out of repair (Code, c. 43, § 53), it is unnecessary to prove lack of safety in the bridge or any defect therein, for this statute has been construed as imposing absolute liability for injuries for such defects, whether latent or obvious, discoverable or undiscoverable, and exercise or nonexercise of care and diligence on the part of the county court is altogether immaterial (O'Hanlin v. Oil Co., 54 W. Va. 510, 46 S. E. 565, 66 L. R. A. 893; Van Pelt v. Clarksburg, 42 W. Va. 213, 24 S. E. 878; Yeager v. Bluefield, 40 W. Va. 484, 21 S. E. 752; Gibson v. Huntington, 38 W. Va. 177, 18 S. E. 447, 22 L. R. A. 561, 45 Am. St. Rep. 853; Biggs v. Huntington, 32 W. Va. 55, 9 S. E. 51; Chapman v. Milton, 31 W. Va. 384, 7 S. E. 22).

At the common law, there was no liability for personal injury occasioned by defects in highways, for the duty of keeping them in repair was regarded as one due to the public and not to the individual, wherefore failure to perform this duty was a mere *nonfeasance* and not a *misfeasance* against the individual. Thomp. Neg. 5919. The statute was passed to remedy this defect in the common law. Therefore to determine the extent of liability it is necessary only to look to the terms of the statute unless there are exceptions by way of implication. That there are some is very well settled. Contributory negligence is an effectual bar to the right of recovery, and it is about the only defense recognized by our decisions so far. The decedent though a servant of the county court, was within the terms of the statute. He was a person injured by a defect in the bridge. Upon what ground can he be deemed to be excepted from the guaranties given by the statute? As the relation of master and servant existed between him and the defendant, it may be said plausibly that his case is not

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indices

† Rehearing denied October 2, 1913.

within the evil the statute was designed to correct, if the common law gave a right of action in such cases. Though there are some decisions in which municipal corporations have been held liable to their employes for negligent injury, upon common-law principles, the general rule is to the contrary. *Labatt, Master & Serv.* § 847; *Shearm. & Redf. Neg.* 253, 255. Thus, an employe of a municipal corporation, engaged in the operation of a stone crusher to prepare materials for constructing and repairing highways, injured by a defect in the machine, was denied right of recovery. *Colwell v. Waterbury*, 74 Conn. 563, 51 Atl. 580, 57 L. R. A. 218. So an employe injured by a vicious horse furnished him by a quasi municipal corporation, engaged in work done for the state, was denied right of recovery. *Backer v. Park Com'rs*, 66 Ill. App. 507. To the same general effect, see *Pettingell v. Chelsea*, 161 Mass. 368, 87 N. E. 380, 24 L. R. A. 426; *Hill v. Boston*, 122 Mass. 344, 23 Am. Rep. 332; *Taggart v. Fall River*, 170 Mass. 325, 49 N. E. 622. General principles stated in *Mendel v. Wheeling*, 28 W. Va. 233, 57 Am. Rep. 664, tend to the same conclusion. See, also, *Nichol v. Water Co.*, 53 W. Va. 348, 44 S. E. 290. Principles declared in *Shaw v. City of Charleston*, 57 W. Va. 433, 50 S. E. 527, 4 Ann. Cas. 515, *Brown's Adm'r v. Guyandotte*, 34 W. Va. 299, 12 S. E. 707, 11 L. R. A. 121, *Gibson v. Huntington*, 38 W. Va. 177, 18 S. E. 447, 22 L. R. A. 561, 45 Am. St. Rep. 353, and *Bartlett v. Clarksburg*, 45 W. Va. 393, 31 S. E. 918, 43 L. R. A. 295, 72 Am. St. Rep. 817, would deny recovery in such cases, under the principles of the common law, absolving municipal corporations from liability for injuries resulting from negligence on their part in the exercise of their governmental and discretionary powers. A servant of a county court injured by a defect in a highway, while in its service, cannot be excepted from the general terms of the statute, therefore, on the theory that his case was not within the mischief the Legislature intended to remedy. Having no right of action against his employer for negligent injury, he was in the same situation as that of a traveler injured in the same way. In other words, it cannot be assumed that the Legislature intended to except him on the ground that the common law afforded him a remedy, for he had no such remedy at common law. The result of this conclusion accords with that found in *Vickers v. Cloud County*, 59 Kan. 86, 52 Pac. 73, in which a workman, employed by the county and injured by the falling of a bridge, was declared to be within the protection of a statute in all substantial respects like the one here under consideration.

Under this construction of the statute, it becomes unnecessary to devote any time to the consideration of the sufficiency of the evidence to establish any particular defect

in the bridge. As has already been shown, the statute makes the county court an insurer of the safety of persons using its highways and bridges, in the absence of contributory negligence or other intervening cause. Therefore, only the evidence tending to prove negligence on the part of the driver of the engine as the proximate cause of the injury, need be considered.

This ground of defense is that, as the engine was passing from the bridge onto the roadway, it was driven so nearly to the east side of the bridge that the rim of the rear wheel struck the diagonal, constituting part of the truss, and pressed it over so as to deprive it of its efficacy as a support to the bridge. To sustain this theory of defense, the strength of the bridge is relied upon. Evidence was adduced tending to prove that it had for years carried vehicles similar to the one under which it went down. One of these was an engine weighing nine tons and a separator five tons. The engine and crusher under which it gave way had passed over it the preceding day. It did not give way until after the front wheels of the engine had passed off of it and onto the ground, nor while the combined weight of the entire engine and crusher were upon it, nor until the weight of the rear portion of the engine was divided between the earth and the bridge, nor until the weight became lighter than it had been at any other time during the passage. The woodwork was unbroken, and very slight defects, if any, were found in the iron. There is some controversy as to whether any of the iron work was broken, although some of it was admittedly bent. Though the bridge had been erected in 1891 and was about 13 years old at the time of the injury, it had been painted several times and had not been seriously impaired by rust. There was evidence tending to prove the passage had been made at an unnecessarily rapid rate of speed, and under unnecessarily heavy steam. The approach to the bridge was downgrade, and although the engine and crusher were equipped with brakes they were evidently not used. It was the northeast part of the truss that went down. The witness Golliday, standing in the door of a mill on the west side of the road, 30 or 40 yards distant, and looking at the crusher and the engine, says he saw "the lower side of the bridge go out and the thing sink from sight," and again said, "I saw between the engine and the crusher this side go out and out of sight." By this he evidently meant the east side of the truss.

In the argument are found calculations based upon evidence of marks on the boards which constituted the floor of the bridge and the ground at the end of it, tending to show probability that the rim of the hind wheel struck the truss. These calculations involve the width of the bridge between the trusses and the length of the boards used for the floor. After the east side of the bridge had

sunk to a certain point, the hind wheels of the engine and those of the crusher slipped toward the east leaving marks on the boards. Neither the distance of these marks from the ends of the boards nor from the inside of the truss was measured. The witness spoke in general terms. He says the scar on the board he noticed showed the wheel had commenced to slide at a point four or five feet from the side of the bridge. On cross-examination, he said he meant four and a half or five feet from the ends of the boards. The boards extended beyond the truss. Counting the distance from the inside of the truss, the wheels would have struck the one on the opposite side. Counting from the ends of the boards, it would have missed it by the very narrow margin of two or three inches. As to the distance the front wheels had gone beyond the end of the bridge onto the road, when the accident occurred, relied upon in these calculations, the evidence is equally uncertain and indefinite. Two of them give four to five feet, and the third one six to eight feet. Calculations based upon the testimony of another one as to the position of the hind wheels on the bridge makes it two feet eight inches to four feet eight inches.

In opposition to this testimony, slight evidence, of defects in the bridge was adduced. Witness Vland says he helped to construct the bridge, and that a brace, put in near the point at which it broke down, was defective in this, that it had but one rivet at a point at which it should have had two. Under an erroneous direction from the superintendent, one of the rivet holes was cut out entirely and the other was partially cut, but the brace was put in nevertheless. He further says some of the bridge irons were pretty badly rusted. Witness Kisner says some of the irons were partly rusted in two where they broke, and that the bottom cord was broken a little way from the northeast abutment. Witness Clark also says some of the irons were pretty rusty. The effect of Vland's testimony was considerably impaired by his admissions on cross-examination, and there was testimony tending to prove the brace he spoke of as having been defective was still intact after the bridge had fallen, and, besides, this brace was probably one that sustained very little, if any, weight.

As has been stated, the calculations relied upon as conclusively proving contact of the rear wheel of the engine with the truss of the bridge do not possess the probative force claimed for them, because it is based upon uncertain data. However, it does conclusively show the wheel must have been very close to the truss, and thus raises a probability of contact. The tests of sufficiency and safety borne by the bridge for many years, the day before the accident and on the very day thereof, renders it more or

less improbable that the accident was due to weight upon it. The uncontradicted testimony of Golliday, the only eyewitness who undertook to describe the character of the fall, showing the careening of the truss, followed by subsidence of that side of the bridge, tends directly to prove the theory of the defense. The slight testimony above detailed, tending to prove defectiveness of materials and workmanship and the breaking of some portions of the iron, might be considered as overcome by the tests of sufficiency and safety already referred to. Upon these considerations, I am inclined to the opinion that there is a preponderance of evidence in favor of the defendant, sufficient to sustain the action of the court upon the demurrer, but my Associates are clearly of the opinion that there is no clear and decided preponderance, and that the issue made by the evidence was one proper for jury determination. As there is no difference of opinion among us as to the law governing demurrers to evidence, there is no occasion for inquiry as to legal principles. When the evidence clearly and decidedly preponderates in favor of the demurrer, all agree the demurrer should be sustained. We differ only as to the existence of such a preponderance in the evidence adduced in this case.

As in the opinion of a majority of the members of the court, the case should have been submitted to the jury, but for interposition of the demurrer, the judgment will be reversed, and a judgment rendered here for the amount of the conditional verdict.

(73 W. Va. 643)

CAVENDISH v. BLUME COAL & COKE CO. et al.

(Supreme Court of Appeals of West Virginia.
June 24, 1913.)

(Syllabus by the Court.)

1. SCHOOLS AND SCHOOL DISTRICTS (§ 65*)—
SALE OF SCHOOL LOT—RIGHTS OF ORIGINAL OWNER.

A lot in a village though not incorporated conveyed to a board of education by absolute deed with general warranty is within the exception of section 33, c. 45, Code 1899 (Code 1906, c. 45, § 33), and the grantor of such lot, who has previously sold and conveyed his adjoining lands, of which such lot was originally a part, to another, is not entitled to a cancellation of the deed for such lot from such board to the same grantee, and to a reconveyance thereof to him by virtue of said statute.

[Ed. Note.—For other cases, see Schools and School Districts, Cent. Dig. §§ 162-167; Dec. Dig. § 65.*]

(Additional Syllabus by Editorial Staff.)

2. WORDS AND PHRASES—"VILLAGE."

A "village" is defined as an assemblage of houses in the country less than a town and inhabited chiefly by farmers and other laboring people.

[Ed. Note.—For other definitions, see Words and Phrases, vol. 8, pp. 7321-7324.]

Appeal from Circuit Court, Fayette County.

Bill by J. F. Cavendish against the Board of Education of the District of Nuttall and others. Decree for defendants, and plaintiff appeals. Affirmed.

Wyatt & Graham, of Huntington, for appellant. Dillon & Nuckolls, of Fayetteville, for appellees.

MILLER, J. Plaintiff sues for cancellation of a deed from the Board of Education of Nuttall District, Fayette County, to Blume Coal & Coke Company, a co-partnership, dated April 13, 1908, in so far as it relates to a school house lot at the village of Lookout, and for a reconveyance thereof to him by said board, by virtue of section 33, chapter 45, Code 1899 (Code 1906, c. 45, § 33), in force at the time the deeds now to be referred to were made.

This lot as alleged had been previously conveyed by plaintiff to said board of education, by two deeds; the first calling for about a half acre, was lost and never recorded, but the bill alleges it was made in 188—; the second, dated May 1, 1897, calling for a lot adjoining the first, is described by metes and bounds as a lot 4 poles wide by 11½ poles in length, and recorded July 25, 1898. By Act of 1905, c. 70, said statute was amended, and as now contained in chapter 45, Code 1906, no such right of reconveyance is preserved.

In the deed sought to have cancelled this lot, covered by both deeds, is described as containing ".69 of an acre." The consideration recited in the second deed is ten dollars paid; it is absolute in terms, without reservation, and with covenants of general warranty. The bill alleges the consideration for the first deed was one dollar, and it is not alleged or pretended that it contained any terms of defeasance or reservation. The answer of Blume Coal & Coke Company, and of the Board of Education, deny this and affirm that it was "possibly as much as \$25.00." If the fact is material, and we do not think it is, plaintiff has not made out a case of nominal consideration only. But for the right alleged to be conferred by the statute no ground for relief is alleged or made to appear.

Said section 33, of chapter 45, Code 1899, excepts from the provision giving right of reconveyance to a grantor, lots situated within any village, town or city. The answer of defendants, Blume Coal & Coke Company, deny that said lot is not situated within any city, town, or village; on the contrary they allege that it is situated within the village of Lookout, and by the terms of the statute expressly excepted from the provision giving right of reconveyance. They also deny the said lot has been abandoned, and allege that it was simply exchanged for a larger and more commodious lot in the same vicinity and for a cash consideration

of \$200.00, paid by respondents, and on which exchanged lot said board has erected a school building costing \$3,000.00.

After so responding to the matter of the bill, it is alleged as ground for the affirmative relief prayed for, that admitting the general right of reconveyance given by said statute, plaintiff, by deed of March 1, 1902, had conveyed to Blume Coal & Coke Company all his adjoining lands, and out of which said school house lot was taken, and other lands, and had thereby also relinquished, sold and conveyed to said coal company all reversionary rights and interests therein.

The prayer of said answer was that it may be treated as a cross bill against plaintiff, and that he be required to convey to respondents his interest in said lot upon the payment to him of \$10.00 tendered therefor, as per contract in said deed.

Plaintiff replied generally to said answer, but made no answer to the affirmative matters thereof; and the depositions taken by him in relation thereto, were excepted to, and in the final decree appealed from said exceptions, though not specifically passed upon, are noted, and the decree was that plaintiff be denied relief, and his bill dismissed, but that the affirmative relief prayed for by the Blume Coal & Coke Company be granted, and the decree so provided.

The provision of the deed relied on, a copy of which is exhibited with the bill, is as follows: "The said J. F. Cavendish and wife covenant with the parties of the second part that they have heretofore sold to various parties certain small tracts or lots of land adjoining to and lying near the property hereby conveyed, which said parties have not paid the said J. F. Cavendish all the purchase money due thereon, and the said J. F. Cavendish hereby covenants and agrees with the said parties of the second part that in the event the said parties fail to pay for the said lots or parcels of land, and the title thereto reverts back to the said J. F. Cavendish, or if for any reason the said J. F. Cavendish cures the title to said tracts or lots so sold by them, as aforesaid, then, and in that event, he agrees to grant and convey the said tracts of land, or so much of them as he may secure title thereto, to the said parties of the second part, the said parties of the second part to pay the said J. F. Cavendish the same price, with accrued interest thereon, which had been agreed to be paid by the parties to whom J. F. Cavendish sold."

A number of interesting questions are presented and argued by counsel; but if said lot at the time of the suit was situated in a "village," as on the evidence we think it was, then, by the very terms of the statute no right of reconveyance existed, and relief was rightly denied plaintiff, and his bill was properly dismissed, and we need not consider any other question.

[2] But it is contended that as chapter 47, of the Code, providing for the incorporation of cities, towns and villages, was in force at the time section 33, chapter 45, was enacted, and on the theory that said section was enacted to encourage persons in the country to donate land for school house sites, the word "village," employed in connection with the words "cities" and "towns," should be construed to mean incorporated villages. Even if that may have been one of the purposes of the statute, we do not think it was the only or main purpose; and if it was, it failed in this case, for the evidence shows that the lot was not a gift or donation, but that a full money consideration was paid for it. This court, in *Carper v. Cook*, 39 W. Va. 351, 19 S. E. 381, said, respecting this statute: "This is a concession of the law to those living in farming communities, that a small portion of a farm may not be taken for school purposes and then be allowed to pass into the hands of a stranger, to the damage of the residue of the land; and the grantor must make his election promptly, before the rights of third parties attach, by a re-payment of the purchase-money and a demand for a re-conveyance. If such demand is refused, even though made in time and in a proper case, the right could not be enforced by an action of ejectment." The word is not defined by the statute. The general rule in the construction of statutes is that unless a different meaning is given or plainly and necessarily implied from the context, the words of a statute are to be given their usual and ordinary meaning. Chapters 45 and 47 of the Code do not relate to the same subject; the first relates to education; the latter to the incorporation of cities, towns and villages. They are not in pari materia. Webster defines village, "an assemblage of houses in the country, less than a town or city, and inhabited chiefly by farmers and other laboring people," and so far as we have been referred to or have found other authority on the subject, judicial or otherwise, this definition is universally recognized as the correct one. In confirmation we refer to 8 Words and Phrases, 7321, 7322. In *Toledo, W. & W. Ry. Co. v. Spangler*, 71 Ill. 568, 569, one of the cases referred to, it is said: "A place where there is a station house, a warehouse, a store, a blacksmith shop, a post-office, and five or six dwelling houses, whether they are situated upon regularly laid out streets and alleys or not, comes fully up to the requirements of a village, for the purpose of excusing a railroad company from fencing its track within the limits thereof." In *Territory v. Stewart*, 1 Wash. 98, 23 Pac. 405, 406, 8 L. R. A. 106, another case, it is said: Villages and towns, as used in Act Wash. T. Feb. 2, 1888 (Acts 1887-88, c. 126) authorizing the incorporation of towns and villages, and not defining the meaning of the term, will be presumed "to be used in their

ordinary acceptance, as meaning an aggregation of houses and inhabitants more or less compact." The record of this case shows that plaintiff himself opened up coal mines in or near the village of Lookout, developing his lands in that vicinity, and by his efforts the village was partially built up. These lands and coal properties he sold and conveyed to the Blume Coal & Coke Company. If he should succeed in this suit on his own theory, he would defeat one of the very purposes of the statute which he invokes, as interpreted by this court in the case above referred to. According to the evidence there is located in the immediate locality of the original village of Lookout some twelve or fourteen houses, including a church, blacksmith shop, and three stores, inhabited by seventy five or eighty people; and the new school house erected near by serves a population of five or six hundred people, living in houses near to and really constituting parts of said village. These houses are located near cross roads, some on both sides of the James River and Kanawha Turnpike, an old State road. The town or village is a mining town it is true, and many of the houses belong to and are located on the coal company's lands, but we think this is one of the class of villages covered by the statute, and on this ground that plaintiff has no right to a re-conveyance of the property. Moreover, having conveyed his farm and property to the coal company, it may be questionable, whether his conveyance, regardless of its special provision respecting other lots, did not carry with it the right of reconveyance given by the statute. But we need not and do not decide this question.

[1] But what about the affirmative relief decreed Blume Coal & Coke Company? Strictly speaking we question whether such relief was well grounded on the theory of the cross answer that the special provision of the deed from plaintiff to the coal company, above quoted, gave that right. But we are clearly of the opinion on facts alleged and admitted, that a claim and decree for affirmative relief, based on the fact of the lost deed, alleged and proven, and right of restoration thereof, would have been well founded. On such a cross answer or bill the relief would have been substantially the same as that decreed on the theory of the cross answer filed. *Wade v. Greenwood*, 2 Rob. (Va.) 474, 40 Am. Dec. 759. Plaintiff was requested, before suit, to join in the conveyance of the board of education to the coal company to restore that deed, and complete the record, but declined. As no costs are decreed against him on the cross answer, or in relation to the execution of the deed decreed to be executed by him, or on his default by a commissioner appointed for the purpose, and he is not injuriously affected or prejudiced by any error in the decree, we

are not disposed to reverse it, for any error therein, in decreeing such cross relief.

For these reasons the decree below will be affirmed.

(95 S. C. 170)

FAIREY v. ZEIGLER.

(Supreme Court of South Carolina. July 8, 1913.)

APPEAL AND ERROR (§ 1135*)—REVIEW.

Where appellant seeks no relief in so far as the merits of the case are involved but only desires to reverse the judgment that he may not be compelled to pay the costs, and no authority is cited to sustain any of his exceptions, the judgment will be affirmed.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4454, 4455; Dec. Dig. § 1135.*]

Appeal from Common Pleas Circuit Court of Hampton County; J. W. De Vore and R. W. Memminger, Judges.

Action by James C. Fairey against E. A. Zeigler. Judgment for plaintiff, and defendant appeals. Appeal dismissed.

The following are the exceptions:

"(1) His honor, Judge J. W. De Vore, erred in holding and deciding, on the first motion of the defendant to vacate the claim and delivery proceedings herein, that the notice of motion was not sufficiently definite, and in requiring the defendant to renew said motion and give more specific grounds of the motion; it being submitted that the said motion papers were sufficiently definite to apprise the plaintiff of the grounds of the motion.

"(2) That his honor, Judge J. W. De Vore, erred in refusing the second motion of the defendant to vacate the proceedings of the plaintiff in this action, heard at Barnwell, S. C., on the 25th day of July, 1911; it being submitted that the affidavit of the plaintiff, on which the action or proceeding for the immediate delivery of the property was based, was not sufficient, under the law, to warrant the taking of the property from the possession of the defendant in this: Section No. 258, Code of Procedure 1912, subd. 1, requires that the plaintiff shall make an affidavit that he 'is owner of the property claimed, or is lawfully entitled to the possession thereof, by virtue of a special property therein, *the facts in respect to which shall be set forth*,' and this requirement was not complied with for the reason that *no facts were set forth* on which he based his claim.

"(3) His honor, Judge R. W. Memminger, erred in admitting in evidence the chattel mortgage, over the objection of defendant, for the reason that, inasmuch as the plaintiff had alleged, in his affidavit and in his complaint, that he was the *owner* of the property claimed, any evidence showing a

special property therein was irrelevant and prejudicial.

"(4) His honor, Judge Memminger, erred in admitting any evidence offered by the plaintiff to show that the plaintiff had the right to the possession of the property by virtue of the nonpayment of a debt secured by a chattel mortgage from the defendant to the plaintiff; same being irrelevant under the allegation of ownership.

"(5) That his honor, Judge Memminger, erred in admitting any evidence, to wit, the chattel mortgage and the verbal testimony of witnesses, as to the right to the immediate possession of the property claimed by the plaintiff, the allegation, 'and of which the plaintiff is entitled to the immediate possession,' being a conclusion of law merely without stating the facts with respect to said right; his honor should have excluded all said testimony as irrelevant.

"(6) His honor erred in admitting evidence of the witnesses Ed Newlin and plaintiff himself as to any damage claimed by the plaintiff; there being no allegation in the complaint as to damages.

"(7) His honor erred in refusing defendant's motion for a directed verdict in his behalf on the grounds that there was a total variance between the allegata and probata in this: The complaint alleged that the plaintiff was the owner of the property, whereas the proof was that he merely claimed the right to the possession of the same by virtue of that special property given by the law where the mortgagor defaults in the payment of the mortgage debt.

"(8) His honor erred in refusing the defendant's motion for a directed verdict on the grounds that the evidence of the plaintiff's own witness, as well as that of the defendant, showed that the plaintiff had instructed his agent, John Kennelly, the witness referred to, to seize the property, take it out of the county, and sell it; it being submitted that the plaintiff did not have the right to take the property from the defendant for the purpose of selling it in another county than the one where the defendant resided.

"(9) His honor erred in charging the jury that the plaintiff in this action *seeks* to recover from the defendant \$50 damages in this action; it being submitted that there is no allegation in the complaint as to any damages claimed by the plaintiff.

"(10) His honor erred in charging the jury that 'consequently, under law, the conditions of the mortgage being broken, the ownership of the property became vested in the plaintiff'; it being submitted that the breach of the condition of a chattel mortgage does not vest the ownership of the property in the mortgagee but merely the right of the plaintiff to the possession of the property for the purpose of selling the same in satisfaction of the mortgage debt.

"(11) His honor erred in charging the jury, 'If you decide that a demand was made and Zeigler should have given up the mules and nevertheless has kept them, he would be liable in such damages as the evidence shows that Faircy sustained by not being able to get possession of these mules, and you must decide from the evidence what amount of damages you would fix;' it being submitted that the plaintiff was not entitled to any damages whatsoever, there being no allegation in his complaint as to any damages."

J. W. Vincent, of Hampton, for appellant.
Glaze & Herbert, of Orangeburg, and J. W. Manuel, of Hampton, for respondent.

GARY, C. J. This is an action in claim and delivery for certain mules, and resulted in a verdict in favor of the plaintiff. The defendant appealed upon exceptions which will be reported.

It seems that the appellant does not contemplate any relief in so far as the merits of the case are involved, and that the sole purpose of the appeal is to reverse the judgment in order that the defendant may not be compelled to pay the costs of the case, for his attorney in his argument says: "If the cost item could be eliminated, the defendant is cheerfully willing to deliver the property to the plaintiff or pay the debt in full."

While the defendant has appealed upon 11 exceptions, he has not cited a single decision to sustain any of them.

First exception: The appellant's attorney did not argue this exception, which is clearly untenable.

Second exception: It is only necessary to refer to the affidavit to show that this exception cannot be sustained.

Third, fourth and fifth exceptions: We fail to see wherein the rulings mentioned in these exceptions were prejudicial to the rights of the appellant.

Sixth exception: The authorities cited in the argument of the respondent's attorneys clearly show that this exception cannot be sustained.

Seventh exception: What has already been said disposes of this exception.

Eighth exception: It has not been made to appear that the facts mentioned in said exception in any respect affected the rights of the plaintiff in this case.

Ninth exception: What has already been said disposes of this exception.

Tenth exception: The ruling of his honor, the presiding judge, is fully sustained by the authorities cited in the argument of the respondent's attorneys.

Eleventh exception: What has already been said disposes of this exception.

Appeal dismissed.

HYDRICK, WATTS, and FRASER, JJ., concur.

(36 S. C. 123)

WATTS v. HERMITAGE COTTON MILLS.
(Supreme Court of South Carolina. June 30, 1913.)

1. MASTER AND SERVANT (§§ 101, 102*)—DUTY OF MASTER—SAFE PLACE OF WORK.

It is an employer's duty to furnish an employé with a safe place of work.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 135, 171, 174, 178-184, 192; Dec. Dig. §§ 101, 102.*]

2. MASTER AND SERVANT (§ 130*)—MASTER'S DUTY—SAFE METHOD OF WORK.

It is an employer's duty to furnish his employé with a safe method of doing his work.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 264, 266, 276; Dec. Dig. § 130.*]

3. MASTER AND SERVANT (§ 189*)—"VICE PRINCIPAL."

Where the superintendent of the mill in which plaintiff was employed placed him under the direction of A., with instructions to do whatever A. told him to do, A. was the master's representative in ordering plaintiff to set a box on end, so as to make the master liable for injury from negligence in giving such order.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 427-435, 437-448; Dec. Dig. § 189.*]

For other definitions, see Words and Phrases, vol. 8, pp. 7313-7316.]

4. MASTER AND SERVANT (§ 149*)—MASTER'S LIABILITY—NEGLIGENCE OF VICE PRINCIPAL.

If an employé was injured from obeying the negligent order given him by the employer's representative, the employer would be liable, in the absence of contributory negligence or assumption of risk.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 291-295; Dec. Dig. § 149.*]

5. TRIAL (§ 296*)—INSTRUCTIONS—CURING ERROR.

Any error in an employé's injury action in refusing to charge upon whether A. and N. were fellow servants of plaintiff was not prejudicial, where the court charged that if A. stood in the place of the master in directing the work plaintiff was doing when injured, and acted negligently in doing so, the master was liable, and also instructed that B. was a fellow servant, and the master would not be liable for injury from his negligence.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 705-713, 715, 716, 718; Dec. Dig. § 296.*]

6. APPEAL AND ERROR (§ 882*)—ESTOPPEL TO ALLEGE ERROR.

Where defendant itself, in an employé's injury action, pleaded affirmatively the defense that the injury was caused by a fellow servant's negligence, though it would have been covered by the general denial, it cannot complain that the court charged that it must prove the defenses of assumption of risk, contributory negligence, and fellow servant's negligence, even though defendant was not required to prove the latter, and plaintiff was required to prove that the act was not that of a fellow servant.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3591-3610; Dec. Dig. § 882.*]

7. MASTER AND SERVANT (§ 265*)—PROOF—NEGLIGENCE OF FELLOW SERVANT.

An injured employé was not bound to prove that he was not injured by the negligence of a

fellow servant; that being for the employer to prove if he relied thereon.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 877-908, 955; Dec. Dig. § 265.*]

8. MASTER AND SERVANT (§ 279*)—INJURIES—WEIGHT OF EVIDENCE.

The master must prove by a preponderance of the evidence, in order to authorize the jury to so find, that the servant's injuries were caused by the negligence of a fellow servant.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 973-975, 978-980; Dec. Dig. § 279.*]

9. MASTER AND SERVANT (§ 280*)—INJURIES—ASSUMED RISK.

Evidence held not to sustain the defense of assumed risk in an employe's injury action.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 981-986; Dec. Dig. § 280.*]

10. MASTER AND SERVANT (§ 281*)—INJURIES—CONTRIBUTORY NEGLIGENCE—SUFFICIENCY OF EVIDENCE.

Evidence, in an employe's action for injuries, held to sustain a finding that plaintiff was not guilty of contributory negligence.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 987-996; Dec. Dig. § 281.*]

11. MASTER AND SERVANT (§ 279*)—INJURIES—SUFFICIENCY OF EVIDENCE.

Evidence, in an employe's injury action, held to sustain a finding that the injury was not caused by the negligence of a fellow servant.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 973-975, 978-980; Dec. Dig. § 279.*]

Appeal from Common Pleas Circuit Court of Kershaw County; Geo. W. Gage, Judge.

Action by L. W. Watts against the Hermitage Cotton Mills. From a judgment for plaintiff, defendant appeals. Affirmed.

The fourteenth exception was to the refusal to charge upon the question whether Andrews and Noland were fellow servants of plaintiff in performing the work about which plaintiff was engaged at the time of his injury, and the nineteenth exception was to error in charging that defendant must prove the defense of assumption of risk, contributory negligence, and fellow servant's negligence by a preponderance of the testimony, when it was incumbent upon plaintiff to prove that the act was that of defendant, and not that of a fellow servant.

W. M. Shannon, M. L. Smith, and Laurens T. Mills, all of Camden, for appellant. Rembert & Monteith, of Columbia, and E. D. Blakeney, of Kershaw, for respondent.

GARY, O. J. This is an action for damages, alleged to have been sustained by the plaintiff through the negligence of the defendant. The defendant denied the allegations of negligence, and set up the defense of contributory negligence and assumption of risk on the part of the plaintiff, and that the injury was the result of a risk which was incident to his said employment, by which, it seems, was meant the negligence of

a fellow servant. At the close of the plaintiff's testimony the defendant made a motion for a nonsuit, which was refused. The jury rendered a verdict in favor of the plaintiff for \$1,000. The defendant made a motion for a new trial, which was also refused. The defendant then appealed upon numerous exceptions, which will be reported.

The first question that will be considered, is raised by the thirteenth exception.

The plaintiff testified as follows:

"Q. The date alleged in this complaint, about the 5th of December, 1910, where were you working? A. At the Hermitage Cotton Mills. Q. What were you employed to do there? A. I was employed to help, at the time, Mr. Andrews, putting up frames. Q. The morning of the injury what work were you actually engaged in that morning? A. Putting up skeleton frames; I was helping them move boxes. Q. Who did you say was there; whom did you work under? A. Mr. Andrews; working under Mr. Andrews at the time. Q. Was Mr. Andrews present? A. Yes, sir. Q. Now, Mr. Watts, were you injured there? A. Yes, sir. Q. I wish you would tell the court and jury how you received any injury there. A. Well, we were moving those boxes, Mr. Andrews had us to move the boxes from the back end, the first box had to go around the upper end of the frame, and come between the wall and frame; as I passed Mr. Andrews I said, 'Where will we put this box?' He said, 'Set it up over there.' Q. Pointed out the place to put it? A. Yes, sir. Q. Who was bringing it? A. Us three; Noland Ballard and myself. Q. Where was Mr. Andrews? A. Standing in the alley, opposite between them and the other frames. Q. You went up and asked him where to put the box? A. Yes, sir. Q. And he told you where to put it? A. Yes, sir. Q. Did you put it where he told you? A. Yes, sir. Q. And you were instructed to set it up on the end? A. Instructed to set it up on the end. Q. Did you place it where he told you? A. Placed it where he told me. Q. Now, coming down to the actual injury, how did that occur? A. After we placed the box up there, I steadied it; I was on the other side of it, and the other two turned off in about the same time I did, I reckon, I think about that time; but we steadied it good before we let it loose, where it was to stand; I just turned around; as I turned around, I got far enough to keep the box from catching me anywhere, except right here, and it knocked me down. Q. Could this box have been laid flat down on the ground? A. Yes, sir; could have been.

"The Court: What you mean is on the side and not on its end?

"Mr. Monteith: Yes, sir.

"Q. If it had been laid that way, would have been flat down on the floor? A. Yes, sir. Q. Could it have turned over that way? A. No, sir. Q. Were you or not instructed

to set it up on its end? A. I was. Q. And you did so? A. Did so; yes, sir. Q. Was this Mr. Andrews the superintendent of the mill? A. He was foreman of them frames; he was not superintendent of the mill. Q. Who was superintendent of the mill? A. Mr. West was superintendent of the mill. Q. Who told you work with this man, Andrews? A. Mr. West. Q. Told you Mr. Andrews was there in charge of putting up the frame? A. Yes, sir; he put me with Mr. Andrews that morning. Q. And told you to do as Mr. Andrews told you to do? A. Yes, sir."

H. F. Andrews, a witness for the defendant testified as follows:

"Q. Where were you at work? A. The Hermitage Mills. Q. What was your business there? A. I came here to put up fly frames. Q. Did you have any one to assist you at that work? A. Three of the mill-men. Q. Was Mr. Watts one of those employed with you at the time? A. Yes, sir. Q. Who furnished you the hands to do this work? A. The superintendent, Mr. West. Q. Was Mr. West there while you were doing this work any time? A. He was in and out of the room. Q. You did that; you directed what to do and how to do it. A. Yes, sir."

Redirect examination:

"Mr. Mills: Mr. Andrews, you were asked whether there was reason for setting the boxes on end, and you said there was. Why? A. You set them on ends, square them around to get them out of the way to go by with the others and give more room. Q. Are you accustomed to receiving boxes of that size and setting them up? A. Yes, sir. Q. Was that the usual box? A. Yes, sir; with that stuff in it. Q. It is customary for you to have those boxes set up that way, on end? A. Yes, sir. Q. How many years have you been doing that? A. Thirteen years. Q. You have done that in one mill, or in many mills? A. Several mills. Q. Have you been doing that since that time? A. Yes, sir. Q. It is not a common thing to set those boxes up that way? A. Yes, sir. Q. And to receive them as you have stated? A. Yes, sir."

"Mr. Blakeney: You say for the reason to move them out, that's the reason that you set them up on end; more liable to fall that way than if laid down to be opened? A. Yes; more apt to fall. If you had laid it down as you did when you took it off of Mr. Watts, it could not have fallen on anybody? A. No, sir. Q. If you laid it down flat, it would be a safer way so far as falling? A. Yes, sir. Q. There was plenty of room to lay it flat? A. Yes, sir. Q. That is the safest way, as far as falling on anybody? A. Yes, sir."

P. L. West, the superintendent of the mill thus testified as a witness, for the defendant:

"Q. Did you hire Mr. Watts? A. Yes, sir. Q. What had you hired him to do? A. Before that, I had him to do something else.

I turned him over to Mr. Andrews, and Mr. Andrews gave him instructions. I just told Mr. Andrews to take those men, he could have them to assist him."

It will thus be seen that P. L. West, the superintendent of the mill, placed the plaintiff under the direction and control of H. F. Andrews, with instructions to do whatever Andrews told him to do, and that he was injured while carrying out the orders of Andrews, which rendered the situation more dangerous than if the box had been placed on its flat surface.

[1-4] It was the duty of the defendant to furnish the plaintiff with a safe place to work, and also a safe method of doing the work. Under the circumstances Andrews was the representative of the master, in ordering the plaintiff to deposit the box on end; and, if in giving such directions he was guilty of negligence which resulted in the plaintiff's injury, the defendant would be liable, unless the plaintiff was guilty of contributory negligence, or unless the injury was the result of a risk which he assumed. *McBrayer v. Chemical Co.*, 89 S. C. 387, 71 S. E. 980. In that case the court said: "This case is distinguished from *Martin v. Royster Guano Co.*, 72 S. C. 237 [51 S. E. 680], because in that case there was no testimony that the foreman ordered Martin to work at the particular place at which he was injured, or that he ordered him to remain there and work after he became apprehensive of danger." This exception is overruled.

[5] We proceed to the consideration of the fourteenth exception. The record shows that the following took place, at the close of the charge:

"Mr. Smith: Our contention is, all of these parties were fellow servants with the foreman, as well as Noland and Tom Ballard, and if they were fellow servants, the jury are to find it made no difference whether the foreman ordered him or not; the mill is not to be liable under the circumstance.

"The Court: I made my charge in response to your argument.

"Mr. Smith: We took that position this morning."

His honor the presiding judge had already charged the jury as follows: "If Andrews stood in the place of the master—that is, of the mill—and directed that box to be put there, and Tom put it there because Andrews, representing the mill, told them to put it there; if you conclude that is so, and that was a careless thing, a negligent thing; that a reasonably careful man would not have done that, would not have ordered a box of that character, to be put at that place; if you come to that conclusion—then you conclude that the mill was negligent, and that is a matter peculiarly for you." He also charged as follows: "The third defense, if I catch the argument of counsel, is that Watts

was a fellow servant with Tom Ballard—you know who Tom is, the black man. I do not think it will be disputed, I do not think that there is any dispute about Watts and Tom being fellow servants; that is to say, they were together handling the box. If Watts came to his disaster by reason of negligence on the part of Tom, under the law the mill would not be liable, because they would be fellow servants, and when Watts went to work with Tom, he assumed that risk; that Tom would be as careful as he would be, and he would be as careful as Tom." So that, even conceding there was error, it was not prejudicial, as the defendant practically received the benefit of the request.

What has already been said disposes of the fifteenth, sixteenth, seventeenth, and eighteenth exceptions.

[6] The nineteenth exception cannot be sustained, for the reason that the defendant had set up as a defense that the injury was caused by the negligence of a fellow servant. In such cases the rule is thus stated in *Roberts v. Chemical Co.*, 84 S. C. 283, 66 S. E. 298: "Evidence tending to prove that the plaintiff's injury was caused solely by his own negligence, or by the negligence of a fellow servant, would have been admissible under the general denial. It was therefore unnecessary for defendants to set up, as an affirmative defense, that plaintiff's injury was caused by the negligence of a fellow servant. This fault in their pleadings very naturally led the circuit judge into the inadvertent error of charging the jury that the burden was upon the defendants to prove the defense, for it was set up as an affirmative defense between the other two affirmative defenses, the burden of proof of which was upon defendants. Parties ought not to be heard to complain, when their own faulty pleading misleads the circuit judge."

[7, 8] Furthermore, it was not incumbent on the plaintiff to prove that he was not injured by the negligence of a fellow servant; and the defendant could not get the benefit of such fact, unless it made proof thereof, which had to be established by the preponderance of the testimony in order to produce conviction on the minds of the jurors.

[9-11] All the other exceptions relate to the sufficiency of the facts, to sustain the plaintiff's cause of action, or to sustain the defense of assumption of risk, contributory negligence, or negligence of a fellow servant, and, as shown by the foregoing testimony and for the reasons hereinbefore stated, cannot be sustained.

Judgment affirmed.

HYDRICK and WATTS, JJ., concur.
FRASER, J., concurs in the result.

(140 Ga. 161)

DOTSON v. SAVANNAH PURE FOOD CANNING CO.

(Supreme Court of Georgia. June 16, 1913.)

(Syllabus by the Court.)

1. PLEADING (§ 193*)—FAILURE TO ATTACH COPY OF CONTRACT—GROUND OF DEMURRER.

Under the decision in *Lynch v. Citizens & Southern Bank*, 136 Ga. 344 (2), 71 S. E. 469, if a petition sets out the substance of a written contract, it is not demurrable because a copy of the contract is not attached.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 425, 428-435, 437-443; Dec. Dig. § 193.*]

2. CORPORATIONS (§ 90*)—STOCK SUBSCRIPTION—ACTION—PLEADING.

A petition alleged that the plaintiff was a corporation under the laws of this state, that on a named date the defendant subscribed for two shares of its stock of the par value of \$200 and agreed to pay that sum, that, relying on such subscription, the plaintiff had incurred a large indebtedness, which it could not pay unless it collected all of its stock subscriptions, and that it had made a call therefor, but the defendant had refused to pay. Held, that the petition was not demurrable on the ground that it did not allege what was the minimum capital stock authorized by the charter, or that it had been subscribed.

(a) A suit on a contract of subscription containing a condition precedent, which must be performed before liability attaches, is not the same as a suit on a general subscription to stock, in which it is sought to defend on the ground that the minimum capital stock has not been subscribed.

(b) Other grounds of demurrer were without merit.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 184, 185, 187, 190, 194; Dec. Dig. § 90.*]

3. APPEAL AND ERROR (§ 1040*)—CORPORATIONS (§ 90*)—STOCK SUBSCRIPTION CONTRACT—FRAUD.

Where a plea attacked a contract of subscription to stock as obtained by fraud and alleged that the terms sought to be enforced were printed on a separate page of the paper, which was folded so as to conceal them, that there was nothing on the face of the paper as signed by the defendant to indicate any terms, and that he was fraudulently led to sign a subscription list on verbal representations and agreements as to the terms of subscription, such plea was not on its face demurrable; and where the contract was not copied in the pleadings, and did not appear to have been formally before the court on the hearing of the demurrer, a judgment sustaining such demurrer will not be rendered correct on the ground that by referring to the contract, which was later introduced in evidence, it showed on its face that there were printed words on the sheet where the defendant signed, referring to the terms on the other page.

(a) Whether this alone would require a reversal is not decided.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4089-4105; Dec. Dig. § 1040.* Corporations, Cent. Dig. §§ 184, 185, 187, 190, 194; Dec. Dig. § 90.*]

4. EVIDENCE (§ 441*)—WRITTEN CONTRACT—CHANGE BY PAROL.

Where a printed contract contained its own terms, and on the page where a subscriber for stock signed reference was made to terms set out on another sheet thereto attached, it was not competent to plead and prove a parol contract of subscription different therefrom; no

sufficient reason appearing why the subscriber did not or could not read the reference on the page where he signed and be put on notice of the written contract.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 1719, 1728-1763, 1765-1845, 2030-2047; Dec. Dig. § 441.*]

5. CORPORATIONS (§ 90*) — ORGANIZATION — STOCK SUBSCRIPTION—ASSIGNMENT—NECESSITY.

A contract in regard to the erection of a factory provided, among other things, as follows: The first party, "until full and final payment of this contract, is a voluntary association of persons." The second party was a corporation, which agreed to erect and equip a canning factory for the price of \$3,500 according to certain specifications. The contractor was to have the right to receive and apply on the contract price any partial or total payments of amounts subscribed. Stock subscriptions in excess of the purchase price might be obtained, "but the total subscription shall be held and collected by second party (the contractor) until such time only as full cash payment has been made. * * * All remaining subscriptions or note balance, after said canning association's entire indebtedness to second party has been so paid, shall be duly assigned to the said corporation for a working capital. After payment and delivery has (have?) been made, as above, said canning association shall organize a co-operative society under state law, fixing aggregate amount of stock not less than the amount subscribed thereto, represented by stock certificates of \$100.00 each. * * * The within read, approved and executed on the date first written by subscribers to the Savannah Canning Co." Held, that the Savannah Pure Food Canning Company, which was chartered and organized by the subscribers to the agreement above described, was not ipso facto vested with title to the choses in action arising from the signing of such agreement, without any assignment by the contracting company.

(a) Upon a suit by the Savannah Pure Food Canning Company against a subscriber to the agreement, it was not sufficient to authorize a recovery to introduce evidence to show that the contractor had been fully paid.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 184, 185, 187, 190, 194; Dec. Dig. § 90.*]

6. EQUITABLE ASSIGNMENT—STOCK SUBSCRIPTION CONTRACT.

Whether payment to the contractor created an equitable assignment or right to the subscription, which could have formed the basis of recovery under equitable pleadings and with all parties in interest or to the agreement before the court, so that their rights could be adjudicated, is not now for determination.

Error from Superior Court, Chatham County; W. G. Charlton, Judge.

Action by the Savannah Pure Food Canning Company against G. C. Dotson. Judgment for plaintiff, and defendant brings error. Reversed.

Saussy & Saussy, of Savannah, for plaintiff in error. Anderson, Cann & Cann and T. F. Walsh, Jr., all of Savannah, for defendant in error.

LUMPKIN, J. The Savannah Pure Food Canning Company brought suit against G. C. Dotson, alleging that it was a corporation under the laws of Georgia; that the defend-

ant was indebted to it in the sum of \$200, with interest, for that he subscribed to two shares of the capital stock of the plaintiff of the par value of \$200; that, relying on such subscription, the plaintiff incurred large indebtedness, amounting to approximately \$10,000, and, unless it collects all the indebtedness due to it and subscriptions to its stock, it will be unable to pay its indebtedness; that on a date named the plaintiff, by order of the board of directors, through its secretary, made a call for the amount due on the stock, and gave notice to the defendant therefor, and demanded payment, but he failed and refused to pay; and that by this and similar suits it seeks to obtain the sums due on subscriptions to its stock for the purpose of paying its debts. The defendant demurred to the petition. The demurrer was overruled.

The defendant sought to amend its answer. The amendment was not allowed. The court refused to grant a nonsuit, and after the close of the evidence directed a verdict for the plaintiff. The defendant excepted.

[2] As to only two points do the headnotes require any elaboration. Where a contract of subscription includes a condition precedent which must be performed before liability attaches, it has been held that the plaintiff, in a suit on such subscription, must show that the condition has been performed or a readiness to perform it. Thus where a contract of subscription to stock provided that the subscription should be paid in such installments and at such times as might be decided by a majority of the stockholders or board of directors or trustees empowered for the purpose by a majority of the stockholders, and suit was brought on such contract against a subscriber, and no proof was offered showing that the stockholders, directors, or trustees had ever provided in what installments the subscriptions should be paid, or had fixed a time or times for such payment, or had made any call therefor, a judgment of nonsuit was held to be proper. *North & South Street Railroad Co. v. Spullock*, 88 Ga. 283, 14 S. E. 478. It has also been held that, in a suit on a subscription to stock which stated as a condition of liability the receiving of a certain amount of subscriptions, this should be alleged and shown. But, in a suit by a corporation against a subscriber to its stock on a general subscription, it has been held in this state that it is not necessary for a corporation to allege and prove as a part of its case what was the minimum capital stock fixed by its charter, and that it had complied with the prerequisites of the statute before organization. If the subscriber sued desired to set up that he was relieved from his subscription by reason of the fact that the minimum capital stock fixed by the charter had not been subscribed, or that some of the subscriptions were colorable only, or that some

of the subscribers had been released, so that the corporation in fact did not have subscriptions for the minimum amount, it has been held in this state that this was proper matter to be set up by way of defense rather than such as furnished ground for demurrer; no lack of authority or right to sue appearing on the face of the petition. *Wood v. Coosa & Chattooga River R. Co.*, 32 Ga. 273 (3); *South Georgia & Florida R. Co. v. Ayres*, 56 Ga. 230 (2); *Hendrix v. Academy of Music*, 73 Ga. 437. See, also, 1 Boone, *Code Pleading*, § 138; *McKay v. Elwood*, 12 Wash. 579, 41 Pac. 919.

[8] The trial judge refused to grant a nonsuit and directed a verdict for the plaintiff. In this he erred. The contract described in the fourth headnote was not the ordinary subscription for stock in a corporation to be formed, payable on call of the directors, where, upon the formation of the corporation, the right to collect the subscriptions vested in it. *Branch v. Augusta Glass Works*, 95 Ga. 573, 23 S. E. 128. Here the primary provision was not the formation of a corporation which should then proceed to act for itself. But, by the terms of the agreement, the subscribers contracted as a voluntary unincorporated association; the subscriptions were parts of a contract with the corporation with which they contracted; it had the right to collect them; there was to be no incorporation of such subscribers until performance of the contract with the contractor; and then the agreement was, not that the title to unpaid subscriptions should vest in the corporation so formed, but that the contractor, after receiving full payment, would assign what was left to the new corporation. The parties to the contract placed in the contractor the title and right to collect these subscriptions for its benefit, and they distinctly recognized that an assignment should be necessary to divest the contractor of such title. The agreement was not one in the nature of a mortgage or lien, where payment terminates the lien of the mortgagee, but it was a chose in action for which an assignment was specifically provided. The ordinary rule as to general subscriptions to stock in a corporation to be formed does not therefore apply.

The decision of the Court of Appeals in *Bing v. Bank of Kingston*, 5 Ga. App. 578, 63 S. E. 652, does not conflict with this ruling, but harmonizes with it, so far as the two cases are similar. It was there held that where subscriptions to stock were evidenced by promissory notes payable to a named person, in the nature of a trustee to hold for the proposed corporation, such person could sue on them for the use of the corporation. How could he sue unless he had the title? Whether the new corporation might have brought an equitable action, making all parties in interest, including the con-

tractor, parties to the case, and determining its rights as well as that of the subscriber, is not before us.

As the uncontradicted evidence showed that there had been no assignment to the new corporation, it was error to overrule a motion for nonsuit and direct a verdict for the plaintiff.

Judgment reversed. All the Justices concur.

(140 Ga. 178)

RILEY v. ROYAL ARCANUM et al.

(Supreme Court of Georgia. June 17, 1913.)

(Syllabus by the Court.)

1. INSURANCE (§ 815*)—PLEADING (§ 193*)—PARTIES (§ 88*)—MISJOINDER—OBJECTION—PETITION—SUFFICIENCY—GENERAL DEMURRER.

Where, in a suit upon an insurance policy, the plaintiff sets forth the name of the insured, the names of the beneficiaries, the amount for which the policy was issued, the facts upon which he relies to show that he was a beneficiary, and alleges also the death of the insured, the maturity of the policy in consequence of that fact, and refers for the full terms and provisions of the policy to that instrument itself, which he alleges to be in the possession of the defendant, such petition will be construed to be a suit involving liability upon a policy of insurance.

(a) It should not have been dismissed upon general demurrer, no special demurrer having been filed, upon the ground that a copy of the policy was not attached.

(b) Even if there was misjoinder of parties and causes of action, this should have been raised by special demurrer.

[Ed. Note.—For other cases, see *Insurance*, Cent. Dig. §§ 1996-1998; Dec. Dig. § 815; *Pleading*, Cent. Dig. §§ 425, 428-435, 437-443; Dec. Dig. § 193; *Parties*, Cent. Dig. §§ 145-147; Dec. Dig. § 88.*]

2. INSURANCE (§ 815*)—PETITION—DEMURRER.

The allegations in the petition not showing that the policy sued on is other than an ordinary insurance policy, it will be treated as such as against a general demurrer.

[Ed. Note.—For other cases, see *Insurance*, Cent. Dig. §§ 1996-1998; Dec. Dig. § 815.*]

3. QUESTION NOT DETERMINED.

Inasmuch as the judgment of the court below is reversed upon another assignment of error, it is unnecessary to pass upon the question raised by the exception to a refusal of the court to give counsel time to prepare an amendment to the declaration.

Error from Superior Court, Fulton County; J. T. Pendleton, Judge.

Action by J. L. Riley against Robert E. Riley and the Royal Arcanum. Judgment for defendants, and plaintiff brings error. Reversed.

J. L. Riley brought suit against Robert E. Riley and the Royal Arcanum, alleging the latter to be "an assessment insurance company." It is alleged in the petition that the insurance company, 10 years previously to the filing of the suit, issued to E. S. Riley a policy of insurance, wherein it contracted

and agreed to pay "to the beneficiaries designated by E. S. Riley the sum of \$3,000 upon the death of E. S. Riley." For the terms and provisions of said policy plaintiff refers thereto, and says that said policy is in possession of one of the defendants, and that its full terms and conditions are known to both of them. After the issuance of the policy E. S. Riley, not caring to continue paying assessments and dues thereon, agreed with plaintiff and defendant R. E. Riley (J. L. and R. E. being sons of E. S. Riley) that if plaintiff and R. E. Riley would pay such assessments as should become due thereafter, upon maturity of said policy the same should belong to and be paid to plaintiff and Robert E.; "that said policy was issued to read payable to J. L. Riley and R. E. Riley, beneficiaries." Plaintiff and R. E. agreed between themselves and with E. S. Riley to make payments of the assessments and dues that might thereafter become due on the policy, and that the policy was "rewritten or changed" so as to be made payable to plaintiff and R. E. Riley, and that from the date thereof plaintiff has paid each alternate month the dues and assessments on the policy, and R. E. Riley has paid each alternate month the dues and assessments, so that the two beneficiaries named have complied with their contract and made payments of dues on said policy up to the death of E. S. Riley, who died about April, 1911, and after his death proof thereof was duly made to the company. And it is alleged that the sum of \$3,000, the amount for which the policy was issued, became due and payable to plaintiff and R. E. Riley, jointly. It is charged that on or about the 14th day of August, 1910, the policy was changed as to the beneficiaries, so as to make R. E. Riley the sole beneficiary, and plaintiff, not having possession of the papers and documents through and by which said change was made, cannot further set them out, but said papers and documents are in the possession of the defendants, or one of them, and they are fully familiar with the contents thereof. It is charged that the defendant Royal Arcanum had notice and knowledge of the contract between E. S. Riley, R. E. Riley and plaintiff, and had notice and knowledge that plaintiff had a one-half interest in said policy, and that plaintiff was paying one-half of the premiums and assessments due thereon; that plaintiff did not know until after the death of E. S. Riley that the change was made as to the beneficiaries, and continued to pay half the dues, assessments, and premiums due on the policy; that having made a valid contract by which he was to receive one-half of the policy, he is entitled to recover that amount, even if the beneficiaries have been changed; that the defendant insurance company has recognized its obligation to pay said sum, but denies the right of the plaintiff to recover his one-half thereof. The petition

was dismissed upon general demurrer, and plaintiff excepted.

Watkins & Latimer, of Atlanta, for plaintiff in error. Dorsey, Brewster, Howell & Heyman, of Atlanta, for defendants in error.

BECK, J. (after stating the facts as above). [1] 1. Considering all the allegations in this petition, we are of the opinion that it was a suit upon an insurance policy. It sets forth the name of the beneficiaries, the amount due under the policy, alleges that the instrument is in the hands of the defendants, and for all the terms and provisions of the policy refers to the instrument itself. It also alleges the death of the insured, the submission of proof of the death, and that the sum for which the policy was issued became due. But we do not think the petition should have been dismissed upon general demurrer, upon a failure to comply with the provisions of section 5541 of the Code, requiring that a copy of the written contract or other writing sued upon shall be attached to the suit. Such an objection to the sufficiency of the petition should have been raised by special demurrer, and could not be effectively raised by a motion to dismiss in the nature of a general demurrer at the trial term.

Nor should the general demurrer have been sustained on the ground that there was a misjoinder of parties or causes of action. An objection of this character should likewise be raised by special demurrer at the appearance term.

[2] 2. The mere fact that the petition refers to the payment of assessments and dues by himself and the other party alleged to be a beneficiary, and the allegation that the policy was payable to the beneficiaries to be named by the insured, when considered in connection with the allegation that, after the agreement between himself and his father and his brother, to the effect that if he (the plaintiff) and his brother would pay the dues and the assessments, they should be the beneficiaries in the policy, and the policy was issued so as to read payable to J. L. Riley (the plaintiff) and R. E. Riley (one of the defendants), are not sufficient, upon general demurrer, to authorize the court to treat the policy as one other than an ordinary life insurance policy, and to hold that it was merely a benefit certificate in a fraternal beneficiary society, wherein the beneficiary could be changed at will by the insured. The instrument sued upon is alleged to be a policy of insurance; and, in the absence of allegations to the contrary, upon general demurrer it will be considered an ordinary policy of insurance, in which the beneficiaries named had a vested interest, especially in view of the fact that they had paid the premiums thereon. If it had been shown by the petition that what is called a policy of insurance was a certificate of membership

in a fraternal beneficiary society, a different question would have been raised.

[3] 8. Inasmuch as the judgment of the court below is reversed upon another assignment of error, it is unnecessary to pass upon the question raised by the exception to a refusal of the court to give counsel time to prepare an amendment to the declaration.

Judgment reversed. All the Justices concur.

(140 Ga. 157)

HUNT et al. v. LAVENDER et al.

(Supreme Court of Georgia. June 16, 1913.)

(Syllabus by the Court.)

1. DESCENT AND DISTRIBUTION (§ 90*)—ACTION BY HEIRS—EVIDENCE.

The court charged the jury as follows: "I charge you if you believe that this land sued for in this case was the dower lands of Mrs. Eliza Lavender, and that she died in 1911, and the plaintiffs were the heirs and legatees of Dr. J. S. Lavender, they are entitled to recover, unless some legal reason is shown to the contrary." This charge was not accurate. Evidently by the enumeration of certain facts and the statement that upon these facts being made to appear the plaintiffs would be entitled to recover, unless some "legal reason" was shown to the contrary, the court meant that, upon proving the facts enumerated, a prima facie case in favor of the plaintiffs would be made which would authorize the recovery unless rebutted by evidence; and the facts enumerated, even if established by evidence, would not of themselves have made a prima facie case in favor of the plaintiffs.

[Ed. Note.—For other cases, see Descent and Distribution, Cent. Dig. §§ 351-358, 368-381; Dec. Dig. § 90.*]

2. EXECUTION (§ 142*) — EXCESSIVE LEVY — WHAT CONSTITUTES.

The court's charge that "an excessive levy is where an officer levies on more property than is necessary to discharge the liens in his hands, with costs," contains a construction of the expression "excessive levy" that is too restricted, and one which, under the facts of this case, was liable to be misunderstood by the jury, in the absence of an explanation that the levying officer exercises a certain discretion and should be allowed a reasonable margin between the exact value of the property levied on and the amount of the execution in his hands, or some other explanation of a similar purport.

(a) A similar criticism might be made of the following charge of the court: "I charge you that a sheriff or other officer cannot raise by execution sale a greater amount of money than by the writ he is commanded to make with cost."

[Ed. Note.—For other cases, see Execution, Cent. Dig. §§ 359-363; Dec. Dig. § 142.*]

3. JUDGMENT (§ 235*) — JOINT ACTION — RECOVERY BY ONE PARTY.

This was an action for the recovery of land by several coplaintiffs; and, there being some evidence authorizing the jury to find that one of the coplaintiffs did not own any interest in the lands sued for and was not entitled to recover, upon request the jury should have been instructed to pass upon the question as to whether that plaintiff was entitled to recover in this action, and should have been directed, in the event they found he was not entitled to recover, to find against the other plaintiffs. The

court refused a written request to charge covering this issue, and the refusal was error.

(a) There was no error in refusing to give the other written requests under the rulings in the cases of *Richards v. Edwardy and Farlinger v. Edwardy*, 138 Ga. 690, 76 S. E. 64.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 414, 429; Dec. Dig. § 235.*]

4. EVIDENCE (§§ 165, 472*)—BEST AND SECONDARY—CONCLUSIONS.

In the progress of the trial, J. S. Lavender, one of the coplaintiffs, was asked the following questions: "Q. Isn't it a provision of the will that as the children became of age they were to get their share of the estate? Ans. Yes, sir. Q. You got yours? Ans. Yes, sir." This evidence, upon motion of plaintiffs' counsel, was excluded. In excluding it the court did not err. The first answer stated a fact of which there was higher and better evidence. And the first as well as the second answer stated conclusions of the witness which depended upon a construction of a will, and that construction was matter for the court to deal with.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 546-555, 2186-2195, 2248; Dec. Dig. §§ 165, 472.*]

Error from Superior Court, Pike County; R. T. Daniel, Judge.

Action by S. J. Lavender and others against T. J. Hunt and another. Judgment for plaintiffs, and the defendant named brings error. Reversed.

E. F. Dupree, of Zebulon, and E. J. Reagan, of McDonough, for plaintiff in error, J. F. Redding and C. J. Lester, both of Barnesville, for defendants in error.

BECK, J. J. S. Lavender and seven other parties, alleging that they are heirs at law of J. S. Lavender, deceased, and that they are legatees under the last will and testament of the decedent, and alleging also that the administrator of the estate of the decedent gives his consent to the bringing of the suit, filed their petition against Thos. J. Hunt and John Jenkins for the recovery of certain lands, which it is alleged the decedent was seized and possessed of at the time of his death, and which was subsequently duly set apart and assigned to Mrs. Eliza Lavender, the widow of the decedent, as dower. The widow died in the year 1911, and after her death in the same year the suit was brought. During the life of the widow the reversionary interest in the dower lands sued for had been sold under executions against the administrator of the decedent's estate, and it is claimed by the plaintiffs that the value of this interest was largely in excess of the executions against the estate and that the sale thereunder was absolutely void. The defendant Thos. J. Hunt filed his plea and answer, admitting that he was in possession of the lands sued for, and asserting that he had title thereto. The jury returned a verdict for the plaintiffs. The defendant made a motion for a new trial, which was overruled, to which judgment the movant then excepted.

[1] 1. The following charge of the court is excepted to: "I charge you if you believe that this land sued for in this case was the dower lands of Mrs. Eliza Lavender, and that she died in 1911, and these plaintiffs were the heirs and legatees of Dr. J. S. Lavender, they are entitled to recover unless some legal reason is shown to the contrary." This charge was not strictly accurate. It is apparent that the court failed to sum up all the facts which were necessary to constitute a *prima facie* case in favor of the plaintiffs, and when the court said that, if such and such facts appeared, plaintiffs would be entitled to recover, unless a "legal reason to the contrary" was shown, it meant that a *prima facie* case would be made in favor of the plaintiffs when the facts enumerated were established by evidence or admitted in the pleadings; and merely to prove that the petitioners were heirs at law and legatees under the will of the decedent, without showing that they were all of the heirs at law, or that by the terms of the will they were the only legatees having an interest in the land sued for, would not authorize a recovery of the entire interest in the property sought to be recovered.

[2] 2. The court charged the jury that "an excessive levy is where an officer levies on more property than is necessary to discharge the lien in his hands, with costs." This charge is not strictly accurate. The jury might have understood such instructions to mean that any excess value of the property over the amount of the liens and the costs would render the levy excessive and void; whereas the officer making the levy is allowed a reasonable margin—we might say, a liberal margin, between the amount of the writ which he is seeking to have satisfied, and the value of the property levied upon (*Roser v. Georgia Loan & Trust Co.*, 118 Ga. 181, 44 S. E. 994); and especially in a case like this, where the property levied upon was a reversionary interest in the land, of which the purchaser could not obtain possession until the death of the life tenant. See in this connection 2 *Freeman on Executions*, p. 412, and cases cited; *Tiernan v. Wilson*, 6 Johns. Ch. (N. Y.) 411. A similar criticism might be made of the following charge of the court: "I charge you that a sheriff or other officer cannot raise by execution sale a greater amount of money than by the writ he is commanded to make with cost." While this charge is in the exact language used in the fourth division of the opinion in the case of *Parker v. Glenn*, 72 Ga. 637, it is only a part of the sentence, and the context leaves no doubt that the officer in making the levy is allowed to exercise a sound discretion, and is given some margin.

[3] 3. This was a joint action for the recovery of land; and, if the evidence showed that one of the joint plaintiffs could not re-

cover, then none could recover. *Shaddix v. Watson*, 130 Ga. 704, 61 S. E. 828. Under the evidence there seems to be some doubt as to whether J. S. Lavender, one of the joint plaintiffs, had received his share of the estate, and having received it was thereby excluded from any further participation in the subsequent distribution of the remainder of the estate. He testified that he had received 100 acres of the land of which his father died seised and possessed, the entire acreage of land belonging to the estate amounting to some 800 or 900 acres, and whether this 100 acres which the party last referred to received was his entire share of the estate of his father, or only his part of it exclusive of the interest in the reversion of the dower lands, may be made clearer upon the next trial. But the question as to whether or not J. S. Lavender had any further interest in the estate was one for the jury, and the court should therefore have given in charge the following written request: "If you believe from the evidence that the plaintiff J. S. Lavender had his share of the estate of J. S. Lavender, deceased, that was coming to him under the will, and he received the same and applied the same to his own use, he would not be entitled to recover in this case, and, if he cannot recover, none of the plaintiffs can, and you should find for the defendant." The other requests to charge were properly refused. The propositions of law contained in them are ruled in the cases of *Richards v. Edwards*, and *Farlinger v. Edwards*, 138 Ga. 690, 76 S. E. 64.

[4] 4. In the progress of the trial J. S. Lavender, one of the coplaintiffs, was asked the following questions: "Q. Isn't it a provision of the will that as the children became of age they were to get their share of the estate? Ans. Yes, sir. Q. You got yours? Ans. Yes, sir." This evidence, upon motion of plaintiffs' counsel, was excluded. In excluding it the court did not err. The first answer stated a fact of which there was higher and better evidence. And the first as well as the second answer stated conclusions of the witness which depended upon a construction of a will, and that construction was matter for the court to deal with. This was not an effort to show that the witness had settled with the legal representatives of the estate and accepted that portion of the land which they showed he had received as being in full of all his claim against the estate, including any interest in the dower lands, so that in no event would he have any further claim on the estate; but, when the two questions are taken together, they amount merely to asking the opinion of the witness as to what the will authorized him to receive, and whether he had received what was so authorized.

Judgment reversed. All the Justices concur.

(140 Ga. 202)

MORGAN v. STATE.

(Supreme Court of Georgia. June 17, 1913.)

*(Syllabus by the Court.)***1. INTOXICATING LIQUORS (§ 16*)—TAXATION—UNIFORMITY—SOFT DRINKS.**

Section 7 of the general tax act of August 16, 1909 (Laws 1909, p. 82; Code 1910, § 983), imposes a business tax of \$1,000 for each place of business on every person who maintains a place of business in this state where beverages, drinks, or liquors in imitation of or intended as a substitute for beer, ale, or wine or whisky, or other alcoholic, spirituous, or malt liquors "are kept for sale or distribution, or are sold in wholesale quantities." The tax above mentioned is enforceable whether the person maintaining the place of business owns the goods which are kept or sold, or deals with them as agent for another, or whether the goods be manufactured in this state, or beyond the limits of this state. So much of the act as has the effect stated is not violative of the uniformity clause of article 7, § 2, par. 1, of the Constitution of this state.

(a) But superadded to what is stated above, section 7 of the general tax act, supra, attempts by a process of classification to impose a different and greater tax on persons maintaining a business of the character mentioned if the goods handled at such place of business are manufactured beyond the limits of this state. So much of the act as seeks to impose a greater tax where the goods handled are manufactured beyond the limits of the state is obnoxious to that part of the Constitution above mentioned, and is void.

[Ed. Note.—For other cases, see *Intoxicating Liquors*, Cent. Dig. §§ 19, 20; Dec. Dig. § 16.*]

2. CONSTITUTIONALITY OF STATUTE.

Omitting the part of section 7 of the general tax act which in the preceding headnote is held to be unconstitutional, the balance of section 7 is not violative of either of several other constitutional provisions specified in the questions propounded by the Court of Appeals, and whether section 7 of the act would be violative of any of such constitutional provisions if the part thereof which is held to be unconstitutional were not eliminated need not be decided.

Certified Questions from Court of Appeals.

Proceedings by the State against J. H. Morgan under the statute imposing a liquor license tax, and Morgan brought error to the Circuit Court of Appeals, which court certifies a constitutional question to the Supreme Court. Answered in opinion.

The Court of Appeals has certified to the Supreme Court the following questions:

"1. Is section 7 of the general tax act of the General Assembly of the state of Georgia, approved August 16, 1909, as codified in Code 1910, § 983, upon which the special presentment in this case was founded, in conflict with paragraph 1 of section 2 of article 7 of the Constitution of the state of Georgia in that: (a) The act imposes a license and special tax not uniform upon the same class of subjects; (b) it imposes a greater tax upon persons maintaining 'a supply depot, warehouse, distributing office, or other place of business within this state' where 'any beverage, drink or liquor in imi-

tation of, or intended as a substitute for beer, ale, wine or whisky, or other alcoholic, spirituous or malt liquors,' manufactured by nonresident manufacturers, is kept for sale, than is imposed by the laws of this state upon persons engaged in the sale of like products of resident manufacturers; (c) the tax required by this act is a discrimination against such dealers handling the products of nonresident manufacturers, and in favor of such dealers handling the products of resident manufacturers?

"2. Is the said act in conflict with the fourteenth amendment of the Constitution of the United States in that: (a) The act imposes a greater tax upon persons maintaining 'a supply depot, warehouse, distributing office, or other place of business within this state' where 'any beverage, drink or liquor in imitation of, or intended as a substitute for beer, ale, wine or whisky, or other alcoholic, spirituous or malt liquors,' manufactured by nonresident manufacturers, is kept for sale, than is imposed by the laws of this state upon persons engaged in the sale of like products of resident manufacturers; (b) the license or tax required by the act is a discrimination against such dealers handling the products of nonresident manufacturers, and in favor of such dealers handling the products of resident manufacturers?

"3. Is the said act in conflict with paragraph 3 of section 8 of article 1 of the Constitution of the United States in that the act attempts to discriminate in favor of products of manufacturers of other states?

"4. Is the said act in conflict with paragraph 1 of section 2 of article 4 of the Constitution of the United States in that: (a) The act denies to citizens of other states privileges and immunities granted to citizens of the state of Georgia; (b) a greater tax is thereby imposed upon the sale of products of manufacturers of other states than is imposed upon the sale of products of manufacturers of the state of Georgia; (c) the act imposes a greater burden upon the sale of products of manufacturers of other states than is imposed upon the sale of like products of manufacturers resident in the state of Georgia, and thereby discriminates in favor of manufacturers resident in the state of Georgia and against manufacturers resident in the other states of the United States; (d) a greater tax is thereby imposed upon persons selling at wholesale products of manufacturers not residing in this state than is imposed upon persons selling products of manufacturers resident in the state of Georgia?"

A. D. Gale and H. F. Dunwody, both of Brunswick, for plaintiff in error. J. H. Thomas, Sol. Gen., of Jesup, for the State.

ATKINSON, J. [1] Section 7 being that part of the tax act which is attacked as be-

ing unconstitutional, refers to the subject of dealing in certain commodities "referred to in the preceding section." The things so referred to are "any beverage or drink or liquor in imitation of, or intended as a substitute for beer, ale, or wine or whisky, or other alcoholic, spirituous, or malt liquors." "The preceding section" makes it mandatory for persons manufacturing such commodities in this state to obtain from the ordinary of the county where the business is carried on a license at a cost of \$1,000 for each place of business. This much having been said of section 4, or "the preceding section," section 7 may the better be understood. It is as follows:

"Every person, firm, or corporation who shall maintain a supply depot, warehouse, distributing office, or other place of business within this state where such beverages, drinks or liquors referred to in the preceding section are kept for sale or distribution, or are sold in wholesale quantities, that is to say, in quantities of more than five gallons, and each and every agent or representative of each separate non-resident manufacturer, manufacturing firm, or manufacturing corporation of any such beverages, drinks or liquors, and each person, firm, or corporation handling the product of such non-resident manufacturer, manufacturing firm, or corporation, and keeping for sale or for distribution or handling and selling any such drinks, liquors, or beverages in this state in wholesale quantities as aforesaid, shall obtain a license so to do from the ordinary of the county wherein such supply depot, warehouse or distributing office, or other place of business by wholesale is located, and shall pay for said license the sum of one thousand dollars for each calendar year or part thereof for each such place of wholesale business in this state. The said agents or representatives of non-resident manufacturers of such beverages, and persons handling and selling by wholesale the product of such non-resident manufacturing persons, firms or corporations, shall obtain and pay for a separate license for each separate non-resident person, firm or corporation represented by them, or whose product is handled by them in wholesale quantities."

In its arrangement the language is somewhat confusing, but properly construed section 7 requires a business tax of \$1,000 on every person who maintains a place of business in this state where beverages, drinks, or liquors in imitation of, or intended as a substitute for beer, ale, wine, or whisky, or other alcoholic, spirituous, or malt liquors "are kept for sale or distribution, or are sold in wholesale quantities." The tax is on the business, and applies more definitely to the place of business. If one person maintains but one place of business he pays one tax; if he maintains more, he is required to pay a correspondingly greater number of taxes.

That a person maintaining such a place of business might own the goods which are kept or sold, or might deal with them as agent for another, or that they might be manufactured within this state or beyond the limits of the state, would not affect his liability to pay one tax for each place of business maintained by him. But superadded to all this, the act attempts by a process of classification to put places of business where goods of foreign manufacture are dealt with on a different footing from those manufactured within the limits of this state. Relatively to the former, the amount of tax to be paid must depend on the number of manufacturers whose product is dealt with, one tax of \$1,000 being required for handling the product of each nonresident manufacturer, so that one place of business might be taxed at \$1,000 or \$10,000, accordingly as the product of one or ten nonresident manufacturers might be handled. Relatively to the latter, there is one tax for the place of business, but no additional tax where the goods handled are the product of several manufacturers. In this instance there could be but \$1,000 tax for one place of business. The difference in the two is palpable. The thing sought to be taxed was the business of maintaining a place for the sale of or keeping for sale or distribution specified articles. The articles were the same, and the character of dealing with them was the same. It was not a case of taxing two separate classes of business, but one where it was sought to impose different taxes on a particular class of businesses. This would clearly contravene the uniformity clause of article 7, § 2, par. 1, of our Constitution. See *Mutual Reserve Ass'n v. Augusta*, 109 Ga. 79, 35 S. E. 71, and cases there cited, to which may be added *Gould v. Atlanta*, 55 Ga. 678, which deal with the subject of classification of businesses for the purpose of taxation. It follows that so much of section 7 as would authorize a tax of more than \$1,000 on one place of business is void. But we do not think that the part of the act which we have held to be void because unconstitutional is so interwoven with the other parts of the act, or that it forms such an essential part of the legislative scheme for taxing places of business of the class referred to in the act that its elimination should have the effect of destroying the entire act. With the objectionable provisions eliminated the balance of the act would merely impose a tax of \$1,000 on each place of business of every person maintaining a place of the character contemplated by the act. There would be no lack of uniformity in that part of the act. It follows that in response to the first question propounded by the Court of Appeals we answer that in so far as the act seeks to authorize the imposition of a tax of more than \$1,000 on one place of business it is violative of the provisions of the Constitution above mentioned, but in so far

as it imposes a tax of \$1,000 on each place of business it is not unconstitutional.

[2] 2. Omitting the part of section 7 which is held to be unconstitutional, the balance of the act left standing is not violative of any of the constitutional provisions specified in succeeding questions propounded by the Court of Appeals, and it is unnecessary to decide whether section 7 would violate them if the omitted parts had not been eliminated from the act. All the Justices concur.

(140 Ga. 112)

BIGHAM v. HAWKINS.

(Supreme Court of Georgia. June 13, 1913.)

(Syllabus by the Court.)

1. SALE OF LAND—RESCISSION OF CONTRACT—FRAUD.

Properly construed, the allegations of the petition on the subject of fraud were insufficient to support an action for rescission.

(Additional Syllabus by Editorial Staff.)

2. FRAUD (§ 34*)—CONDITIONS PRECEDENT TO ACTION—RESCISSION OF CONTRACT.

Where a vendee sued for rescission and to recover damages because of fraudulent representations, a money judgment could not be recovered until there had been a rescission.

[Ed. Note.—For other cases, see Fraud, Cent. Dig. § 29; Dec. Dig. § 34.*]

3. VENDOR AND PURCHASER (§ 113*)—REPRESENTATIONS—CONSTRUCTION—FALSITY.

Where a vendor represented that the water on the place was good and pure, such representation should be construed as relating to the quality of the well water on the place generally and was therefore not falsified by the fact that a single well contained much animal and impure matter, which might have been brought about by nonuse or insufficient cleansing.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. § 201; Dec. Dig. § 113.*]

4. VENDOR AND PURCHASER (§ 113*)—CONTRACT—FALSE REPRESENTATION—FRAUD.

Where a vendor represented that he had done a good deal of ditching, that the land was porous, and that no water would pond on the place, and it appeared that six months after the first contract was made a modified contract was entered into, and that nine months thereafter, when there had been excessive rains, it was claimed that water did pond on a portion of the land, such facts were insufficient to show false representations sufficient to justify a rescission.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. § 201; Dec. Dig. § 113.*]

Error from Superior Court, Sumter County; Y. A. Littlejohn, Judge.

Action by E. D. Bigham against C. C. Hawkins. From a judgment of dismissal on demurrer, plaintiff excepted and brings error. Affirmed.

E. D. Bigham instituted an action against C. C. Hawkins. The petition contained allegations of fact relied on to state a cause of action, and concluded with prayers for: (a) Rescission of contract; (b) recovery of a money judgment for the amount paid on the purchase price; (c) for process; (d) for

such other and further equitable relief as the facts and circumstances might authorize. The action was founded on two written instruments, both of which were signed in duplicate by the respective parties and set out in the petition, one being dated May 25, 1911, and the other November 28, 1911. Omitting the formal parts, they were as follows:

(1) "Witnesseth: That the said E. D. Bigham has this day bargained with C. C. Hawkins for the purchase of the following described land in Sumter county, Ga., namely: Lot of land No. (107) in the 27th district containing 202½ acres, more or less; also east half of lot of land No. (108) in the 27th district containing 101¼ acres, more or less, whole aggregating (303¾) acres, more or less.

"The said E. D. Bigham has this day paid to said C. C. Hawkins five hundred (\$500.00) dollars in cash on the purchase of said land, and it is agreed that said E. D. Bigham will pay to the said C. C. Hawkins for the balance of the purchase money on said land three thousand (\$3,000.00) dollars on the 1st of October, 1911, and fourteen thousand (\$14,000.00) dollars on the 1st day of December, 1911, which three (3) sums is the entire purchase price of said land. And when said amounts are all paid in full the said C. C. Hawkins agrees that he will make good and warrantee titles to the said E. D. Bigham, or his assigns, to said land.

"It is understood and agreed that the five hundred dollars this day paid by the said E. D. Bigham shall go as part of the purchase money on said land only in the event that the three thousand (\$3,000.00) dollars due on the 1st day of October be promptly paid. In the event that said three thousand dollars be not promptly paid on the 1st day of October, 1911, then the five hundred dollars paid this day shall be forfeited by the said E. D. Bigham to the said C. C. Hawkins as liquidation [liquidated] damages, and all rights under this contract to the said E. D. Bigham shall cease; time being of the essence of this contract.

"It is understood and agreed that the said E. D. Bigham may have possession of the land as soon as the three thousand (\$3,000.00) dollars has been paid and C. C. Hawkins can conveniently gather the crop on the land that is planted and growing for the year 1911; it being the intention of the parties hereto that said E. D. Bigham may have the privilege of sowing down whatever lands he may wish in oats as soon as the said C. C. Hawkins can turn over the land in the fall after gathering the crop thereon, the entire possession being given as soon as the last payment on the land is made."

(2) "Witnesseth: That the said E. D. Bigham has this day secured from C. C. Hawkins an option for the purchase of the fol-

lowing described lands, in Sumter county, Ga., viz.: Lot of land No. 107 in the 27th district, containing 202½ acres, more or less; also the east half of lot of land No. 108 in the 27th district, containing 101¼ acres; whole aggregating 303¾ acres, more or less.

"It is agreed that the said E. D. Bigham shall have the right to purchase of the said C. C. Hawkins the above-described lands up to and including March 1st, 1912, for the sum of fifteen thousand (\$15,000.00) dollars, which, if the said E. D. Bigham well and truly purchase and pay the said sum of fifteen thousand dollars cash, the said C. C. Hawkins binds himself and assigns to make good and sufficient titles to the said E. D. Bigham, or his assigns.

"It is understood and agreed that the said option shall extend only until March 1st, and including March 1st, 1912, time being of the essence of this contract, and if the said E. D. Bigham shall not, within said time, purchase said land and pay said sum of money, then all rights under this contract shall cease, determine, and be void, and whatever sum may have heretofore been paid to the said C. C. Hawkins, on account of any contemplated purchase heretofore made, shall be forfeited to the said C. C. Hawkins as liquidated damages.

"It is further understood and agreed that if the said E. D. Bigham shall, on or before March first next, pay the said C. C. Hawkins the purchase price of said land, then he shall also have the option to purchase all the personalty, such as mules, plows, feed stuff and farming implements that the said C. C. Hawkins may have and hold necessary to run the place to make a crop for the year 1912, and also to pay all debts that the said C. C. Hawkins may have to incur on account of his farming relations in renting said place for the year 1912, and in the event that the said E. D. Bigham pay all of said farming debts, and purchases all the personalty, and assumes all obligations incurred for the renting of said place, including fertilizers, debts to hands and assumed by hands, then the said E. D. Bigham shall have the right to take immediate charge of the said place.

"It is understood and agreed that the said C. C. Hawkins shall not charge more than the actual market price for any of the articles that the said E. D. Bigham may desire to purchase in exercising this option; the two parties hereby contracting mutually to carry out these ends and intentions in the best of spirit.

"It is further agreed that, if the said E. D. Bigham does not choose to exercise this option in purchasing the personalty and assuming of the debts after he has purchased said plantation, the said C. C. Hawkins agrees to rent the place for the sum of \$560.00, and when this contract has been carried out, and the said E. D. Bigham may have paid for said place and received deeds, the said C. C.

Hawkins will execute to the said E. D. Bigham his promissory notes for said rent."

According to the allegations of the petition the first deferred payment of \$3,000 was not made on October 1st, the date of its maturity under the first contract, but \$2,000 thereof was paid on the succeeding day, or 2d of October; and thus the transaction remained until the second instrument was executed some two months later. After the execution of the second contract, Bigham, having arranged for a loan of \$8,000 from a third person on the property for the purpose of applying the same on the purchase price, entered into a further agreement with Hawkins, in pursuance of which Hawkins on the 22d day of December executed a deed to Bigham to the land for the purpose of enabling him to use the property as security for the loan above mentioned. The loan was obtained and the proceeds paid over to Hawkins. After executing the loan deed to the lender of the money, Bigham on the 23d day of December, 1911, reconveyed the land to Hawkins to be held until the balance of the purchase price, amounting to \$7,000, should be paid. Hawkins continued in possession subject to the terms and conditions as set forth in the contract. Nothing further appears to have been done until Bigham, on the 29th of February, 1912, instituted a suit for rescission of the contract and other relief as indicated in the prayers mentioned above.

The allegations relied on as a basis for the relief sought were to the effect that before the purchase of the land petitioner inquired of defendant as to well water on the land, and whether a certain basin on the farm, which was at that time dry, was a pond or would pond water, in response to which defendant represented to petitioner that the water on the place was good pure water, and that the basin would not pond or hold water, "and after your petitioner had seen said place" defendant represented that he had done a great deal of ditching and that there was no place on the land that would pond water, but as fast as the water would fall it would seep through the ground. Petitioner relied upon such representations of the defendant when he entered into the contract of purchase, and had he known at that time that the representations were untrue he would not have entered into the contracts of purchase for the consideration named. When the representation was made, and when the suit was filed, the principal well on the place was supplying "water containing a good many worms and other insects. So much so that the people using said water have to and they do strain the same for the purpose of getting out of the water said worms and insects. That new cloths are used daily in straining said water. That this condition of said water was, at the time of the making of the representations as afore-

said, well known to said defendant. Petitioner shows that said water, instead of being pure, is well impregnated with animal matter and is anything else but pure." Also at the time of the contract of purchase, and when the suit was filed, a portion of the land was so situated that it would pond water, which fact was well known to defendants; there being a pond "on said tract covering an area of about 20 acres of land, a portion of this pond being at a depth of about four feet. That said water has accumulated and ponded until it has extended up to and under one of the tenant houses on said land and ponded around a well of water near said tenant house a depth of about eight inches. That, while it is true that since last December there has been excessive rains, yet the said defendant assured and represented to your petitioner that he had so ditched said land that no part of it would pond water. * * * That, while your petitioner had seen said basin which is now full of water, he specifically asked the defendant if water would not accumulate and pond in said basin, and in response to said inquiry defendant made the representations and statements hereinabove alleged." On account of the condition of the well the land is less valuable and is not suited for the purposes for which it was purchased. Petitioner is not advised as to whether the condition of the water is peculiar to this one well, or whether it can be overcome by sinking another well in a different locality, but petitioner avers that the well water is totally worthless for any purpose whatever. The pond of water renders the place less valuable because it renders cultivation of the land impossible, unless the pond is drained at a very great cost. The pond is about 300 yards from the residence, and this fact renders the property less valuable because the pond is unsightly, "and when it begins to dry up it will create sickness and will in many ways make said place undesirable and unhealthy." The property was purchased by petitioner with the view of making it his home, and this is why he specifically inquired in regard to the water on the place and whether the basin would pond water. It was further alleged: "That your petitioner has complained to the defendant of the condition of said well and of the ponding of said water on said land, and has asked for a rescission of the contract and a refund of the money that has been paid on the purchase price of the same. That he likewise stated to the defendant that if he would make proper reduction for a reasonable concession, on account of the unfavorable conditions of said tract of land he would still pay a reasonable part of the purchase price and carry out his contract. That your petitioner avers that said defendant refused to make any concession and also refused to return or refund to your petitioner the money

that has been paid by petitioner to defendant in the purchase of said land." The case was dismissed on demurrer, and the plaintiff excepted.

R. L. Maynard, of Americus, for plaintiff in error. Shipp & Sheppard, of Americus, for defendant in error.

ATKINSON, J. This is an effort by a purchaser to procure a decree rescinding a contract for the sale of land and to recover a personal judgment for so much of the purchase price as had been paid.

[2] Before a money judgment could be recovered, there would have to be rescission, because the contract is conclusive upon the parties so long as it stands. Fraud is relied on as the ground of rescission. The judgment complained of was rendered on demurrer and resulted in a dismissal of the plaintiff's action by the court. The controlling question is whether or not the allegations charge fraud upon the part of defendant, thereby inducing plaintiff to enter into the contract. The petition should be construed most strongly against the pleader. Representations as to the quality of well water on the land constituted the basis of one of the charges of fraud, while the other related to representations of the defendant in regard to the ponding of water in a certain low place or basin on the land. There were no charges of fraud upon any other subject connected with the transaction.

[3] Under a fair construction of the petition, the representations attributed to the defendant in regard to well water should not be held to apply to any particular existing well, but to well water generally to be obtained on the farm. The plaintiff did not pretend to allege that pure well water could not be obtained on the farm, but the allegations complaining of well water had reference to a single well which was alleged to be in a condition which every one knows could be brought about in any well by nonuse or insufficient cleansing. The fact that this one well might have been in the condition as described, when compared to the representations attributed to the defendant, would not be sufficient to show that the representations were falsely or fraudulently made.

[4] In regard to the basin, it is manifest from the allegations of the petition that the plaintiff as well as the defendant, before the first contract was made, examined the land and saw its condition. From the allegations it appears that the thing complained of was pointed out by the plaintiff to defendant at the time the alleged representations were made, and before the first contract was made, which occurred in May, 1911. The representations were to the effect that defendant had done a great deal of ditching, and the land was porous, and therefore water would not pond on the place. It is not alleged that this statement was false in that the land was not

porous and that there were no ditches, which together were sufficient at the time the representations were made to prevent the ponding of water. In one portion of the petition it was alleged that the basin was dry when the representations were made; in another that it ponded water to the depth of several feet covering a large area. It is difficult to reconcile this repugnancy. If the water was actually ponded, the condition was obvious to the plaintiff, and he could not thereby have been deceived. On the other hand, if it was dry, the inference would be that it was properly drained. Such an inference would be reasonable and consistent with the truthfulness of the representation, and in the absence of allegations to the contrary should be given effect. The representations were made before the first contract, which was executed some six months before the second contract was made in November, 1911, and nine months before suit was filed in February, 1912. In the meantime there had been excessive rains. Under such conditions natural agencies would tend to clog and fill the ditches and destroy their efficiency for drainage purposes, and probably did so. Allegations that after so long a time, under such circumstances, the water ponded is not the equivalent of an allegation that at the time the representation was made it was false and known to be such.

The allegations as a whole were insufficient to form a basis for a charge of fraud upon the part of defendant, and the case was properly dismissed on general demurrer.

Judgment affirmed. All the Justices concur.

(140 Ga. 138)

LATHAM v. STEWART, Tax Collector, et al.
(Supreme Court of Georgia. June 17, 1913.)

(Syllabus by the Court.)

HAWKERS AND PEDDLERS (§ 3*)—LICENSE—
STATUTE—CONSTRUCTION—EJUSDEM GEN-
ERIS—"ANY OTHER KIND OF MERCHANDISE
OR COMMODITY WHATSOEVER."

The provisions of the general tax act of 1909 (Civ. Code 1910, § 946) are not to be construed as imposing a business tax upon peddlers of chickens, eggs, and butter. It was error, therefore, for the judge to refuse to enjoin the collection of such a tax from the plaintiff, who was engaged in peddling such commodities.

[Ed. Note.—For other cases, see *Hawkers and Peddlers*, Cent. Dig. §§ 3-6; Dec. Dig. § 3.*]

For other definitions, see *Words and Phrases*, vol. 1, pp. 434-437; vol. 8, p. 7577.]

Lumpkin and Hill, JJ., dissenting.

Error from Superior Court, Fulton County; Geo. L. Bell, Judge.

Action by A. P. Stewart, Tax Collector, and others against E. M. Latham. Judgment for plaintiffs, and defendant brings error. Reversed.

E. M. Latham filed an equitable petition for injunction against A. P. Stewart, as tax collector of Fulton county, and Amos Baker, as deputy, to enjoin the collection of a peddler's license tax claimed by the tax collector to be due under the provisions of part 1, tit. 2, § 2, par. 27, p. 46, General Tax Act 1909, as now embodied in Civil Code 1910, § 946. On the interlocutory hearing there was evidence to the effect that the plaintiff had engaged, in Fulton county, during the year for which the tax was claimed, in peddling from his wagon chickens, eggs, and butter without any license. The judge refused to grant an interlocutory injunction, and the plaintiff excepted.

Gober & Jackson, of Atlanta, for plaintiff in error. J. D. Kilpatrick and Brantley, Jones & Brantley, all of Atlanta, for defendants in error.

ATKINSON, J. The judge was authorized to find that the plaintiff, without a license so to do, in the county of Fulton, engaged in peddling chickens, eggs, and butter, and the only question is whether the peddling of such commodities renders petitioner subject to the tax provided for in part 1, tit. 2, § 2, par. 27, p. 46, General Tax Act 1909, as now embodied in the Civil Code 1910, § 946. After providing for a number of specific and occupation taxes, the act imposed such a tax of \$50 in each county where the business was conducted "upon every peddler and traveling vendor of any patent or proprietary medicines, or remedies, or appliances of any kind, or of special nostrums, or jewelry, or stationery, or drugs, or soap, or any other kind of merchandise or commodity whatsoever (whether herein enumerated or not), peddling or selling any such goods, wares, medicines, nostrums, remedies, appliances, jewelry, stationery, soap, drugs, or other merchandise." If the peddling of chickens, eggs, and butter is comprehended by this section of the act, the plaintiff was subject to the tax, and the ruling of the court was proper; but, if not so comprehended, the plaintiff would not be subject to the special tax, and the judgment of the court would be erroneous. It will be observed that the tax is upon dealers "of any patent or proprietary medicines, or remedies, or appliances of any kind, or of special nostrums, or jewelry or stationery, or drugs, or soap, or of any other kind of merchandise or commodity whatsoever (whether herein enumerated or not)." Chickens, eggs, and butter clearly would not be included under any of the things specially mentioned, and the question is whether they are comprehended by the words "or of any other kind of merchandise or commodity whatsoever." These are general words, which are preceded by words specially designating particular classes of merchandise or commodities. Under the rule of ejusdem generis, the general

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Series & Rep'r Indexes

words ordinarily should be construed as referring to merchandise or commodities of the same kind as those specially named. *Grier v. State*, 103 Ga. 428, 30 S. E. 255. Those which were specially named are of a different nature altogether from articles of food, in which class chickens, eggs, and butter would fall. It was evidently the legislative intent that the general words should apply only to merchandise or commodities which were of the same nature as those before specially named. The effect of so restricting the general words would be to leave the Legislature free to tax the peddling of other merchandise or commodities of a different nature at a higher or lower amount, or not at all, accordingly as the nature of the commodity might in the legislative mind deserve to be treated. Section 2, par. 28, of the act, is indicative of such intent, for there a higher business tax of \$200 was imposed on peddlers and traveling vendors of stoves, ranges, and clocks, all of which were commodities or proper subject-matter of merchandise, but different in nature from patent, proprietary medicines, etc., the things specially named. If this interpretation be given section 2, par. 27, that part of the act will harmonize with section 2, par. 28; but if it should not be given, and the general words should be held to include all merchandise or commodities of whatever nature, the two sections will be in irreconcilable conflict, for both would tax the peddling of stoves, ranges, etc., but in different amounts. Again, section 2, par. 27, of the act (Civ. Code 1910, § 946), requires the payment of \$50 in each county wherein a peddler may sell "any patent or proprietary * * * appliances of any kind," while under section 2, par. 28 (3), of the act (Civ. Code 1910, § 947), every peddler is required to pay \$25 in every county in which he may sell "any other patented article" than those enumerated in that section. Now, unless the rule of *eiusdem generis* be applied in construing the two sections, at least in determining which amount, \$50 or \$25, shall be paid by a peddler for selling a patented article in a county, when such article is not one specifically named in either of these sections of the act, how can the conflict in the two sections be reconciled? And, if the application of such rule must be made to reconcile the conflict as to some portions of the sections, it seems fair and just to apply the rule generally to the construction of both sections in their entirety. Moreover, if the general words in section 2, par. 27, should be construed to extend to every class of merchandise or commodity of whatever nature, it would lead to absurd results. It could hardly be contended that a tax of \$50 upon boys peddling newspapers on the streets was in the legislative mind; yet newspapers are commodities, and the peddling of them would be taxed under such a construction. Examples of this character could be multiplied.

Further, if the general words are to be so construed, the particular words which precede them would have been entirely useless, and no reason appears why the Legislature should idly have employed them. The Legislature might have taxed the peddling of articles of food had it been thought proper to do so, but there was no mention of them, or anything in the nature thereof anywhere in the act. It seems evident that the peddling of them was not intended to be taxed. In view of this construction of the act, it was erroneous to refuse to enjoin the collection of the tax.

Judgment reversed. All the Justices concur, except LUMPKIN and HILL, JJ., dissenting. EVANS, P. J., and BECK, J., concur specially.

EVANS, P. J., and BECK, J. (concurring specially). We concur in the interpretation placed on the tax act by Mr. Justice ATKINSON. A familiar canon of construction of statutes is that effect should be given to every word in the statute if possible. If the Legislature meant to impose a tax upon a peddler of any commodity or every kind of merchandise, how easy would it have been to indicate such intent by just saying so. The enumeration of certain articles would be entirely meaningless, unless they were intended to apply to a specific proposition, or were to be used as illustrative of the subjects the vending of which was intended to be taxed. The words, "or any other kind of merchandise," etc., are general, and are ancillary to the specific proposition, viz., to tax the vendor or peddler of a certain class of articles. Where you have general ancillary words, they should not be given such a construction as to do away with the specific proposition which they follow.

LUMPKIN and HILL, JJ. (dissenting). Two cases were argued in this court, and are controlled by the opinions filed by the majority. In each case it appeared that the plaintiff in error was peddling on the streets of Atlanta. In the one case he was peddling chickens, eggs, butter, etc. In the other case he was peddling fruit. The only question is whether peddlers of such merchandise or commodities fall within the terms of section 946 of the Civil Code, which reads as follows: "Upon every peddler and traveling vendor of any patent or proprietary medicines, or remedies, or appliances of any kind, or of special nostrums, or jewelry, stationery, or drugs, or soap, or of any other kind of merchandise or commodity whatsoever (whether herein enumerated or not), peddling or selling any such goods, wares, medicines, nostrums, remedies, appliances, jewelry, stationery, soap, drugs, or other merchandise, fifty dollars in each county where the same or any of them are peddled, sold or offered for sale." The majority of the court

are of the opinion that, under the doctrine or rule of construction generally referred to as the doctrine of "ejusdem generis," the words "or of any other kind of merchandise or commodity whatsoever (whether herein enumerated or not)" should be construed as limited to merchandise or commodities of a similar genus or kind to those specifically enumerated, and that, so construed, they do not include the merchandise or commodities which the plaintiffs in error were peddling. In this view we cannot concur.

In Black on Interpretation of Laws, p. 141, the rule is thus stated: "It is a general rule of statutory construction that where general words follow an enumeration of persons or things, by words of a particular and specific meaning, such general words are not to be construed in their widest extent, but are to be held as applying only to persons or things of the same general kind or class as those specifically mentioned. But this rule must be discarded where the legislative intention is plain to the contrary." On pages 143 and 144 it is said: "But the rule of construction, that general and unlimited terms are restrained and limited by particular recitals, when used in connection with them, does not require a rejection of general terms entirely, and it is to be taken in connection with other rules of construction, not less important, such as that an act shall be so construed as to carry out the declared intention of the Legislature. 'The doctrine of ejusdem generis is but a rule of construction to aid in ascertaining the meaning of the Legislature, and does not warrant a court in confining the operation of the statute within narrower limits than was intended by the lawmakers. The general object of an act sometimes requires that the final general term shall not be restricted in meaning by its more specific predecessors.'"

* * * It is further to be remarked that this principle or rule applies only where the specific words preceding the general expression are all of the same nature. Where they are of different genera, the meaning of the general word remains unaffected by its connection with them. Thus, where an act made it penal to convey to a prisoner, in order to facilitate his escape, 'any mask, dress, disguise, or any letter, or any other article or thing,' it was held that the last general terms were to be understood in their primary and wide meaning, and as including any article or thing whatsoever which could in any manner facilitate the escape of a prisoner, such as a crowbar.'" In 2 Lewis' Sutherland, Stat. Const. (2d Ed.) § 487 (p. 882), it is said: "In cases coming within the reach of the principle of ejusdem generis, general words are read not according to their natural and usual sense, but are restricted to persons and things of the same kind or genus as those just enumerated; they are construed according to the more explicit context. This rule can be used only

as an aid in ascertaining the legislative intent, and not for the purpose of controlling the intention of or confining the operation of the statute within narrower limits than was intended by the lawmaker. It affords a mere suggestion to the judicial mind that, where it clearly appears that the lawmaker was thinking of a particular class of persons or objects, the words of more general description may not have been intended to embrace any other than those within the class. The suggestion is one of common sense. Other rules of construction are equally potent, especially the primary rule which suggests that the intent of the Legislature is to be found in the ordinary meaning of the words of the statute. * * * So the restriction of general words to things ejusdem generis must not be carried to such an excess as to deprive them of all meaning." See, also, 26 Am. & Eng. Enc. Law (2d Ed.) 609, 610; 36 Cyc. 1119, 1112. Numerous citations could be made in support of the rules announced by these authorities. One illustrative case will suffice. In Webber v. Chicago, 148 Ill. 313, 36 N. E. 70, an ordinance provided for licensing "circuses, menageries, caravans, side-shows and concerts, minstrels or musical entertainments, given under a covering of canvas, exhibitions of monsters or of freaks of nature, variety and minstrel shows, athletic ball, or similar games of sport, and all other exhibitions, performances and entertainments not here enumerated, given in a building, hall or under canvas or other cover, or within any enclosure." It was held that this ordinance included horse races within an inclosure. The court declared that the maxim of ejusdem generis was only one of many rules of construction to ascertain the intent of the Legislature, and that "where, from the whole instrument, a larger intent may be gathered, the rule under consideration will not be applied to defeat such larger intent."

In the light of these rules of construction, let us see whether the general words in the statute under consideration should be given a restricted meaning, so as to include only merchandise and commodities of the same kind or genus as those specifically mentioned. The General Tax Act of 1902 imposed a specific tax "upon every traveling vendor or proprietary medicines, special nostrums, jewelry, paper, soap, or other merchandise, fifty dollars in each county where they may offer such articles for sale." In Standard Oil Co. v. Swanson, 121 Ga. 412, 49 S. E. 262 (decided in December, 1904), it was held that, under the doctrine of ejusdem generis, the general words "or other merchandise" would be construed in connection with the words of specific enumeration, and that they did not embrace vendors of merchandise not ejusdem generis (that is, not of a like kind or genus) with the articles expressly enumerated. The General Tax Acts for some years employed the language above quoted or similar lan-

guage. In 1909 the Legislature materially changed the form of words used in the General Tax Act in relation to these specific taxes. We must assume that the legislative branch of the government knew what language had been previously employed and what construction this court had placed upon it. Knowing that this court had held that the addition of the general words "or other merchandise" to the specific enumeration preceding them would be considered as meaning other merchandise of like kind or genus, the Legislature deliberately discarded that form of expression and used different language, apparently for the purpose of meeting the decision above cited, and placing beyond controversy the fact that they did not mean to limit the concluding general words to merchandise or commodities of like kind with those which had been specifically mentioned. As codified in section 946 of the Civil Code 1910, after enumerating proprietary medicines, or remedies, or appliances of any kind, or special nostrums, or jewelry, or stationery, or drugs, or soap, the act added, "any other kind of merchandise or commodity whatsoever (whether herein enumerated or not)." Bearing in mind that the doctrine of ejusdem generis is merely a rule of construction to the effect that ordinarily, in the absence of anything to indicate a contrary legislative intent, general words accompanying a specific enumeration will be construed to mean things of like kind as those enumerated, we are unable to see how it can be held that the general words "merchandise or commodity" shall be construed to mean merchandise or commodity of like kind as the articles specified, when the Legislature has declared in express words that they do not mean of like kind only, but "of any other kind. * * * whatsoever (whether herein enumerated or not)." "Other kind" is not the same as like kind, and cannot be properly construed to mean the same. The statute does not say any other merchandise or commodity, as it formerly did, but any other kind.

In the light of the history of this legislation, the previous construction placed upon the language by this court, and the change thereupon made by the Legislature, to hold that the words merchandise or commodity shall be limited to merchandise or commodity of like kind only, in the face of the declaration of the Legislature that it means any other kind of merchandise or commodity whatsoever, would be in effect to hold that the Legislature did not mean what they said in plain English words, and that it was impossible for them to escape from the interpretation which they knew that this court had placed upon the general words "or other merchandise." We, of course, recognize the rule that some effect is to be given to the fact that there is a specific enumeration, but, if the general words merchandise or commodity are to be restricted to merchan-

dise or commodities of like kind with those enumerated, what effect is to be given to the words "or of any other kind * * * whatsoever (whether herein enumerated or not)." Such a construction would give to the act exactly the same meaning as if the words last quoted were entirely stricken from the statute. It is one of the fundamental rules of statutory construction that the court should presume that the Legislature intended for all the words of the statute to have some meaning. In the case of the Standard Oil Co. v. Swanson, supra, no reference was made to the question of whether the enumerated articles were themselves of like kind or genus, and it may be well doubted whether it can be declared that patent medicines and stationery are of the same genus, or that jewelry and drugs belong to the same family of merchandise. If the enumeration itself includes different genera, as stated in the text-books above cited, the doctrine of ejusdem generis has little or no application as to the words under discussion.

We recognize the fact that sections 946 and 947 of the Civil Code 1910, may seem in some respects to overlap each other. Thus in section 946, among the enumerated articles, are "any patent or proprietary medicines or remedies, or appliances of any kind," and in section 947, after enumerating certain patented articles, occur the words "or any other patented article." But this involves another rule of construction, that the Legislature is not to be deemed as having conflicted with itself in the same act, and that a construction will be placed upon two parts of an act so as to harmonize them, if practicable. Where general words are used in one part of an act in reference to requiring a specific tax, and in another part of the same act certain classes of things are made subject to a different tax, they will be considered as taken from under the previous general enumeration. This is illustrated by two different parts of section 947. In the the first part are general words in regard to peddling certain classes of articles. In the latter part a different tax is placed upon traveling vendors using boats. We assume that the court would construe the two parts of the section so as to harmonize them, and give to each its proper sphere of operation. But we are unable to see that this rule of harmonizing different parts of an act can be carried to the extent of saying that when the Legislature declares in terms that it intends to place a specific tax upon peddlers of certain merchandise and commodities, and upon peddlers of any other kind of merchandise or commodities whatsoever (whether herein enumerated or not), a construction should be put upon the act so as to exclude a large class of peddlers from being subject to any tax at all under any part of the act. See in this connection *Cece v. Stewart*, Tax Col-

lector, 139 Ga. 102, 78 S. E. 864, where the same statute was under consideration.

With the question of the expediency of the legislation this court has nothing to do. That is for the Legislature. The only question is, What did that body enact? Moreover, the illustration from newsboys does not seem to us very convincing as newsboys have never been classified as peddlers or traveling vendors under any law, so far as we are aware.

(140 Ga. 196)

BUTLER et al. v. STEWART, Tax Collector, et al.

(Supreme Court of Georgia. June 17, 1913.)

(Syllabus by the Court.)

CASE FOLLOWED.

This case is similar to that of Latham v. Stewart, T. O., et al., 78 S. E. 812, this day decided, and is controlled by the decision therein rendered. The parties seeking the injunction in this case were engaged in peddling fruits, consisting of oranges, apples, and bananas.

Lumpkin and Hill, JJ., dissenting.

Error from Superior Court, Fulton County; W. D. Ellis, Judge.

Action between M. Butler and others against A. P. Stewart, Tax Collector, and others. From the judgment, the parties first named bring error. Reversed.

Nathan Coplan, of Atlanta, for plaintiffs in error. Brantley, Jones & Brantley, of Atlanta, for defendants in error.

ATKINSON, J. Judgment reversed. All the Justices concur, except LUMPKIN and HILL, JJ., dissenting.

(140 Ga. 181)

MILLS v. CENTRAL OF GEORGIA RY. CO.

(Supreme Court of Georgia. June 17, 1913.)

(Syllabus by the Court.)

1. DEMURRER—PETITION—ERROR.

The court erred in sustaining the demurrer filed to the petition in this case.

(Additional Syllabus by Editorial Staff.)

2. NEGLIGENCE (§ 111*)—PLEADING—INJURIES TO CHILDREN—EXPLOSION OF TORPEDO.

A petition in an action for the death of plaintiff's 8 year old son alleged that, while intestate was walking along defendant's track at the ends of the ties in an uninclosed place where the track was customarily used for pedestrians, his brother, 15 years old, picked up a signal torpedo negligently left on the track by defendant's servants, and placing it on the rail hit it with an iron tap or nut to break it open without knowledge that it was dangerous; that it exploded, and a piece of it struck intestate, resulting in his death. *Held*, that the petition sufficiently charged defendant's negligence as the proximate cause of decedent's death to withstand a demurrer.

[Ed. Note.—For other cases, see Negligence, Cent. Dig. §§ 182-184; Dec. Dig. § 111.*]

Error from Superior Court, Effingham County; W. W. Sheppard, Judge.

Action by Elizabeth Mills against the Central of Georgia Railway Company. Judgment for plaintiff, and defendant brings error. Reversed.

Elizabeth Mills brought suit against the Central of Georgia Railway Company to recover damages for the alleged tortious killing of her minor son. The petition alleged in substance that her three minor sons were walking down defendant's line of railroad, which was not inclosed, to their work outside the corporate limits of the town of Eden, where the public, traveling as footmen, have always had full access and free use of the same in traveling to and upon the railroad, walking between the track or in the footpath at the end of the cross-ties, which fact was well known to the servants and employees of the defendant. The oldest son, 15 years of age, found lying upon the track between the rails a railroad signal torpedo, a distance of about "14 telegraph poles" from Eden. The torpedo was such as is fastened upon the top of the iron rails to give signals and warning to engineers and trainmen. The torpedo being a pleasing and attractive looking object and harmless in its appearance, the oldest son picked it up and tried to open it. Being unable to open it, after walking the distance of about "six telegraph poles" he saw and picked up an iron nut or tap, and placing the torpedo on one of the iron rails hit it with the iron tap or nut for the purpose of breaking it open, which caused the torpedo to explode, and another son of plaintiff (Ruby) eight years of age, standing some eight feet away, and who was not aware and did not know that he was in any danger, or that any harm could be done by his brother trying to break open the torpedo, was hit and struck by a piece of it which penetrated his bowels and caused his death. At the time of his death the boy was in good health and strong and well developed. He was earning 25 cents per day at the time of his death, and it was alleged that his earning capacity would have steadily increased until he would have earned \$1.50 per day by the time that he arrived at the age of 21 years. The boy had no father living at the time of his death, and it was alleged that the plaintiff was in part dependent on his earning for her support and maintenance. It was also alleged that the torpedo was of a kind manufactured expressly for railroad use in train signaling, and for no other purpose, and was used by the defendant as signals in the operation of its trains, and was composed of dynamite, or other highly dangerous explosives, inclosed in an oval top tin box sealed up, to which was attached a leaden strap projecting about three inches on each side of the metal box or torpedo for the purpose of strapping it to the top of the iron rails, to be exploded by the next passing train. The torpedo was found

south of the south end of the siding or passing track at Eden, and at a point where it had been the custom of defendant's servants and agents to place signal torpedoes. The torpedo which caused the death of the plaintiff's son was placed on defendant's roadway by its servants in a wanton and careless manner prior to the homicide. Defendant was careless and negligent in operating its trains on its roadway longer than its passing tracks, and in blocking the main line, and in permitting its servants and employees to carelessly and wantonly place torpedoes on its roadway at the points named, and in placing the torpedo on the track, and in wantonly leaving the same where it was found by the plaintiff's sons, and which caused the death of her son Ruby as stated.

To this petition general and special demurrers were filed. One ground of demurrer was that the petition shows that the injury complained of was not the proximate result of defendant's negligence. Another ground of demurrer was that the petition does not show by what agent and employee, and when, the torpedo was left on defendant's roadbed, and how long it remained there. The court sustained the demurrer, and dismissed the petition, and the plaintiff excepted.

J. H. Smith, of Eden, for plaintiff in error. H. W. Johnson, of Savannah, for defendant in error.

HILL, J. (after stating the facts as above).

[1] We think the petition made such a case as was sufficient to withstand the demurrer filed thereto. It was alleged that the torpedo which caused the death of the plaintiff's son, who was 8 years old, was placed on defendant's roadway by its servants in a wanton and careless manner prior to the homicide; that the brother of the deceased, who was 15 years old, picked up the torpedo lying in the track on which they were walking to their work, as was customary with pedestrians, and placing it on one of the iron rails hit it with an iron tap or nut for the purpose of breaking it open, never having seen one, and not knowing that it was dangerous or liable to do any harm. The younger brother was standing seven or eight feet away, and when the torpedo exploded was struck by a piece of it, which caused his death. The facts are more fully set out in the foregoing statement.

[2] One ground of the demurrer is that the petition shows that the injury complained of was not the proximate result of the defendant's negligence. It is alleged in the petition that the death of plaintiff's son was caused by the negligence and carelessness of the defendant, their agents, and employees, by carelessly and negligently leaving or allowing a dangerous and highly explosive torpedo to be thrown down and allowed to remain on its roadbed. What is, or what is not, the

proximate cause of an injury must in all cases be determined from the evidence. *Central Ry. Co. v. Tribble*, 112 Ga. 866, 38 S. E. 356. See, also, *Smith v. Atlantic Coast Line Ry.*, 5 Ga. App. 219, 220, 221, 62 S. E. 1020. In the case of *Harriman v. Pittsburgh, etc., Ry. Co.*, 45 Ohio St. 11, 12 N. E. 451, 4 Am. St. Rep. 507, it was held: "The servants of a railroad company negligently placed and left an unexploded signal torpedo at a point on the company's track, which the public, including children, had long been accustomed to use as a crossing, with the acquiescence of the company. The torpedo was picked up by a boy 9 years of age, while so using the company's track, and was carried by him into a crowd of boys near by, and, being ignorant of its dangerous character, he attempted to open it. The torpedo exploded, and the plaintiff, a boy 10 years of age, was injured by the explosion. Under this state of facts, it was held that the negligence of the company's servants was the proximate cause of the injury suffered by the plaintiff; and the fact that the torpedoes were wantonly placed on the company's track by its trainmen, when there was no necessity for using them at that time and place, did not exempt the company from liability to the plaintiff." See, also, *Railway v. Shields*, 47 Ohio St. 387, 24 N. E. 658, 8 L. R. A. 464, 21 Am. St. Rep. 840, and discussion of this case in 31 Cent. Law J. 169, and cases there cited; *Juntti v. Oliver Iron Mining Co.*, 119 Minn. 518, 138 N. W. 673, 42 L. R. A. (N. S.) 840; *Akin v. Bradley Engineering & Mach. Co.*, 48 Wash. 97, 92 Pac. 903, 14 L. R. A. (N. S.) 586; *Powers v. Harlow*, 53 Mich. 507, 19 N. W. 257, 51 Am. Rep. 154.

It was held in the case of *Carter v. Columbia R. R. Co.*, 19 S. C. 20, 45 Am. Rep. 754, that "a railroad company is not liable in damages for the death of a man caused by the explosion of a torpedo with which he intermeddles while walking on the railroad track, and which had been placed there by the company as a danger signal to approaching trains." But it will be observed that in the *Carter Case* the person who picked up and caused the torpedo to explode was a "man," and not a mere boy, as in the instant case. And it definitely appeared in that case that the torpedo had been placed by the railroad company as a danger signal. Mr. Chief Justice Simpson, in delivering the opinion in that case, said: "It would, no doubt, require a much stronger case to make out negligence as to a trespasser than is required in ordinary cases, but we have found no case which goes to the extent of declaring that a trespasser has no protection. * * * Suppose * * * the defendant, knowing that its track was being trespassed upon by parties unauthorisedly appropriating it as a track or road to walk upon, and to break up this use had placed a dangerous explosive instrument thereon, * * * with no notice

or advertisement to the public of the facts, and a traveler, though technically a trespasser, had been injured thereby, could it be claimed as a legal proposition that, under such circumstances, the company would be exempt from liability? We think not."

In 3 Elliott on Railroads, § 1260, it is said: "It has been held that a railroad company is liable for an injury to a boy caused by the explosion of a torpedo, which had been left upon the track by its employés at a place where children were in the habit of going with the knowledge and acquiescence of the company, and was picked up by another boy who was with him." The general rule is well settled that children are only required to exercise such care for their own safety as may reasonably be expected, in view of their age and condition. The question is usually one for the jury to determine, but the child may be so young that the court may say that he was non sui juris and incapable of contributory negligence, or so old and intelligent that he was guilty of contributory negligence as a matter of law, where it is clear that he did not exercise such care as should reasonably be expected of children of the same age and intelligence under the circumstances. There is no fixed period below which children are non sui juris, and at which they at once become sui juris. Id. 1261.

In the case of Sullivan v. Creed (1904), decided in the Irish High Court of Justice and Court of Appeal, 2 British Ruling Cases, 139, the defendant had left a gun loaded and at full cock standing inside of a fence on his land, beside a gap from which a private path led over defendant's lands from the public road to his house, and the defendant's son, aged between 15 and 16, coming from the road to the gap on his way home, found the gun. He went back with it to the public road, and, not knowing that it was loaded, pointed it, in play, at the plaintiff who was on the road. The gun went off, and the plaintiff was injured. It was held by the King's Bench Division, and by the Court of Appeal, that the defendant was liable for the injury. In delivering the opinion, Palles, C. B., said: "One is responsible not only for the necessary, but for the reasonably probable, consequence of his acts. Now, ought the defendant to have so foreseen? In other words, would a reasonable man, placed in the circumstances in which he was, and giving such consideration to the question whether he should leave his gun in the place in which he did leave it, have so foreseen? As a general rule, such a question is one of fact, and ought to be submitted to the jury. * * * I hold that any one who is in possession of a dangerous instrument owes a duty to the public, or at least to such members of the public as are reasonably likely to be injured by its misuse, to keep it with reasonable care, so that it shall not be misused to the injury of others."

In another English case, that of Clark v. Chambers (1878) 3 Q. B. D. 327, 19 Eng. Rul. Cases, 28, the defendant, without legal right, had put chevaux-de-frise across a private roadway to prevent vehicles from coming up to his land. Some persons, without his authority, removed part of the barrier to the footpath, and on a dark night the plaintiff, while lawfully using the road, knocked against one of the spikes and injured his eye. The defendant was held liable, although the immediate cause of the accident was the act of the stranger who had placed the barrier on the footpath. Cockburn, C. J., said: "It appears to us that a man who leaves in a public place, along which persons, and amongst them children, have to pass, a dangerous machine which may be fatal to any one who touches it, without any precaution against mischief, is not only guilty of negligence, but of negligence of a very reprehensible character, and not the less so because the imprudent and unauthorized act of another may be necessary to realize the mischief to which the unlawful act or negligence of the defendant has given occasion."

There is nothing in the petition to indicate that the torpedo was being used by the railroad company as a signal device when it was picked up. On the contrary, the petition discloses that no train was at the place at the time the torpedo was picked up by the boy, and its allegations are to the effect that the torpedo was not being used for signal purposes at the time of the injury to the plaintiff's son.

Another ground of demurrer is that the petition does not show by what agent and employé of the defendant, and when, the torpedo was left on its roadbed. We do not think this ground of the demurrer well taken. It is sufficient if it is alleged that the torpedo was wantonly, carelessly, and negligently placed there by the servants and employés of the defendant prior to the injury, and this the petition does. Thus, it has been held that, "an allegation in an action for injuries caused by the negligence of the employés of a railroad company is sufficiently definite, though it does not give the names of the agents or servants." Bolin v. Sou. Ry. Co., 65 S. C. 222, 43 S. E. 665. And in the case of Rinard v. Omaha, etc., Ry. Co., 164 Mo. 270, 64 S. W. 124, in a case where a work train on which the plaintiff's husband was riding was backing west when it collided with a freight train from the east, as the result of the negligence of defendant's agents and servants while running the train, it was held that, "a motion to make the petition more definite and certain by specifying the agents and servants, whose negligence caused the death of plaintiff's husband, was properly denied."

In view of all the allegations of the petition, we think this case is one for the jury,

and should not have been dismissed on demurrer.

Judgment reversed. All the Justices concur; FISH, C. J., and LUMPKIN and ATKINSON, JJ., specially.

FISH, C. J. (concurring specially). I concur in the result, but I do not care, at this time at least, to concur in all of the reasoning of the opinion. I am not prepared to hold or intimate that railroads cannot employ torpedoes properly constructed and used for signaling purposes, lest they be removed by trespassing boys, and exploded by them. But, as I construe the allegations of the petition, they mean that the torpedo was not at the time in use for signaling purposes, but had been carelessly or wantonly placed or dropped in the middle of the track, and allowed to remain there by the defendants' agents or employes, who had charge of torpedoes for use as signals, where they knew that the public, including children, were accustomed to pass constantly without objection; and that the boy picked it up and exploded it, and injury resulted therefrom. So construed, the petition sets out a cause of action; and I do not think it necessary to go further in the case.

Mr. Justice LUMPKIN and Mr. Justice ATKINSON authorize me to say that they concur in this view.

(140 Ga. 138)

WILBURN v. STATE.

(Supreme Court of Georgia. June 13, 1913.)

(Syllabus by the Court.)

1. CRIMINAL LAW (§ 1023*)—VENUE—CHANGE OF VENUE—WRIT OF ERROR.

Where a petition for a change of venue is made by one accused of crime under the provisions of the act approved August 21, 1911 (Acts 1911, p. 74), relating to the change of venue in criminal cases, and after hearing the evidence the judge hearing the petition refused the same, the judgment is reviewable in the Supreme Court, where a bill of exceptions is sued out in pursuance of the provisions of the act referred to.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2583-2598; Dec. Dig. § 1823.*]

2. CRIMINAL LAW (§ 134*)—VENUE—CHANGE OF VENUE—EVIDENCE—PREJUDICE OF PUBLIC.

Under the evidence submitted for the consideration of the judge below, there was no error in refusing to grant the prisoner's motion for a change of venue.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 243, 251, 252; Dec. Dig. § 184.*]

3. CRIMINAL LAW (§ 1023*)—VENUE—CHANGE OF VENUE—PREJUDICE OF INHABITANTS—BLACK-HAND LETTER.

The court did not err in excluding from evidence a certain letter of a threatening character purporting to be a "black-hand letter," addressed, not to the accused, but to another party, and intimating that violence would be

visited upon the addressee of the letter in case he furnished money to assist the defendant in making his defense; there being no testimony offered to show the authorship of the letter.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2583-2598; Dec. Dig. § 1023.*]

(Additional Syllabus by Editorial Staff.)

4. CRIMINAL LAW (§ 134*)—"CRIMINAL CASE."

The term "criminal case," as used in Const. art. 6, § 2, par. 5, declaring that in reference to criminal cases, the Supreme Court shall be a court for the correction of errors in all cases of conviction of capital felony, is essentially one in which is involved an alleged injury done to the state by the violation of some law, for the punishment of which the offender is prosecuted by the state in order that punishment may be meted out after conviction, the criminal case necessarily involving the question of the guilt or innocence of the party accused, so that a proceeding by accused, in a prosecution for homicide to obtain a change of venue, was not a criminal case within such provision (citing 2 Words and Phrases, pp. 1741-1745).

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 243, 251, 252; Dec. Dig. § 134.*]

Error from Superior Court, Jones County; James B. Park, Judge.

Nick Wilburn was indicted for murder, and from an order denying his motion for a change of venue, he brings error. Affirmed.

Nick Wilburn, under indictment for the offense of murder, which crime was alleged to have been committed in the county of Jones, at the April term, 1913, of the superior court of that county presented a petition to the judge of that court, alleging that at the time of presenting the petition he was detained in the jail of an adjoining county, and that if he should be carried back to Jones county there was danger of his being visited with mob violence and of his being lynched, and that a fair and impartial jury could not be obtained in Jones county for the trial of the case against him. The petition was filed under the provisions of the act approved August 21, 1911 (Laws 1911, p. 74), relating to the change of venue in criminal cases. A rule nisi was issued, calling upon the solicitor general to show cause why the prayer for a change of venue should not be granted. The state resisted the motion to change the venue, and evidence was submitted both by the petitioner and by the state. After hearing evidence the court denied the motion. The petitioner sued out his writ of error to this court under the provisions of the act referred to.

John R. Cooper, of Macon, for plaintiff in error. F. H. Johnson and J. B. Jackson, both of Gray, Jos. E. Pottle, Sol. Gen., of Milledgeville, and T. S. Felder, Atty. Gen., for the State.

BECK, J. (after stating the facts as above). [1] 1. The first question that arises in this case is whether this court has jurisdiction

to entertain the writ of error bringing the refusal of the lower court to grant a change of venue here for review. If the petition addressed to the judge of the court below and the resistance by the state of the motion contained in that petition constituted a criminal case, then this court is without jurisdiction to review the ruling of the judge on appeal. For, by article 6, § 2, par. 5, of the Constitution of this state (Civil Code, § 6502), it is declared in reference to criminal cases that the Supreme Court shall be a court for the correction of errors "in all cases of conviction of a capital felony." And so far as relates to criminal cases, this court has no jurisdiction except that which arises in cases where there has been a conviction of a capital felony. There has been no trial nor conviction in the case of the state against this plaintiff in error; and, if his petition for a change of venue and the issue joined upon that, and the evidence heard upon that issue made a criminal case, this court is clearly without jurisdiction to review the judgment rendered by the court below disposing of the motion of the petitioner for a change of venue. But after a careful consideration of the question we are of the opinion that the presentation of a petition for a change of venue, and the hearing thereon by the judge below, is not necessarily to be classed as a criminal case.

[4] A criminal case is essentially one in which is involved an alleged injury done to the state by the violation of some law, for the punishment of which the offender is prosecuted by the state in order that punishment for the offense may be meted out to said person after conviction. *Grimball v. Ross*, T. U. P. Charlt. 175; *Ames v. Kansas*, 111 U. S. 449, 4 Sup. Ct. 437, 28 L. Ed. 482; and cases cited in 2 Words and Phrases Judicially Defined, under the definition of "criminal action" and "criminal case." A criminal case necessarily involves the question of guilt or innocence of the party accused. But in the proceedings which we are asked to review here, and which reached a finality before the commencement of the trial under the indictment, neither the question of the guilt or innocence of the prisoner was involved, nor what punishment should be meted out to him. Of course it would be competent for the Legislature, in providing for a hearing upon the question as to whether the venue in criminal cases should be changed or not, to provide that the hearing of that question should take place at the trial, and under those circumstances the hearing of that question might become a part of a criminal case, and be reviewable here in case of conviction, as other questions arising upon the trial are reviewed, just as is done in passing upon the question as to whether it was error or not to refuse a continuance of the case upon motion made by the defendant at the trial. But a motion like that which we have under consideration

is not so intimately or essentially connected with the criminal case which we have under consideration as to make it a criminal case or a part of a criminal case. It is provided, in the act under which these proceedings to review were instituted, that the judge might hear the petition of the accused at chambers with or without the presence of the accused, and at any time and place in the state that he might direct. Taking these provisions of the statute under consideration, as well as the fact that the question of the guilt or innocence of the prisoner is not involved; that no punishment or discharge of the prisoner follows the judgment of the court below, rendered upon this proceeding, whether it be in favor of or adverse to the prisoner—we are convinced that the procedure for the determination of the question as to whether a change of venue should be granted to the prisoner or not is one of a civil nature, and does not fall within the category of criminal cases. While the pendency of a criminal case or action against the prisoner must exist before the right to address a petition to the court upon the subject of changing the venue shall arise, and to that extent it might be said that the right to make the petition and the right to a hearing thereon spring from a criminal case, the real source of the right to a hearing is in the existence, or the claim thereof, of the danger of violence being visited upon the prisoner, or the existence of such feeling in the county where the crime is alleged to have been committed that it is impossible for a fair and impartial jury to be obtained there for the trial of the criminal case against him. Hence we think it was competent for the Legislature to treat this matter of making a petition for a change of venue as a thing apart from the criminal case, and that, severance having been effected by legislative enactment, the case falls in the category of civil cases. And to the judgment of the court below determining the issue in that case a writ of error will not lie to this court.

[2] 2. While the act of the Legislature, referred to above, relative to the change of venue has enlarged the class of cases in which it is proper for the judge to grant a change of venue, and it is provided that if the evidence submitted shall show "that there is probability or danger of lynching, or other violence, then it shall be mandatory on said judge to change the venue to such county in the state as in his judgment will avoid such lynching," we are of the opinion that where the evidence is conflicting upon the issue as to whether or not under the petition such a case is made as requires the judge to grant the motion, the judge hearing the same passes upon the issues that are to be determined upon evidence, and that his finding and judgment upon the same is final and controlling, unless manifestly erroneous. In the present case the evidence was conflicting upon the

material issues, and it cannot be said that it was manifestly erroneous to refuse to grant a change of venue.

[3] 3. It requires no argument to demonstrate that it was proper for the court to exclude from the evidence a letter which was addressed, not to the accused, but to a third party, threatening the addressee of the letter with violence in case he should furnish money for the purpose of assisting the accused in making his defense; no evidence being offered to show the authorship of the letter.

Judgment affirmed. All the Justices concur.

(140 Ga. 197)

EZELL v. CITY OF ATLANTA.

(Supreme Court of Georgia. June 17, 1913.)

(Syllabus by the Court.)

COMMERCE (§ 61*) — INTERSTATE COMMERCE — REGULATION—LIQUORS.

An ordinance of the city of Atlanta requires the agents, in charge of their business in the city, of all railroad companies, express companies, and all common carriers doing business in the city, on receipt of any spirituous or malt liquors, wines, or beers, in quantities in excess of three gallons, consigned to any person, firm, or corporation in the city, to "make out a list of same, place of shipment, name of consignee, and the quantity by cases or barrels, the contents as marked thereon," and to report the same to the police authorities of the city. *Held*, that such ordinance, in so far as it relates to interstate shipments of the liquors therein specified, is repugnant to the fifteenth section of the act of Congress, commonly known as the "Interstate Commerce Act (Act Feb. 4, 1887, c. 104, 24 Stat. 394 [U. S. Comp. St. 1901, p. 3165])," as amended June 18, 1910 (Act June 18, 1910, c. 309, § 12, 36 Stat. 551 [U. S. Comp. St. Supp. 1911, p. 1301]), and is therefore void and unenforceable.

[Ed. Note.—For other cases, see Commerce, Cent. Dig. §§ 81-84, 89; Dec. Dig. § 61.*]

Action between the City of Atlanta and O. M. Ezell. On certified questions from the Court of Appeals.

"The Court of Appeals desires the instruction of the Supreme Court upon the questions hereinafter stated; the determination of such questions being necessary to a decision of the above-stated case. The city of Atlanta has enacted the following ordinance:

"An ordinance requiring railway companies, express companies, and all common carriers to report the receipts of any and all spirituous or malt liquors in quantities in excess of three gallons, and to permit the chief of police, and his officers acting under his authority, to make an inspection of their books as to the receipts of such liquors, and for other purposes.

"Be it ordained by the mayor and general council of the city of Atlanta as follows:

"Section 1. That all railroad companies, express companies, and all common carriers

doing business in the city of Atlanta shall, on receipt of any spirituous or malt liquors, wines or beers, in quantities in excess of three gallons, on the day of the receipt of same, or on the day following thereof, make out a list of same, place of shipment, name of consignee, and the quantity by cases or barrels, the contents as marked thereon.

"Sec. 2. That in the event any person, firm, or corporation shall have consigned to them in three gallon lots, more than one shipment in any one week, then a full report shall be made thereof in the same manner as provided for other shipments in sec. 3135 of this ordinance.

"Sec. 3. That the books, bills of lading, waybills, records, and other documents in the possession, custody, or control of railroad companies, express companies, and all common carriers, which show the receipt or delivery of any spirituous or malt liquors, wine or beers, to or for any person residing in the city of Atlanta, doing business in this city, shall be, at all times during the hours when their offices are open for business, subject to the inspection of the chief of police, or any member of the department authorized by said chief to inspect same, and said common carriers, their agents and employes, shall permit the chief of police or his authorized officers aforesaid to inspect such books, records and documents fully and completely in so far as same refer or show delivery or receipt of any spirituous or malt liquors, wines or beers, to or for any person residing within the limits of the city of Atlanta.

"Sec. 4. The reports provided for in section 1 of this ordinance shall be made by the agent of said common carrier in charge of its business in the city of Atlanta, and shall be made on a printed blank, which blank shall be furnished by the city free of charge, and the reports provided for shall be written or typewritten thereon neatly and legibly.

"Sec. 5. Any person, firm or corporation, railroad company or express company, or common carrier, their officers, agents and employes, violating any of the provisions of this ordinance, or failing or refusing to furnish the reports provided hereunder, or failing or refusing to allow their books to be inspected as to the character of shipments heretofore designated, shall be deemed guilty of an offense against the peace and good order and general welfare of said city, and on conviction thereof in the recorder's court shall be punished by a fine not exceeding two hundred dollars, and by a sentence to work on the public works of the city of Atlanta for not exceeding thirty days, either or both penalties to be inflicted in the discretion of the recorder."

"The plaintiff in error was tried before the recorder for the violation of the foregoing ordinance and convicted.

"The following facts were agreed on by

counsel for both parties: 'Said accused, O. M. Ezell, is the agent of the Central of Georgia Railway Company, a common carrier engaged in commerce between the state of Georgia and other adjoining states. That on or about March 9, 1912, the city of Atlanta furnished printed blanks to said accused, as agent of said common carrier, to make reports mentioned in said ordinance, and on March 19, 1912, officer T. D. Shaw, a member of the police force of the city of Atlanta, demanded said reports from said O. M. Ezell, and he failed and refused to furnish the same in response to said demand. In the meantime said railroad company had received at its agency in Atlanta, of which agency the accused was the agent in charge, certain shipments of spirituous and intoxicating liquors of more than three gallons each, from points without the state of Georgia to Atlanta, Ga., and made delivery of the same in the ordinary course. On the 19th of March, 1912, said officer Shaw, then a police officer of the city of Atlanta, with authority as above stated, demanded of said Ezell in the city of Atlanta that he make a report to him, acting for the city of Atlanta, as described in section 1 of said ordinance. At the time, said Shaw suspected that persons were receiving shipments of spirituous liquors over the Central of Georgia Railway for the purpose of sale, or illegal sale, in the city of Atlanta, and while he did not have or specify any particular name of offender, he desired such information for the purpose of prosecuting such persons as he might ascertain had been guilty of such illegal traffic in spirituous liquors; and such information, if received, would have been used in the recorder's court of the city of Atlanta in the prosecution of cases against such offenders if such information had been found pertinent. Said recorder's court has jurisdiction, not only of offenses against the ordinances of the city of Atlanta, but also has jurisdiction as a court of inquiry for the state of Georgia, with power to require a bond for the appearance of those for whom reasonable cause exists as to the violation of offenses against the state of Georgia for their appearance in either the city court of Atlanta or the superior court of Fulton county to answer such crime.'

"(1) Is the said ordinance invalid or unenforceable against the plaintiff in error, as being an unlawful interference with and attempt to regulate interstate commerce?

"(2) Is the said ordinance repugnant to the act of Congress, commonly known as the 'Interstate Commerce Act,' as amended by the act of Congress passed June 18, 1910; and especially to that portion of the fifteenth section of said act of Congress, as follows: 'It shall be unlawful for any common carrier subject to the provisions of this act, or any officer, agent or employé of such common carrier, or for any other person or corporation lawfully authorized by such common

carrier to receive information therefrom, knowingly to disclose to or permit to be acquired by any person or corporation other than the shipper or consignee, * * * any information concerning the nature, kind, quantity, destination, consignee, or routing of any property tendered or delivered to such common carrier for interstate transportation, which information may be used to the detriment or prejudice of such shipper or consignee, or which may improperly disclose his business transactions to a competitor; and it shall also be unlawful for any person or corporation to solicit or knowingly receive any such information which may be so used: Provided, that nothing in this act shall be construed to prevent the giving of such information in response to any legal process issued under the authority of any state or federal court, or to any officer or agent of the government of the United States, or of any state or territory, in the exercise of his powers, or to any officer or other duly authorized person seeking such information for the prosecution of persons charged with or suspected of crime; or information given by a common carrier to another carrier or its duly authorized agent, for the purpose of adjusting mutual traffic accounts in the ordinary course of business of such carriers.'

"(3) Is the said ordinance repugnant to section 20 of the above-mentioned act of Congress, by reason of the fact that in said act exclusive jurisdiction is conferred upon the Interstate Commerce Commission to prescribe the manner in which common carriers, subject to said act, shall keep their books and accounts?

"(4) As applied to transactions of an intrastate nature in the state of Georgia, is said ordinance invalid because repugnant to section 2863 of the Civil Code of 1910, which confers upon the Railroad Commission of the state of Georgia exclusive jurisdiction to prescribe the methods in which common carriers are to carry on their intrastate business in the state of Georgia, in keeping their books and accounts?

"(5) Had the city of Atlanta authority, under its charter or under any laws of the state, to enact said ordinance?

"Wherefore it is ordered that the clerk of this court transmit to the Supreme Court a certified copy of these questions, together with the bill of exceptions, and record in the case."

Little & Powell, of Atlanta, for plaintiff in error. J. L. Mayson, and W. D. Ellis, Jr., both of Atlanta, for defendant in error.

FISH, C. J. We will first consider the second question, that is, whether the ordinance is repugnant to that portion of the fifteenth section of the Interstate Commerce Act which is set forth in that question. The section of the act quoted, in express terms, makes it unlawful for any common carrier,

subject to the provisions of the act, or any officer, agent, or employé of such common carrier, knowingly to disclose the very information which the ordinance requires the agents of such common carriers, in charge of their business in the city of Atlanta, shall give to the police of the city, and the ordinance is therefore repugnant to the act, and for this reason void, unless the ordinance falls within the scope of the proviso of the act. Under the proviso the information sought to be obtained by the ordinance can only be given "in response to any legal process issued under the authority of any state or federal court, or to any officer or agent of the government of the United States, or of any state or territory in the exercise of his powers, or to any officer or other duly authorized person seeking such information for the prosecution of persons charged with or suspected of crime." The provisions of the ordinance requiring the information to be given are general, and apply to every case of interstate shipment of liquors, and are not limited to any of the instances referred to in the proviso of the act. This is illustrated by the facts of this case, where an effort is made to enforce the ordinance in circumstances not within the proviso. The police officer who demanded the report from Ezell as to certain interstate shipments of liquor was not acting under any legal process issued under the authority of any state or federal court, nor was he an officer or agent of the United States, or of any state or territory, acting in the exercise of his powers, nor was he an officer or other duly authorized person seeking such information for the prosecution of persons charged with or suspected of crime. He had no warrant; no offense had been committed in his presence; he knew of no persons who had committed any offense against the state or the city; and therefore he was not acting, in demanding the report, as an arresting officer in the exercise of his powers to make arrests. No person had been charged with crime; in fact no particular person had been suspected of committing a crime. The officer merely suspected that if he obtained the information sought, he would then have reasonable grounds to suspect that some one had, or would, violate the prohibition law. The act of Congress under consideration does not give permission to common carriers engaged in interstate commerce, or their agents, to furnish information such as the ordinance seeks as to interstate shipments, for the purpose of raising suspicion against some unidentified or unknown person or persons. But it permits such information to be given for the purpose of aiding the detection or prosecution of some particular person or persons already charged with or suspected of crime. It follows therefore that the answer to the second question must be in the affirmative.

Manifestly the ordinance is not aimed at intrastate shipments alone, or separately from interstate shipments. It is a single legislative scheme to cover all shipments, irrespective of their origin. Indeed, as the manufacture or sale of the liquors referred to in the ordinance is prohibited in this state, it seems that there would be few, if any, intrastate shipments. It appears from the agreed statement of facts that the only shipments involved in the case were interstate in character, and there is no intimation that there were any intrastate shipments at all. As we have held the ordinance to be void for the reasons above stated, it is unnecessary to pass on the question as to whether the requirements of the ordinance are, as to intrastate shipments, in conflict with the provisions of Civil Code, § 2663, authorizing the Railroad Commission of the state to prescribe the methods in which common carriers shall keep their books and accounts.

In view of what we have said, it becomes unnecessary to make specific answers to other questions.

It was suggested in the brief of counsel for the city that, since this case arose, what is known as the "Webb Act" has been passed by Congress. Whatever may be the extent or effect of that act—as to which we express no opinion—it has no effect upon the present case. All the Justices concur.

(140 Ga. 119)

WELLS v. THOMPSON.

(Supreme Court of Georgia. June 18, 1913.)

(Syllabus by the Court.)

1. WILLS (§§ 52, 289*)—PROBATE—SOLEMN FORM—BURDEN OF PROOF.

To probate a will in solemn form, the burden is upon the proponent to prove the due execution of the instrument and the testamentary capacity of the testator at the time of its execution.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 101-110, 653-661; Dec. Dig. §§ 52, 289.*]

2. WILLS (§ 303*)—PROBATE—SOLEMN FORM—STATUTES.

The statutory rule that a will must be proved in solemn form by all the attesting witnesses is of necessity dispensed with, where the production of all is impossible because some may be beyond the jurisdiction of the court, or cannot be found, or are dead, or insane, or otherwise incompetent as witnesses at the time of the trial. In such cases the due execution of the will may be proved by the subscribing witnesses who can be produced, and proof of due attestation by the requisite number of witnesses may be made by proving the handwriting of the others.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 711-723; Dec. Dig. § 303.*]

3. DEPOSITIONS (§ 2*)—STATUTORY PROVISIONS—PROBATE OF WILL—STATUTES.

While the interrogatories or depositions of attesting witnesses who reside beyond the jurisdiction of the court may be taken, it is not

necessary to take them if the will can be proved by other legal and satisfactory evidence.

[Ed. Note.—For other cases, see Depositions, Cent. Dig. §§ 2, 3; Dec. Dig. § 2.*]

4. WILLS (§ 289*)—ATTESTATION CLAUSE—PRESUMPTION.

Where there is an attestation clause to an instrument offered for probate as a will, reciting all the facts essential to its due execution as a will, and it is shown that the alleged testator and those whose names appear thereon as witnesses actually affixed their signatures to the paper, a presumption arises that it was executed in the manner prescribed by law for the execution of wills.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 653-661; Dec. Dig. § 289.*]

5. WILLS (§ 309*)—PROBATE—DEVISAVIT VEL NON—KNOWLEDGE OF TESTATOR.

That the alleged testator knew the contents of the instrument offered for probate and desired to execute it as a will may be considered on the trial of an issue of devisavit vel non.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 735-737; Dec. Dig. § 309.*]

6. WILLS (§ 215*)—EXECUTION—PROBATE—DEVISAVIT VEL NON—SCOPE OF INQUIRY.

In a proceeding to probate a will in solemn form, the only issue is devisavit vel non, and therefore the matter of construing the terms of the instrument offered for probate is not up for determination.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 522, 523; Dec. Dig. § 215.*]

7. WILLS (§ 324*)—PROBATE—PROOF—DIRECTION OF VERDICT.

The evidence submitted in behalf of the proponent as to the due execution of the instrument offered for probate, and as to the testamentary capacity of the alleged testatrix at the time of its execution, was sufficient to make out a prima facie case for the probate of the paper as a will, and, no evidence having been adduced for the contestant, the court erred in directing a verdict in favor of the latter.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 225, 767-770; Dec. Dig. § 324.*]

Error from Superior Court, Turner County; Frank Park, Judge.

Petition by A. J. Wells, nominated executor of the alleged will of Mrs. Evie Brown, for probate, in which Pearl M. Thompson filed objections. Judgment for objector, and proponent brings error. Reversed.

A. J. Wells, the nominated executor of the alleged will of Mrs. Evie Brown, applied for the probate of the same in solemn form. A caveat was filed by Mrs. Pearl M. Thompson, who claimed to be the sole heir at law of Mrs. Brown. The grounds of the caveat were in substance as follows: (a) Mrs. Brown, at the time the alleged will purports to have been executed, was not of sound and disposing mind and memory, but was then a lunatic, and continuously so remained until the date of her death; (b) if Mrs. Brown signed the alleged will at all, she did not do so freely and voluntarily, "but she was moved thereto by the undue influence and persuasions of * * * said A. J. Wells;" and (c) that the pretended will was void because A. J. Wells was not the son-in-law of Mrs. Brown at the time of her death, as his wife, the daughter of Mrs. Brown, had died

without issue prior to the death of Mrs. Brown. Mrs. Thompson at the time of the filing of the application had two children, both of whom were minors, and a guardian ad litem was appointed for them. The case was tried in the superior court of Turner county on appeal from the court of ordinary of that county. On the trial the instrument sought to be probated was put in evidence by the proponent. The second item thereof was as follows: "I give to my daughter, Mrs. A. J. Wells, and my son-in-law, A. J. Wells," a described house and lot in the city of Ashburn, this state. In the third item two designated lots in the same city were given to Mrs. Pearl M. Thompson for and during her life, with remainder to such children as she might leave surviving her. In a subsequent item all other property owned by Mrs. Brown was given to her two daughters, Mrs. A. J. Wells and Mrs. Pearl M. Thompson, share and share alike. The instrument purported to be signed by Mrs. Evie Brown and four attesting witnesses, namely, M. J. Miller, C. W. Graham, J. N. Raines, and J. H. Allen. The name of the latter purported to be signed officially as a notary public of Turner county, Ga. The following attestation clause immediately followed the purported signature of Mrs. Brown and preceded the purported signatures of the four witnesses: "Signed and published by Mrs. Evie Brown as her last will and testament, in the presence of the undersigned, who subscribed our names as witnesses at the instance and request of said testator, and in her presence, and in the presence of each other, this the 1st day of April, 1909." By evidence introduced by the proponent it was shown that two of the persons who appeared to be attesting witnesses to the instrument had removed from this state, and that one of them, Miller, was, at the time of the trial, a resident of the state of South Carolina, and that the other, Graham, was then a resident of the state of Florida. It appeared that the places where these witnesses respectively resided in such states were known. The interrogatories of neither of these two nonresident witnesses were taken. Miller's brother testified that he knew Miller's signature, and that his signature to the instrument was genuine. No one testified as to a knowledge of the handwriting of Graham. Raines and Allen, the other two persons who appeared to be subscribing witnesses to the instrument, were introduced by the proponent and testified on the trial. Raines' testimony was to the effect that Mrs. Brown signed the instrument sought to be probated in his presence, and that he signed it as a witness in her presence. He could not remember seeing Graham, Allen, and Miller, the other three persons who purported to be attesting witnesses, sign the instrument, but he testified that they were present

when it was signed. On cross-examination he testified: "Now, I don't remember having seen Mr. Allen there." Raines further testified to the effect that he had boarded in the same house with Mrs. Brown for three years or more prior to her death, and was accustomed to see her on an average of three times daily. She spoke to him three or four times about making her will, and asked him to recommend to her some one to draw it up. She informed witnesses several times how she desired to dispose of her property, and the disposition made of it in the instrument was the same as she has informed him she wished to make of it. He conversed with her frequently, and there was nothing in her conduct to indicate that she was not of sound mind. Her memory was bad the last six months of her life. Allen's testimony was in substance as follows: He knew Mrs. Brown several years prior to her death. He went frequently to the house where Mrs. Brown resided. She signed the paper offered for probate, and he himself, Raines, Graham, and Miller also signed it. She requested the witness to sign it. He went on: "She signed it in my presence and in the presence of others. * * * She said that she understood it. I conversed with her, and she was rational as she ever was. She read the paper over: She knew what she was giving to Mrs. Thompson and what she was giving to Mrs. Wells. I said to her: '* * * Mrs. Brown, I want to fix it just like you want it, and if it is not like you want it I will fix it;' and she said: 'The property is divided just like I want it and I want to have it witnessed up to-day.'"

At the conclusion of the evidence introduced in behalf of the proponent—and when no evidence had been adduced for the contestant—the court directed a verdict in favor of the latter. No exception was taken by the proponent on the ground that the court was without authority to direct a verdict at the conclusion of the evidence for the proponent, and where the contestant had introduced no evidence. Proponent moved for a new trial on the usual general grounds that the verdict was contrary to law and the evidence, etc., and upon the following special ground: "One of the grounds upon which the court directed said verdict was that the evidence adduced showed that Mrs. A. J. Wells, one of the beneficiaries under said will, died without issue prior to the death of the testatrix, Mrs. Evie Brown, which left only two legatees named in the will, her son-in-law, A. J. Wells, and her daughter, Mrs. Pearl Thompson, and that because of the death of Mrs. A. J. Wells A. J. Wells was no longer a son-in-law, and as a matter of law could no longer be a beneficiary under said will." Error was assigned upon the direction of a verdict on this ground, because it was contrary to law, and that the words "my son-in-law, A. J. Wells," as used in the will, were merely *descriptio personae*, and

did not designate the character in which Wells was to take under the will. A new trial was refused, and the proponent excepted.

J. T. Hill and J. W. Dennard, both of Cordele, for plaintiff in error. J. B. Hutcheson, of Ashburn, and J. H. Tipton and J. B. Williamson, both of Sylvester, for defendant in error.

FISH, C. J. (after stating the facts as above). [1] Upon the trial of the issue *devisavit vel non*, the burden was upon the proponent to prove the due execution of the instrument offered for probate as the will of Mrs. Brown—that is, that she signed it as her will—and that it was attested and subscribed in her presence by three or more attesting witnesses (Civil Code, § 3846), and that she, at the time of its execution, was mentally capable of making a will.

[2] To successfully carry this burden—it being a proceeding to probate a will in solemn form—it was incumbent upon the proponent to prove the paper offered to be the will of Mrs. Brown by all the witnesses purporting to attest it who were at the time of the trial in existence and within the jurisdiction of the court, or by proof of their signatures and that of the alleged testatrix, Mrs. Brown, if the witnesses, or any of them, were beyond the jurisdiction of the court. Civil Code, § 3856.

[3] It was shown on the trial that two of the persons whose names appeared as attesting witnesses, viz., Graham and Miller, were at that time nonresidents of this state, and were therefore not within the jurisdiction of the court. The proponent has no means of compelling these two nonresident witnesses to attend the trial in person, and it was not obligatory upon him to procure and to introduce in evidence upon the trial their interrogatories or depositions, notwithstanding the declaration in Civil Code, § 3861; that "Witnesses to wills may be examined by commission, in the same cases, and under the same circumstances, as other witnesses in other cases." This provision is merely permissive, and a will may be admitted to probate upon other legal and satisfactory proof, without the interrogatories or depositions of nonresident witnesses. The fact that the depositions of a witness could have been taken does not prevent proof of his handwriting. *Denny v. Pinney*, 60 Vt. 524, 12 Atl. 108; *Allison v. Allison*, 104 Iowa, 130, 73 N. W. 489; *Turner v. Turner*, 1 Litt (Ky.) 101; *Clark's Wills*, 75 Hun (N. Y.) 471, 27 N. Y. Supp. 681; *Wilson v. Collum*, 9 L. R. Ir. 150; *McKeen v. Frost*, 46 Me. 239. Civil Code, § 5834, provides: "Whenever the subscribing witnesses to an instrument in writing are dead, insane, incompetent, or inaccessible, or, being produced, do not recollect the transaction, then proof of the actual signing by, or of the handwriting of, the

alleged maker shall be received as primary evidence of the fact of execution." The general rules of evidence are applicable in regard to the admissibility of evidence to prove the execution, existence, and genuineness of a will. *Gillis v. Gillis*, 96 Ga. 1-18, 23 S. E. 107, 30 L. R. A. 143, 51 Am. St. Rep. 121; 40 Cyc. 1284. How could the trial court compel a witness in a foreign jurisdiction to appear there before commissioners that his interrogatories or depositions might be taken? Moreover, wills are documents of too important and valuable character to require them to be sent into foreign jurisdictions that the interrogatories or depositions of witnesses there may be taken—the instrument may be lost or destroyed in transmission—and, besides, there is no method by which commissioners may be required to return the paper to the trial court of this state. The statutory rule requiring that a will must be proved in solemn form by all the attesting witnesses is of necessity dispensed with when the production of all is impossible because one or more may be beyond the jurisdiction of the court, or cannot be found, or are dead, or insane, or otherwise incompetent to testify at the time of trial. In such cases the execution of the will may be proved by the subscribing witnesses who can be produced, and proof of due attestation by the requisite number of witnesses may be made by proving the handwriting of the others. 40 Cyc. 1307, 1308; 14 Enc. Ev. 417. Numerous cases are cited in these encyclopedias in support of the principle announced. There is nothing in conflict with the propositions hereinbefore stated in the decisions in *Deupree v. Deupree*, 45 Ga. 417, *Brown v. McBride*, 129 Ga. 92, 58 S. E. 702, or *Bowen v. Neal*, 136 Ga. 859, 72 S. E. 340, relied on by counsel for defendant in error. The rulings in these cases considered in connection with the facts involved tend to support what we now hold. In the *Deupree* Case, which was tried in Oglethorpe county, the proponent moved for a continuance on the ground that two of the attesting witnesses resided in the county of Meriwether, this state, that they had been served with subpoenas and were absent, that the expenses of attending court had been tendered to both of such witnesses, and, further, that the other subscribing witness resided in the state of Alabama. A continuance was refused and the ruling was upheld by this court on the ground that the witnesses did not reside in the county in which the trial was had, and under the general law of the state were not compelled to attend court in another county. It was further held that the interrogatories of all the witnesses could be used. In *Brown v. McBride* there were three witnesses to the instrument offered for probate. One of them testified by interrogatories that he and the other two witnesses signed the instrument in the presence of the testator, and in the presence of each other, but that, according to

his recollection, the testator did not sign it in the presence of this witness, and that he did not know whether the other two witnesses were present when the testator signed. It was proved on the trial that one of the other witnesses was dead, and that the other, some 15 years before the trial, had left the county, and had not been heard of since. It was shown that the signature to the instrument was the genuine signature of the testator. It was held by this court: "When it is sought to prove a will in solemn form, where one of the subscribing witnesses is absent, it is competent to prove the signature of such witness after proving that the witness is inaccessible. Such proof for the purpose mentioned is equivalent to proof that the witness is dead or beyond the jurisdiction of the court." It was further held that the evidence was of such character as to support the verdict in favor of the validity of the will. In *Bowen v. Neal* one of the witnesses was dead, and it was said proof of his handwriting could be shown. The case was decided adversely to the proponent on the ground that only one of the three witnesses was introduced to prove the will, when it did not appear that the other subscribing witness was shown to be beyond the jurisdiction of the court, as he resided in another county of this state, and his interrogatories could have been taken.

In the case now before us, Raines, whose name appeared as an attesting witness, testified that he saw Mrs. Brown sign the instrument offered for probate, and that he signed it as a subscribing witness in her presence. Allen, whose name also appeared as an attesting witness, testified that he saw Mrs. Brown sign the instrument, that he signed it as a subscribing witness, and that he saw Graham, Miller, and Raines, whose names appeared as attesting witnesses, sign the instrument as subscribing witnesses, and that Mrs. Brown signed the will in his presence and in the presence of others. It thus appears that two of the subscribing witnesses testified upon the trial, and that the evidence of one of them, Allen, showed that the instrument was executed in accordance with all the requirements of the law. His testimony was to the effect that the signature of Mrs. Brown as well as the signatures of all four of the witnesses were genuine, and Raines' testimony was to the effect that Mrs. Brown's signature and his own were genuine. There can be no more satisfactory evidence of the genuineness of a signature than the testimony of one who saw it written (3 Chamberlayne, *Modern Law of Evidence*, § 2177), and the evidence of Allen and Raines as to the execution of the instrument sought to be probated was, in the circumstances of the case, sufficient to make out a *prima facie* case. Moreover, there was evidence of Mrs. Brown's knowledge of the contents of the instrument and her desire to execute it as her will, and besides there was a full attesta-

tion clause reciting compliance with all formalities of execution, and these were matters for consideration in passing upon the question of will or no will. 40 Cyc. 1286-1304.

[4] In *Underwood v. Thurman*, 111 Ga. 325, 36 S. E. 788, it was held: When the attestation clause to an instrument offered for probate as a will "recites all the facts essential to its due execution as a will, and it is shown that the alleged testator and those whose names appear thereon as witnesses actually affixed their signatures to the paper, a presumption arises that it was executed in the manner prescribed by law for the execution of wills, and this is so, though there may be on the part of one or more of the witnesses a total failure of memory as to some or all of the circumstances attending the execution."

[5, 6] In a proceeding to probate a will in solemn form the issue and the only issue is *devisavit vel non*. The jury must find that the paper offered for probate is or is not the will of the decedent. The construction of the terms of the instrument are not in such a proceeding before the court for determination. *Wetter v. Habersham*, 60 Ga. 193; *Gillis v. Gillis*, 96 Ga. 1, 23 S. E. 107, 30 L. R. A. 143, 51 Am. St. Rep. 121. Therefore, even if the provision in the instrument offered for probate in the present case, devising to Mrs. A. J. Wells, the daughter of Mrs. Brown, and her son-in-law, A. J. Wells, certain realty, could be construed as being inoperative by reason of the fact that Mrs. Wells died prior to Mrs. Brown, and that therefore he was not the latter's son-in-law at the time of her death, this could not be a valid reason why the instrument should not be probated as the will of Mrs. Brown.

[7] There was ample evidence, in the absence of any showing to the contrary, of the testamentary capacity of Mrs. Brown to make a will at the time the instrument offered for probate was executed.

It follows from what has been said that the verdict directed by the court against the proponent was contrary to the evidence, and the judgment refusing a new trial is therefore reversed.

Judgment reversed. All the Justices concur.

(13 Ga. App. 101)

ATKINSON et al. v. COOK. (No. 4,627.)

(Court of Appeals of Georgia. July 15, 1913.)

(Syllabus by the Court.)

1. INJURIES TO FREIGHT SHIPMENT.

The exceptions to the ruling upon the demurrer, as well as the assignments contained in the motion for a new trial, are controlled by the rulings of this court in *Louisville & Nashville Railroad Co. v. Burns*, 9 Ga. App. 243, 70 S. E. 1112, and *Atlantic Coast Line Railroad Co. v. Hill*, 12 Ga. App. 392, 77 S. E.

316, adversely to the contention of the plaintiffs in error.

2. CONNECTING CARRIERS.

Since the plaintiff's petition can properly be construed as an action sounding in tort, predicated upon the carrier's breach of duty as the last of several connecting carriers, the ruling in *Southern Express Co. v. Cowan*, 12 Ga. App. 318, 77 S. E. 203, is not in point.

3. INJURIES TO FREIGHT.

The evidence authorized the verdict and there was no error in refusing a new trial.

Error from City Court of Fitzgerald; E. Wall, Judge.

Action by B. O. Cook against H. M. Atkinson and others, receivers. Judgment for plaintiff, and defendants bring error. Affirmed.

Elkins & Wall, of Fitzgerald, and Bolling Whitfield, of Brunswick, for plaintiffs in error. Griffin & Griffin and McDonald & Grantham, all of Fitzgerald, for defendant in error.

RUSSELL, J. Judgment affirmed.

(13 Ga. App. 79)

KAYLOR v. MAYOR, ETC., OF CARROLLTON. (No. 4,959.)

(Court of Appeals of Georgia. July 8, 1913.)

(Syllabus by the Court.)

CRIMINAL LAW (§ 1179*)—REVIEW—DECISION OF INTERMEDIATE COURT.

Where a petition for certiorari attacks the finding of a recorder of a municipal court solely on the ground that it was without evidence to support it, and this finding is approved by the judge of the superior court, and there is some evidence, although slight, in support of the finding of the recorder, this court will not reverse the judgment of the superior court overruling the certiorari. *Hardaway v. City of Atlanta*, 9 Ga. App. 837, 72 S. E. 304.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 3001; Dec. Dig. § 1179.*]

Error from Superior Court, Carroll County; R. W. Freeman, Judge.

Petition for certiorari by Jeff Kaylor against the Mayor, etc., of Carrollton. From a judgment dismissing the petition, plaintiff brings error. Affirmed.

J. O. Newell, of Carrollton, for plaintiff in error. O. E. Roop, of Carrollton, for defendant in error.

HILL, C. J. Judgment affirmed.

(13 Ga. App. 86)

BARRETT v. MAYOR, ETC., OF SAVANNAH. (No. 4,406.)

(Court of Appeals of Georgia. June 25, 1913. Rehearing Denied July 15, 1913.)

(Syllabus by the Court.)

1. APPEAL AND ERROR (§ 1003*)—FINDINGS—EVIDENCE.

Under the ruling of this court when this case was here before (9 Ga. App. 642, 72 S. E. 49), two questions were left to be determined.

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

ed by the jury: (1) Whether it was negligence upon the part of the municipality to leave the excavation upon its street unprotected by guard rails or other device; and (2) whether this negligence (if the jury found that the excavation was such as required protection) was a concurrent cause of the injury. Both of these questions were fairly submitted by the trial judge to the jury. While, in our opinion, the evidence strongly preponderates in favor of a finding for the plaintiff, still we cannot adjudge that the testimony demanded a finding that the plaintiff's injury would not have resulted if the city had not been negligent, nor can we hold, as a matter of law, that the act of the city in leaving the excavation unguarded was negligence.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3938-3943; Dec. Dig. § 1003.*]

2. MUNICIPAL CORPORATIONS (§ 821*)—QUESTION FOR JURY.

No act can be affirmed to be negligence, as a matter of law, unless it has been made so by statute; and nothing ruled in the former decision of this case can properly be construed as a holding that the act of the municipality in leaving the excavation unguarded was, as a matter of law, negligence. For this reason the court did not err in the instructions of which complaint is made in the various grounds of the motion for a new trial, nor in qualifying the request for instructions, so as to leave it to the jury to say whether the failure of the municipality to place guards or barriers around the excavation in question was negligence, when considered in connection with the facts and circumstances of the particular case.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 1745-1757; Dec. Dig. § 821.*]

Error from City Court of Savannah; Davis Freeman, Judge.

Action by Mrs. J. H. Barrett, Jr., against the Mayor, etc., of Savannah. Judgment for defendant, and plaintiff brings error. Affirmed.

Twiggs & Gazan, of Savannah, for plaintiff in error. H. E. Wilson and David C. Barrow, both of Savannah, for defendant in error.

RUSSELL, J. Judgment affirmed.

(13 Ga. App. 32)

JENKINS v. STATE. (No. 4,978.)

(Court of Appeals of Georgia. July 8, 1913.)

(Syllabus by the Court.)

1. CRIMINAL LAW (§ 775*)—INSTRUCTIONS—NECESSITY.

The evidence tending to establish an alibi was weak and inconclusive, and there was no error in the failure of the court to charge the jury specifically on the subject; especially is this true in the absence of a request to give such charge. *Smith v. State*, 6 Ga. App. 577, 65 S. E. 300.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1833-1837; Dec. Dig. § 775.*]

2. WITNESSES (§ 331½*)—IMPEACHING EVIDENCE—EXCLUSION.

The ruling of the trial judge in excluding from evidence testimony offered to impeach a

witness on a matter wholly immaterial and irrelevant to the issue was not erroneous.

[Ed. Note.—For other cases, see Witnesses, Dec. Dig. § 331½.*]

3. CRIMINAL LAW (§ 942*)—NEW TRIAL—IMPEACHING EVIDENCE.

The alleged newly discovered evidence being purely impeaching in character, there was no abuse of discretion in the refusal to grant a new trial on that ground.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2316, 2331, 2332; Dec. Dig. § 942.*]

4. REVIEW ON APPEAL.

No error of law appears, and the evidence clearly supports the verdict.

Error from City Court of Sandersville; E. W. Jordan, Judge.

R. A. Jenkins was convicted of crime, and brings error. Affirmed.

A. R. Wright and Gross & Swint, both of Sandersville, for plaintiff in error. J. E. Hyman, Sol., of Sandersville, for the State.

HILL, C. J. Judgment affirmed.

(12 Ga. App. 78)

SHEFFIELD v. STATE. (No. 4,953.)

(Court of Appeals of Georgia. July 8, 1913.)

(Syllabus by the Court.)

1. MASTER AND SERVANT (§ 67*)—LABOR CONTRACT—PROSECUTION—EVIDENCE.

To authorize a conviction under the act of 1903 (Acts 1903, p. 90), the evidence must show a contract of service, distinct and definite as to all essential terms, such as the time when the contract is to commence and terminate, the amount of wages to be paid, how the laborer is to work, whether by the day, week, month, or year, where he is to work, and the kind and character of the work to be performed. *Starling v. State*, 5 Ga. App. 171, 62 S. E. 993; *Mosely v. State*, 2 Ga. App. 189, 58 S. E. 298; *Glenn v. State*, 123 Ga. 585, 51 S. E. 605; *McCoy v. State*, 124 Ga. 218, 52 S. E. 434; *Presley v. State*, 124 Ga. 446, 52 S. E. 750; *Thorn v. State*, 12 Ga. App. —, 78 S. E. 953.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 75; Dec. Dig. § 67.*]

2. MASTER AND SERVANT (§ 67*)—LABOR CONTRACT—PRESUMPTION.

A verbal contract alleged to have been made in March, 1912, by which the laborer agreed "to work for the prosecutor from January 1, 1913, to July 1, 1913, at \$20 per month," is too indefinite as to some of the essential terms, such as the place where the work was to be done and the kind and character of the work to be performed, to be the basis of a prosecution for cheating and swindling under the above-mentioned act.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 75; Dec. Dig. § 67.*]

Error from City Court of Jackson; H. M. Fletcher, Judge.

Ed Sheffield was convicted of violating the labor contract law, and brings error. Reversed.

J. T. Moore, of Jackson, for plaintiff in error. O. L. Redman, Sol., of Jackson, for the State.

HILL, C. J. Judgment reversed.

(13 Ga. App. 67)

GIBSON v. STATE (No. 4,914)

(Court of Appeals of Georgia. July 8, 1913.)

*(Syllabus by the Court.)***LARCENY (§§ 28, 30, 32*)—INDICTMENT—DESCRIPTION OF PROPERTY—DEMURRER—LOCATION OF PROPERTY—OWNERSHIP.**

The court did not err in overruling the demurrer to the indictment.

(a) Where a timely demand is made by special demurrer, one indicted for simple larceny is entitled to have such a definite and particular description of property alleged to have been stolen as will enable him to know the exact transaction in which it is claimed he violated the law; but a description of the property as "one metal church bell" belonging to a named church is sufficiently definite to withstand a special demurrer which does not itself specify in what respect the description should be more minute.

(b) In an indictment for simple larceny, it is not necessary to state the location of the property or the place from which it was taken and carried away, farther than to state that it was in the county in which the court had jurisdiction, unless a statement of the location is a descriptive averment essential to the identification of the property alleged to have been stolen.

(c) The words "Morning Star Colored Baptist Church" import a religious association, and such a right to the possession of property suitable for church purposes as will authorize the ownership of any property used by it which may have been stolen to be laid in such a congregation of persons.

[Ed. Note.—For other cases, see Larceny, Cent. Dig. §§ 58, 59, 62, 64-75, 81-92, 99, 101; Dec. Dig. §§ 28, 30, 32.*]

Error from Superior Court, Miller County; W. C. Worrill, Judge.

Will Gibson was convicted of larceny, and brings error. Affirmed.

W. I. Geer, of Colquitt, for plaintiff in error. J. A. Lang, Sol. Gen., of Dawson, and B. T. Castellow, Sol. Gen., of Cuthbert, by R. R. Arnold, of Atlanta, for the State.

RUSSELL, J. Judgment affirmed.

(13 Ga. App. 101)

PAYNE v. SEAGARS. (No. 4,769.)

(Court of Appeals of Georgia. July 15, 1913.)

*(Syllabus by the Court.)***PAYMENT (§ 89*)—APPLICATION—LANDLORD AND TENANT.**

In the absence of direction by a debtor to apply a payment made by him to one of two demands which his creditor holds against him, the creditor can apply the payment to either one of the demands, where no rights of third parties will be affected, even though the payment be derived from the proceeds of property upon which the creditor has a special lien as to one of the debts. This principle applies to the payment by the tenant to the landlord, where the latter receives no direction from the tenant to apply such payment to the rent, but the tenant leaves it optional with the landlord either to apply the payment to the rent due or to another unsecured indebtedness which the landlord holds against the tenant. *Bufford v. Wilkerson*, 7 Ga. App. 443, 67 S. E. 114; Civil Code 1910, § 4318.

[Ed. Note.—For other cases, see Payment, Cent. Dig. §§ 104-114; Dec. Dig. § 89.* Landlord and Tenant, Cent. Dig. §§ 857, 858.]

Error from City Court of Jefferson; G. A. Johns, Judge.

Action between John Payne and S. A. Seagars. From the judgment, Payne brings error. Affirmed.

Ray & Ray, of Jefferson, for plaintiff in error. Chas. Emory Smith and Wolver M. Smith, both of Athens, for defendant in error.

HILL, C. J. Judgment affirmed.

(13 Ga. App. 111)

MAYOR, ETC., OF CEDARTOWN v. VANN. (No. 4,869.)

(Court of Appeals of Georgia. July 15, 1913.)

*(Syllabus by the Court.)***TRIAL (§ 193*)—INSTRUCTIONS—EXPRESSION OF OPINION.**

There being evidence that the grade of the street adjacent to the plaintiff's property had been changed without her consent, and that in consequence thereof the market value of her property had depreciated to the extent of from \$400 to \$500, a verdict in her favor for \$75 was not unsupported. *Pause v. Atlanta*, 98 Ga. 92, 26 S. E. 459, 58 Am. St. Rep. 290.

Taken as a whole, the charge of the trial judge sufficiently restricted the jury to a finding of damages resulting from diminution in market value. The charge sufficiently instructed the jury in reference to the measure of damages, in the absence of a request for more specific instructions. Considered in the light of the context and of the entire charge, the court did not, by the use of the following language, express the opinion that the plaintiff was entitled to recover: "You look to all the evidence, see what the proof is upon all these questions, and see what the damage was, what she would be entitled to."

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 436-438; Dec. Dig. § 193.*]

Error from City Court of Polk County; F. A. Irwin, Judge.

Action by Mrs. M. R. Vann against the Mayor, etc., of Cedartown. Judgment for plaintiff, and defendant brings error. Affirmed.

Jno. K. Davis and W. G. England, Jr., both of Cedartown, for plaintiff in error. Bunn & Trawick, of Cedartown, for defendant in error.

POTTLE, J. Judgment affirmed.

(13 Ga. App. 120)

MOORE v. C. H. LOWE & CO. (No. 4,482.)

(Court of Appeals of Georgia. July 22, 1913.)

(Syllabus by the Court.)

1. **No ERROR—VERDICT SUSTAINED.**
There was no error in the charge of the court; and, though there was sharp conflict in the evidence, the verdict was authorized.

2. **TRIAL (§§ 253, 256, 296*)—INSTRUCTIONS—REQUESTS—WITHDRAWAL OF ISSUES—CURE BY OTHER INSTRUCTIONS.**

The fact that the court did not specifically refer to circumstances corroborative of the con-

tentions of one of the parties affords no ground for an assignment of error complaining that this omission withdrew the consideration of these circumstances from the jury. The judge fairly stated the controlling issue in the case and correctly instructed the jury with reference thereto. If more explicit instructions were desired they should have been made the subject of a timely and appropriate request.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 613-623, 628-641, 705-713, 715, 716, 718; Dec. Dig. §§ 253, 256, 296.*]

Error from City Court of Valdosta; J. G. Cranford, Judge.

Action by C. H. Lowe & Co. against W. H. Moore. Judgment for plaintiffs, and defendant brings error. Affirmed.

J. R. Walker and Dan R. Bruce, both of Valdosta, for plaintiff in error. I. H. Corbitt, of Milltown, and W. R. Smith, of Nashville, for defendants in error.

RUSSELL, J. [1] Lowe & Co. brought suit against Moore on a promissory note. He filed a plea of non est factum, and this was the only issue in the case. The defendant contended that he never signed the note, and witnesses testified in his behalf that the note which he signed was a very small piece of paper, whereas the note here involved is an extremely long instrument, covering nearly two pages of the record, with clauses containing reservation of title, conveyance of a mortgage lien, power of sale, and various other stipulations. Moore also introduced, for comparison on the part of the jury, a number of other notes which he had given. It is enough to say that there was ample evidence to have sustained the finding on the part of the jury in favor of the defendant's plea of non est factum. On the other hand, the plaintiffs proved by the subscribing witnesses the execution of the note.

[2] The assignment of error and the amended grounds of the motion for new trial all complain of the omission of the judge to call special attention to certain circumstances in the evidence, and especially that the court excluded from the consideration of the jury evidence in his favor and the argument of his counsel, which tended to stress the fact that it was improbable and unlikely that a man of the defendant's standing would have given such a hide-bound instrument as that in suit. It is insisted that when the judge told the jury that it was not a question of what they would have done, or any one else would have done, in the premises, but that the real question was whether the defendant signed the note, he virtually prevented the jury from considering the reasonableness or unreasonableness of the testimony in behalf of the plaintiff, and thereby prejudiced the cause of the defendant. A case can be imagined in which an instruction on the part of the trial judge might have had this effect; but in the present case the judge specifically told the jury

(after correctly telling them that the question being tried was whether the note was signed by the defendant and whether this was the note or not) to consider all the evidence that throws light upon whether or not Moore signed the note, and that, if they believed from the preponderance of the evidence that Moore signed it, their verdict would be in favor of the plaintiff; whereas, if they believed that Moore did not sign it, the verdict would be in favor of the defendant. So far from excluding from the jury the consideration of the probability of the defendant signing such a note as that in suit, the judge in his charge expressly told them more than once that all the evidence had been admitted for the express purpose of throwing light on the question whether Moore had in fact signed the note. As stated by the judge, what any one of the jury would have done in regard to the note would be immaterial. The true question was whether, under the circumstances in the case, and considering Moore's surroundings, he signed the note. In a portion of the charge, antecedent to that of which complaint is made, the court charged the jury as follows: "The burden of the proof is upon the plaintiffs in this case, and the plaintiffs should make out their case by a preponderance of the testimony. The question is a question of fact. It is a question of whether or not Mr. W. H. Moore signed the note sued upon. All the testimony has been let in for the purpose of throwing light upon that one fact as to whether or not Mr. Moore signed or not."

Viewing the charge as a whole, there is nothing in the point that the court withdrew from the consideration of the jury any fact or circumstance illustrative of the main issue. The real question in the case was whether or not Moore signed the note. The court did not withdraw such circumstances from the jury, but, on the contrary, expressly submitted to them every circumstance which might illustrate what Moore would have done, or did, under the circumstances. What any one else might have done was entirely immaterial, because the same influences might not have operated in like manner upon another individual. There was no error in refusing a new trial.

Judgment affirmed.

(13 Ga. App. 100)

ATKINSON et al. v. TAYLOR. (No. 4,442.) (Court of Appeals of Georgia. July 15, 1913.)

(Syllabus by the Court.)

1. APPEAL AND ERROR (§ 1004*) — REVIEW — EXCESSIVE DAMAGES.

The recovery of damages which cannot be legally measured by any other standard than the enlightened conscience of impartial jurors cannot be set aside upon the ground that it is excessive, unless it is manifestly the result of prejudice, bias, or corrupt motive. Southern

Railway Co. v. Wright, 6 Ga. App. 172, 64 S. E. 703; *Murphy v. Meacham*, 1 Ga. App. 155, 57 S. E. 1046; *Merchants' & Miners' Transportation Co. v. Corcoran*, 4 Ga. App. 654, 62 S. E. 130.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 3944-3947; Dec. Dig. § 1004.*]

2. DAMAGES (§ 102*)—PERSONAL INJURIES—“PAIN AND SUFFERING.”

“Inasmuch as enforced idleness or diminished efficiency in offices of labor is calculated to give rise to mental distress, it is not error to describe the thing by its effects, and call it pain and suffering.” Such deprivation or impairment can be classed as “pain and suffering,” and the jury may properly be instructed that the law fixes no other measure than the enlightened conscience of impartial jurors. *Powell v. Railroad Co.*, 77 Ga. 200, 3 S. E. 757; *Atlanta Street Railway Co. v. Jacobs*, 88 Ga. 647, 652, 15 S. E. 825; *Metropolitan Street Railway Co. v. Johnson*, 90 Ga. 508, 16 S. E. 49; *Southern Railway Co. v. Hutchen-son*, 136 Ga. 591(1), 71 S. E. 802.

[Ed. Note.—For other cases, see *Damages*, Cent. Dig. §§ 255-259; Dec. Dig. § 102.*]

3. DAMAGES (§ 216*)—PERSONAL INJURIES—MENTAL SUFFERING.

Though the allegation upon that subject might have been subject to special demurrer, mental pain and suffering was charged in the petition as an element of damage; and for this reason, as well as because the allegations of the petition were supported by evidence, it was not error for the court to charge the jury that “the physical injury which incapacitates a man or woman from labor is classified in law with actual mental pain and suffering, such pain and suffering as is charged in the petition.”

[Ed. Note.—For other cases, see *Damages*, Cent. Dig. §§ 548-555; Dec. Dig. § 216.*]

4. DAMAGES (§ 216*)—PERSONAL INJURIES—INSTRUCTIONS.

The use of the word “accident” in an instruction, in which the jury were told that “if inability to labor is the result of an accident or injury, and is the result of the accident or injury charged in the petition, if there is evidence to sustain that, you will take that into consideration with other evidence in determining what the plaintiff in this case should recover for the injury which she claims was sustained,” was entirely harmless, since the meaning of the word “accident” was qualified, if not entirely eliminated, by the immediate use of the words “or injury” as explanatory thereof, and could not have misled the jury; for all right of recovery was expressly confined, in the latter part of the instruction, to the injury alleged by the plaintiff.

[Ed. Note.—For other cases, see *Damages*, Cent. Dig. §§ 548-555; Dec. Dig. § 216.*]

5. TRIAL (§ 252*)—INSTRUCTIONS—EVIDENCE TO SUPPORT—PHYSICAL CONDITION.

The jury saw the plaintiff, and there was evidence that at the time of the alleged injury her appearance would plainly indicate to any observer her extremely weak and delicate physical condition. It was therefore not error for the court to instruct the jury that when a person is physically incapable of helping herself on a train, and that fact is known to the conductor, then, under the relationship existing between the carrier and passenger, it would be the duty of the conductor to render such assistance as the circumstances might necessitate.

Nor was it error for the court to charge, in connection therewith, “The facts and circumstances, if you believe they existed in this case, that would demand and require any assistance of the conductor are to be determined by you,” although the plaintiff’s petition did not charge that any assistance was demanded or required of the conductor.

[Ed. Note.—For other cases, see *Trial*, Cent. Dig. §§ 505, 506-612; Dec. Dig. § 252.*]

6. INSTRUCTIONS.

The evidence authorized the reference which the court made to the subject of permanent injuries, and the instruction upon that subject, of which complaint is made, was appropriate and free from error.

Error from City Court of Tifton; R. Eve, Judge.

Action by S. A. Taylor against H. M. Atkinson and others, receivers. Judgment for plaintiff, and defendants bring error. Affirmed.

J. H. Merrill, of Thomasville, and Fulwood & Skeen, of Tifton, for plaintiffs in error. J. S. Ridgill and C. O. Hall, both of Tifton, for defendant in error.

RUSSELL, J. Judgment affirmed.

(13 Ga. App. 103)

YEARGIN v. DYE. (No. 4,862.)

(Court of Appeals of Georgia. July 15, 1918.)

(Syllabus by the Court.)

GUARANTY (§ 49*)—DISCHARGE OF GUARANTOR.

Where one agrees to pay the debt of another, and receives for his promise a valuable consideration, he is not released merely because, upon his failure to pay, the creditor, without a return of the consideration, agrees to look to the original, instead of the substituted, debtor for payment. The statements made by the creditor in the present case did not amount to an agreement to release the substituted debtor, and were admissible in evidence only for the purpose of illustrating whether there had been an agreement by the defendant to pay the plaintiff the debt due him by a third person. There was no error in the instruction on this subject of which complaint is made in the motion for a new trial. The defendant in effect admitted a promise to pay what the original debtor owed, and contended merely that he and the plaintiff had been unable to agree on the amount. The evidence fully authorized the verdict.

[Ed. Note.—For other cases, see *Guaranty*, Cent. Dig. § 60; Dec. Dig. § 49.*]

Error from City Court of Elberton; Geo. O. Grogan, Judge.

Action by Albert Dye against W. H. Yeargin. Judgment for plaintiff, and defendant brings error. Affirmed.

Worley & Nall, of Elberton, for plaintiff in error. Ward & Payne, of Elberton, for defendant in error.

POTTLE, J. Judgment affirmed.

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

(13 Ga. App. 68)

HODGES v. GILLESPIE, SHIELDS & CO.
(No. 4,858.)

(Court of Appeals of Georgia. July 8, 1918.)

*(Syllabus by the Court.)***HUSBAND AND WIFE (§ 232*) — CONTRACTS — SURETYSHIP—EVIDENCE.**

The evidence demanded a finding in favor of the plea of suretyship filed by the defendant, who was a feme covert, and the court erred in overruling her motion for a new trial.

[Ed. Note.—For other cases, see Husband and Wife, Cent. Dig. §§ 844-848, 981; Dec. Dig. § 232.*]

Error from City Court of Jefferson; J. A. Johns, Judge.

Action by Gillespie, Shields & Co. against Olivia Hodges. Judgment for plaintiff, and defendant, Olivia Hodges, brings error. Reversed.

Geo. C. Thomas, of Athens, for plaintiff in error. Lewis C. Russell, of Winder, for defendant in error.

POTTLE, J. Suit was brought against a husband and wife on two promissory notes signed by them apparently as joint makers. The wife pleaded that she signed the notes as surety for her husband. It appeared from the evidence that the husband was a merchant and that the notes were given for the purchase price of certain merchandise which had been shipped to him. The evidence shows that the wife had no interest in the business and received no part of the consideration for which the notes were given; the goods having been shipped directly to the husband and disposed of in a stock of merchandise owned by him. The husband and the wife both testified that the notes were signed by the wife as security at the request of the husband. One of the agents of the plaintiffs testified that he did not ship the goods to the husband until the notes were received, and that he requested that both the husband and the wife sign the notes before the goods would be shipped. Several letters and telegrams containing correspondence between the husband and the plaintiffs were introduced in evidence. In these it appears that the husband promised to forward the notes, and the plaintiffs wrote to the husband that the goods would be shipped as soon as the notes were received, signed jointly by the husband and the wife.

Several decisions are cited by counsel for the plaintiffs to the effect that where a sale has been agreed upon with a husband and he cannot give security, and thereafter his wife becomes the purchaser of the goods, either directly or through her husband as agent, and gives the required security, it is the

same as if no sale to the husband had been contemplated. In such a case the debt is hers, not his. See *Boland v. Klink*, 63 Ga. 448; *Hull v. Sullivan*, 63 Ga. 127; *McDonald v. Bluthenthal & Bickart*, 117 Ga. 120, 43 S. E. 422. The facts of this case, however, do not bring it within the principle of those decisions. There is nothing to show that any sale was made to the wife. Nor were there any negotiations between the wife and the creditors looking to a sale to her. On the contrary, the evidence demanded a finding that the sale was made to the husband. The goods were shipped to him and disposed of by him, and the wife received no part of the consideration. It is true she might have constituted her husband her agent to purchase the goods and sell them for her, and she might have signed the notes jointly with him as a maker, and the obligation would have been binding upon her, but there is nothing in the evidence to show that she did this.

Both the husband and the wife testified positively that the wife signed the notes solely as security for the husband, and the only evidence to impeach the truth of this testimony is the bare fact that the creditors would not ship the goods until it received the notes signed jointly by the husband and the wife. This testimony in behalf of the plaintiffs is not inconsistent with the testimony for the wife that she was merely a security for her husband. Doubtless the plaintiffs thought that her relation to the paper was that of a joint maker; but when they shipped the goods to the husband, without making any contract with the wife and without ascertaining what her true relations to the paper was, they took the risk of her showing, as she has done, that her real relation to the paper was that of a surety for her husband; that she did not contract to buy the goods, either directly or through her husband as agent; that she received no part of the consideration; and that she signed the notes merely for the accommodation of her husband. There is nothing in any of the correspondence to indicate that the husband was acting as agent for his wife. The case is simply one where the creditors dealt exclusively with the husband and declined to extend him credit until the wife signed the evidence of the indebtedness with him. They knew that she was a married woman, knew that she had no power to bind her estate by a contract of suretyship, and knowing these things they took the risk. The evidence demanded a verdict in the wife's favor, and a contrary finding should have been set aside on her motion for a new trial.

Judgment reversed.

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

(140 Ga. 250)

AULTMAN et al. v. NATIONAL BANK OF TIFTON et al.

(Supreme Court of Georgia. July 18, 1913.)

*(Syllabus by the Court.)***WIDOW'S SUPPORT.**

The judge, to whom the case, by consent, was submitted for determination without a jury, did not err in holding that, under the evidence and the law applicable to the issues involved, the widow and children of the decedent were not entitled to the fund in controversy as a year's support.

Error from Superior Court, Tift County; W. E. Thomas, Judge.

Action by Mrs. Lee Aultman and others against the National Bank of Tifton and others. Judgment for defendants, and plaintiffs bring error. Affirmed.

Perry, Foy & Monk, of Sylvester, for plaintiffs in error. Fulwood & Skeen, of Tifton, for defendants in error.

FISH, O. J. Judgment affirmed. All the Justices concur.

(140 Ga. 170)

McCORD v. McCORD (two cases).

(Supreme Court of Georgia. June 17, 1913.)

*(Syllabus by the Court.)***1. DIVORCE (§ 90*)—BILL—SCHEDULE OF PROPERTY.**

The court did not err in refusing, upon oral motion in the nature of a general demurrer, made by the defendant at the trial term, to dismiss the petition in this case on the ground that a schedule of the property of the plaintiff and defendant was not attached to the petition.

[Ed. Note.—For other cases, see Divorce, Cent. Dig. §§ 283-286; Dec. Dig. § 90.*]

2. WITNESSES (§ 219*)—HUSBAND AND WIFE—CONFIDENTIAL COMMUNICATION—WAIVER.

A confidential communication by a wife to her husband, whether orally made or by letter, is privileged, and in a suit between the husband and wife will be excluded from evidence, upon objection made by the wife, based upon the ground of a privilege. But such privilege may be waived. And where, as in the present case, the suit is one brought by the wife for divorce on the ground of desertion, and the wife gives testimony in her own favor showing that her husband had willfully and continuously deserted her for a period of three years prior to the commencement of the suit, it was competent for the husband to introduce her letter, in which the wife, at a time immediately prior to the beginning of the period of alleged desertion, wrote him requesting him not to make any attempts to see her upon her return to her home, from which she had been absent a short time on a visit; the plaintiff and defendant during their married life, up to the time when she left on the visit, having resided upon the property of the plaintiff.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. §§ 769, 781, 782; Dec. Dig. § 219.*]

3. APPEAL AND ERROR (§ 302*)—MOTION FOR NEW TRIAL—GROUNDS.

A ground of a motion for a new trial, complaining of a lengthy excerpt from a charge covering several pages, and embracing numerous and varied propositions of law, some of which are clearly applicable to the facts of the

case, presents no ground for the reversal of a judgment refusing a new trial, where the ground of the motion was that the charge complained of did not correctly state the law applicable to the facts of the case.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1744-1752; Dec. Dig. § 302.*]

4. DIVORCE (§ 147*)—DESERTION—SEPARATION BY CONSENT.

Where a suit, brought by a wife for divorce from her husband, is based upon the ground of desertion, as in the instant case, and the husband introduces in evidence the letter from the wife referred to in the second headnote, and from the wife's testimony it appeared that the husband actually remained away from her home continuously for three years prior to the filing of the suit, it cannot be said that the court erred in submitting to the jury the question as to whether or not his remaining away "was done with the consent and agreement upon the part of the plaintiff."

(a) The letter referred to, considered in connection with the testimony of the wife and the fact that the husband did remain away, would have authorized counsel for the defendant to have argued to the jury a theory of the case, based upon a contention that the absence of the husband for a period of three years from the home of the wife was by consent and agreement; and, the court having stated in his charge that such was the contention of the defendant, it will not be assumed, in the absence of anything to show that the defendant did not make this contention, that the statement of the court was not true.

[Ed. Note.—For other cases, see Divorce, Cent. Dig. §§ 489-492, 493; Dec. Dig. § 147.*]

5. DIVORCE (§ 148*)—INSTRUCTION—MISUSE OF WORDS—DISJUNCTIVE CONJUNCTION.

In one part of the charge to the jury, the judge used language which imposed upon the defendant in the case the burden of showing, in case the jury believed that he willfully remained away from the wife for a period of three years, that this was done by "consent and agreement," whereas it would have been a sufficient reply upon the part of the defendant to show that he had remained away from the wife with her consent or by agreement.

[Ed. Note.—For other cases, see Divorce, Cent. Dig. §§ 494, 495; Dec. Dig. § 148.*]

6. DIVORCE (§ 119*)—DESERTION—ABSENCE—INTENT.

The court should not have so charged the jury as to make the undisclosed intent with which the wife wrote the letter referred to in the second headnote a material fact for the consideration of the jury in passing upon the question as to whether or not the absenting of himself for a period of three years by the husband was with the consent of the wife, in the absence of evidence to show that the husband knew of the intent with which the letter was written.

[Ed. Note.—For other cases, see Divorce, Cent. Dig. § 383; Dec. Dig. § 119.*]

Error from Superior Court, Brooks County; W. E. Thomas, Judge.

Action by Mattie E. McCord against R. K. McCord for divorce. Decree for plaintiff, and defendant brings error and plaintiff prosecutes a cross-bill of exceptions. Reversed on defendant's bill and affirmed on the cross-bill.

Mrs. McCord filed her libel for divorce, basing her action upon the alleged willful and continuous desertion of her husband for

a period of three years prior to the commencement of the suit. The husband filed his plea and answer denying the truth of the material allegations in the plaintiff's petition. Upon the trial a verdict in favor of the petitioner and granting a total divorce was rendered by the jury. A motion for a new trial was made by the respondent, which being overruled, he excepted. And the plaintiff filed her cross-bill of exceptions, complaining of the admission in evidence, over objection, of a letter written by her to the husband a short time before the commencement of the period of desertion alleged in the petition.

J. R. Walker and Dan R. Bruce, both of Valdosta, and J. D. Wade, Jr., of Quitman, for plaintiff in error. G. C. Edmondson, McCall & McCall, and Branch & Snow, all of Quitman, for defendant in error.

BECK, J. (after stating the facts as above). [1] 1. The court did not err in refusing, upon oral motion in the nature of a general demurrer made by the defendant at the trial term, to dismiss the petition in this case on the ground that a schedule of the property of the plaintiff and defendant was not attached to the petition.

[2] 2. Both in the motion for a new trial filed by the husband and in the cross-bill of exceptions filed by the wife, who was the prevailing party in the action, exceptions are taken to the admission in evidence of communications in the shape of letters from the complaining wife to her husband, which letters were written a short time before the alleged desertion began. The plaintiff introduced three of these letters written by herself, and the husband introduced one letter from his wife, written to him. Objection was made to the introduction of the letters written by the plaintiff and tendered at the trial by her counsel, upon the ground, among others, that the same were nothing more than self-serving declarations. The letters contained, among statements and communications that are immaterial, complaints upon the part of the writer of the husband's coldness towards the writer and neglect of her, of his failure to give indications of love and affection, and of indifference to her welfare. This is not a full statement of the contents of the letters, but sufficiently illustrates their character for purposes of this decision. The letter from the wife to the husband, and which was introduced in evidence by the husband over objection of counsel for the plaintiff, was as follows: "Mr. McCord: I send you your ring and also the brooch, and ask you to kindly return my ring by registered mail to Quitman, Ga. I expect to reach home soon, and ask you in advance to not make any attempts to see me. Very resptly, [Signed] Mattie E. McCord."

While the question of admissibility of this last letter is raised in the cross-bill, the ques-

tion is considered here in connection with the objections raised by the defendant to the admission of the letters from the wife, which were tendered in evidence by her. So far as relates to the letters written by the wife to the husband and tendered by her they should have been excluded upon the ground stated, viz., that in so far as they were relevant to the case they were purely self-serving declarations. It was not competent for the wife to write to the husband charging him with certain acts and a course of conduct which, in a suit subsequently brought for divorce, would corroborate her testimony as to his desertion, and then by means of a notice to produce have these letters brought into court and made evidence for herself. Whether these letters at the time they were written were penned with an eye to the use which the plaintiff subsequently sought to make of them, or whether penned under the stress of sincere grief and passion aroused by the husband's real or seeming neglect or indifference, they contain nothing more relatively to the issue involved between the husband and wife in this case, than declarations made by the wife in her own favor, and should have been excluded under the rule applicable to self-serving declarations offered by the party making them.

As to the letter written by the wife to her husband, the defendant in the case, and which was introduced in evidence by the husband, counsel for the wife raised the objection that it was in the nature of a confidential communication between husband and wife, and fell within the inhibition contained in section 5785 (1) of the Code, which excludes, on account of public policy, communications between husband and wife. The language of the section of the Code referred to is as follows: "There are certain admissions and communications excluded from public policy. Among these are: (1) Communications between husband and wife."

In discussing a somewhat similar provision at common law and in other jurisdictions in this country, Prof. Wigmore, in his work on Evidence, says: "(1) That the disqualification of husband and wife to testify the one on the other's behalf is distinct from the privilege of either against the other's disclosure of communications ought to be plain enough. The judicial confusion of them is nevertheless frequent, and the occasional legislative commingling of them in the same sentence of the same enactment has given rise to much of this confusion. Perhaps the commonest error is to ignore the husband's right to waive the privilege; i. e., when he offers the wife to prove his communications to her, the erroneous tendency is to treat the disclosure as absolutely prohibited in spite of his consent. A disqualification, of course, cannot be waived; but it is of the essence of this privilege (as of every privilege) that it may be; and yet the communications, when

offered by the privileged person, are even yet repeatedly excluded, in apparent ignorance of the distinction." Volume IV, p. 3259. And on page 3268 of the same work it was said: "(1) The privilege is intended to secure freedom from apprehension in the mind of the one desiring to communicate (ante, § 2332); it thus belongs to the communicating one, and the other one—the addressee of the communication—is therefore not entitled to object, unless, as already noticed (ante, § 2338, par. 4), the latter's silence is desired to be treated as an assent and an adoption of the statement, which thus makes it doubly a communication and doubly privileged. (2) The spouse possessing the privilege may of course waive it. The waiver may be found in some extrajudicial disclosure, or in some act of testimony which in fairness places the person in a position not to object consistently to further disclosure; for, as already noted (ante, § 2327), the principle of waiver cannot depend solely upon the interpretation of conduct implying willingness to waive. Nevertheless, in a few courts the doctrine of waiver appears to be ignored entirely. This confusion of a disqualification with a privilege has been already adverted to (ante, § 2334); it is entirely unjustifiable (except as required by the express words of some perversely phrased statute), and is so radical an error of principle that no further arguments would cure such a misapprehension." The reasoning in the passage last quoted from Prof. Wigmore's work and the distinction between a disqualification and a privilege seem to be sound, and relatively to the question under consideration the same distinction is drawn in *Greenleaf on Evidence*. Laying it down as an accepted rule that "one spouse may not testify to confidential communications by the other," he says: "Under the third head [which embraces the rule last stated], the principle applies quite irrespective of whether either spouse is a party to the cause. Moreover, the death or the divorce of the other member does not affect the policy of prohibition. Again, the other member may always waive the privilege." 1 *Greenleaf on Evidence*, § 333c. While the distinction which is pointed out in the foregoing between a privilege and a disqualification does not seem to have been distinctly recognized in any decisions by this court, it has been recognized in other jurisdictions, in decisions which are cited to support the passage from *Wigmore on Evidence* quoted above; and in no case in our own decisions is it ruled that the section of the Code relative to the exclusion of communications between husband and wife creates a disqualification. It is true that in numerous decisions of our own court it has been held that one spouse is not competent to testify as to confidential communications from the other, but in none of the cases, so far as we are able to discover—and we have examined all to

which our attention has been called, or which we have been able to find after diligent search—has it been held that the section of the Code referred to did not create a privilege instead of a disqualification, and that the privilege could not be waived by the possessor; that is by the member making the communication. Had it been the legislative intent by this section of the Code to create an absolute disqualification, it could have appropriately been done by making it an exception to the rule in reference to the competency of witnesses laid down in Code, § 5858.

Now, while it appears that the wife is insisting upon her privilege, and that the letter tendered by counsel for the husband should have been excluded under the statute when the possessor of the privilege is apparently standing upon it, it would seem that, although apparently insisting upon the privilege, the wife had, before raising the express objection to the introduction of her letter, waived the right to make such an objection and destroyed her privilege under the statute by her conduct; that is, by testifying to conduct upon the part of her husband and insisting that it should be construed as amounting to desertion. That is, she testified: "We [that is the plaintiff and the defendant] lived together as husband and wife until July, 1906, when I left home and went to Waynesville, N. C., on a summer vacation. I did not return home from Waynesville until the middle of October, 1906. When I left home for Waynesville Mr. McCord and myself were living in my home in Quitman, Ga. Mr. McCord accompanied me to the train when I left for Waynesville, and I have not seen him since. He has never returned to my home and lived with me since, nor provided a joint home for myself and him, nor has he made any proposal for me to live with him." Here the witness testified to conduct on the part of the husband which the jury might have found amounted to desertion. While she is stating, seemingly as a bare fact, that he did not return to her home, and did not live with her after her departure for Waynesville, that fact so stated might have the effect of producing one or another conviction in the minds of the jury accordingly as it was coupled with another fact or disassociated from that other fact. While she testifies to the bare fact that the husband did not return to her home, when this testimony is considered in connection with the allegations in her petition that the husband was guilty of desertion, the testimony given by her as to his not returning to her home is to be construed as meaning that he continued to absent himself from her home and remain away from her without her consent; for, if it was with her consent, his mere absence would not amount to desertion. Consequently, in the light of the pleadings in the case and the basis of her suit, the

wife was virtually testifying that the husband remained away from her without her consent, and thus practically brought into the case herself the question as to whether she had communicated to him a desire that he should remain away, or a consent that he should remain away. She thus removed the veil that protects from the public gaze the privacy of the married life and shields communications from the wife to the husband from judicial inquisition. She herself destroyed her own privilege of protection from a disclosure of her communications to her husband. And having destroyed that privilege for the purpose of making out her own case, she could not have it restored and upheld for the purpose of maintaining the fabric, when it was proposed to subject it to a perfectly proper test, instituted for the purpose of ascertaining whether that fabric rested on a solid foundation. The foundation of her case was desertion. The test of the solidity and strength of that foundation was whether that seeming desertion was actual desertion; that is, willful desertion by the husband without cause, and without consent of the spouse claiming to have been deserted. If the husband stayed away from the wife in obedience to and in compliance with her wish that he should stay away, that he should make no efforts to see her, surely she could not charge that he was guilty of desertion whatever other grounds she may have had for complaint against him. And the wife's letter, which was offered and introduced in evidence in this case, unless explained itself, certainly explains the husband's conduct in remaining away from her.

[3] 3. Where a lengthy excerpt from a charge consisting of several pages is complained of on the ground that it does not state the law applicable to the facts, and the portion of the charge thus criticised embraces many and varied propositions of law, some of which are clearly applicable to the facts of the case, a new trial will not be granted upon this ground of the motion; such an exception is not sufficiently specific.

[4-6] 4-6. The rulings made in headnotes 4, 5, and 6 require no elaboration or discussion.

There are other inaccuracies appearing in the charge, but none of such gravity to require the grant of a new trial, or of sufficient importance to require a discussion of them.

In the cross-bill of exceptions filed by the defendant in error there is only one exception, and that relates to the admission of the letter, over objection, which is set forth in the second division of this opinion; and, as we have ruled above that this letter was properly admitted in evidence, no further discussion is required here.

Judgment reversed on the main bill of exceptions and affirmed on the cross-bill. All the Justices concur.

WARREN v. STATE.

(Supreme Court of Georgia. July 15, 1913.)

(Syllabus by the Court.)

1. HOMICIDE (§ 286*)—INSTRUCTIONS—EVIDENCE.

A woman was indicted for the murder of her husband. The evidence showed that she admitted the killing, but asserted that it was the result of an accident, while she and her husband were scuffling over a gun. Other evidence showed that she had gone to a house near by and borrowed gun shells, on the statement that her husband desired to shoot some wild chickens, but that she had carried a gun with her and left it on the side of the road before reaching the house to which she was going. There were blood stains on the bed in the house of the couple, and a pillow was found under another bed, with a hole shot in it, and with bloody pieces of flesh and teeth forced into it. The deceased was shot in the face with a gun; the shot tearing away a part of his mouth and teeth. The defendant ran away, and was captured about two years thereafter. There was evidence tending to show that she and her husband had had some fusses before the homicide. Held, that the evidence authorized a charge to the effect that, where a homicide is shown to have been committed by the accused, the law presumes that it was malicious, until the contrary appears, unless the evidence adduced by the state shows justification, or mitigation, or excuse, and that, if it does not do so, it devolves on the defendant to show such justification, mitigation, or excuse.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. §§ 586-591; Dec. Dig. § 286.*]

2. HOMICIDE (§ 253*)—EVIDENCE.

The evidence was sufficient to support the verdict, and there was no error in overruling the motion for a new trial.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. §§ 522-532; Dec. Dig. § 253.*]

Error from Superior Court, Hancock County; J. B. Park, Judge.

Bell Warren was convicted of murder, and brings error. Affirmed.

T. M. Hunt, of Sparta, for plaintiff in error. Jos. E. Pottle, Sol. Gen., of Milledgeville, and T. S. Felder, Atty. Gen., for the State.

LUMPKIN, J. [1] Bell Warren was indicted for the murder of Eugene Warren, her husband. She admitted the killing, but stated that her husband intended to go the swamp to shoot some wild chickens, and that she and he got into a scuffle over the gun, and it was accidentally discharged, causing his death. The evidence for the state showed that she came out of the house where they lived, carrying a shotgun, and went to a house located near by and borrowed some gun shells, alleging that her husband desired to shoot chickens; that before reaching the house to which she went she left the gun on the side of the road; that after she obtained the shells she returned to the house where she lived, and in a very few minutes a gun was heard to fire, and when other persons went to the house her husband was found lying on the floor beside the bed. There was

also evidence that there were signs of blood upon the bed, as if the deceased had been lying down, and that a pillow was afterward found in another room, under a bed located there, which showed signs of a charge of shot having penetrated it at close range, carrying into the pillow bloody flesh and teeth. The deceased was shot in the face; the shot tearing away a part of his jaw and mouth and some of his teeth. A witness testified that prior to the killing the defendant and her husband had not lived in perfect amity. After the killing she ran away, and was captured some two years later. She sought to explain this by saying that the father of her deceased husband had told her to leave; but he denied this. These facts were sufficient to bring the case within the ruling made in *Mann v. State*, 124 Ga. 760, 53 S. E. 324, 4 L. R. A. (N. S.) 934, and other cases following it, so as to authorize a charge to the effect that, if a homicide is shown beyond a reasonable doubt to have been committed by the defendant, the law presumes that it is malicious until the contrary appears, unless the evidence adduced by the state shows justification, or mitigation, or excuse, and that, if the evidence adduced by the state does not show circumstances of justification, mitigation, or excuse, it would then devolve upon the defendant to show such circumstances in order to reduce the homicide from murder to manslaughter or to justify it.

[2] 2. The evidence was sufficient to support the verdict, and the refusal of a new trial was not error.

Judgment affirmed. All the Justices concur.

(140 Ga. 222)

LANE v. STATE

(Supreme Court of Georgia. July 15, 1913.)

(Syllabus by the Court.)

1. CRIMINAL LAW (§ 655*)—TRIAL—REMARKS OF COURT.

"It is not necessary for the judge, in charging a jury in a criminal case, to make introductory remarks as to the importance of the case both to the state and to the accused; but it is not error requiring a new trial for him to do so, provided what is said is not a misstatement of the law, or calculated to prejudice the minds of the jurors against the accused."

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1520-1523, 1527, 1535; Dec. Dig. § 655.*]

2. CRIMINAL LAW (§ 782*)—TRIAL—CORROBORATING EVIDENCE.

The female alleged to have been raped testified to the fact, and her testimony was corroborated by that of other witnesses. The failure of the court to instruct the jury that no conviction could be had unless the victim's testimony was corroborated by that of other witnesses is not error.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1847, 1849, 1851, 1852, 1877, 1878, 1880-1882, 1906, 1907, 1908-1911, 1960, 1963, 1967; Dec. Dig. § 782.*]

Error from Superior Court, Ollach County; T. A. Park, Judge.

Lige Lane was convicted of crime, and brings error. Affirmed.

B. W. Cornelius and R. G. Dickerson, both of Homerville, for plaintiff in error. M. D. Dickerson, Sol. Gen., of Douglas, S. Burkhalter, of Homerville, and T. S. Felder, Atty. Gen., for the State.

EVANS, P. J. The plaintiff in error, a negro man, was convicted of the rape of a white woman. The person alleged to have been raped positively identified the plaintiff in error as her assailant, and testified that he had carnal knowledge of her forcibly and against her will. She made immediate complaint, displayed her torn clothing and a wound upon her mouth made, as testified to by her, by the accused in stifling her outcry. The scene of the crime was near the home of the victim, and bore evidence of a struggle.

[1] 1. Complaint is made of the court's introductory instruction: "You sit as impartial men between the state of Georgia and this defendant. You have a very important and serious duty to perform. It is a matter of the most vital importance to this accused because with him it is a matter of life or death or imprisonment in the penitentiary; it is a matter of no less importance to the state of Georgia that if her laws have been violated they shall be vindicated. The only way we can get protection for ourselves, our homes, our lives, our property, and our persons is through a due and proper administration and enforcement of the law. I charge you that the law is just as truly vindicated in the acquittal of an innocent man as it is in the conviction of a guilty man. And at last the purpose and object of every legal investigation is the discovery and ascertainment of the truth. That is the purpose of this trial." The criticism is that it tended to stress the importance of the case, and amounted to an intimation that the accused was guilty. It is not necessary for a judge in charging a jury to make introductory remarks as to the importance of the case, but the propriety of doing so must be left to the judge; and, unless the charge contains a misstatement of the law, or the form of expression is calculated to prejudice the jury against the accused, a new trial will not be granted. *Vanderford v. State*, 126 Ga. 753, 55 S. E. 1025; *Johnson v. State*, 128 Ga. 102, 57 S. E. 353; *Lyles v. State*, 130 Ga. 303, 60 S. E. 578. The giving of this instruction is not ground for a new trial in this case.

[2] 2. Complaint is further made of the court's omission to charge the jury that, "before you are authorized to convict the defendant under the indictment in this case, you must find that the victim's oath has been corroborated by other evidence than her own." There was corroborating evidence,

and the failure of the court to give this instruction is not error. *Washington v. State*, 138 Ga. 370, 75 S. E. 253. The evidence supports the verdict.

Judgment affirmed. All the Justices concur.

(140 Ga. 211)

BROADHURST v. HILL et al.
(Supreme Court of Georgia. July 15, 1913.)

(Syllabus by the Court.)

1. INSTRUCTIONS.

The instructions excepted to were not erroneous for any reason assigned.

2. TRIAL (§ 260*)—INSTRUCTIONS.

The matter of the written request to instruct the jury was fully covered in the charge given, not only in stating in the abstract the legal principle involved, but also in a full and clear application of the legal principle to the evidence in the case.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 651-659; Dec. Dig. § 260.*]

3. NEW TRIAL (§ 39*)—REFUSAL OF INSTRUCTIONS.

In accordance with numerous decisions of this court, the refusal of an oral request to instruct the jury is not cause for the grant of a new trial.

[Ed. Note.—For other cases, see New Trial, Cent. Dig. §§ 57-61; Dec. Dig. § 39.*]

4. NEW TRIAL (§§ 104, 105*)—NEWLY DISCOVERED EVIDENCE.

The alleged newly discovered evidence was cumulative and impeaching in its character, and moreover would not likely produce a different result on another trial.

[Ed. Note.—For other cases, see New Trial, Cent. Dig. §§ 183, 218-220, 221-223, 228, 229; Dec. Dig. §§ 104, 105.*]

5. SUFFICIENCY OF EVIDENCE.

There was evidence to authorize the verdict, and the court did not err in refusing a new trial.

Error from Superior Court, Sumter County; Z. A. Littlejohn, Judge.

Action between R. S. Broadhurst, as guardian, and E. B. Hill and others. From the judgment, Broadhurst brings error. Affirmed.

R. L. Maynard, of Americus, for plaintiff in error. Ellis, Webb & Ellis, W. P. Wallis, J. B. Hudson, and E. A. Hawkins, all of Americus, for defendants in error.

FISH, C. J. Judgment affirmed. All the Justices concur.

(140 Ga. 224)

BLOUNT v. STATE.
(Supreme Court of Georgia. July 15, 1913.)

(Syllabus by the Court.)

SUFFICIENCY OF EVIDENCE.

There are no assignments of alleged errors of law requiring a new trial, and the evidence is sufficient to support the verdict.

Error from Superior Court, Hancock County; J. B. Park, Judge.

Jim Blount was convicted of crime, and brings error. Affirmed.

John R. Cooper, of Macon, and T. M. Hunt, of Sparta, for plaintiff in error. Jos. E. Pottle, Sol. Gen., of Milledgeville, and T. S. Felder, Atty. Gen., for the State.

HILL, J. Judgment affirmed. All the Justices concur.

(140 Ga. 216)

KENNEMER v. BRANCH.
(Supreme Court of Georgia. July 15, 1913.)

(Syllabus by the Court.)

SUFFICIENCY OF EVIDENCE.

No complaint was made that any error of law was committed upon the trial. There was evidence to authorize the verdict, and the judge did not err in refusing a new trial.

Error from Superior Court, De Kalb County; L. S. Roan, Judge.

Action between C. M. Kennemer and R. E. Branch. From the judgment, said Kennemer brings error. Affirmed.

Alonzo Field, of Atlanta, for plaintiff in error. Napier, Wright & Cox, of Atlanta, for defendant in error.

HILL, J. Judgment affirmed. All the Justices concur.

(140 Ga. 229)

DAVIS et al. v. WALTERS et al.
(Supreme Court of Georgia. July 15, 1913.)

(Syllabus by the Court.)

APPEAL AND ERROR (§ 327*)—DISMISSAL—DEFECT OF PARTIES.

Where, upon an interlocutory hearing, the judge refused an ad interim injunction, and the plaintiffs excepted, a party defendant to the pleadings in the trial court, who will really be affected by the judgment to be rendered in this court, is to be regarded as an indispensable party; and, where there is a failure to serve the bill of exceptions upon such party defendant, and service is not acknowledged by him, for him by another duly authorized, with consent that he be made a party by amendment in the Supreme Court, and that the case proceed, as provided under the Civil Code 1910, § 6160, par. 3, the writ of error will be dismissed.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1795, 1814-1820, 1822-1835; Dec. Dig. § 327.*]

Error from Superior Court, Lee County; Z. A. Littlejohn, Judge.

Action by Malinda Davis and others against Monroe Walters and others. Judgment for defendants, and plaintiffs bring error. Dismissed.

R. J. Bacon and R. H. Ferrell, both of Albany, for plaintiffs in error. Ware G. Martin, of Leesburg, for defendants in error.

ATKINSON, J. Malinda Davis and several other persons instituted an action against Monroe Walters and others, including Cora

Duncan. The petition as amended alleged that, as legatees and heirs of legatees under the will of Jack Walters, the plaintiffs were the owners of separate tracts of land of 8¼ acres each, set apart to them under a partition of the last half of land lot 166 in a designated district, bequeathed by the decedent, in which partition certain lots were also set apart to the defendants, and that all of the parties took possession of their respective tracts, and acquiesced in the partition for about 18 years. It was further alleged: "Monroe Walters is now attempting to wrest the possession of the tracts of your petitioners from your petitioners, and to throw cloud upon the title of the tracts of your petitioners, and is attempting to gain the occupancy and possession of the entire east half of said lot, under conspiracy with the other of said defendants, who are assisting him in said endeavor; and said defendants are guilty of repeated acts of trespass on the lands of your petitioners, and now threaten to further trespass thereon. * * * The title of all your petitioners to their respective tracts in severalty rests upon the validity of said partition, and your petitioners have common cause in sustaining said petition and in fighting and resisting the said occupancy of the said defendants as aforesaid, and now bring this suit in order to avoid a multiplicity of suits." Process was prayed against "said defendants." Other prayers were, "that the cloud from title may be removed from the several tracts of your petitioners, and that said partition may be decreed to be obligatory and binding, and that the possession and boundaries as shown by said plot may be recognized and sustained by judgment and decree of this honorable court, * * * that defendants and each of them be enjoined from any acts of trespass," and that "all the parties to this petition may be required to settle all other differences in regard to the said partition of said Jack Walters' estate in this litigation, and be enjoined from all litigation in other courts." All of the persons named as defendants were served, except one. Relatively to him there was a return of non est inventus. All of those served filed demurrers and answers, except Cora Duncan, who did not appear by counsel or otherwise. On the interlocutory hearing the judge refused to grant an ad interim injunction, on the grounds: (1) That the petition was multifarious; and (2) that under the allegations of the petition and evidence the court was not authorized to issue the injunction prayed for. The plaintiffs sued out a bill of exceptions, assigning error on this judgment. There was an acknowledgment of service upon the bill of exceptions by counsel of record for designated defendants, constituting all of those who were served and appeared in defense. There was no service of the bill of exceptions upon Cora Duncan, or acknowledgment of

service by her, personally or otherwise. In the Supreme Court there was a motion to dismiss the bill of exceptions, on several grounds, one of them being that "all persons who are essential parties defendant in error are not such parties to this bill of exceptions." Cora Duncan was one of the defendants designated in the petition against all of whom injunction was prayed, based on the same state of facts as to all; and, having been served, she was a party to the action, and any judgment rendered by the court on the hearing for injunction would affect her to the same extent as it would any of the other defendants. The judgment was in her favor, and as a result she was not enjoined as prayed, nor rendered liable to the payment of costs. As a formal party to the action she was interested, therefore, in sustaining the judgment which was rendered by the court. Under these circumstances she was a necessary party defendant in the bill of exceptions. *Western Union Tel. Co. v. Griffith*, 111 Ga. 551, 38 S. E. 859. Cora Duncan was not served with the bill of exceptions, nor did she acknowledge service, either personally or otherwise. Consequently, she is not to be treated as a party defendant in error. Civil Code, §§ 6161, 6176. Nor by her consent was she made a party defendant by amendment to the bill of exceptions, under the provisions of Civil Code, § 6160, par. 3. It follows that the motion to dismiss the writ of error must be sustained. *U. S. Leather Co. v. First National Bank*, 107 Ga. 263, 33 S. E. 31.

Writ of error dismissed. All the Justices concur.

(140 Ga. 231)

WRIGHT v. MAYOR, ETC., OF BRUNSWICK et al.

(Supreme Court of Georgia. July 15, 1913.)

(Syllabus by the Court.)

MUNICIPAL CORPORATIONS (§ 966*)—TAXATION—SITUS OF VESSEL.

During 1905 Wright was the part owner of a vessel registered under the acts of Congress at the port of the city of Brunswick, Glynn county. She made daily trips, except on Sundays, from Brunswick to St. Simon's Island, also in Glynn county, to the city of Darien in McIntosh county, leaving Brunswick about 8:30 o'clock a. m., arriving at St. Simon's Island about 9:30 a. m., arriving at Darien about 1 p. m. Returning by St. Simon's Island, she reached Brunswick about 6:30 p. m., where she remained during the night and until the next start to Darien. Wright did not reside within the city limits of Brunswick at any time during 1905, but during all of that year resided at St. Simon's Island. Held, Wright's interest in the vessel was not subject to ad valorem municipal taxation during the year 1905 by the city of Brunswick.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. §§ 2045-2061; Dec. Dig. § 966.*]

Error from Superior Court, Glynn County; C. B. Conyers, Judge.

Action by J. B. Wright against the Mayor, etc., of Brunswick and another. Judgment for defendants, and plaintiff brings error. Reversed.

On June 20, 1909, the clerk of the mayor and council of the city of Brunswick issued an execution against J. B. Wright and his $1\frac{1}{2}\%$ interest in the steamboat Hessie No. 2, for taxes claimed to be due the city on his interest in the vessel for the year 1905. The execution was levied by the marshal of the city upon Wright's interest in the vessel, and he thereupon brought his petition against the mayor and council and the marshal to enjoin the enforcement of the execution. The petition alleged the execution to be illegal for the reason, among others, that Wright's interest in the vessel was not subject to taxation by the city for 1905, because he did not reside in the city at any time during that year. The case, by consent, was submitted to the judge for decision on the law and evidence without a jury. On the hearing, the evidence was in substance as follows: Wright, during 1905, was the owner of an $8\frac{1}{10}\%$ interest in the vessel Hessie No. 2, which, during that year, was engaged in the transportation of freight and passengers, making daily trips, except of Sundays, from the city of Brunswick, Glynn county, to St. Simon's Island, in the same county, and on to the city of Darien, in McIntosh county, all in this state. The vessel left Brunswick about 8:30 a. m., arriving at St. Simon's Island about 9:30 a. m., and at Darien about 1 p. m. Returning, she arrived at Brunswick about 6:30 p. m. the same day. Wright did not reside within the corporate limits of the city of Brunswick at any time during the year 1905, but during the whole of that year resided at St. Simon's Island. He did not return his interest in the vessel to the city authorities of Brunswick for taxation during 1905, and paid no taxes on such interest to the city for that year, but did pay to the city "dock rent for the purpose of wharfing during the short time the boat was in the harbor of Brunswick." The vessel was registered in the office of the collector of customs of the district and port of Brunswick, as required by the United States statutes relating to the registration of vessels. The judge decided that Wright was not entitled to an injunction, and he excepted.

D. W. Krauss, of Brunswick, for plaintiff in error. J. T. Colson, of Brunswick, for defendants in error.

FISH, C. J. (after stating the facts as above). Under the first ad valorem tax act of this state (Acts 1852, p. 238) all returns of property for taxation were to be made in the county wherein the taxpayer resided. Our first Code, after providing for returns to be made by banks and railroad, insurance,

and express companies, declared: "All other companies or persons taxed shall make their returns to the receiver of the respective counties where the persons reside, or the office of the company is located, except in case of mining companies, and of persons who cultivate lands in counties not their residence." Code 1863, § 756. This provision has been incorporated in all of our subsequent Codes, and appears in Political Code (1895) § 828. Basing the opinion upon this statutory provision, it was held in *County of Walton v. County of Morgan*, 120 Ga. 548, 48 S. E. 243, that, in the absence of a statute to the contrary, personal property is to be returned where the owner resides, and that, except as to special provisions referred to in the opinion, section 828 is the only law of this state regulating the place where personal property is to be returned. This statute and decision relate to the taxable situs of personalty in respect to state and county taxation, and fix such situs in the county of the owner's residence. There is no statute in this state fixing the taxable situs of vessels for state and county taxation elsewhere than that of the county of the owner's residence; but, on the contrary, section 15 of the general tax act for 1905 (Acts 1904, p. 26) declared: " * * * That any person or company, resident of this state, who is the owner of a vessel or boat or water craft of any description, shall answer under oath the number of vessels, boats and other water craft owned by them, and the value of each, and make returns of the same to the tax receiver of the county of the residence of such persons or companies, and the same shall be taxed as other personal property is taxed." A like provision appeared in the general tax acts for many previous years. This statute clearly fixed the taxable situs, in respect to state and county taxes, of all vessels, boats, or other water craft, owned by residents of this state, for the year 1905, in the county where the owner resided.

In the absence of any statute to the contrary, we cannot say that it was the intention of the Legislature to fix the situs of vessels for municipal taxation at a place not within the county of the owner's residence, where its situs is for state and county taxation. If Wright had resided during 1905 in a county of the state other than Glynn, it would be clearly inconsistent to say that the city of Brunswick could have taxed his interest in the vessel in question, but that it could not have been taxed for the benefit of the county of Glynn, although Brunswick is in and constitutes a part of that county. No power is given expressly or by necessary implication to the city of Brunswick by its charter to tax vessels registered at the custom house in that city, where their owners do not reside within the city limits. The only authority given to the city by its charter is general; that is, "to levy and collect a tax upon all taxable property within the

limits of said city." Acts 1872, p. 151, § 12; Acts 1889, pp. 1010, 1022.

It has been decided by the Supreme Court of the United States that the place of enrollment of a vessel is irrelevant to the question of taxation, because the power of taxation of vessels depends either upon the actual domicile of the owner or the situs of a permanent nature of the property within the taxing jurisdiction. *Ayer & Lord Co. v. Kentucky*, 202 U. S. 409, 26 Sup. Ct. 679, 50 L. Ed. 1082, 6 Ann. Cas. 205. In *Hooper v. Mayor and City Council of Baltimore*, 12 Md. 464, it was held: "A ship registered at the custom house in and sailing out of the port of Baltimore, owned by a bona fide and actual resident of Baltimore county [but not of the city of Baltimore], having his place of business, as a merchant, in the city, is not liable to pay taxes to the city for municipal purposes." In *Cook v. Town of Port Fulton*, 106 Ind. 170, 6 N. E. 321, it appeared that: "Under section 6293, R. S. 1881, all water craft must be listed for taxation at the place of the owner's residence, without regard to its actual situation. Two of the members of a firm owning water craft resided in P., an incorporated town in this state; the property being kept at a harbor two miles beyond the town. The other partner resided in another town in the same county." It was held "that the property is subject to taxation by the town of P." Under a statute of New Jersey, personality is taxable in the township, ward, or taxing district where the owner resides. It was held in *American Mail Steamship Co. v. Crowell*, 76 N. J. Law, 54, 68 Atl. 752: "Vessels owned by a New Jersey corporation having its principal office in one county are not taxable in a municipality in another county, although registered pursuant to act of Congress in the latter municipality." The same thing was decided in *Shrewsbury Tp. v. Merchants' Steamship Co.*, 76 N. J. Law, 407, 69 Atl. 958.

Our conclusion is that the judge erred in refusing to grant the injunction.

Judgment reversed. All the Justices concur.

(140 Ga. 398)

COHEN v. COHEN.

(Supreme Court of Georgia. June 17, 1913.)

(Syllabus by the Court.)

1. DENIAL OF CONTINUANCE.

There was no abuse of discretion in overruling the motion to continue or postpone the case, when originally made or when repeated.

2. BILLS AND NOTES (§ 368*)—EXECUTION IN BLANK—VALIDITY.

A promissory note, payable to order and issued with a blank for the payee's name, may be filled up by any bona fide holder with his own name as payee, and it is a good promissory note as to him from its date. *Moody v. Threlkeld*, 13 Ga. 55 (3). See, also, *Roth v.*

Donnelly Grocery Co., 8 Ga. App. 351, 70 S. E. 140.

(a) The motion to review and reverse the ruling of this court in the case above cited is denied.

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. §§ 949, 950; Dec. Dig. § 368.*]

3. JURY (§ 80*)—APPEAL AND ERROR (§ 1045*)—HARMLESS ERROR—STRIKING FROM JURY PANEL.

In a civil case, it is generally the better practice not to require a party, over objection, to strike a jury from less than a full panel; but in this case no injury could have resulted to the defendant from so doing.

[Ed. Note.—For other cases, see Jury, Cent. Dig. §§ 360-366; Dec. Dig. § 80;* Appeal and Error, Cent. Dig. §§ 4124-4127; Dec. Dig. § 1045.*]

4. SUFFICIENCY OF EVIDENCE.

The presiding judge submitted the theory of each party, and it cannot be said that the verdict was without evidence to support it.

5. MOTION FOR NEW TRIAL.

None of the grounds of the motion for a new trial show any error requiring a reversal.

Error from Superior Court, Fulton County; Geo. L. Bell, Judge.

Action by Julius Cohen against S. Aron and Morris Cohen. Judgment for plaintiff, and defendant Morris Cohen brings error. Affirmed.

Morris Macks and Gober & Jackson, all of Atlanta, for plaintiff in error. Winn & Visanska, of Atlanta, for defendant in error.

LUMPKIN, J. Julius Cohen sued S. Aron as maker and Morris Cohen, as indorser on a promissory note. Morris Cohen pleaded, among other things, that the note had been altered, since he indorsed it, by the insertion of the name of the plaintiff as payee, and also that he and the plaintiff agreed to indorse a note for Aron, to be discounted at a certain bank or returned, and that it was neither so discounted nor returned, but the plaintiff gave his own note for the amount of money, and thus obtained it from a third party, and then held this note as security. There was conflicting evidence. The judge submitted the two contentions. The jury settled the issue, and there was sufficient evidence to sustain their verdict. None of the grounds of the motion for a new trial require a reversal.

[3] The headnotes require no elaboration except in one respect. When the case was called, there were 18 jurors present. The plaintiff's counsel declined to strike, and waived his right to do so. The defendant's counsel desired a full panel of 24. The judge directed that he strike from the 18. After he had exhausted his 6 strikes, the case was tried before the remaining 12. This is alleged as error. Perhaps it might have been more correct to have filled the panel. But how was the defendant hurt? There were 18 jurors. He had but 6 strikes. Twelve were left. The thirty-ninth rule of the su-

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep.'s Indexes

perior court provides that, if either party shall fail to strike, by such failure he shall forfeit a strike; and if more than 12 jurors remain upon the list, the first 12 not stricken shall constitute the jury. Had the names of 6 extra jurymen been added to the panel, and had the defendant stricken any or all of them, then he would have lost that many strikes, which he used as to jurymen already on the panel. Had he made the same strikes, then the 6 added jurymen would have been excused after calling the 12 first names above them. So that, in either event, we see no harm which befell the defendant.

Judgment affirmed. All the Justices concur.

(140 Ga. 212)

LITTLE & GREEN v. DAVIS et al.

(Supreme Court of Georgia. July 15, 1913.)

(Syllabus by the Court.)

1. INTERPLEADER (§ 23*)—GROUNDS FOR RELIEF—PETITION.

Under the allegations of the petition for interpleader, the plaintiff was practically a mere stakeholder, willing and ready to pay to either of the two defendants the debt which each of them was demanding of him, upon the determination of a single question of fact, in regard to which the defendants were themselves at issue, and which the plaintiff could not determine for himself without the hazard of having to pay the debt twice; and the court did not err in overruling the demurrer to the petition.

[Ed. Note.—For other cases, see Interpleader, Cent. Dig. §§ 47, 51; Dec. Dig. § 23.*]

2. INTERPLEADER (§ 10*)—RIGHT TO RELIEF—DISINTERESTED STAKEHOLDER.

But under the answer of the defendants (the plaintiffs in error) and the evidence introduced to support the answer, the plaintiff in the petition for interpleader was clearly divested of his character as a disinterested stakeholder, and the right to require the other parties to interplead was therefore lost.

[Ed. Note.—For other cases, see Interpleader, Cent. Dig. § 12; Dec. Dig. § 10.*]

Error from Superior Court, Fulton County; Geo. L. Bell, Judge.

Petition for interpleader by W. J. Davis against W. L. & John O. Dupree, a partnership, and others. From an order requiring defendants to interplead, the defendants Little & Green bring error. Reversed.

W. J. Davis filed a petition against W. L. & John O. Dupree, a partnership, and Little & Green, another partnership, alleging that each of said defendants is a firm of real estate agents; that during certain months of the year 1912 the petitioner sent out to almost every real estate firm and agent in Atlanta a circular letter, in which he called attention to a certain piece of real estate owned by him which was for sale, and requested the agents addressed to undertake the sale of same at a stated price; that each of the defendants received the letter and

became active in regard thereto; that the piece of real estate was sold to Columbus Roberts; and that each of the defendants claims to have effected the sale; that while the trade has been closed with Columbus Roberts, petitioner is unable to determine to which defendant firm he is due the commission; that Little & Green have instituted suit therefor, and W. L. & John O. Dupree threaten to bring suit to recover the same; that it is a universal custom in Atlanta that when the same piece of property is placed for sale with a number of real estate agents, the commission is to be paid to the agent bringing about the sale, and, there being no different agreement made in this case, there is consequently an implied contract that only one commission is to be paid. Petitioner admits his indebtedness of \$387 as due to the agent or firm bringing about the sale; he is willing and anxious to pay the same, and he prays that the defendants be required to interplead, so that it may be determined to whom the same is due. W. L. & Jno. Dupree answered, setting up that they induced and brought about the sale to Columbus Roberts, and claimed the commission therefor. Little & Green answered to a similar effect, and made the additional averments that they claimed the commission under a contract with Davis, with which contract the claim of the other defendants can have no possible connection, and that Davis is not an innocent stakeholder of a fund to which all defendants claim a right, nor does he owe the same duty to all defendants. A copy of the alleged contract is as follows:

"Little & Green, Real Estate, Atlanta, Ga. Salesman, Little & Green. Atlanta, August 8, 1912. \$100.00. Received of Columbus Roberts one hundred (\$100.00) dollars as a part payment on all that tract or parcel of land which I have this day sold Columbus Roberts, subject to approval of titles, for the sum or consideration of thirteen thousand five hundred dollars, to be paid as follows: \$3,000.00 cash, assume loan of six thousand five hundred at six per cent, balance in one and two years at six per cent. I agree to pay Little & Green a commission of Reg. Commission dollars for services rendered. As per agreement with L. C. Green. In the event the buyer fails to pay for the property as stipulated above, then the amount paid is to be forfeited and is to be kept by W. J. Davis. [Signed] W. J. Davis, Owner.

"I hereby agree to purchase the above-described property upon the terms and conditions above named. [Signed] Columbus Roberts, Purchaser."

Upon the trial the court passed an order in accordance with the prayers of the petition, requiring the parties to interplead. To this order Little & Green excepted.

L. Z. Rosser, Jr., and Stiles Hopkins, both of Atlanta, for plaintiffs in error. J. A. & J. M. Noyes and C. T. & L. C. Hopkins, all of Atlanta, for defendants in error.

BECK, J. (after stating the facts as above). [1] 1. We do not think that the court erred in overruling the demurrer to the petition for interpleader. Under the allegations of the petition the sole question for determination was which of the two parties whom the plaintiff sought to have interplead had procured a purchaser. The petitioner admitted that he owed one or the other the sum of \$387, and sets up facts to show that this identical sum was due by him to one or other of the two real estate firms. The petition made him practically a stakeholder, owing but one debt to one of two parties, and which he could not safely pay to either without the hazard of having to pay the debt twice; and the question as to which was the rightful claimant of the debt depended, according to his allegations, upon the determination of a single issue of fact, which was, as we have stated, Who had procured the purchaser? This was a question of fact, in the solution of which, under the allegations of the petition, the petitioner had no interest whatever. And moreover, this issue of fact (the sole issue for determination before it could be rightly determined which of the two claimants was entitled to the fund) was an issue made by the claimants themselves, in the suit brought by one of them, and in the suit which the other was threatening to bring. We mean by this that this plain, single issue of fact was involved in the two suits, the one actually brought, and the other threatened, as stated in the petition. Under the allegations of the petition the plaintiff therein clearly owed but a single debt. No question of a double liability could arise under the allegations of the petition, and consequently the object of the petition for interpleader was against the danger of a "double vexation against a single liability." The allegations of the petition, taken as true, show the right of the plaintiff to an order requiring the defendants to interplead.

[2] 2. But upon the hearing to determine whether the injunction should be granted and the parties required to interplead under the issues made by the allegations contained in the answer of the plaintiffs in error and the evidence submitted to support these allegations, a different case from that made by the petition was disclosed. Under the allegations of the answer filed by Little & Green and the evidence introduced in support of that answer, Davis, the petitioner, ceased to be a disinterested stakeholder, because, under one theory of the evidence, Davis had agreed in writing to pay the commission to Little & Green, "subject to agreement with L. C. Green, a member of the firm

of Little & Green." As to the meaning of that condition, "subject to agreement with L. C. Green," there was an issue of fact between Davis and Green; Davis testifying that the agreement between him and Green was to the effect "that the commission should be held by the said Davis and should be paid over by him to whichever one of said real estate firms should be entitled thereto according to a decree of court," while L. C. Green testified that "the words 'as per agreement with L. C. Green,' which were inserted in the sales contract by Davis, had no reference to any agreement to pay the money into court, or to allow the court to pass a decree as to whom the money belonged; but these words were inserted before the suit by Little & Green against Davis was filed, and had reference to a statement of Green to Davis when Davis refused to pay Green his commission; that this agreement was a proposition by Green that if Davis should pay Green the commissions, Green would give to Davis a good and solvent bond in an amount not less than twice the amount of the commissions, conditioned to reimburse Davis should Davis ever have to pay this commission to another agent, and that this was the only agreement ever made by Green and Davis, and this statement was made before suit was filed against Davis for Little & Green. Again, while it is alleged in the petition that there was a universal custom in the city of Atlanta, well known to defendants and all dealers in real estate, that when the same piece of property is placed for sale with a number of real estate agents, only one real estate commission should be due for the sale of the property, and the same was to be paid to the party bringing about the sale; and, while this allegation was supported by the testimony of a witness introduced by the plaintiff, it was controverted on the hearing, and a sharp issue raised thereon by the testimony of L. C. Green, who testified that from an experience of between two and three years in the real estate business in Atlanta, and being familiar with all the customs governing the trade, he could and did swear that there was no custom in Atlanta to the effect that only one real estate commission was to be paid for a sale of property listed with more than one agent, but that in every such case the number of commissions was a matter of contract in each case. With the introduction of this conflicting evidence in reference to the meaning of the words "subject to agreement with L. C. Green," and upon the subject of the custom of paying commissions to only one agent (whether the testimony of Davis or that of Green was true with reference to the agreement, or whether the testimony introduced by the plaintiff or that introduced by the defendants with reference to the custom was true), the character of the petitioner as a disinterested stakeholder vanished, and he stands revealed clearly as an antagonist

onist of Little & Green, and interested in destroying the effect of the written contract between him and Little & Green to the extent of eliminating from that contract a promise to pay the commissions to Little & Green, taking from them a bond for indemnity. Under Davis's theory of the case, as developed by the evidence, he was interested, as against Little & Green, to the extent of removing them from the advantageous position of the holder of a written promise to pay, to a level with the other claimants of the debt, W. L. & J. O. Dupree, as mere claimants of the fund, with the validity of that claim depending upon the establishment of the fact that they had effected the sale. Having under the evidence been divested of the character of a mere stakeholder, Davis was no longer in position to enforce his demand for interpleader between Little & Green and the Duprees, and the court erred in holding otherwise.

Judgment reversed. All the Justices concur.

(140 Ga. 336)

McAFEE et al. v. FLANDERS et al.

(Supreme Court of Georgia. June 13, 1913.)

(Syllabus by the Court.)

1. SPECIAL ASSIGNMENTS.

There are no errors in the special assignments requiring a new trial.

2. EXECUTORS AND ADMINISTRATORS (§ 314*)—ACTION—VERDICT—EVIDENCE.

The verdict is contrary to the evidence. The evidence tended to show that there were seven legatees entitled to the estate left by the testator. The jury found in favor of the three plaintiffs the full amount of all cotton left by the testator, certain rents, and the purchase money of certain lands collected by the executors. The three plaintiffs were entitled to recover only three-sevenths of the estate left by the testator. The following portion of the verdict of the jury, under the facts of this case, was also contrary to the evidence and the law, to wit: "We, the jury, direct that six of the heirs at law be paid the sum of \$200.00 each, as said will provides."

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. §§ 1274-1297; Dec. Dig. § 314.*]

Error from Superior Court, Johnson County; K. J. Hawkins, Judge.

Action between S. A. Flanders and others and J. K. McAfee and others, executors. From the judgment, McAfee and others bring error. Reversed.

See, also, 138 Ga. 403, 75 S. E. 819.

Hines & Jordan, of Atlanta, and Kent & Moye, of Wrightsville, for plaintiffs in error. Wm. Faircloth and A. L. Hatcher, both of Wrightsville, and Little & Powell and M. F. Goldstein, all of Atlanta, for defendants in error.

HILL, J. Judgment reversed. All the Justices concur.

(140 Ga. 208)

DE VAUGHN v. HAYS.

(Supreme Court of Georgia. July 15, 1913.)

(Syllabus by the Court.)

1. TRUSTS (§ 114*)—CONSTRUCTION—EXECUTED OR EXECUTORY.

A devise to a named trustee, in trust for another for life, and after his death to such child or children as he may leave surviving, and, in the event there shall be no such child or children, then to other legatees named in the will, share and share alike, created a trust only for the life estate, with legal remainder over, and the trust for life became executed upon coming into existence, if the life tenant were then sui juris, or so soon as he became so.

[Ed. Note.—For other cases, see Trusts, Cent. Dig. § 164; Dec. Dig. § 114.*]

2. TRUSTS (§§ 9, 56*)—SPENDTHRIFT TRUST—VALIDITY—ANNULMENT.

A valid trust may, under certain circumstances, be created in this state for the benefit of one sui juris. The mere fact, however, that a legal remainder over is made in the instrument creating a trust, will not suffice to uphold the trust for one sui juris. If at any time the grounds for the creation of a "spendthrift" trust shall cease, then the beneficiary thereof shall be possessed legally and fully of the same estate as was held in trust, and he may file a proper proceeding in the superior court where the trustee resides to have the trust annulled on that ground. The petition in the present case being brought to annul a "spendthrift" trust on such ground, and the allegations of the petition, which were not denied in the answer filed, being sufficient to authorize the granting of the relief sought, the court erred in denying the prayers of the petition.

[Ed. Note.—For other cases, see Trusts, Cent. Dig. §§ 6, 7, 76; Dec. Dig. §§ 9, 56.*]

Error from Superior Court, Macon County; Z. A. Littlejohn, Judge.

Action by O. B. De Vaughn against J. E. Hays. Judgment for defendant, and plaintiff brings error. Reversed.

The will of J. E. De Vaughn, executed July 11, 1908, was duly proven in solemn form and admitted to record. The portions of the will here material are as follows:

"Item 3. I give and bequeath to Mary Porter De Vaughn, Mrs. Mamie Pierce, Mrs. Rosa Polhill, Carl L. De Vaughn, Mack S. De Vaughn, and Otis B. De Vaughn all the remainder of my realty and personalty, and other property of every kind and description, share and share alike, except my wife, Mary Porter De Vaughn, to have a certain policy of life insurance payable to her, and to Mack S. De Vaughn the Lytle and Wood farms, containing 200 acres, more or less; also the dwelling house and lot where he now lives; and to Otis B. De Vaughn five thousand dollars in cash, so that the last three named heirs will be made equal in property heretofore given off to my heirs hereinbefore mentioned.

"Item 4. I give to my nephew, J. E. Hays, in trust for my son, Otis B. De Vaughn, the above described property as set forth in item No. 3 of this my will, to be held by said Hays and rented annually, or leased as the case

may be, and the proceeds applied monthly for the support of my said son Otis B. De Vaughn, during the remainder of his life, and at his death, his said property held in trust by said Hays, shall go to his child or children then in life, and in the event he shall have no child or children at his death, his said interest or property so held in trust by J. E. Hays, shall revert back to the other heirs of my estate, as mentioned in item 3 of this my will."

Otis B. De Vaughn brought his petition against Hays, as trustee, in which the provisions of the will were set out, and alleging that a partition in kind of the property left by the testator had been made, and that the defendant as trustee had received the portion allotted to him in trust for petitioner, and had since held and managed the same as such trustee. It was further alleged that petitioner was 21 years of age, of sound mind, and able to manage his own property, and that, if there were ever any reason why the property devised to petitioner should be put in the hands of the trustee, such reason no longer existed, and that the defendant was willing to resign as trustee. The allegations of the petition were not denied in the defendant's answer. The prayers were that the defendant be allowed to resign his trust, and that petitioner be authorized to take charge of and control the property devised to the defendant as his trustee, and that a full accounting be had between petitioner and defendant as trustee.

There being no issues of fact involved, the case by consent order was heard in vacation by the judge, with the right of exception to both parties reserved. The judgment rendered was adverse to petitioner, and the material portion of it was as follows: "It is my opinion that, from the broadest construction that could be given the will, the testator gave the property in trust for his son, the plaintiff, for life, with limitation over to plaintiff's children, and, if no children, then to revert back to the other heirs mentioned in said item of the will. * * * The testator had the right to create this kind of an estate, and to appoint a trustee to carry out his wishes in regard to this property, and to preserve an estate over in accordance with his wishes. Therefore I have no authority to remove the trustee and turn the property over to the plaintiff, and, should the trustee resign, it would be the duty of the court to appoint another, to preserve this estate, and to carry out the wishes of the testator in regard thereto. The prayers of the petition are hereby denied." To this judgment petitioner excepted.

Jule Felton, of Montezuma, for plaintiff in error. R. L. Greer, of Oglethorpe, for defendant in error.

FISH, C. J. (after stating the facts as above). [1] The devise to Hays in trust for

Otis B. De Vaughn for life, and after his death to such child or children as he might leave surviving, and, in the event that there should be no such child or children, then to other legatees named in the will, share and share alike, created a trust only for Otis B. De Vaughn during his life, as no express trust was created for those to take in remainder. Such a trust was executed as soon as it became operative, if Otis B. De Vaughn was then sui juris, or as soon as he became so. *Vernoy v. Robinson*, 133 Ga. 653, 66 S. E. 928, and cases cited. While under certain circumstances a valid trust can be created in this state for the benefit of a person of full age (Civil Code, § 3729; *Sinnott v. Moore*, 113 Ga. 908, 39 S. E. 415; *Moore v. Sinnott*, 117 Ga. 1010, 44 S. E. 810), the mere fact that there is a legal remainder over will not suffice to uphold a trust for one sui juris. The ruling in *Lester v. Stephens*, 113 Ga. 496, 39 S. E. 109, is not authority to the contrary, for there the testatrix by her will undertook to create a trust for her brother and sisters, who were sui juris and had no intemperate, wasteful, or profligate habits, and which it was held she could not do under Civil Code, § 3729, and that therefore upon her death the trust became immediately executed.

Civil Code, § 3729 provides: "Trust estates may be created for the benefit of any minor, or person non compos mentis. Any person competent by law to execute a will or deed may, by such instrument duly executed, create a trust for any male person of age, whenever in fact such person is, on account of mental weakness, intemperate habits, wasteful and profligate habits, unfit to be entrusted with the right and management of property: * * * Provided also, if at any time the grounds of such trust shall cease, then the beneficiary shall be possessed legally and fully of the same estate as was held in trust, and any person interested may file any proper proceeding in the superior court, where the trustee resides, to have the trust annulled on that ground, if he so desires. Any person having claims against the beneficiary may avail himself of the provisions of the Code in relation to condemning trust property at common law."

[2] Treating the trust created for his benefit in the will under consideration as falling within the provisions of the Code section just referred to—that is, as a "spendthrift trust"—the petitioner sought in the manner prescribed to have the trust annulled on the ground that, if the trust was created for any of the reasons specified in such section, they had ceased to exist, for the reason that at the time his petition was filed he was 21 years of age and fully capable in every way of managing and controlling his own property. As the allegations of his petition were not denied by the defendant trustee, the court erred in denying the prayers of the petition.

In respect to the bequest of \$5,000 in money.

given to the defendant in trust for the petitioner, the court may upon the trial provide by decree for the protection of the corpus for the benefit of the contingent remaindermen. See, in this connection, *Ohisholm v. Lee*, 53 Ga. 612.

Judgment reversed. All the Justices concur.

(140 Ga. 223)

ROY v. STATE.

(Supreme Court of Georgia. July 15, 1913.)

(Syllabus by the Court.)

1. CRIMINAL LAW (§ 939*)—NEW TRIAL—GROUNDS.

Where a mother was charged with murder resulting from an assault upon her child, in which the latter was beaten and stamped, and it appeared that several persons were present, one of whom assisted the mother in catching the child, it furnishes no ground for reversal that after the trial the evidence of some of these eyewitnesses (including the one who assisted her), who had not been subpoenaed or introduced as witnesses on the trial, was claimed to have been newly discovered; no sufficient reason appearing why the accused did not know of such witnesses, or could not procure their evidence, at the trial.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2318-2323; Dec. Dig. § 939.*]

2. CRIMINAL LAW (§ 956*)—NEW TRIAL—AFFIDAVITS—SUFFICIENCY.

Where such witnesses made mere general statements in affidavits that they did not apprise the defendant or her counsel before the trial of the facts to which they could testify, for the reason that they "had no opportunity to see defendant after her arrest, or her counsel after counsel had been employed," and the defendant and her counsel made affidavits in which they stated in general terms that they did not know of such evidence before the trial of the case, and could not by the exercise of ordinary diligence have discovered it, without any reason being shown why it could not have been discovered, this did not suffice to explain the failure to obtain such testimony before the trial, or to furnish ground for a new trial.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2373-2391; Dec. Dig. § 956.*]

3. CRIMINAL LAW (§ 1156*)—APPEAL—GROUND FOR REVERSAL—NEWLY DISCOVERED EVIDENCE.

Newly discovered evidence, which is only cumulative or impeaching in its character, will not ordinarily require a reversal, where the presiding judge has declined to grant a new trial on that ground.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 3067-3071; Dec. Dig. § 1156.*]

4. VERDICT AND DENIAL OF NEW TRIAL APPROVED.

The evidence was sufficient to support the verdict, and there was no error in refusing to grant a new trial.

Error from Superior Court, Bleckley County; E. D. Graham, Judge.

Pammy Roy was convicted of crime, and brings error. Affirmed.

J. C. Linney and A. C. Saffold, both of Cochran, for plaintiff in error. W. A. Wooten, Sol. Gen., of Eastman, and T. S. Felder, Atty. Gen., for the State.

LUMPKIN, J. Judgment affirmed. All the Justices concur.

(140 Ga. 207)

CALLAWAY v. BEAUCHAMP et al.

(Supreme Court of Georgia. July 15, 1913.)

(Syllabus by the Court.)

1. APPEAL AND ERROR (§ 499*)—RECORD—OBJECTIONS.

In order to authorize this court to reverse the judgment of the trial judge allowing an amendment to pleading, the record must distinctly disclose, not only that objection to the allowance of such amendment was made at the time the same was allowed, but also the ground of such objection. *McCowan v. Brooks*, 113 Ga. 532 (4), 59 S. E. 115.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2295-2298; Dec. Dig. § 499.*]

2. NEW TRIAL (§ 124*)—MOTION—SUFFICIENCY.

The ground of a motion for new trial, complaining of the admission of documentary evidence, over stated objections, which does not set forth the document, in form or substance, is incomplete, and fails to set forth any question for decision. *Stewart v. Bank*, 100 Ga. 496 (2), 28 S. E. 249; *Stewart v. Randall*, 138 Ga. 796 (5), 76 S. E. 352.

[Ed. Note.—For other cases, see New Trial, Cent. Dig. §§ 250-253; Dec. Dig. § 124.*]

3. ADVERSE POSSESSION (§ 85*)—EVIDENCE OF TITLE—DEEDS.

In an action of complaint for land, where the plaintiff relied on prescriptive title, ancient deeds, purporting to convey the land, not connected with plaintiff's chain of deeds, were inadmissible at his instance as tending to illustrate the good faith of his possession, though offered in connection with extraneous parol evidence to the effect that such deeds were included among a number of other ancient, though more recent, deeds, handed down to him as muniments of title by his predecessors.

[Ed. Note.—For other cases, see Adverse Possession, Cent. Dig. §§ 313, 498-503, 656, 657, 660, 668, 688-690; Dec. Dig. § 85.*]

4. ADVERSE POSSESSION (§§ 109, 116*)—REFUSAL OF INSTRUCTIONS—TITLE—ABANDONMENT.

Where title to land is acquired by seven years' adverse possession under color of title, such title cannot be lost by the holder thereof by abandonment. *Tarver v. Deppen*, 132 Ga. 798 (7), 65 S. E. 177, 24 L. R. A. (N. S.) 1161. Accordingly, in an action of complaint for land, where plaintiff relied for recovery on prescriptive title, and the evidence in his favor tended to show that after he had acquired prescriptive title he moved away from the state, leaving a tenant in possession, and the defendants relied on prescriptive title, based on adverse possession alleged to have commenced after the departure of the plaintiff, and to have run for the prescriptive period before the institution of the suit, and it was an issue whether the tenants residing on the property were those of the plaintiff or those of the defendants, it was error requiring the grant of a new trial for the court to refuse, on writ-

ten request, to charge the principle above announced.

[Ed. Note.—For other cases, see *Adverse Possession*, Cent. Dig. §§ 66, 629-635; Dec. Dig. §§ 109, 116.*]

5. INSTRUCTIONS.

All other requests to charge were covered by the general charge, in so far as they accurately stated principles of law applicable to the case; and while certain portions of the charge, which were complained of in the motion for new trial, may not have been entirely accurate, none of them were erroneous for any reason assigned.

6. MATTERS NOT DETERMINED.

As the case will be returned for another trial, no ruling will be made on the assignments of error based on the general grounds of the motion for new trial, and those which complain particularly that the verdict was contrary to the charge of the court.

Error from Superior Court, Quitman County; M. C. Edwards, Judge, pro hac.

Action by E. D. Callaway against J. W. Beauchamp and others. Judgment for defendants, and plaintiff brings error. Reversed.

Smith & Miller, of Edison, for plaintiff in error. B. T. Castellow, of Cuthbert, for defendants in error.

ATKINSON, J. Judgment reversed. All the Justices concur.

(140 Ga. 217)

FELKER v. CITY OF MONROE.

(Supreme Court of Georgia. July 15, 1913.)

(Syllabus by the Court.)

1. EMINENT DOMAIN (§ 307*)—DAMAGES FROM CONSTRUCTION OF SEWER—NONSUIT.

While the declaration in this case is inartificially drawn, and does not clearly and distinctly allege any amount of damages as the result of the taking of petitioner's property, it does in general terms allege that the plaintiff was damaged in a certain amount per annum by reason of the construction of a sewer through his land along a different route from that on the line of which he had consented for the city to construct it, and that, in consequence of the unauthorized change in the location of the sewer, plaintiff had been damaged. There was some evidence from which the jury would have been authorized to find that the city had constructed the sewer along the route not authorized in the plaintiff's agreement with the city; and, that being true, the court should not have granted a nonsuit, but should have submitted to the jury the question of damages resulting to the plaintiff.

[Ed. Note.—For other cases, see *Eminent Domain*, Cent. Dig. §§ 820-824; Dec. Dig. § 307.*]

2. EMINENT DOMAIN (§ 271*)—DAMAGES FROM CONSTRUCTION OF SEWER—DEFENSES.

If, as a matter of fact, the plaintiff had consented for the city to construct a sewer upon one line through his property, the city could not altogether defeat a recovery of damages, in case they actually constructed the sewer along a different line through the plaintiff's land, although the construction of the sewer along the latter line did not cause any greater damage than if it had been constructed along

the line agreed upon between the plaintiff and the city.

[Ed. Note.—For other cases, see *Eminent Domain*, Cent. Dig. §§ 725-736, 741; Dec. Dig. § 271.*]

Error from Superior Court, Walton County; H. C. Hammond, Judge.

Action by Joseph H. Felker against the City of Monroe. Judgment for defendant, and plaintiff brings error. Reversed.

Jos. H. Felker, of Monroe, for plaintiff in error. R. L. Cox, of Monroe, for defendant in error.

BECK, J. Judgment reversed. All the Justices concur.

(140 Ga. 245,

WATTERS v. LANFORD et al.

(Supreme Court of Georgia. July 16, 1913.)

(Syllabus by the Court.)

1. INTERPLEADER (§ 8*)—RIGHT TO COMPEL.

"Whenever a person is possessed of property or funds, or owes a debt or duty, to which more than one person lays claim, and the claims are of such a character as to render it doubtful or dangerous for the holder to act, he may apply to equity to compel the claimants to interplead." Civ. Code 1910, § 5471.

[Ed. Note.—For other cases, see *Interpleader*, Cent. Dig. §§ 8, 9, 11; Dec. Dig. § 8.*]

2. INTERPLEADER (§ 6*)—RIGHT TO COMPEL.

Lanford brought a petition for interpleader against Andy Nolan and J. C. Watters. The petition alleged that Lanford was in possession of certain described jewelry, which he held as a mere stakeholder, having no title or interest therein, and that his possession was acquired in the following way: Nolan reported to petitioner, who was chief of the detective force in the city of Atlanta, that Watters had cheated and defrauded Nolan out of the jewelry while the two were engaged in a game of chance commonly known as a "crap game." Petitioner thereupon had Watters arrested, and he turned the jewelry over to petitioner. Both Nolan and Watters claimed title to the jewelry, and both notified petitioner of their respective claims. Nolan sued out a possessory warrant for the jewelry against petitioner, and Watters had brought an action of trover and bail against petitioner for the jewelry. Petitioner was ready to deliver the jewelry to either Watters or Nolan, as the court might determine upon the trial under an interpleader. Upon the hearing, the evidence tended to prove the allegations of the petition. Held, that the court did not err in ordering Nolan and Watters to interplead, and in granting an interlocutory injunction restraining them from further proceeding with their respective actions against the petitioner.

[Ed. Note.—For other cases, see *Interpleader*, Cent. Dig. § 6; Dec. Dig. § 6.*]

3. INTERPLEADER (§ 6*)—RIGHT TO COMPEL.

Even if Nolan, under the facts of the case, could not maintain his possessory warrant, this of itself did not furnish a good reason why the interpleader should not have been granted, as Nolan might bring an action of trover against Lanford for the recovery of the jewelry, after failing in the possessory warrant proceeding.

[Ed. Note.—For other cases, see *Interpleader*, Cent. Dig. § 6; Dec. Dig. § 6.*]

Error from Superior Court, Fulton County; W. D. Ellis, Judge.

Petition for interpleader by N. A. Lanford against J. O. Watters and Andy Nolan. Judgment for petitioner, and Watters brings error. Affirmed.

Moore & Branch, of Atlanta, for plaintiff in error. J. L. Mayson, W. D. Ellis, and Frank L. Haralson, all of Atlanta, for defendants in error.

FISH, C. J. Judgment affirmed. All the Justices concur.

(140 Ga. 253)

McCOY v. MEADOR.

(Supreme Court of Georgia. July 18, 1913.)

(*Syllabus by the Court.*)

1. NEW TRIAL (§ 132*)—BRIEF OF EVIDENCE.

While certain matters are set forth in the brief of evidence which properly have no place therein, they are not sufficient to require a ruling that the brief should not be considered in passing on the grounds of the motion for new trial.

[Ed. Note.—For other cases, see New Trial, Cent. Dig. §§ 273-275; Dec. Dig. § 132.*]

2. NEW TRIAL (§ 70*)—GROUND—EVIDENCE.

The suit being upon an open account, which defendant denied owing, and no witness having testified as to the sale to the defendant of the goods for the prices of which the action was brought, nor as to the delivery of such goods to the defendant, it not being shown that the salesman was dead, or that his testimony could not be procured, and there not being sufficient evidence to prove the correctness of the account, the verdict in behalf of the plaintiff was without evidence to support it, and the court erred in refusing a new trial.

[Ed. Note.—For other cases, see New Trial, Cent. Dig. §§ 142, 143; Dec. Dig. § 70.*]

Error from Superior Court, Fulton County; Geo. L. Bell, Judge.

Action by T. D. Meador, trustee, against B. F. McCoy. Judgment for plaintiff, and defendant brings error. Reversed.

W. E. Suttles, of Atlanta, for plaintiff in error. Tindall & Silverman, of Atlanta, for defendant in error.

FISH, C. J. Judgment reversed. All the Justices concur.

(140 Ga. 325)

BULLARD & WOODSON et al. v. PLANTERS' WAREHOUSE & GROCERY CO.

(Supreme Court of Georgia. July 18, 1913.)

(*Syllabus by the Court.*)

APPEAL AND ERROR (§ 954*)—REVIEW—INTERLOCUTORY INJUNCTION.

This case comes within the well-settled rule that the discretion of the judge of the su-

perior court in granting or refusing an interlocutory injunction will not be interfered with, unless abused.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3818-3821; Dec. Dig. § 954.*]

Evans, P. J., dissenting.

Error from Superior Court, Bleckley County; E. D. Graham, Judge.

Action by the Planters' Warehouse & Grocery Company against Bullard & Woodson and others. Judgment for plaintiff, and defendants bring error. Affirmed.

H. F. Lawson, of Hawkinsville, for plaintiffs in error. Saffold & Stallings, of Cochran, for defendant in error.

HILL, J. Judgment affirmed. All the Justices concur, except EVANS, P. J., dissenting.

(140 Ga. 349)

LINDSEY v. PORTER & GARRETT.

(Supreme Court of Georgia. July 18, 1913.)

(*Syllabus by the Court.*)

1. MORTGAGES (§ 499*)—FORECLOSURE—VALIDITY OF DECREE—ENFORCEMENT.

Where, upon a petition filed in 1892 to foreclose a mortgage in equity, a judgment was rendered foreclosing the mortgage, while, so far as the same may purport to be a general personal judgment, it is dormant because of failure to issue an execution thereon in terms of the statute relating to dormancy of judgments, it is valid and enforceable as a decree foreclosing a mortgage. *Conway v. Caswell*, 121 Ga. 254, 48 S. E. 956, 2 Ann. Cas. 269.

[Ed. Note.—For other cases, see Mortgages, Cent. Dig. §§ 1478-1485; Dec. Dig. § 499.*]

2. MORTGAGES (§ 480*)—FORECLOSURE IN EQUITY—VERDICT OF JURY—NECESSITY.

The decree is not invalid and void because rendered without a verdict of a jury. The mortgagee filed his petition in equity to foreclose the mortgage under the provisions of Civil Code 1910, § 3305. There was no appearance by the mortgagor. There was no question of fact involved requiring decision by a jury, and the judge properly rendered the decree without the verdict of the jury, under the provisions of Civil Code 1910, § 5422.

[Ed. Note.—For other cases, see Mortgages, Cent. Dig. § 1399; Dec. Dig. § 480.*]

Error from Superior Court, Butts County; R. T. Daniel, Judge.

Action by Porter & Garrett against R. P. Lindsey. Judgment for plaintiffs, and defendant brings error. Affirmed.

W. A. Thompson, of Atlanta, and Jno. R. L. Smith, of Macon, for plaintiff in error. O. M. Duke, of Flovilla, for defendants in error.

BECK, J. Judgment affirmed. All the Justices concur.

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

(140 Ga. 226)

DEVEREAUX v. STATE

(Supreme Court of Georgia. July 15, 1918.)

(Syllabus by the Court.)

1. HOMICIDE (§ 200*)—DYING DECLARATION—ADMISSIBILITY.

There was testimony that the deceased was in articulo mortis and conscious of his condition at the time he made the statement received in evidence as a dying declaration, and the court properly instructed the jury with reference thereto.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. §§ 425-427; Dec. Dig. § 200.*]

2. CRIMINAL LAW (§ 828*)—INSTRUCTIONS—DYING DECLARATIONS.

Such instruction was not erroneous because of an omission to charge, in the absence of a written request, that evidence of a dying declaration should be received by the jury with great caution.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 2007; Dec. Dig. § 828.*]

3. HOMICIDE (§ 292*)—INSTRUCTIONS—MALICE.

The charge on the subject of malice was not open to the criticism that it was inappropriate because no unlawful homicide was proved.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. §§ 597, 598, 600, 601; Dec. Dig. § 292.*]

4. HOMICIDE (§ 300*)—INSTRUCTIONS—JUSTIFIABLE HOMICIDE.

The charge on the subject of justifiable homicide was not open to the criticism that it narrowed the law of self-defense.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. §§ 614, 616-620, 622-630; Dec. Dig. § 300.*]

5. CRIMINAL LAW (§ 814*)—INSTRUCTIONS—IMPEACHMENT OF WITNESSES.

In an instruction relating to the impeachment of witnesses, it is proper to omit reference to a form of impeachment concerning which there is no evidence.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1821, 1833, 1836, 1860, 1865, 1883, 1890, 1924, 1979-1985, 1987; Dec. Dig. § 814.*]

6. CRIMINAL LAW (§ 814*)—INSTRUCTIONS—DEFENSE OF HABITATION.

The evidence did not authorize an instruction upon the defense of one's habitation, as contained in Penal Code 1910, § 72.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1821, 1833, 1836, 1860, 1865, 1883, 1890, 1924, 1979-1985, 1987; Dec. Dig. § 814.*]

7. HOMICIDE (§ 309*)—INSTRUCTIONS—MANSLAUGHTER.

The evidence did not authorize a charge on voluntary manslaughter.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. §§ 643, 650, 652-655; Dec. Dig. § 309.*]

8. HOMICIDE (§ 316*)—EVIDENCE—DENIAL OF NEW TRIAL.

The verdict is supported by the evidence.

[Ed. Note.—For other cases, see Homicide, Dec. Dig. § 316.*]

Error from Superior Court, Hancock County; J. B. Park, Judge.

Will (or Buck) Devereaux was convicted of murder, and he brings error. Affirmed.

John R. Cooper, of Macon, and T. M. Hunt, of Sparta, for plaintiff in error. Jos. E. Pottle, Sol. Gen., of Milledgeville, and T. S. Felder, Atty. Gen., for the State.

EVANS, P. J. The plaintiff in error was convicted of the murder of L. D. Thornton, and recommended to the mercy of the court. According to the testimony submitted by the prosecution, the accused had a farm on the plantation of the decedent. The decedent went to the house of the accused and asked him why he was not hoeing his cotton. The accused replied that he was sick. Both engaged in a colloquy, and the accused got his shotgun. The decedent, who was unarmed, ran around the house, entreating the accused not to shoot him. The accused shot him twice as he was endeavoring to escape. The wound was inflicted upon the right side of the body, in the upper part of the lumbar region. The gunshot made a hole as large as a man's fist, and broke several ribs. The decedent survived about six hours after receiving his injuries. Shortly before his death, after stating that he knew he was going to die, he declared that the accused shot him. The defendant offered a witness, who testified that after the decedent and the accused engaged in a wordy altercation, each cursing the other, the decedent ran to his home, procured a pistol, and immediately returned to the house of the accused; that he came into the house of the accused, saying, "Buck if you want to shoot me, I am here;" the accused replied, "I didn't say I wanted to shoot you, and I didn't say I was going to do it, but before I will let you run over me like you did this morning I will shoot you like a damn rabbit." Whereupon decedent presented his pistol and shot the accused, who was sitting on the foot of his bed. The accused then shot the decedent with a gun. Evidence was submitted that this witness had made statements outside of court, respecting the homicide, materially different from his testimony.

[1] 1. There was no error in admitting the dying declaration of the decedent as to the cause of his death and who shot him, as it was made by the declarant in articulo mortis and while conscious of his condition. Penal Code, § 1026.

[2] 2. "While the testimony of a witness whose evidence goes to the jury through the medium of dying declarations is to be considered under the same rules that govern them in determining the credibility of other witnesses who testify from the stand, the failure of the judge to charge upon the subject of such rules will not be a sufficient reason for granting a new trial, in the absence of an appropriate and timely written request asking instructions upon the subject." Hall v. State, 124 Ga. 649 (2), 52 S. E. 891.

[3] 3. The jury were instructed: "Under the

definition of malice as defined by the law, it does not necessarily imply any previous ill will on the part of the person killing against the person killed; but where a homicide is shown to have been committed, and all the circumstances connected with such homicide show a deliberate intention unlawfully to take human life, without mitigation, or without excuse, or without justification, under circumstances of that kind malice as defined by the law would exist." There was evidence of an unlawful killing, and this instruction was not erroneous because the defendant in his statement admitted and justified the killing. *Mann v. State*, 124 Ga. 760 (1), 53 S. E. 324, 4 L. R. A. (N. S.) 934.

[4] 4. The court's instructions as complained of in the third and sixth grounds of the amended motion, when considered in connection with that part of the charge from which the excerpts were taken, were not open to the criticism that they narrowed the law of self-defense, in that the jury were not told that if they should find that the deceased was making an assault upon the defendant, less than a felony, and the circumstances were such as to arouse in him the fears of a reasonable man that his life was in danger, and he killed the decedent under the influence of those fears, the homicide would be justifiable. The court instructed the jury, in immediate connection with the charges complained of, that "if the circumstances that surrounded the defendant at the time [of the killing] were sufficient to excite the fears of a reasonable man that his own life was in danger, or a felony was about to be committed on his person, and he shot under the influence of those fears, and not in a spirit of revenge, under the laws of the state of Georgia he would be justifiable, and you would not be authorized to convict the defendant of any offense."

[5] 5. The court charged that a witness may be impeached by disproving the facts testified to by him, and by previous contradictory statements made by him of matters relevant to his testimony and to the case. It is contended that the court also should have instructed the jury that a witness was impeachable as to his general bad character. There was no attempt to impeach any witness by proof of general bad character, and the court properly gave no instruction as to this mode of impeachment.

[6-8] 6-8. The summary of facts, though brief, is comprehensive of the case made by the prosecution and the defense. There was no attack upon the habitation of the accused, and the court properly refrained from giving in charge Penal Code, § 72. According to the evidence submitted by the prosecution, the accused was guilty of murder. If the witness offered by the accused was credible, he was justifiable in taking the life of the decedent. There was no middle ground. The

verdict is supported by the evidence, and no reason appears for interfering with the discretion of the court in refusing a new trial. Judgment affirmed. All the Justices concur.

(12 Ga. App. 95)

EZELL v. CITY OF ATLANTA. (No. 4,158.)
(Court of Appeals of Georgia. July 15, 1913.)

(Syllabus by the Court.)

COMMERCE (§ 61*)—ORDINANCES—INVALIDITY—CRIMINAL OFFENSE.

The Supreme Court, in response to questions certified to it by the Court of Appeals, having held that the ordinance under which the petitioner for certiorari was convicted, in so far as it relates to interstate shipments of liquors therein specified, is void and unenforceable; and since it was admitted on the trial before the city recorder that the report demanded of the accused was one relating to interstate shipments of liquors, the conviction of the accused by the recorder was illegal, and the judge of the superior court erred in refusing to sanction the petition for certiorari.

[Ed. Note.—For other cases, see Commerce, Cent. Dig. §§ 81-84, 89; Dec. Dig. § 61.*]

Error from Superior Court, Fulton County; Geo. L. Bell, Judge.

O. M. Ezell was convicted of violating a city ordinance, and brings error from refusal of the superior court to sanction his petition for certiorari. Reversed.

For answer of Supreme Court to certified questions, see 78 S. E. 821.

Little & Powell, of Atlanta, for plaintiff in error. J. L. Mayson and W. D. Ellis, Jr., both of Atlanta, for defendant in error.

RUSSELL, J. Ezell, who is the agent of the Central of Georgia Railway Company at Atlanta, was arrested for a violation of a municipal ordinance requiring railway companies, and all other common carriers, to report receipts of any and all spirituous and malt liquors in quantities in excess of three gallons, and to permit the chief of police and his officers acting under his authority to make an inspection of the books of the carrier company as to the receipts of such liquors.

Before filing his plea of not guilty the defendant presented a verified special plea setting up: (1) That the ordinance is too vague and indefinite to be capable of enforcement; (2) that the ordinance is void because the transaction to which the accusation relates was one had by the carrier in carrying on interstate commerce, and, so far as the ordinance requires the defendant to furnish the information required in the ordinance, it is repugnant to that provision of the fifteenth section of the Interstate Commerce Act (Act Feb. 4, 1887, c. 104, 24 Stat. 884 [U. S. Comp. St. 1901, p. 3165], as amended by Act June 18, 1910, c. 309, § 12, 36 Stat. 551), under which it is unlawful for a common

carrier engaged in interstate commerce, or any of its agents or employes, to knowingly disclose, or permit to be acquired by any person other than the shipper or consignee, any information which may be used to the detriment of the shipper or consignee, or to improperly disclose his business transactions to a competitor, unless such information be given in response to legal process for the prosecution of persons charged with or suspected of crimes, etc.; (3) that the ordinance, as applicable to the defendant and the transaction with which he stood charged, was repugnant to article 1, § 8, par. 3, of the Constitution of the United States, to the effect that "the Congress shall have power to regulate commerce with foreign nations and among the several states," etc.; (4) that the ordinance is repugnant to section 20 of the Interstate Commerce Act, since by said act of Congress sole and exclusive jurisdiction is conferred upon the Interstate Commerce Commission to prescribe the manner in which common carriers shall keep their books and accounts; (5) that the ordinance is void because no authority has been conferred upon the city of Atlanta to pass it; and (6) that the ordinance is void because those portions which are repugnant to the Constitution of the United States and the Interstate Commerce Act are so interdependent and so connected with the other provisions of the ordinance as to render the entire ordinance null and void.

The accused was tried before the recorder of the city of Atlanta upon an agreed statement of facts, to the effect that Ezell was the agent of the Central of Georgia Railway Company, a common carrier engaged in commerce between the state of Georgia and other adjoining states; that the city of Atlanta furnished printed blanks to the accused as agent of the railway company to make the reports mentioned in the ordinance; and that a member of the police force of the city of Atlanta, having authority to make arrests for offenses both against the laws of the state of Georgia and the city of Atlanta, demanded reports required by said ordinance from Ezell, and that he (Ezell) refused to furnish the same in response to the demand. In the meantime the railway company had received at the agency of which the accused was in charge certain shipments of spirituous and intoxicating liquors of more than three gallons each from points without the state of Georgia to Atlanta, Ga., and had delivered them in the ordinary course. It was further admitted that the policeman, acting for the city of Atlanta, demanded of Ezell that he make a report to him of the receipts of shipments of spirituous liquors which had been delivered in quantities exceeding three gallons each, because he (the policeman) suspected that persons were receiving shipments of spirituous liquors over the Central of Georgia Railway for the purpose of sale, or illegal sale, in the city of Atlanta, and

that he desired the information for the purpose of prosecuting such persons as he might ascertain had been guilty of illegal traffic in spirituous liquors; and the information, if disclosed, would have been used in the recorder's court of the city of Atlanta—which has jurisdiction not only of offenses against the ordinances of the city of Atlanta, but is also a court of inquiry with power to require bond for the appearance of those as to whom reasonable cause exists to apprehend that they have violated the laws of the state of Georgia.

The recorder struck the special plea, and upon the facts as agreed to be true in the admitted statement of facts adjudged the defendant guilty, and the judge of the superior court refused to sanction a petition for certiorari, in which the accused sought to review the judgment of the recorder. To the judgment of the judge of the superior court, in refusing to sanction the petition for certiorari, exception was taken by writ of error upon all of the grounds originally urged in the special plea. This court certified to the Supreme Court appropriate questions as to each of these grounds, and in answer to these questions the Supreme Court holding that the ordinance in question, being repugnant to the fifteenth section of the act of Congress, commonly known as the Interstate Commerce Act, as amended June 18, 1910, is void and unenforceable, in so far as it relates to interstate shipments of liquors therein specified, an answer to other questions submitted by this court was held to be unnecessary.

The opinion of the Supreme Court follows: "We will first consider the second question; that is, whether the ordinance is repugnant to that portion of the fifteenth section of the Interstate Commerce Act which is set forth in that question. The section of the act quoted in express terms makes it unlawful for any common carrier subject to the provisions of the act, or any officer, agent, or employe of such common carrier, knowingly to disclose the very information which the ordinance requires the agents of such common carriers in charge of their business in the city of Atlanta shall give to the police of the city, and the ordinance is therefore repugnant to the act, and for this reason void, unless the ordinance falls within the scope of the proviso of the act. Under the proviso the information sought to be obtained by the ordinance can only be given 'in response to any legal process issued under the authority of any state or federal court, or to any officer or agent of the government of the United States, or of any state or territory in the exercise of his powers, or to any officer or other duly authorized person seeking such information for the prosecution of persons charged with or suspected of crime.' The provisions of the ordinance requiring the information to

be given are general, and apply to every case of interstate shipment of liquors, and are not limited to any of the instances referred to in the proviso of the act. This is illustrated by the facts of this case, where an effort is made to enforce the ordinance in circumstances not within the proviso. The police officer who demanded the report from Ezell as to certain interstate shipments of liquor was not acting under any legal process issued under the authority of any state or federal court, nor was he an officer or agent of the United States or of any state or territory acting in the exercise of his powers, nor was he an officer or other duly authorized person seeking such information for the prosecution of persons charged with or suspected of crime. He had no warrant; no offense had been committed in his presence; he knew of no persons who had committed any offense against the state or the city, and therefore he was not acting, in demanding the report, as an arresting officer in the exercise of his powers to make arrests. No person had been charged with crime—in fact, no particular person had been suspected of committing a crime. The officer merely suspected that if he obtained the information sought he would then have reasonable grounds to suspect that some one had, or would, violate the prohibition law. The act of Congress under consideration does not give permission to common carriers engaged in interstate commerce, or their agents, to furnish information such as the ordinance seeks as to interstate shipments, for the purpose of raising suspicion against some unidentified or unknown person or persons. But it permits such information to be given for the purpose of aiding the detection or prosecution of some particular person or persons already charged with or suspected of crime. It follows, therefore, that the answer to the second question must be in the affirmative.

"Manifestly the ordinance is not aimed at intrastate shipments, alone or separately from interstate shipments. It is a single legislative scheme to cover all shipments, irrespective of their origin. Indeed, as the manufacture and sale of the liquors referred to in the ordinance is prohibited in the state, it seems that there would be few, if any, intrastate shipments. It appears from the agreed statement of facts that the only shipments involved in the case were interstate in character, and there is no intimation that there were any intrastate shipments at all. As we have held the ordinance to be void for the reasons above stated, it is unnecessary to pass upon the question as to whether the requirements of the ordinance are, as to intrastate shipments, in conflict with the provisions of the Civil Code, § 2863,

authorizing the Railroad Commission of the state to prescribe the methods in which common carriers shall keep their books and accounts. In view of what we have said it becomes unnecessary to make specific answers to other questions.

"It was suggested in the brief of counsel for the city that, since this case arose, what is known as the 'Webb Act' has been passed by Congress. Whatever may be the extent or effect of that act—as to which we express no opinion—it has no effect upon the present case."

Since it was admitted by the city of Atlanta that the information to which the report would have related (if the report had been made in accordance with the ordinance) was as to the shippers or consignees of interstate shipments, it follows that the recorder erred in adjudging the defendant guilty, and the judge of the superior court erred in refusing to sanction the petition for certiorari. Judgment reversed.

(13 Ga. App. 118)

USHER et al. v. HARRELSON et al.
(No. 4,475.)

(Court of Appeals of Georgia. July 22, 1913.)

(Syllabus by the Court.)

1. EXCEPTIONS, BILL OF (§ 56*)—CERTIFICATION—SURPLUSAGE.

Where a bill of exceptions is duly and regularly certified according to law, an additional certificate, following the one required by statute, will be ignored and treated as surplusage. *Stilwell v. Watkins*, 135 Ga. 149 (2), 68 S. E. 1114; *Dyson v. Southern Railway Co.*, 113 Ga. 327 (3), 38 S. E. 749; *Woolf v. State*, 104 Ga. 536, 537 (3), 30 S. E. 796.

[Ed. Note.—For other cases, see Exceptions, Bill of, Cent. Dig. §§ 94-96; Dec. Dig. § 56.*]

2. JUDGMENT (§ 393*)—MOTION TO SET ASIDE—HEARING.

In the absence of an order, granted in term, continuing the hearing of a motion to set aside a judgment, the court is without jurisdiction to render a judgment in the premises in vacation.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. § 763; Dec. Dig. § 393.*]

Error from City Court of Springfield; J. H. Smith, Judge.

Action between Kate Usher and others and W. H. Harrelson and others. From the judgment, the parties first named bring error. Reversed.

Jos. A. Cronk, Paul E. Seabrook, and Stubbs & Chapman, all of Savannah, for plaintiffs in error. H. A. Boykin, of Sylvania, for defendants in error.

RUSSELL, J. Judgment reversed.

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

(13 Ga. App. 10)

THORN v. STATE. (No. 4,633.)

(Court of Appeals of Georgia. June 25, 1913.)

(Syllabus by the Court.)

1. MASTER AND SERVANT (§ 67*)—LABOR CONTRACT ACT—INDICTMENT—SUFFICIENCY.

An indictment charging a violation of the "labor contract act" of 1903 (Penal Code 1910, § 715) is demurrable, where it alleges that the wages contracted to be paid to the defendant were to be half of the crop made by him as a cropper, but fails to allege the kind or extent of the crop to be planted and fails to identify and locate the particular parcel of land which he was to cultivate. In an indictment charging this offense, a distinct and definite contract of service must be alleged, and the allegations must be sufficiently full to enable the accused to defend the charge. *Glenn v. State*, 123 Ga. 587, 51 S. E. 605; *Wilson v. State*, 124 Ga. 22, 52 S. E. 81; *Sanders v. State*, 7 Ga. App. 46, 65 S. E. 1071; *McCoy v. State*, 124 Ga. 221, 52 S. E. 434; *Taylor v. State*, 124 Ga. 795, 53 S. E. 320.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. § 75; Dec. Dig. § 67.*]

2. MASTER AND SERVANT (§ 67*)—VIOLATION OF LABOR CONTRACT LAW—PROSECUTION—BURDEN OF PROOF.

The evidence was insufficient to authorize the conviction of the accused. It is essential to conviction of the offense of cheating and swindling, under the labor contract act (Pen. Code 1910, § 715), that it be made to appear that the failure of the accused to carry out his contract was without good and sufficient cause; and the state, in the present case, failed to carry that burden. So far as appears, the accused may have had good and sufficient cause for not performing the contract; and the mere failure to perform does not raise the presumption that he failed to comply with his contract without a cause, or good and sufficient cause.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. § 75; Dec. Dig. § 67.*]

Error from City Court of Millen; Thos. L. Hill, Judge.

Sam Thorn was convicted of violating the "Labor Contract Act," and brings error. Reversed.

G. C. Dekle, of Millen, for plaintiff in error. W. Woodrum, Sol., of Millen, for the State.

RUSSELL, J. The defendant was indicted for a violation of section 715 of the Penal Code. The indictment alleged that he contracted with one T. L. Burke "to perform for him on the farm of him, the said T. L. Burke, in said county, services as share cropper from the 1st day of January, 1912, until the 1st day of January, 1913. The wages for said period were to be one-half the crop made by said Sam Thorn, said cropper, with intent then and there to procure money, and did thereby and under said contract, and in furtherance of said intent, then and there procure of the said T. L. Burke \$17.50 in money, of the value of \$17.50, and belonging to said Burke, intending then and there to procure said money from the said T. L. Burke and not to perform the services con-

tracted for, and then and thereafter failing and refusing, without good and sufficient cause, to comply with the said contract and render said services, and failing to return to the said T. L. Burke the said money, after opportunity to do the same, to the loss and damage of the said T. L. Burke in the sum of \$17.50 aforesaid, contrary to the laws of said state," etc. The defendant demurred to the indictment as follows: "(1) That said indictment does not set forth the contract and the terms thereof with sufficient definiteness to put the defendant on notice of what he has to defend. (2) That said indictment fails to state the nature of the crop to be planted and shared in by the defendant. (3) That said indictment fails to state the amount of services that was to be rendered by defendant on the farm of the said T. L. Burke. (4) That said indictment does not locate the farm of the said T. L. Burke (whether in Jenkins or other county), nor does it describe said farm with any amount of definiteness whatever—certainly not enough so to put defendant on notice of what farm of the said Burke is meant. (5) That the contract as set forth in said indictment is too vague and indefinite to be the basis of a criminal prosecution." The court overruled the demurrer, and on the trial the defendant was convicted and sentenced to serve 12 months in the chain gang. His motion for a new trial was overruled, and he excepts to this judgment, and also to the judgment overruling his demurrer.

[1] I. We think the demurrer to the indictment should have been sustained, and we treat all of the grounds of the demurrer as one, because each ground merely calls attention to the different respects wherein the indictment fails to set forth the contract with sufficient clearness and distinctness to put the defendant fairly on notice of the charge against him. A distinct and definite contract between the parties is essentially necessary as a basis to a prosecution for cheating and swindling as defined in the "labor contract act" of 1903 (now embodied in section 715 of the Penal Code). Unless the promise to work which is the inducement of the advance (which advance the contracting employé must obtain with the present intention not to perform the labor) is so clear and definite as not to be misunderstood by either party (in other words, unless the minds of both parties meet at the same time, upon the same thing, and in the same sense), a contract is not created; and, if the contract is vague and indefinite, it necessarily follows that it will be impossible to ascertain whether the accused intended to perform the contract insisted upon by the prosecutor or not. In other words, if it is doubtful whether the accused intended to perform the contract as he understood it, though he did not intend to carry out the contract as his employer

understood it, there could not be a conviction.

In the indictment in the present case the duration of the contract and the wages to be paid the accused are definitely stated, but there seems to have been no agreement whatever as to what crops should be planted or what particular plot of ground should be cultivated by the accused. If there was no agreement as to this, the contract failed to be either definite or distinct. If there was an agreement which made the contract on these points distinct and definite, it should have been alleged and proved. To one familiar with farming operations it is easy to see that a laborer might contract with a landowner to cultivate on shares certain marketable crops, on a designated portion of a plantation, which the proposed cropper knew to be suitable to these crops and sufficiently fertile to warrant the expectation of remuneration for his services; whereas he might not be at all willing to contract to take another portion of the same plantation, which might be worn out and unfit for cultivation and wholly worthless, and take the risk of receiving as his sole means of a livelihood a part of such crops as he could not reasonably expect would be produced. The prosecutor and the accused in this case could not have made a contract which would not have been too vague and indefinite for enforcement, unless there had been some reference to some particular plot of ground to which the minds of both parties had turned, which was mentioned between them (even if it was to be selected by one of them), and which both parties had agreed should be the land to be cultivated.

It is essential to the guilt of one accused of this offense that at the time that he obtained the advance he entertained the intention of not performing his contract, and, if there had been no agreement as to the land he was to work, there could not, of course, be any definite intention, one way or the other, as to this unfixed subject-matter. In such a case the wrongful act of the accused becomes merely a general promise to work in repayment of a pre-existing debt, and the case would fall within the ruling in *Ryan v. State*, 45 Ga. 128. The "labor contract act," supra, like all other criminal statutes, must be strictly construed, and it is especially essential that there shall be a distinct and definite contract between the parties as to every material matter pertaining to the services, for the reason that it is only the contract of employment and reliance upon its future performance that prevents this statute from being a statute to enforce the collection of mere debts.

[2] 2. As has frequently been held by the Supreme Court, and as also held by this court, the burden is on the state to prove that the failure of the accused to perform the

service contracted for, or to return the money, was without good and sufficient cause. *Brown v. State*, 8 Ga. App. 212, 68 S. E. 865; *Mason v. Terrell*, 3 Ga. App. 348, 349, 60 S. E. 4. The failure to perform the service or return the money is presumptive evidence of an undisclosed intent to defraud only when it appears that there was no good and sufficient cause why the contract was not performed. And hence, to complete its presumptive case, the state must show that there was no good reason why the contract was not performed, or, in default thereof, that there was no good reason why the accused did not return the money advanced to him. Without this proof the state's case is incomplete, because the prosecution has not created the evidentiary presumption necessary to rebut the presumption of innocence. Presumably the accused had good and sufficient cause. It is only after the state has made it appear that there was no sufficient cause, nor any good reason, why the accused did not perform his contract, or else return the money, that the state has made even a prima facie case. In the present instance the defendant, in his statement at the trial, gave a reason which the jury might have adjudged sufficient; and this statement was not denied by the prosecutor.

Judgment reversed.

(13 Ga. App. 83)

WILLIAMS v. STATE. (No. 4,952.)

(Court of Appeals of Georgia. July 8, 1913.)

(Syllabus by the Court.)

1. CRIMINAL LAW (§ 970*) — INDICTMENT — VOLUNTARY MANSLAUGHTER—FACTS CHARGING MURDER—ARREST OF JUDGMENT.

Where a bill of indictment charging murder by shooting with malice was considered by the grand jury, and a return of "true bill for voluntary manslaughter" was indorsed thereon, and the accused joined issue and was convicted of voluntary manslaughter, the judgment of conviction will not be arrested because the offense of murder was charged in the body of the bill.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2445-2462; Dec. Dig. § 970.*]

(Additional Syllabus by Editorial Staff.)

2. INDICTMENT AND INFORMATION (§ 10*)—OFFENSES OF DIFFERENT DEGREES—TRUE BILL.

A finding of a "true bill" against accused for voluntary manslaughter was equivalent to a finding of no bill as to higher degrees of homicide.

[Ed. Note.—For other cases, see Indictment and Information, Cent. Dig. §§ 50-61; Dec. Dig. § 10.*]

Error from Superior Court, Richmond County; H. C. Hammond, Judge.

Isaiah Williams, Jr., was convicted of voluntary manslaughter, and he brings error. Affirmed.

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

Milton C. Barwick, of Augusta, for plaintiff in error. A. L. Franklin, Sol. Gen., of Augusta, by Jno. M. Graham, of Atlanta, for the State.

POTTLE, J. An indictment was prepared by the solicitor general and presented to the grand jury, charging the accused with the offense of murder in that he "did unlawfully and with malice aforethought kill and murder one William Brown by shooting him in the head with a pistol." On this indictment the grand jury made the following finding: "True bill for voluntary manslaughter." The accused was convicted of voluntary manslaughter. He moved in arrest of judgment on the ground that no true bill was ever found by the grand jury, and that the indictment under which he was tried was not a valid indictment for manslaughter. The motion was overruled, and he excepted.

[1] Of course there can be no question that, if the bill had been found to be true as presented, the accused might have been convicted of voluntary manslaughter. *Reynolds v. State*, 1 Ga. 222; *Welch v. State*, 50 Ga. 128, 15 Am. Rep. 690; *Smith v. State*, 109 Ga. 479, 35 S. E. 59; *Dickerson v. State*, 121 Ga. 333, 49 S. E. 275; *Spence v. State*, 7 Ga. App. 825 (2) 827, 68 S. E. 443. It is contended in behalf of the accused that the finding of the grand jury was virtually a finding of a "no bill," since they found that no murder was committed, they, in reaching this conclusion considered and acted only upon an indictment in which murder was charged. Had murder alone been involved in the charge as presented to the grand jury, their return must of course have been limited to a finding of true or not true as to that offense. But the indictment considered by the grand jury contained a charge of murder, voluntary manslaughter, assault with intent to murder, the statutory offense of shooting at another, assault and battery, and assault. It was just as though each of these offenses had been set forth in separate counts. If they had been, a finding of "true" as to one count would have rendered all the others nugatory.

[2] A finding of "true" as to the charge of voluntary manslaughter is equivalent to the finding of "no bill" as to the higher grade of homicide, and a true bill for voluntary manslaughter, under which a conviction might be had for that offense or any lesser offense involved in an indictment for voluntary manslaughter. If the indictment had in the body of it charged the offense of manslaughter, judgment of conviction would not have been arrested because the facts set forth in the indictment made out the offense of murder. *Camp v. State*, 25 Ga. 689. It can make no substantial difference that the charge of manslaughter was embraced in the grand jury's return, rather than in the body of the indictment, if the facts therein

alleged are sufficient to support the finding. It is true that the indictment in the case just cited did charge a willful as well as malicious killing, and hence did in terms embrace a charge of voluntary manslaughter, but the bill was treated as one charging murder and such lesser offenses as were involved in a charge of murder by beating. The exact question now under consideration was not involved in that case, but it was discussed, and the contention of the plaintiff in error was fully answered by the Supreme Court in the following excerpt: "There is ancient authority for saying that, if a grand jury return a true bill for manslaughter on a bill for murder, it is void, but the reason assigned for it is not very satisfactory, viz., that the grand jury are not to distinguish between murder and manslaughter, for it is only the circumstance of malice that makes the difference, and that may be implied by law without any facts at all. *Bac. Ab. Indictment, Letter 'O.'* The same reason would prevent a jury from finding a true bill for either murder or manslaughter on a bill having two counts, one charging murder and the other manslaughter, for they would have to distinguish between them in that case. There is an authority as old as the time of Sir Matthew Hale that if a bill of indictment be for murder, and the grand jury ignore it as to murder, but find a true bill for manslaughter, the words which give to the charge the distinctive character of murder may be stricken out in the presence of the jury and leave so much as makes the bill stand barely for manslaughter. *Id.* The same authority says the safest way is to deliver the grand jury a new bill for manslaughter. But, whatever of doubt hangs over this question in the English courts, there is none here. The grand jury accused the prisoner of manslaughter. The body of the indictment makes a charge of murder. If the grand jury had found a bill throughout for murder, on the trial the petit jury might have acquitted the prisoner of murder and found him guilty of manslaughter. The prisoner is not prejudiced by the change of a single word, manslaughter for murder. He is rather benefited, for he cannot be found guilty of murder. He was arraigned on the indictment as it stands and pleaded not guilty. If he wished to demur to the indictment for any matter not affecting the real merits of the charge, he ought to have done it on arraignment, before pleading the general issue. It is too late after pleading the general issue and undergoing a trial thereon, for no motion in arrest of judgment can be sustained for any matter not affecting the real merits of the offense charged in the indictment." See, also, *Wharton, Crim. Pl. & Pr. § 374*; 1 *Archbold, Crim. Pl. (Pomeroy Ed. 1887) p. 311*; 3 *Burn's Justice (24th Ed.) tit. Indictment, 7, p. 44*; *Cherry v. State*, 6 Fla. 679; 22 *Cyc.* 257; 27 *Cent. Dig.* 40.

In all probability the objection to the indictment would not have been good if raised by demurrer, but at most it was an exception which went merely to the form of the indictment and did not affect the real merits of the offense and could not be taken advantage of by a motion in arrest of judgment. Penal Code, § 980. The accused was not hurt. He was deprived of no right to which he would have been entitled had the offense of voluntary manslaughter been specifically set forth in the body of the bill. A substitution of the word "willfully" for the words "with malice aforethought" and striking the word "murder" would have made the bill a good indictment for voluntary manslaughter. The effect of the grand jury's return was to make the necessary substitution and elimination. Malice involves intention and something more beside. The grand jury found the intention to have existed but not the other ingredients of malice. There was enough in the bill to authorize the finding of the grand jury. The court did not err in overruling the motion in arrest of judgment.

Judgment affirmed.

(13 Ga. App. 48)

PARKS v. BANK OF ADAIRSVILLE.

(No. 4,683.)

(Court of Appeals of Georgia. July 8, 1913.)

(Syllabus by the Court.)

1. JUSTICES OF THE PEACE (§ 164*)—APPEAL—PAPERS—TRANSMISSION TO CLERK BY ATTORNEY FOR APPELLANT.

Where an appeal from a justice's court has been duly entered in that court, the costs paid, and the appeal bond approved, the appeal is not rendered invalid because the attorney for the appellant, on request of the justice, transmits and delivers to the clerk of the superior court the papers in the appeal case. The case of *Bower v. Patterson*, 116 Ga. 814, 43 S. E. 25, is distinguished.

[Ed. Note.—For other cases, see *Justices of the Peace*, Cent. Dig. §§ 607-636; Dec. Dig. § 164.*]

2. JUSTICES OF THE PEACE (§ 188*)—APPEAL—TRANSMISSION OF PAPERS—IRREGULARITIES—MOTION TO DISMISS—TIME.

After an appeal case from a justice's court has been tried and judgment rendered in the superior court, it is too late to move to set the judgment aside because of irregularity in the transmission of the appeal papers from the justice's court to the clerk of the superior court. The proper practice is to move before the trial that the appeal be dismissed for this reason.

[Ed. Note.—For other cases, see *Justices of the Peace*, Cent. Dig. §§ 721-725, 733; Dec. Dig. § 188.*]

3. ATTORNEY AND CLIENT (§ 76*)—EMPLOYMENT OF COUNSEL—CONTINUANCE—APPEAL.

The employment of counsel in a litigation extends to the whole of it from the time of employment to the end of the litigation, unless expressly limited by the client; and the attorney is expected to represent the client throughout

its progress, unless otherwise instructed by him.

[Ed. Note.—For other cases, see *Attorney and Client*, Cent. Dig. §§ 120-131; Dec. Dig. § 76.*]

Russell, J., dissenting.

Error from Superior Court, Gordon County; A. W. Fite, Judge.

Action by the Bank of Adairsville against W. B. Parks. Judgment for plaintiff, and defendant brings error. Affirmed.

J. M. Lang, of Calhoun, for plaintiff in error. F. A. Cantrell, of Calhoun, for defendant in error.

HILL, G. J. The bill of exceptions in this case recites that the proceeding in the lower court was a motion to reinstate the case and a motion for a new trial. On the call of the case, after reading the papers and affidavits, the court passed an order striking the motion for a new trial and giving judgment for the costs against the movant, to which ruling the movant then and there excepted and now excepts and assigns the same as error. Then, on motion for the respondent, the court passed an order overruling the motion to reinstate said case and refused to reinstate the same and to grant a new trial, to which ruling the movant excepted and now assigns the same as error. We gather from the rather chaotic condition of the record that the case was really a motion to set aside a verdict and judgment which had been rendered against the movant in the superior court on appeal from the justice's court. It seems that the Bank of Adairsville brought suit against W. B. Parks on a promissory note in a justice's court, to which a plea of non est factum was filed; that the justice rendered a judgment in favor of the defendant, and the plaintiff took an appeal to a jury in the superior court; that on the trial of the appeal a verdict was rendered against the defendant and in favor of the plaintiff, upon which a judgment was entered; and that the defendant, by his motion, desires to set aside this verdict and judgment on the following grounds: That he had no notice of the appeal having been entered; that he asked the justice if an appeal had been entered and the justice told him "No"; that, relying upon this statement of the justice, he did not appear at the term of the court to which the appeal would have been properly returnable; and that he was not represented in the trial of the appeal. It appears, however, that this statement of the justice was an error, since the evidence discloses the fact that he had approved the appeal bond which had been filed by the defendant on the very day the judgment was rendered in the justice's court in the following language: "Costs paid and bond approved. W. A. Jones, N. P. & J. P." It further appears that on said day the appeal papers were turned over by

the justice to the attorney for the appellant with the request that he transmit them to the clerk of the superior court.

[1] It is insisted by the plaintiff in error that the appeal was never properly transmitted to the superior court, because the attorney for the appellant had no authority or right to take the papers and deliver them to the clerk of that court, and he cites the case of *Bower v. Patterson*, 116 Ga. 814, 43 S. E. 25, where it is held that: "When an appeal from the judgment of a justice of the peace has been entered, it is the duty of the justice to transmit the same to the superior court; and when the attorney for the appellant, without authority from the justice so to do, hands the papers to such clerk, the appeal is not transmitted according to law, and should, upon motion of the opposite party therefor, be dismissed." The decision is not controlling, in view of the evidence in the present case, because here the evidence shows that the justice not only entered the appeal but authorized the attorney for the appellant to transmit the papers to the clerk of the superior court.

[2] The evidence further discloses the fact that the plaintiff in error was represented in the superior court on the trial of the appeal by an attorney at law; and, if the appeal had not been properly transmitted, the proper procedure would have been to move to dismiss it on this ground. It is too late to make the point after judgment.

[3] It is insisted, however, by the plaintiff in error that this attorney did not represent him in the superior court on the trial of the appeal case, that he represented him only on the trial of the case in the justice court. It does not appear, however, that he had discharged the attorney, and, having once employed him in the case, it would seem fair to presume that the employment would continue until the end of the litigation, at least in the trial court, unless he was directly instructed to the contrary. It is held in *Walker v. Floyd*, 30 Ga. 240, that the employment of counsel goes to the whole of the litigation from the time of his assignment to the end of the same, and he is expected, and it is his duty, to do every service in the progress of the cause that is necessary for the protection or defense of his client's rights. It also appears that this attorney not only represented the plaintiff in error on the trial of the appeal in the superior court but subsequently filed a motion for a new trial in behalf of the plaintiff in error, which service the plaintiff in error accepted in the court below, and the dismissal of that motion by the lower court on the ground of his assignments of error, though not insisted on here. In the case of *Combs v. Choven*, 89 Ga. 779, 15 S. E. 686, it is held that failure to keep sight of the case and to ascertain when it stands for trial is negligence against which

equity will not grant relief, after the case has been tried ex parte and a judgment rendered in favor of respondent in the appeal proceeding. Certainly no case is made for relief from the verdict and judgment on appeal where the evidence discloses that the appeal has been properly entered and the appellee properly represented by counsel on the trial of the same.

We think that the case for the plaintiff in error was entirely without merit, and that the refusal of the court below to reinstate the case and to grant a new trial should be affirmed.

RUSSELL, J., dissents.

(12 Ga. App. 71)

LOVETT v. STATE. (No. 4,919.)

(Court of Appeals of Georgia. July 8, 1913.)

(Syllabus by the Court.)

1. DRUNKARDS (§ 11*)—CRIMINAL LAW (§ 1169*)—EVIDENCE—PUBLIC STREETS.

In a prosecution for drunkenness on a public street or highway of a municipality, the evidence must show that the street or highway legally became such by legislative enactment, or by municipal ordinance authorized by the charter of the city or town, or by dedication or prescription. But the fact that the court permitted a witness, who had already stated facts showing the establishment of the highway in question by prescription, and another witness, who proved that another highway was a public street by dedication and subsequent use, to refer to these streets as "public streets" is not error requiring the grant of a new trial.

[Ed. Note.—For other cases, see *Drunkards*, Cent. Dig. §§ 12-18; Dec. Dig. § 11.* Criminal Law, Cent. Dig. §§ 754, 3088, 3180, 3137-3143; Dec. Dig. § 1169.*]

2. DRUNKARDS (§ 11*)—INSTRUCTIONS.

It appearing that, in an indictment charging a violation of section 442 of the Penal Code of 1910, it was alleged that the defendant manifested the alleged drunkenness in all the ways referred to in the statute, it was not error for the court to charge the jury (after having read to them the Code section) that if they believed "that the defendant was drunk at the place alleged in this bill of indictment, and that his conduct was such as violates this statute I have just read to you," it was their duty to convict. This instruction was not error because, as alleged, it tended to confuse the jury, or for any other reason.

[Ed. Note.—For other cases, see *Drunkards*, Cent. Dig. §§ 12-18; Dec. Dig. § 11.*]

3. DRUNKARDS (§ 11*)—EVIDENCE.

To vomit on one's person and clothing, although the act be done involuntarily and in a drunken stupor, and is not accompanied by any other act or by any language, places one in such an "indecent condition," as related to a public highway as will authorize a jury, upon proof of the drunkenness of the accused, to convict him of a violation of section 442 of the Penal Code of 1910.

[Ed. Note.—For other cases, see *Drunkards*, Cent. Dig. §§ 12-18; Dec. Dig. § 11.*]

4. SUFFICIENCY OF EVIDENCE.

The evidence authorized the verdict, and there was no error in refusing a new trial.

Error from City Court of Dublin; J. B. Hicks, Judge.

J. R. Lovett was convicted of drunkenness, and brings error. Affirmed.

T. E. Hightower, of Dublin, for plaintiff in error. Geo. B. Davis, of Dublin, for the State.

RUSSELL, J. The defendant was convicted of the offense of being drunk upon a public highway. There are only two points presented by the special assignments of error. In the fourth ground of the amended motion the plaintiff in error contends that the court erred in allowing certain witnesses to testify that the defendant was drunk on certain streets, which they designated to be "public streets," in the town of Dexter, Ga., without proof that these streets were in fact public highways. If the proof as to whether the streets in question were in fact lawfully created public highways rested wholly upon the opinion of witnesses to that effect, the point would be good. As pointed out in *Johnson v. State*, 1 Ga. App. 195, 58 S. E. 265, public highways which are not within a municipality can only be established in four ways, to wit: (1) By legislative enactment; (2) by action of the proper county authorities; (3) by dedication; or (4) by prescription. Within the limits of a municipality public highways or streets can only be established: (1) By legislative enactment; (2) the action of the municipal authorities within the special powers conferred by the municipal charter, or by virtue of the act of the proper county authorities prior to incorporation; (3) by dedication; and (4) by prescription.

[1] Since the law definitely prescribes the manner in which public highways must be established, the proof, upon the trial of one accused of drunkenness in violation of section 442 of the Penal Code, must show that the road or street which the indictment alleges to be a public street or public highway was established in accordance with the law, and in one of the modes prescribed by the law. In the present case, however, this was done. As to one of the streets over which the witnesses testified they saw the defendant pass in a drunken condition a witness testified that this street had been used as a public highway or road for more than 20 years. The establishment of this street by prescription was therefore proved. As to another street upon which numerous witnesses testified that the defendant was seen in a drunken condition, the former owner of the land through which the street was opened testified that he had dedicated it as a public street. It is true that there was testimony that the place where the defendant was arrested in his three-wheeled buggy was not a public street, but a mere passageway which had been opened by the owner of the land to provide customers of his mill means of ac-

cess thereto; but this is immaterial, since the testimony is undisputed that the defendant had traversed two public streets proved to have been established as such in the two methods to which we have above referred. Since there was positive evidence of the establishment of these two streets, it was not error on the part of the trial judge to permit the witnesses, in referring thereafter to these highways, to designate or describe them as streets and public streets.

[2] 2. It is insisted that the instruction of the trial judge which is quoted in the headnote was error, because it tended to confuse the jury and mislead them as to the law on which the defendant was being tried, especially as the court had charged the whole statute and the defendant was only being tried, as insisted, for violating a specific part thereof, and not for a violation of the whole. The language of the trial judge is not error or objectionable because it tended to confuse the jury, or for any other reason. The indictment charged that the drunkenness of the accused was manifested in all of the ways mentioned in section 442 of the Penal Code. It might be that the evidence was not sufficient to satisfy the jury that the drunkenness of the accused was manifested in any of the ways mentioned in the indictment (and also in the statute), except one. But since it was not the duty of the judge to pass upon the evidence, nor within his power to determine whether this was in fact the state of the record, and as it was for the jury to determine whether the drunkenness of the accused was manifested in all of the ways mentioned in the statute, or in only one way, it was not error for the judge, after having read the statute, and referring specifically to it (as appears from the charge), to tell the jury that if they believed the defendant's conduct was such as violated the statute in any of the ways specified therein, he would be guilty.

[3] 3. The facts in this case make apparent the soundness of the judge's instruction. The real question in the case was whether the involuntary act of the accused, while in a drunken stupor, of vomiting all over himself, and thus making an exhibition of himself, in one of those public places where the observance of common decency must be enforced, was such a willful act as to come within the inhibition of the statute, which forbids any one to be and appear on a public street or highway in an intoxicated condition, which is manifested by the indecency of his acts or by his very condition. In a supposable case, in which it appears in the proof that the defendant did none of those acts which are mentioned in the statute as means by which the drunkenness which is prohibited may be demonstrated or manifested, the law may still be violated if the condition of the person accused, caused by his drunkenness, is such as of itself to be ob-

noxious to public decency, and yet the question as to whether one's condition is such as to offend public decency is purely a question of fact, and must be determined by the jury, who can take into consideration the circumstances of the case.

[4] Having dealt with the special assignments of error in the headnotes, we need say nothing more than that a review of the record satisfies us that the evidence fully authorized the verdict, and it was not error on the part of the trial judge to refuse a new trial.

Judgment affirmed.

(13 Ga. App. 74)

HOWELL v. STATE. (No. 4,927.)

(Court of Appeals of Georgia. July 8, 1913.)

(*Syllabus by the Court.*)

CRIMINAL LAW (§ 292*) — EVIDENCE — JUDICIAL NOTICE — CITY ORDINANCES — FORMER JEOPARDY.

Judicial cognizance of the superior court does not extend to or include the by-laws or ordinances of municipalities. Consequently a plea of former jeopardy, setting up that the accused had already been convicted by the recorder of a certain municipality of the same offense, but which failed to set out a copy of the ordinance under which he had been convicted, was totally defective, and was properly stricken on demurrer.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 668-671; Dec. Dig. § 292.*]

Error from Superior Court, Whitfield County; A. W. Fite, Judge.

Don Howell was convicted of being intoxicated on certain highways and public streets, and he brings error. Affirmed.

W. E. Mann, of Dalton, for plaintiff in error. Sam P. Maddox, Sol. Gen., of Dalton, for the State.

RUSSELL, J. Howell was indicted for the offense of being intoxicated on certain highways and public streets of Dalton, Ga.; it being alleged that his drunkenness was manifested by boisterous and indecent condition and acting, by vulgar, profane, and unbecoming language, etc. On arraignment and before pleading to the merits, he filed a plea setting up a former conviction of the same offense by the recorder of the city of Dalton. The court struck the plea, and a ruling is invoked here, as it was in the court below, as to whether one punished under a municipal ordinance for the offense of public drunkenness can thereafter be tried in a state court for a violation of section 442 of the Penal Code. It is a general rule that municipal ordinances cannot occupy the territory covered by state laws. Where the state has penalized a certain act, the exercise of this power on the part of the state excludes the right of a municipality to punish for the same act, unless by express legislation the state has authorized it so to do. It would

seem, therefore, that the plea of former jeopardy filed by the defendant in this case would be ineffectual, if it had related to almost any municipal ordinance, because it would have devolved upon the defendant, when arraigned in the municipal court, to plead to the jurisdiction of the court upon the ground that the offense charged was only cognizable in and triable by the state courts. If the offense charged against the defendant had not been that of drunkenness, he might have relied upon such rulings as those of the Supreme Court in *Kahn v. Macon*, 95 Ga. 419, 22 S. E. 641, and *Moran v. Atlanta*, 102 Ga. 840, 30 S. E. 298, and that of this court in *Cotton v. Atlanta*, 10 Ga. App. 397, 73 S. E. 683. If the defense is one covered by a statute of the state in which the state has reserved to itself the sole right of dealing with the act forbidden by law, this fact will afford to one accused of violation of a municipal ordinance which attempts to punish for the same act a perfect defense in a municipal court. On the other hand a municipality may punish for an act which is forbidden by the penal laws of the state, if into the act penalized by the ordinance there enters some essential ingredient not necessary to constitute the statutory offense, or if the ordinance can be violated, even though there enter not into the act thereby denounced some ingredient essential to the consummation of the act which is made a crime by the state law. Upon this point see *Callaway v. Mims*, 5 Ga. App. 9, 62 S. E. 654; *Athens v. Atlanta*, 6 Ga. App. 245, 64 S. E. 711; *Alexander v. Atlanta*, 6 Ga. App. 329, 64 S. E. 1105; *Callaway v. Atlanta*, 6 Ga. App. 354, 64 S. E. 1105; *Dorn v. Atlanta*, 6 Ga. App. 529, 65 S. E. 254.

In the present case neither the lower court nor this court can tell whether or not the ordinance of the city of Dalton is invalid upon the ground that it impinges upon the state law, and thereby enables the municipality to usurp the functions of the state; for no ordinance is in the record. Neither the superior court nor this court takes judicial cognizance of municipal ordinances. It may not be the duty of the municipality in making out its case to produce evidence of the existence of the ordinance under which the defendant in the municipal court is being tried, for the mayor, or recorder, as the case may be, can perhaps be presumed to know that there is a municipal ordinance applicable to the case upon trial. This court held in *Collins v. Dalton*, 12 Ga. App. 119, 76 S. E. 1053, that the judgment rendered might import the existence of an ordinance forbidding the act to which the sentence and judgment in this case related, but we have held also that judicial cognizance does not extend to municipal ordinances. *Dorsey v. State*, 7 Ga. App. 367, 66 S. E. 1096. For this reason, one who seeks to review a judgment

of a municipal court which is predicated upon an alleged municipal ordinance must, in the record, present the ordinance, so as to enable the reviewing court to intelligently pass upon the question.

In the present case it is contended that, as section 442 of the Penal Code provides that it "shall not be construed to affect the powers delegated to municipal corporations to pass by-laws to punish drunkenness or disorderly conduct within their corporate limits," the plea of former jeopardy is good, and should not have been stricken. In the original act (Acts of 1905, p. 115) the language used is that "nothing contained in this act shall be construed to affect the power heretofore or that may hereafter be delegated to municipal corporations to regulate the liquor traffic and pass by-laws to punish drunkenness or disorderly conduct within their corporate limits." It would seem that this language is broad enough to have authorized the city of Dalton to pass a by-law punishing drunkenness upon its streets, and even, in such an ordinance, to define the offense exactly as defined in section 442 of the Penal Code, and of course in that event, a conviction in the municipal court would be a bar to any prosecution for the same act in the state court, and a timely and proper plea of former jeopardy, should be sustained. However, so far as appears from the record in the present case, we are left completely in the dark as to the nature of the ordinance passed by the city of Dalton, and even if under the ruling in *Collins v. Dalton*, supra, we might assume that an ordinance had been passed containing such provisions as would authorize the municipality to punish for the offense of drunkenness, still we do not know whether the ordinance is thus restricted. Nor was the trial judge informed upon this point by the production of the ordinance itself. If the city of Dalton, by its ordinance, sought only to penalize drunkenness at some other place than those mentioned in section 442 of the Penal Code, the act forbidden by the ordinance would be differentiated from the state offense, because it could be committed without the ingredients of manifestation which are essential to constitute a violation of the state law, and the judge could properly have stricken the plea of former jeopardy, upon the authority of *Athens v. Atlanta*, supra, and the other cases cited.

We are unable to decide whether, under the provisions of section 442, which would seem to delegate to the municipality certain power to deal with the question of drunkenness, the city of Dalton had such right to punish for drunkenness on its public highways and streets as would, under a plea of former jeopardy, prevent a prosecution for the same act in the state courts, or whether the city ordinance merely prohibits drunkenness at places other than those mentioned in the

statute, or only drunkenness manifested in ways different from those dealt with in the state law; because the ordinance is not before us, and we have no legal means of ascertaining its scope or contents. We have held more than once that mere drunkenness, manifested by extreme stupor or deep sleep, is not a violation of the state law, for the state penalizes only that drunkenness which is manifested in the manner specifically pointed out by the section of the Code. Therefore, if there is no ordinance of Dalton which attempts to punish for drunkenness at those places mentioned in section 442 of the Penal Code, or for drunkenness manifested by those circumstances enumerated in the Code, the question which the plea of former jeopardy seeks to present would not be involved at all. Since mere drunkenness, when not manifested "by boisterousness or by indecent condition or acting, or by vulgar, profane, or unbecoming language, or loud and violent discourse," has not been forbidden or made penal by the state law, there is no such conflict with the state law as would prevent a municipality from passing an ordinance making mere drunkenness a municipal offense.

In the present case the necessity for the production of the ordinance is emphasized by the fact that the summons (as appears from the record) charges Howell with the offense of drunkenness within the corporate limits of the city, and from the sentence it appears that the defendant pleaded guilty of being drunk on the streets of Dalton. The ordinance not being in the record, we cannot tell whether the charge or the sentence conforms to the ordinance. For the same reason, the trial judge did not err in striking the plea.

Judgment affirmed.

(13 Ga. App. 125)

BENFORD v. SHIVER. (No. 4,853.)

(Court of Appeals of Georgia. July 22, 1913.)

(Syllabus by the Court.)

1. CONTINUANCE (§ 19*) — GROUNDS — SICKNESS.

It appearing, without contradiction, that one of the parties to the cause was detained at his home on account of the extreme illness of his child, and that his attendance upon the child was necessary, it was error to refuse to continue the case, after his counsel had stated in effect that his presence was absolutely necessary to enable counsel to proceed with the trial.

[Ed. Note.—For other cases, see *Continuance*, Cent. Dig. §§ 41, 43-48; Dec. Dig. § 19.*]

2. JUDGMENT (§ 359*)—MOTION TO SET ASIDE — GROUNDS—REFUSAL OF CONTINUANCE.

While, generally, a verdict cannot be set aside except for defects appearing upon the record, this rule is not without exceptions, recognized by the common law, for at common law a motion to set aside a judgment could be based upon any irregularity of the judgment,

whether appearing on the face of the record or not. A judgment which depends entirely upon the fact that the court erred in refusing a continuance may, upon a proper showing, be set aside for this irregularity, just as a judgment obtained by fraud or by perjury may be set aside upon a timely and appropriate motion filed at the term at which the judgment was rendered, though neither the fact of perjury nor of fraud would appear from the record.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. § 697; Dec. Dig. § 359.*]

8. JUDGMENT (§ 359*)—MOTION TO SET ASIDE—GROUNDS—REFUSAL OF CONTINUANCE.

In the present case a motion to set aside the judgment was based upon the ground that the defendant was entitled to a continuance, for the reason that he was providentially prevented from being present at the court, and was thus deprived of an opportunity of testifying, as well as of the general right of a party to be present and assist his counsel in the conduct of the case. The motion was filed at the term at which the judgment was rendered, and its material averments were supported by proof which was not contradicted. The movant showed therein that he was not in laches, and also by express reference to the defendant's plea set forth a meritorious defense, and announced immediate readiness for trial. It was therefore error to refuse to set aside the verdict and to reinstate the original case.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. § 697; Dec. Dig. § 359.*]

Error from City Court of Dublin; J. B. Hicks, Judge.

Action by R. S. Shiver against J. R. Benford. Judgment for plaintiff, and defendant brings error. Reversed.

Hal B. Wimberly of Dublin, for plaintiff in error.

RUSSELL, J. At the December quarterly term of the city court of Dublin the case of Shiver v. Benford was called for trial. The defendant's counsel moved for a continuance because of the absence of the defendant, and stated, in his place, that his client's presence was necessary for him to go to trial in the case, as it was a suit on a contract, in which his client would have to do all the swearing, and in which he could not swear for him. He stated further, as explanatory of his client's absence, that on Monday night of the week at which the verdict was rendered he received a note by the hand of the defendant's son, which stated that a child of the defendant was dangerously ill and needed his (the defendant's) presence and attention at that time, and that until the receipt of this communication, setting forth the sickness of his client's child, he had fully expected to go to trial, but that without his client he was unable to go to trial. The court overruled the motion for continuance, and a verdict was rendered in favor of the plaintiff. During the same term the defendant's counsel prepared an affidavit and sent it to the defendant to have it signed by the attending physician, which was done; and

during the same term counsel filed a motion to set aside the verdict, which motion stated the foregoing facts, and was amended by setting out a meritorious defense and announcing ready for trial. Upon this motion the court heard the testimony. The movant testified that at the time his case was tried he was at home with a sick child, who at that time he thought was going to die, and that he had sent out for assistance to aid in shrouding the child. He testified that his reason for not sending a certificate of a doctor was that he did not know what to do, since he was expecting the child to die. According to the doctor's statement the child was so sick at that time that the presence of the defendant was needed at the sickbed. There was further evidence showing the necessity for the attendance of the physician, and the necessity for the presence of the defendant with his child, as well as evidence of the payment of the physician. The court refused to set aside the verdict and to reinstate the case, for the reason that it appeared from the evidence that the doctor was attending the child 10 days before the case was called, holding, in effect, that if proper diligence had been shown, the defendant would have made a proper showing for continuance upon the call of the case.

[1] We think the court erred in refusing to set aside the verdict. It appearing, without contradiction, that one of the parties to the cause was detained at his home on account of the extreme illness of his child, and that his attendance upon the child was necessary, it was error to refuse to continue the case, after his counsel had stated, in effect, that his presence was necessary to enable counsel to proceed with the trial. We do not think that the exercise of diligence on the part of the defendant required that he should have sent a certificate or sworn statement from the doctor 10 days in advance of the trial. Neither this defendant nor any one else could have known with certainty at that time what would be the condition of the child upon the first day of the trial. If a certificate of this kind had been furnished, it would rather have inclined us to believe that the defendant was anxious for a continuance without regard to the propriety of continuing the case, and without any good reason why the case should be continued. The testimony for the movant being the only testimony introduced upon the motion to set aside the judgment, and it being apparent from the statement of the judge that he himself did not disbelieve it, it appears that at the time the verdict was rendered the presence of this father with his child, if not absolutely necessary, was demanded by every instinct of humanity. The child was thought to be dying; the physician himself expressed the opinion that the child could not live 20 minutes. Conceding the defendant to have

the natural instincts of paternity, we cannot concur in the opinion that he was required to be busying himself with perfecting a certificate to explain his absence from court, but rather are of the opinion that he should be excused for the reason that the absorbing nature of his interest in his child precluded the consideration of any other subject.

[2, 3] 2. If the judge erred in refusing the motion for continuance, the question which next arises is whether the point can be reached by a motion to set aside the judgment. There have been a number of rulings in this state in which it has been held that a motion cannot be made to set aside a judgment except for defects appearing upon the record. *Regopoulos v. State*, 118 Ga. 596, 42 S. E. 1014, and citations. But, as pointed out by Justice Evans in *Ford v. Clark*, 129 Ga. 292, 58 S. E. 818, motions to set aside judgments are not necessarily based on matters appearing on the face of the record. In support of this proposition the ruling in *Mobley v. Mobley*, 9 Ga. 247, is cited. In that case objection was offered to the admission of evidence of fraud under the proceedings, because it could not be disclosed by anything appearing in the record. As to this point Nisbet, J., ruled: "Fraud in procuring a judgment is ground for its reversal. * * * It is an irregularity which vacates it. It may be inquired into by the court which rendered the judgment." The same may be said as to a motion to set aside a judgment obtained by perjury. The proof that the testimony alleged to be perjured was in fact knowingly, willfully, and absolutely false would necessarily be proof which would not be apparent upon the record.

It is to be borne in mind that at common law a motion to set aside a judgment could be based upon irregularities in the judgment, whether these appeared in the face of the record or not. The true rule seems to be that "In a proper proceeding by petition with rule nisi or process, and service upon the necessary parties, the courts of this state may exercise the jurisdiction, which obtained at common law, to set aside judgments for irregularities not appearing on the face of the record." *Union Compress Co. v. Leffler*, 122 Ga. 640 (1), 50 S. E. 483. See, also, *Turner v. Jordan*, 67 Ga. 604; *Dobbins v. Dupree*, 39 Ga. 394; *Ayer v. James*, 120 Ga. 578, 48 S. E. 154.

Whether the rule would apply after the adjournment of the term at which the judgment was rendered or not, we are clear that during the term at which it was returned a proper motion might be filed, and upon a proper showing the judgment might be set aside and the case reinstated for another trial.

Judgment reversed.

(13 Ga. App. 119)

YOUMANS et al. v. MOORE. (No. 4,479.)
(Court of Appeals of Georgia. July 22, 1913.)

(Syllabus by the Court.)

1. APPEAL AND ERROR (§ 1068*)—HARMLESS ERROR—FAILURE TO INSTRUCT.

It is plain that neither the charge of the court nor the omission to charge on the subject of counterclaim and set-off, of which complaint is made, injuriously affected defendants (the plaintiffs in error); for the jury, in their finding, reduced the amount claimed by the plaintiff, by allowing, as credits on the note sued on, various items of the account pleaded as a set-off.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4225-4228, 4230; Dec. Dig. § 1068.*]

2. BILLS AND NOTES (§ 471*)—PLEADING—ATTORNEY'S FEE.

In the absence of a timely demurrer thereto, the statement in the petition that the defendants had been "notified of this suit in writing, ten days before filing same," construed in connection with the allegation in the first paragraph of the petition, to the effect that the defendants, in their promissory note, a copy of which was attached to the petition, promised to pay "10 per cent. attorney's fees," was a legally sufficient basis for the recovery of attorney's fees, upon proper proof of these allegations; and since the defendants, in their amended answer, admitted these allegations, the finding in favor of the plaintiff, for attorney's fees, was authorized.

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. §§ 1467-1470; Dec. Dig. § 471.*]

3. COMPROMISE AND SETTLEMENT (§ 23*)—EXECUTION OF NOTE—PRESUMPTION.

Upon proof that the promissory note sued upon evidenced a transaction separate and independent of prior accounts between the plaintiff and the defendants, the presumption that the execution and delivery of the note evidenced a settlement of antecedent transactions may be rebutted. But unless the jury is satisfied that there is no connection between the note and any prior accounts, the presumption, arising from the execution of a promissory note by one claiming to be a creditor upon an open account of the payee of the note (that the note was given in settlement of all differences between the parties and truly represents the state of their mutual dealings) would be sufficient to authorize a jury to find a verdict in favor of the payee of the note. The judge did not err in charging the jury that "the execution of a promissory note is presumptive evidence of a full settlement of all debts up to date thereon, except such as are especially excepted at the time, and where the maker sues the payee for a debt alleged to have been due before the execution of the note, the giving of the note to the payee is presumptive evidence that he had paid the debt to the maker before or when the note was executed. This presumption may be rebutted."

[Ed. Note.—For other cases, see Compromise and Settlement, Cent. Dig. §§ 91-94; Dec. Dig. § 23.*]

4. APPEAL AND ERROR (§ 1064*)—HARMLESS ERROR—INSTRUCTION—DEFENSES.

The use of the terms "paid" and "payments," in the instructions of the court with reference to the set-off relied upon by the defendants, was not apt, nor, in a technical sense, precisely appropriate, and yet this reference to the defense presented by the defendant was not harmful, for the reason that it was per-

fectly plain to the jury that the judge was referring to the defense of set-off, as this was the only defense relied upon by the defendant, and the instructions given were pertinent and correct.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4219, 4221-4224; Dec. Dig. § 1064; * Trial, Cent. Dig. §§ 476, 525.]

Error from City Court of Swainsboro; H. R. Daniel, Judge.

Action by D. J. Moore against E. S. Youmans and others. Judgment for plaintiff, and defendants bring error. Affirmed.

Williams & Bradley, of Swainsboro, for plaintiffs in error. Smith & Kirkland, of Swainsboro, for defendant in error.

RUSSELL, J. Judgment affirmed.

(13 Ga. App. 142)

WADE v. STATE. (No. 5,006.)

(Court of Appeals of Georgia. July 22, 1913.)

(Syllabus by the Court.)

1. CRIMINAL LAW (§ 1153*)—WITNESSES (§ 240*)—APPEAL—LEADING QUESTIONS—DISCRETION.

The admission or rejection of evidence drawn out by leading questions is generally in the sound discretion of the trial judge, and unless that discretion has been clearly abused, to the prejudice of the party complaining, this court will not interfere. 4 Enc. Digest Ga. Rep. 455. In the present case no abuse of this discretion appears.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 3061-3066; Dec. Dig. § 1153; * Witnesses, Cent. Dig. §§ 795, 837-839, 841-845; Dec. Dig. § 240.*]

2. No ERROR—VERDICT SUSTAINED.

No other error of law is complained of here, and the verdict is supported by the evidence.

Error from Superior Court, Grady County; Frank Park, Judge.

Oble Wade was convicted of crime, and brings error. Affirmed.

See, also, 11 Ga. App. 411, 75 S. E. 494.

W. M. Harrell, of Bainbridge, and Ira Carlisle and J. Q. Smith, both of Cairo, for plaintiff in error. M. L. Ledford, Sol. Gen. pro tem., of Cairo, for the State.

HILL, C. J. Judgment affirmed.

(13 Ga. App. 139)

MORGAN v. CITY OF CEDARTOWN.

(No. 4,996.)

(Court of Appeals of Georgia. July 22, 1913.)

(Syllabus by the Court.)

INTOXICATING LIQUORS (§§ 224, 236*)—PROSECUTION—PROOF.

On the trial of one charged with keeping on hand intoxicating liquors for unlawful sale in violation of a municipal ordinance, a prima facie case against the accused is made by proof that he received money or other thing of value and furnished intoxicating liquor in considera-

tion therefor. In order to rebut the prima facie case thus made, the accused must show that he was acting solely as agent for the purchaser and did not participate in any way in the illegal sale. A conviction is warranted under evidence which authorizes a finding that the defense interposed by the accused is merely a subterfuge, and that he was either the seller or was interested in the sale otherwise than as agent for the purchaser. Cheatwood v. City of Buchanan, 9 Ga. App. 828, 72 S. E. 284.

[Ed. Note.—For other cases, see Intoxicating Liquors, Cent. Dig. §§ 275-281, 300-322; Dec. Dig. §§ 224, 236.*]

Error from Superior Court, Polk County; Price Edwards, Judge.

W. A. Morgan was convicted before a magistrate of violating a municipal ordinance, and from the judgment of the superior court brings error. Affirmed.

W. W. Mundy, of Cedartown, for plaintiff in error. W. G. England, Jr., of Cedartown, for defendant in error.

POTTLE, J. The accused conducted a restaurant. Application was made to him for the sale of intoxicating liquor. He replied that he did not know where any could be purchased, but shortly thereafter handed the applicant a piece of paper on which was written, "If you will give me the money, maybe I can turn a trick for you." Thereupon the applicant handed him a dollar and he retired. When he returned he reported to the person who had handed him the dollar that a pint of whisky might be found in the rear of the restaurant by the side of a sugar barrel. It was subsequently found there and appropriated by the purchaser.

In reply to the prima facie case thus made, the accused offered evidence that he gave the purchaser's dollar to a negro, whose name was not disclosed, and who went away after the whisky. Under this state of facts the magistrate was authorized to find that the negro was the agent of the accused. The magistrate might have found that the prima facie case made by the city was rebutted, but he was not bound to do so. In order to exculpate himself, one who procures intoxicating liquor from another must disclose the real seller and acquit himself of any guilty connection with the sale. The negro may have been the agent of the accused. There may have been collusion between both of them and the seller of the whisky, or the accused himself may have been the seller and the negro a mere intermediary. Apparently the accused was a party to the sale, and it was incumbent upon him to show that he had no connection with the illegal transaction. The showing made by him was not such as to demand a finding in his favor, and the judgment against him must be affirmed.

Judgment affirmed.

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

(13 Ga. App. 142)

THOMPSON v. CITY OF CEDARTOWN.
(No. 5,005.)

(Court of Appeals of Georgia. July 22, 1913.)

*(Syllabus by the Court.)***ILLEGAL SALE OF LIQUOR.**

This case is in principle controlled by the decision of this court this day rendered in the case of *Morgan v. City of Cedartown*, 78 S. E. 863.

Error from Superior Court, Polk County; Price Edwards, Judge.

Riley Thompson was convicted of violating a city ordinance, and from the judgment of the superior court brings error. Affirmed.

W. W. Mundy, of Cedartown, for plaintiff in error. W. G. England, Jr., of Cedartown, for defendant in error.

POTTLER, J. Judgment affirmed.

(13 Ga. App. 117)

PEARSON v. WHITE & COCHRAN.
(No. 4,466.)

(Court of Appeals of Georgia. July 22, 1913.)

*(Syllabus by the Court.)***INFANTS (§§ 50, 54*)—CONTRACTS—LIABILITY—NECESSARIES.**

The evidence demanded a verdict in favor of the defendant in the justice's court, and the judge of the superior court erred in overruling the certiorari.

[Ed. Note.—For other cases, see *Infants*, Cent. Dig. §§ 114, 115, 117-127, 130-134; Dec. Dig. §§ 50, 54.*]

Error from Superior Court, Cherokee County; N. A. Morris, Judge.

Action by White & Cochran against J. D. Pearson. Judgment for plaintiffs in justice's court, and from an order of the superior court overruling certiorari defendant brings error. Reversed.

H. L. Patterson, of Cumming, and J. A. Patterson, of Atlanta, for plaintiff in error. J. W. Collins, of Canton, for defendants in error.

RUSSELL, J. The suit was brought in a justice's court, upon a promissory note. The defendant filed a plea of infancy. The evidence is uncontradicted that he was a minor at the time the note was executed. The plaintiffs adduced testimony to the effect that the consideration of the note was an account for clothing furnished to the minor, and that for some years the minor had worked in some nearby mines, collecting his own wages and signing the weekly pay roll. There was also evidence that he had conducted a farm, but this was irrelevant, because it appears that the farming was subsequent to the execution of the note. In behalf of the defendant there was testimony that he lived with his father, that the father's consent for him to labor in the mines was upon the condition that the

father was to draw such portion of his weekly wages as he might desire, and that the son could collect nothing except such balance as the father had not drawn. The father further testified that the clothing purchased from the plaintiffs was not necessary for his son; that he provided him fully all clothes and other necessities suitable to his condition and station in life, and this was not disputed, the testimony for the plaintiff merely showing that the articles furnished by the plaintiff were clothing. The jury returned a verdict in favor of the plaintiffs, and it appears from the record that this was the second finding in their favor. In the superior court the verdict of the jury in the lower court was sustained, and the certiorari was overruled.

We think the trial judge erred in overruling the certiorari. In order to hold an infant upon his contract it must appear: (1) That he was practicing a profession or trade or engaged in some business as an adult; (2) that he had the permission of his parents or guardian to pursue such occupation or profession; (3) that the contract was connected with that trade, profession, or occupation. Civil Code 1910, § 4235. None of these things appeared in the present case, and the fact that the minor was working for wages with a mining company showed that he was not engaged in practicing a profession or trade, nor could this occupation as a laborer be called a business. Furthermore, the plaintiffs were not entitled to recover upon the theory that this account was for necessities furnished, because the evidence was undisputed that all necessities for the minor were furnished by his father. *James v. Sasser*, 3 Ga. App. 568, 60 S. E. 329.

Judgment reversed.

(13 Ga. App. 122)

SEABOARD AIR LINE RY. v. CARNES & CO. (No. 4,491.)

(Court of Appeals of Georgia. July 22, 1913.)

*(Syllabus by the Court.)***RAILROADS (§ 446*)—INJURY TO ANIMALS—QUESTIONS FOR JURY.**

The railway company attempted to rebut the presumption of negligence against it, arising upon proof that the mule had been killed by one of its trains, by testimony tending to show that the servants of the company exercised all due diligence to avoid killing the mule; but the circumstances in evidence, contradictory to the testimony for the defendant, authorized the jury to infer that the defendant was negligent. Several statements of the engineer as to material matters were contradicted by witnesses for the plaintiff; and the credibility of the witnesses, as well as the ultimate question whether the injury in question was due to negligence, are questions so exclusively for the jury that there was no error in refusing a new trial.

[Ed. Note.—For other cases, see *Railroads*, Cent. Dig. §§ 1627-1641; Dec. Dig. § 446.*]

Error from City Court of Abbeville; D. B. Nicholson, Judge.

Action by Carnes & Co. against the Seaboard Air Line Railway. Judgment for plaintiffs, and defendant brings error. Affirmed.

Tom Eason, of McRae, for plaintiff in error. Hal Lawson, of Abbeville, for defendants in error.

RUSSELL, J. Judgment affirmed.

(13 Ga. App. 130)

RASH v. STATE. (No. 4,986.)

(Court of Appeals of Georgia. July 22, 1913.)

(Syllabus by the Court.)

CRIMINAL LAW (§ 1173*)—APPEAL—HARMLESS ERROR—INSTRUCTIONS.

The evidence demanded the verdict; and if there was any error, either in charging the jury or in failing to charge, it affords the plaintiff in error no cause for complaint.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 3164-3168; Dec. Dig. § 1173.*]

Error from City Court of Cartersville; A. M. Foute, Judge.

John Rash was convicted of crime, and brings error. Affirmed.

W. T. Townsend, of Cartersville, for plaintiff in error. Watt H. Milner, of Cartersville, for the State.

POTTE, J. Judgment affirmed.

(13 Ga. App. 122)

TOOLE et al. v. DAVIS. (No. 4,638.)

(Court of Appeals of Georgia. July 22, 1913.)

(Syllabus by the Court.)

1. APPEAL AND ERROR (§ 781*)—WRIT OF ERROR—GROUND FOR DISMISSAL.

In a case in which the defendant below (the plaintiff in error here) would be entitled to recover the money back in the event the judgment should be reversed, full payment of the *fi. fa.* founded on the judgment sought to be reversed, pending a writ of error (it not appearing that any supersedeas was sued out), is not cause for dismissing the writ of error. *Richmond & Danville Railroad Co. v. Buice*, 88 Ga. 180, 14 S. E. 206; *Hudson v. Alford*, 118 Ga. 669, 45 S. E. 454. See, also, upon this subject, *White v. Tifton*, 1 Ga. App. 569, 57 S. E. 1038. The writ of error will not be dismissed.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 8122; Dec. Dig. § 781.*]

2. WITNESSES (§ 818*)—CORROBORATION—ARGUMENTATIVE MATTER—EXCLUSION.

Upon the direct examination of a witness, it is not error for the court to repel or exclude testimony as to irrelevant matters, when it is apparent that the only purpose of the testimony is to give argumentative support to a positive statement, previously made by the witness, as to a material fact as to which the parties are at issue.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. §§ 1084-1086; Dec. Dig. § 318.*]

3. SALES (§ 202*)—DELIVERY—ERROR.

The assignment of error that a part of the charge of the court was argumentative, for the reason, as insisted, that the judge did not

charge the converse of a certain proposition stated by the court (which is quoted, and in which a correct principle of law was properly applied to testimony which was before the jury), is without merit, because it would have been error to have so charged the jury. If the defendant sold the trunk in question to the plaintiff, and, without reserving title, delivered it to her in pursuance of the sale, as the plaintiff testified, it became as completely the property of the plaintiff as if the purchase price had been paid in full before the delivery of the chattel. On the other hand, of course, the plaintiff had no title if, as was also testified, the defendant had not sold the trunk to the plaintiff, but merely permitted her to use it, and the court correctly instructed the jury to this effect. It was immaterial whether the plaintiff moved the trunk after the defendant delivered it to her, except in so far as the moving of the trunk might illustrate the issue, and aid the jury in determining whether the trunk was delivered in pursuance of a sale, or had merely been loaned to the plaintiff.

[Ed. Note.—For other cases, see Sales, Cent. Dig. §§ 542-551; Dec. Dig. § 202.*]

4. TRIAL (§ 255*)—DUTY TO INSTRUCT—NECESSITY OF REQUEST.

It is the duty of the trial judge, even without a request, to give the jury appropriate instructions as to the law applicable to material contentions of both parties, set out in the pleadings and supported by testimony; but in the absence of an appropriate and timely request therefor, the judge is not required to direct the special attention of the jury to specific portions of the testimony which either of the parties may think are in his favor or weak points in the lines of his adversary.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 627-641; Dec. Dig. § 255.*]

Error from City Court of Miller County; C. C. Bush, Judge.

Action by W. L. Davis against Z. B. Toole and others. Judgment for plaintiff, and defendants bring error. Affirmed.

Bush & Stapleton, of Colquitt, for plaintiffs in error. W. I. Geer, of Colquitt, for defendant in error.

RUSSELL, J. Judgment affirmed.

(13 Ga. App. 111)

DRIGGERS v. MOSLEY. (No. 4,344.)

(Court of Appeals of Georgia. July 22, 1913.)

(Syllabus by the Court.)

APPEAL AND ERROR (§ 227*)—OBJECTION BELOW—NECESSITY.

The judge of the superior court did not err in overruling the certiorari. According to the answer, which was not traversed, the trial court properly overruled the defendant's motion for a continuance and ruled the case to trial. The defendant, though present, made no effort to amend his plea, and waived his right to complain of the dismissal of his appeal, by declining to interpose any objection at the time the motion to dismiss it was made. Courts of review cannot adjudicate questions which are not presented in the trial court.

[Ed. Note.—For other cases, see Appeal and Error, Dec. Dig. § 227.*]

Error from Superior Court, Tattnall County; W. W. Sheppard, Judge.

Action by Elizabeth Mosley against S. B. Driggers. Judgment for plaintiff, and defendant brings error. Affirmed.

H. H. Elders, of Reidsville, for plaintiff in error.

RUSSELL, J. Judgment affirmed.

(13 Ga. App. 140)

AMOS v. STATE. (No. 5,000.)
(Court of Appeals of Georgia. July 22, 1913.)

(Syllabus by the Court.)

WEAPONS (§ 13*)—CARRYING WEAPONS—ELEMENTS OF OFFENSE.

The verdict is without evidence to support it, and therefore is unauthorized by law.

[Ed. Note.—For other cases, see Weapons, Cent. Dig. §§ 16, 17; Dec. Dig. § 13.*]

Error from City Court of Madison; K. S. Anderson, Judge.

Son Amos was convicted of crime, and brings error. Reversed.

Willford Lambert, of Madison, for plaintiff in error. A. G. Foster, Sol., of Madison, and Little, Powell, Hooper & Goldstein, of Atlanta, for the State.

HILL, C. J. This was a conviction of a violation of the act approved August 12, 1910 (Acts 1910, p. 134), which makes it penal for any one "to carry around with him on his person, or to have in his manual possession outside of his own home or place of business," a pistol or revolver, without first obtaining a license from the ordinary. The defendant's motion for a new trial being overruled, he brings error.

The facts, briefly stated, are as follows: The accused lived with his wife in Social Circle. He was a musician, and was employed to play in a restaurant in Madison, not far from Social Circle. He heard that one Jesse Hollis had threatened to shoot him, and while he was asleep in his room in Madison, at his cousin's house, where he stayed while at work in Madison, Hollis came to the house looking for him and making threats against him. He was informed of these threats by his cousin, and he got from his bed, dressed himself, went into his cousin's room, and took her pistol off the dresser, and held it in his hand for the purpose of defending himself against Hollis who was then searching the house for him. Hollis came into the room where he was standing with the pistol and pulled out his own pistol, and thereupon the defendant shot him in the mouth. Hollis sank to the floor, his pistol falling out of his hand, and while he was down the defendant told him that if he attempted to raise his pistol he would shoot him again. Hollis got up, went out of the room, and walked home. The defendant put the pistol back where he got it and went away, but later voluntarily

gave himself up to the sheriff of the county.

The purpose of the act in question was to prevent the evil of carrying pistols or revolvers around on the person, or having them in manual possession while going around from place to place, outside of one's home or place of business. The act should receive a reasonable construction; and, giving it a reasonable construction, we think that under the facts of this case the accused was not guilty of its violation. According to the undisputed evidence, he did not carry the pistol around on his person; it was not his, and he had it only a short time, for the purpose of self-defense. He did not even keep it in his room, but took it from the dresser in the room of another person, compelled to do so by the exigency of self-defense.

Judgment reversed.

(13 Ga. App. 142)

DAVIS v. STATE. (No. 5,011.)

(Court of Appeals of Georgia. July 22, 1913.)

(Syllabus by the Court.)

1. CRIMINAL LAW (§ 308*)—PRESUMPTION OF INNOCENCE.

Where the facts in evidence and all reasonable deductions therefrom present two theories, one of guilt and the other consistent with innocence, the justice and humanity of the law compels the acceptance of the theory which is consistent with innocence.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 731; Dec. Dig. § 308.*]

2. CRIMINAL LAW (§ 561*) — BURDEN OF PROOF—REASONABLE DOUBT.

Guilt of a criminal offense must be proved beyond a reasonable doubt, and must not depend upon mere conjecture or rest upon bare suspicion.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 1287; Dec. Dig. § 561.*]

Error from Superior Court, Laurens County; Frank Park, Judge.

Charleston Davis was convicted of selling intoxicating liquors, and brings error. Reversed.

Plaintiff in error was convicted of selling intoxicating liquor; and, his motion for a new trial having been overruled, he brings error. Only one witness was introduced by the state. He testified as follows: "I know Charleston Davis. I bought a pint of whisky from him about the 1st of December, 1912, in the transaction I paid him 75 cents for it. I gave him the money, and he gave it to a woman, she gave him a pint of whisky, and he gave the whisky to me. I saw Charleston when he gave the woman the money, and saw her when she gave him the whisky, and then he gave the whisky to me." The defendant's statement to the jury was as follows: "I did not sell the whisky, Dorsey gave me the money, and I laid the money down and the woman picked it up and put a pint of whisky down, and I gave it to Dorsey. I did not sell the whisky."

Howard & Kea, of Dublin, for plaintiff in error. E. L. Stephens, Sol. Gen., of Wrightsville, for the State.

HILL, C. J. (after stating the facts as above). [1, 2] Do the above facts exclude every other reasonable hypothesis save that of the guilt of the accused? Under this evidence, it is just as reasonable to infer that the accused was agent of the purchaser as that he was agent of the seller, and it is well settled that where two theories are presented by the facts in evidence—one of guilt and one of innocence—the one should be accepted which is consistent with innocence rather than that of guilt. The Solicitor General insists that the facts of this case bring it clearly within the rule frequently announced by the Supreme Court and by this court, that, where one is charged with the sale of intoxicating liquor, proof that he received money from another person, with a request to procure whisky for the latter, and thereupon went away and shortly returned and delivered a bottle of whisky to the purchaser, casts on the accused the onus of showing how, where, and from whom he got the whisky. *Mills v. State*, 11 Ga. App. 383, 75 S. E. 266; *Gaskins v. State*, 127 Ga. 51, 55 S. E. 1045. In the case of *Bray v. Commerce*, 5 Ga. App. 605, 63 S. E. 596, this court held that the burden which would be cast upon the accused by these facts would be successfully carried by him if, in corroboration of his own statement, he proved by an unimpeached witness that he had, in fact, bought the whisky from another person and paid him for it. Here the state proved by its only witness (and there is no evidence to the contrary) that the witness handed to the accused 75 cents for the whisky, and that the accused handed the 75 cents to a woman who then handed a pint of whisky to the accused, and he immediately delivered it to the witness. The accused did not keep any of the money, and apparently he acted as the medium through which the money for the whisky passed from the purchaser to the seller and the whisky from the seller to the purchaser. It is just as reasonable to conclude from these facts that the woman sold this liquor as that the accused sold it. The situation thus presented leaves entirely too much for conjecture. If the evidence had shown the existence of some relationship between the woman and the accused—either that of husband and wife or any relationship at all—or that the man lived in the house where the whisky was kept, then unquestionably the jury would have been authorized to infer that the accused was either the seller or was interested in the sale in some way; and on a second trial these facts possibly can be shown. Certainly something more should

be shown, indicating that the accused was the seller or interested in the sale, before the jury would be authorized to infer the existence of a mere subterfuge or pretext on his part to violate the law. It is difficult for courts to detect all the ingenious devices and tricks employed by those who violate the liquor laws, but in the trying of these cases well-established rules of evidence must control, and this court does not feel justified in permitting a verdict to stand which rests solely upon a bare suspicion of guilt, and and which presents a theory as consistent with innocence as that of guilt. For this reason, we are constrained to hold that the verdict was without any evidence to support it, and therefore was contrary to law.

Judgment reversed.

(13 Ga. App. 147)

JACKSON v. STATE. (No. 5,013.)

(Court of Appeals of Georgia. July 22, 1913.)

(Syllabus by the Court.)

1. CRIMINAL LAW (§ 554*) — INTOXICATING LIQUORS (§ 236*)—EVIDENCE—STATEMENT OF ACCUSED.

This case falls within the well-settled rule that where one receives money, and in consideration therefor delivers intoxicating liquor, he is presumed to be the seller, and his conviction is authorized, unless he shows to the satisfaction of the jury that he was neither the seller nor interested in the sale. To meet the prima facie case made by the state in the present case, the accused relied solely upon his own statement, which the jury had a right to disbelieve. The case differs from that of *Davis v. State*, 78 S. E. 866, this day decided. In that case the evidence relied on by the state showed that the accused neither furnished the whisky nor received any part of the money paid therefor.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1255, 1256; Dec. Dig. § 534;* Intoxicating Liquors, Cent. Dig. §§ 300-322; Dec. Dig. § 236.*]

2. CRIMINAL LAW (§ 824*)—INSTRUCTIONS—DUTY TO REQUEST.

The theory of defense upon which the court failed to charge having arisen solely from the prisoner's statement at the trial, and, no written request to charge upon such theory having been presented, the omission to charge is not reversible error. *Cobb v. State*, 11 Ga. App. 52, 74 S. E. 702.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1996-2004; Dec. Dig. § 824.*]

Error from Superior Court, Laurens County; Frank Park, Judge.

Norman Jackson was convicted of selling intoxicating liquor, and brings error. Affirmed.

Howard & Kea, of Dublin, for plaintiff in error. E. L. Stephens, Sol. Gen., of Wrightsville, for the State.

POTTER, J. Judgment affirmed.

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

(13 Ga. App. 144)

BROWN v. STATE. (No. 4,988.)

(Court of Appeals of Georgia. July 22, 1913.)

*(Syllabus by the Court.)***1. CRIMINAL LAW (§ 1158*)—APPEAL—DENIAL OF NEW TRIAL.**

Where a new trial is sought in a criminal case on the ground that one of the jurors who rendered the verdict had, after hearing the evidence adduced on a former trial, expressed an opinion that the accused was guilty, the trial judge, as to this matter, occupies the position of a trior, and the reviewing court will not reverse a finding that the juror was impartial, if there is any evidence to support the conclusion thus reached.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 3061-3066, 3070, 3071, 3074; Dec. Dig. § 1153.*]

2. CRIMINAL LAW (§§ 552, 1159*)—APPEAL—VERDICT—CIRCUMSTANTIAL EVIDENCE—SUFFICIENCY.

The evidence was circumstantial, but was sufficient to authorize the verdict.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1257, 1259-1262, 3074-3088; Dec. Dig. §§ 552, 1159.*]

Russell, J., dissenting.

Error from City Court of Sandersville; E. W. Jordan, Judge.

Gardner Brown was convicted of larceny, and brings error. Affirmed.

Evans & Evans, of Sandersville, for plaintiff in error. J. E. Hyman, Sol. Gen., and Hardwick & Wright, all of Sandersville, Jas. K. Hines, of Atlanta, and W. H. Burwell, of Sparta, for the State.

POTTE, J. [1] 1. A new trial is sought upon the ground that one of the jurors who had qualified on the voir dire was not impartial. In support of this affidavits of five persons were tendered to the effect that previous to the trial the juror had stated that he believed the accused was guilty, and that a former jury, which had made a mistrial, ought to have convicted him. Accompanying the motion were affidavits of the accused and his counsel that, until after the verdict of guilty had been returned, they had no knowledge of the statements claimed to have been made by the juror. The affidavits of certain other persons were tendered, to the effect that the persons claiming to have heard the statements made by the juror were persons of good character and worthy of credit. The only counter showing made by the state was the affidavit of the juror himself, positively and unequivocally denying that he made the statements attributed to him, and stating further, that he was perfectly impartial between the state and the accused, and had never formed or expressed an opinion as to the guilt of the accused.

If there had been no counter showing, a new trial would have been demanded. According to the evidence introduced by the accused on the hearing of the motion for a new trial, he had not been tried by a consti-

tutional jury; that is, a jury made up of 12 impartial citizens, without bias or prejudice against him. *Monroe v. State*, 5 Ga. 85, 142; *Wade v. State*, 12 Ga. 25; *Glover v. State*, 128 Ga. 1, 57 S. E. 101. Where a new trial is sought on the ground that one of the jurors was not impartial, the trial judge as to this matter occupies the position of a trior, and the reviewing court will not undertake to control his discretion, unless it manifestly appears that it has been abused. *Bowdoin v. State*, 113 Ga. 1150, 39 S. E. 478; *Jones v. State*, 117 Ga. 710, 44 S. E. 877; *Moore v. State*, 1 Ga. App. 728, 57 S. E. 956.

Counsel for the plaintiff in error recognize the correctness of this rule, but insist that the record discloses such an abuse of discretion as requires a reversal of the judgment. The question to be determined was whether the juror expressed the opinion attributed to him. Upon this question, the evidence submitted to the trial judge was conflicting. If we should hold that the judge erred in his finding, this would be equivalent to substituting our own opinion of the evidence for that of the trial judge, and would deprive him altogether of the discretion with which the law vests him. There are good reasons why we ought not to do this. The preponderance of evidence is not always with the greater number of witnesses. The citizens upon whose affidavits the accused relied may be, and doubtless are, as counsel suggest, men of character and veracity, and doubtless the persons who made the affidavits in support of their character are citizens whose word is entitled to respect. But what shall be said of the juror? He, too, is presumed to be a man of character. The jury commissioners thought him sufficiently upright for his name to be put in the jury box; and we are bound to presume that his character was such as to justify the confidence placed in him by the jury revisers. But all this has been determined by the trial judge. He knows the parties, and had a right to say whom he would believe. The law does not clothe us with the power to say that he must have believed the five witnesses rather than the one, even though this one be the person whose character is attacked. The only rule by which we can be guided is that, where any matter of fact is addressed to the discretion of the trial judge, his finding will never be controlled where there is any evidence to support it.

[2] 2. It is earnestly insisted that the verdict is wholly without evidence to support it. Circumstantial evidence is rarely ever conclusive of guilt, and the law does not require it to be so. It is only necessary that it shall exclude every other reasonable hypothesis save that of guilt. It must be borne in mind, also that the reviewing court must examine the evidence, not for the purpose of satisfying itself of the guilt of the accused,

but only for the purpose of ascertaining whether there was any evidence from which the jury were authorized to infer guilt. Sometimes the evidence produced to us upon the printed record raises a reasonable doubt in our minds as to the guilt of the accused, so that, if we had the power to pass upon the facts as jurors, we would unhesitatingly set the verdict aside. When a question of fact comes before us for determination, the only matter which we have jurisdiction to decide is whether there was any evidence to support the verdict. We are frequently obliged to let a verdict stand even when we do not approve of it. When the evidence is circumstantial, the only question which can be properly addressed to us is not whether we are satisfied that the circumstances were sufficient to show guilt, but whether there is enough to enable the 12 men who found the facts to conclude that the accused was guilty. We have carefully examined the evidence in the present record. It is by no means conclusive of guilt, and, if we could sit as jurors, we might find in favor of the accused; but we cannot say that the jury were compelled to take this view of the evidence and that the circumstances were wholly insufficient to justify the conviction. It is certain that the prosecutor's cotton was stolen, and there was enough to authorize the jury to find that the accused was the thief. This being so, we have no power to interfere with the verdict; no material errors of law having been committed.

Judgment affirmed.

RUSSELL, J. (dissenting). While I would not under any circumstances usurp the prerogative of the jury in deciding a contested issue of fact, or in passing upon the credibility of witnesses, still when the evidence is not legally sufficient, under any view of it, to authorize a conviction, a verdict finding one who is accused of crime guilty is contrary to law. It is clear to me that in the present case the circumstances in proof are as fully consistent with the innocence of the accused as with his guilt, and consequently, in the contemplation of the law, it is not within the power of the jury to prefer a hypothesis under which the guilt of the accused may be suspected to the hypothesis, equally as strong, that another committed the larceny. See *Davis v. State*, 78 S. E. 866, this day decided.

(13 Ga. App. 42)

WILLIAMS v. CHATHAM REAL ESTATE & IMPROVEMENT CO. et al. (No. 4,820.)
(Court of Appeals of Georgia. July 8, 1913.)

(Syllabus by the Court.)

1. MECHANICS' LIENS (§§ 73, 263*) — FORECLOSURE—PARTIES—INTEREST OF MORTGAGEE.
Where the holder of a deed to real estate, made to secure a debt, had knowledge of a con-

tract made by the vendor to improve the real estate, and expressly agreed to such contract, he is a proper party to the foreclosure of a lien for the improvements made under the contract; and the lien of the contractor binds the interest of the holder of the deed to the real estate.

[Ed. Note.—For other cases, see *Mechanics' Liens*, Cent. Dig. §§ 87, 88, 90-102, 471-481; Dec. Dig. §§ 73, 263.*]

2. COURTS (§§ 163, 188*)—JURISDICTION — CITY COURTS.

While a city court in this state has no jurisdiction to decree affirmative equitable relief, and no jurisdiction of suits involving title to land, it has jurisdiction to render a judgment foreclosing a materialman's lien on real estate.

[Ed. Note.—For other cases, see *Courts*, Cent. Dig. §§ 410, 411, 439, 440, 442, 443, 447-449, 451, 452, 454, 458, 464, 465, 467, 468, 1294; Dec. Dig. §§ 163, 188.*]

Error from City Court of Savannah; Walter G. Charlton, Judge.

Action by Griffin Williams against the St. Paul's Colored Methodist Episcopal Church, the Chatham Real Estate & Improvement Company, and others. Judgment for defendants, and plaintiff brings error. Reversed.

Anderson, Cann & Cann, of Savannah, for plaintiff in error. H. W. Johnson, of Savannah, for defendants in error.

HILL, C. J. Griffin Williams brought suit against the St. Paul's Colored Methodist Episcopal Church and the trustees thereof, naming them, and the Chatham Real Estate & Improvement Company. The petition sought to obtain a general judgment against the church and the trustees, and to set up and establish and enforce a lien which the plaintiff claimed for improvements made by him as a contractor on land on which the church was located, and to which the Chatham Real Estate & Improvement Company held a deed to secure a debt. The real estate company filed demurrers, general and special. These demurrers were sustained, and the petition was dismissed as to the real estate company, and to this judgment the plaintiff excepted. The allegations of the petition substantially made the following case: The church and its trustees named made a contract with the plaintiff for the making of certain improvements on a certain lot of land, which land and improvements were described in the petition. This contract was made with the full knowledge, acquiescence, and approval of, and was adopted as its own by, the Chatham Real Estate & Improvement Company, the holder of a deed to secure a debt covering said land. The real estate company, before the contract was executed, agreed with the plaintiff to see that he was paid the amount called for by the contract, and the plaintiff relied upon this agreement and representation of the company. The improvements increased the value of the lot of land, which inured to the benefit of the real estate company. Notice of the lien claimed by the plaintiff was given to the defendants; both

before and at the time of the filing of said lien for record, and before the money borrowed by the trustees and the church had been paid out by the real estate company. The secretary and treasurer of the realty company, who was authorized to act in the premises, was the person to whom notice was given, and who acted in behalf of the company. The contract made by the plaintiff was duly complied with and completed, and his claim of lien duly recorded, and his suit was brought to foreclose this lien within the statutory period after the recording of the same. Attached to the petition was a copy of the lien, and a copy of the contract made with the church and the trustees thereof. A bill of particulars was also attached to the petition, showing the work done and the materials furnished by the plaintiff under this contract. The petition alleged that the original contract price for the work and materials was \$3,500, and that of this sum \$3,100 had been paid, leaving a balance due him under the contract of \$400, and that in addition to the contract price he performed work and furnished material at the instance and for the use of the defendants, under changes in the plans, not specifically agreed on in the original contract, to the amount of \$585, which, after making an allowance of \$120 on price of windows, leaves a total amount sued for of \$865.40, for which amount a lien is claimed upon the improvements, consisting of the church edifice and parsonage, and the real estate described in the petition upon which the improvements were erected; the same being the property of the church and the realty company, holder of the deed to secure a debt. The general demurrer of the real estate company was upon the grounds that the allegations of the petition set out no cause of action against that defendant, and that there was a misjoinder of parties defendant, in this, to wit: That the petition undertakes to join in one suit the St. Paul's Colored Methodist Episcopal Church and nine individuals and this defendant the Chatham Real Estate & Improvement Company, whereas the petition shows on its face that there was no previous contract between the parties named in the petition, also that the city court of Savannah had no jurisdiction to hear and determine the case, because the petition seeks equitable relief which could only be granted by the superior court. The grounds of the special demurrer, in so far as they were meritorious, were met by appropriate amendment, and therefore will not be considered.

[1] 1. Under the act of 1863 the lien of mechanics upon improvements made by them attached to such improvements without regard to the title. The Civil Code (1910) § 3352, provides that: "All mechanics of every sort, who have taken no personal security therefor, shall, for work done and material furnished in building, repairing, or improving any real estate of their employers;

all contractors, materialmen, and persons furnishing material for the improvements of real estate * * * shall each have a special lien on such real estate"—and, further, that when work is done or material furnished for the improvement of real estate upon the employment of a contractor or some other person than the owner, then and in that case the lien given by this section shall attach upon the real estate improved as against the true owner, for the amount of work done or material furnished. In the case of Reppard-Snedeker Co. v. Morrison, 120 Ga. 28, 47 S. E. 554, it was held that the owner could not be subjected to a lien unless he expressly or impliedly consented to the contract under which the improvements were made, or the materials furnished for improvements made. In other words, the general principle is decided in that case that the title of the true owner cannot be incumbered by a lien without some act on his part, either actual or constructive, which shows that he assented to the contract under which the lien is claimed. That was a case where a tenant had the improvements put upon the property of the owner, and it was held that no lien was created on the property against the owner unless it was shown that he assented to the contract. In the present case the allegations show that the church, or the trustees thereof, held the equitable title to the land upon which the improvements were placed, that the legal title to this land was held by the Chatham Real Estate & Improvement Company to secure a debt, and that this debt was incurred for the purpose of making these improvements. We think that the holder of an equitable title to property stands in a somewhat different and higher position with reference thereto and to the general public than a tenant. The equitable owner retains possession of the property, and really occupies the position of a true owner to one contracting with him for the purpose of improving the property. But this is immaterial here, because the allegations of the petition specifically show that the contract made by the plaintiff with the equitable owners of the property was adopted as its own by the Chatham Real Estate & Improvement Company, who were the legal owners of the property. In other words, both the equitable owners and the legal owners stood in a contractual relation to the plaintiff, in so far as the improvements were concerned. In *Central of Georgia Ry. Co. v. Shiver*, 125 Ga. 220, 53 S. E. 610, it is held that all that is required to create a lien against the true owner is consent on his part, either express or implied, to the contract for the improvement of the real estate. Here the allegation is that the holder of the legal title, or the one who in law could be called the real owner, knew of the contemplated improvements, acquiesced in, and approved of and adopted as its own the contract for the improvements.

The case of *Bennett Lumber Co. v. Martin*, 132 Ga. 493, 64 S. E. 484, as well as the case of *Carr v. Witt*, 137 Ga. 373, 73 S. E. 668, seems to be distinguished on the facts from the instant case. In the first case mentioned, which was an effort to set up a lien for lumber furnished to improve real estate, the evidence expressly showed that the real owner, or the holder of the deed to secure a debt, had no knowledge whatever that any lumber was furnished or was to be furnished by the person seeking to foreclose the lien, and in the second case a general demurrer was sustained, because there was no allegation that the contract for the improvements of the real estate had been adopted by the holder of the deed to secure a debt. In the present case it is specifically alleged that the holder of the deed to secure a debt on the real estate had knowledge of the contract for the improvement of the real estate, and expressly agreed to see that the money was paid to the contractor for the improvements, thus ratifying and confirming the contract made by the trustees of the church, and adopting it as its own. If these allegations of the petition be sustained by proof, under the principle of the above decisions, a prima facie case for the establishment of a lien upon the real estate, even as against the Chatham Real Estate & Improvement Company, would be made out. We do not think it necessary that the Chatham Real Estate & Improvement Company should have actually joined with the trustees of the church in making the contract for the improvement of the church property; but, if the evidence should show that it had full knowledge of the contract, that it expressly assented to its execution, agreeing with the contractor to see that he was paid according to its terms, and received the benefit of the improvements which the contractor placed upon the property, relying upon its representation as to payment, these facts would be sufficient to give to the contractor a special lien upon the real estate to which that defendant held title for the purpose of securing a debt.

2. There was no misjoinder of parties. Before the lien on the land could be established under the allegations of the petition, both the holder of the legal title, to wit, the Chatham Real Estate & Improvement Company, and the holders of the equitable reversionary title, to wit, the trustees, for the use of the church, would have to be joined in the suit. The legal title being in the realty company, and the equitable title in the trustees for the church, and the church itself having been built for the use of the Colored Methodist Episcopal Church, under the allegations of the petition there was a privity of interest between all the parties. Certainly the realty company was a necessary party, and its title could not have been incumbered in the suit without first having made it a party.

The owner of the property, or of the interest sought to be charged, is a necessary party, without whose presence a valid judgment foreclosing the lien cannot be rendered. 27 Cyc. 349; *Western & Atlantic R. Co. v. Tate*, 129 Ga. 526, 59 S. E. 266.

[2] 3. While the city court had no jurisdiction to afford affirmative equitable relief, it has jurisdiction to render a judgment foreclosing a materialman's lien on real estate. *Cooper v. Jackson*, 107 Ga. 255, 33 S. E. 60. See, also, the case of *Beckwith v. McBride*, 70 Ga. 642, where suit was brought in the city court of Atlanta against Beckwith, trustee, for the purpose of charging certain church property located in Atlanta for goods which had been furnished to the church. In that case a demurrer was filed on the ground that the city court was without jurisdiction, because the petition set forth an equitable cause of action, in that it sought to subject trust property to a debt, and, further, because the title to real estate was involved. The demurrer was overruled, the court placing its judgment upon section 3377 of the Code of 1882 (Civil Code of 1910, § 3786). It held, in effect, that trust estates are made liable in courts of law for services rendered to them, or for property or money furnished for their use, to the extent to which they would be held liable in courts of equity, and it was further held that it was certainly not a suit respecting the title to land, in the sense attached to those words by the Constitution and laws, any more than would be any other suit which might eventuate in fixing a lien upon land. For the reasons stated, we think the trial judge erred in sustaining the general demurrer of the Chatham Real Estate & Improvement Company.

As heretofore stated, the grounds of special demurrer, except those met by special amendment, were not meritorious.

Judgment reversed.

(95 S. C. 210)

BEYLOT v. ATLANTIC COAST LINE R. CO.

(Supreme Court of South Carolina. July 14, 1913.)

MASTER AND SERVANT (§ 78*)—COMPENSATION OF SERVANT—BENEFIT AND RELIEF FUNDS.

Under Civ. Code 1912, § 2808, providing that where a company maintains a relief fund for its employes, it shall be liable to pay the amount called for by the contract, the acceptance of which shall not bar the right of the employe or his personal representative to recover damages for negligence, and that any contract to the contrary, or any release given in consideration of payment of the relief fund, shall be void, the beneficiary under such fund may recover the amount due after having, as administratrix, recovered damages for the death of the employe, caused by the negligence of the company, even though the benefit contract provides that if suit be brought against the

company for damages the benefit shall be forfeited.

[Ed. Note.—For other cases, see Master and Servant, Dec. Dig. § 78.*]

Gary, C. J., dissenting.

Appeal from Common Pleas Circuit Court of Charleston County; Frank B. Gary, Judge.

Action by Caroline M. Beylot against the Atlantic Coast Line Railroad Company. Judgment for the defendant, and plaintiff appeals. Reversed.

Logan & Grace, of Charleston, for appellant. W. Huger Fitz Simons, of Charleston, for respondent.

FRASER, J. The respondent thus states this case: "This action was commenced on the 15th day of July, 1911. This suit is by the beneficiary named in the contract of Marion J. Beylot, deceased, who was a member of the Atlantic Coast Line Railroad Company relief department, and is brought to recover \$250 death benefits under said contract. Marion J. Beylot was an employé in the service of the Atlantic Coast Line Railroad Company, and as such became a member of said relief department, and was killed on the 19th day of January, 1910, while in the service of that company, and a member of said relief department. The complaint alleges these facts. The answer alleges that Caroline M. Beylot, the plaintiff herein, as the administratrix of the said Marion J. Beylot, brought a suit against the Atlantic Coast Line Railroad Company for the death of said Marion J. Beylot, and a judgment therein, rendered in November, 1910, which judgment was paid in full January 7, 1911, and release in full executed therefor. This suit was for the sole benefit of the plaintiff, Caroline M. Beylot, as the mother of Marion J. Beylot. The answer also alleges the nature and organization of the relief department, its regulations, and the nature of the contract of a member of such department. It also alleges that by the terms of said contract it was provided: 'If any suit should be brought against said Atlantic Coast Line Railroad Company for damages arising from or growing out of injury or death occurring to him, the benefits otherwise payable and all obligations of said relief department created by his membership therein should thereupon be forfeited without any declaration or other act by said relief department or said Atlantic Coast Line Railroad Company.' The answer further alleges that the bringing of said suit for damages for the death of said Marion J. Beylot, and the recovery and payment of the judgment therein, forfeited all obligations for payment of benefits by defendant to plaintiff under the terms of the contract, and operated as a release and discharge of defendant from any and all claims by reason of the death of Marion J. Beylot, or by rea-

son of his membership in said relief department. Plaintiff demurred to the answer, alleging that the facts therein stated did not constitute a defense, for the reason that the judgment in the suit for damages constituted no defense to this suit for benefits under the relief department contract. The case came on for trial upon the pleadings before Judge Frank B. Gary at the April term, 1912, the circuit judge overruled the demurrer, holding that the forfeiture clause of the contract was binding, and the facts stated in the answer would constitute a defense by an order made May 8, 1912. From that order this appeal was taken. The only question, therefore, raised by this appeal is whether a member of such a relief department, or his beneficiary, can maintain an action upon such a contract for benefits thereunder, after a suit for damages has been prosecuted and recovered upon for the very injury for which the benefits are claimed."

The respondent relies upon *Sturgiss v. R. R. Co.*, 80 S. C. 187, 60 S. E. 939, 61 S. E. 261, to sustain the order overruling the demurrer. The difference between that case and this is that in the *Sturgiss* Case the statement of facts contains the following (80 S. C. at pages 198, 199, 60 S. E. at page 939, 61 S. E. 261): "That as a result of said action, the plaintiff succeeded in recovering from the defendant the sum of \$2,700 for the alleged injuries sustained, and the same was paid to the plaintiff by the defendant, and a full and complete release and discharge was taken for all claim and demand against the said defendant for said injuries."

In this case there is no such allegation. Forfeiture was alleged and release by operation of the original contract. Mr. Justice Gary (now Chief Justice) and Chief Justice Pope, who concurred with him, did not hold as respondent claims. They set forth in that opinion the well-established doctrine that there is a difference between a contract to release or limit liability for damages from future negligence and a settlement for past acts of negligence. The one is forbidden by law and the other favored.

The appellant claims that in the *Miller* Case, 90 S. C. 249, 73 S. E. 71, the plaintiff was allowed to take relief money and then bring suit, and claims that there is no logical difference between that case and the one in which an employé brings suit and then claims the relief money. There is no logical difference, but that is not the question. Our cases hold that the question must be decided by the statute, and there is no power in the courts to so amend the statutes as to make them conform to the court's ideas of logic.

The statute is as follows: Code of Laws of South Carolina, vol. 1, § 2808: "Receipt of Relief Fund No Bar to Action for Damages.—When any corporation, firm or individual

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

runs or operates what is usually called a relief department for its employes, the members of which are required or permitted to pay dues, fees, money or other compensation, by whatever name called, to be entitled to the benefit thereof, upon the death or injury of the employe, a member of such relief department, such corporation, firm or individual, so running or operating the same is required to pay to the person entitled to the same the amount it was agreed the employe, his heirs or other beneficiary under such contract should receive from such relief department; the acceptance of which amount shall not operate to estop, or in any way bar the right of such employe or his personal representative from recovering damages of such corporation, firm or individual for personal injury or death caused by the negligence of such corporation, firm or individual, their servants or agents, as are now provided by law; and any contract or agreement to the contrary, or any receipt or release given in consideration of the payment of such sum, is and shall be null and void." It will be observed that in the first part of the section there is an absolute requirement that corporations, firms or individuals shall pay according to the contract. This absolute requirement is not limited by any other part of the statute. On the contrary, it provides that acceptance of benefits shall not operate as an estoppel, and also that a release given, in pursuance of the contract, shall be void. If the Legislature had intended to make the action for damages operate as a release, it must say so in the act. The act does not say so, and this court has no right to amend the act by saying that a suit for damages shall operate as a release.

The judgment is reversed.

HYDRICK and WATTS, JJ., concur.

GARY, C. J. I dissent for the reasons stated in the decree of his honor the circuit judge.

(95 S. C. 248)

WILKINS v. HILTON-DODGE LUMBER CO.

(Supreme Court of South Carolina. July 15, 1913.)

1. INJUNCTION (§ 175*)—PRELIMINARY INJUNCTION—MOTION TO DISSOLVE—HEARING—CONFLICTING AFFIDAVITS.

In an action by the grantee of a right of way to restrain a prior grantee of another right of way across the same land from crossing the plaintiff's right of way, where the affidavits are conflicting as to whether the prior grantee had notice of an option previously given to the subsequent grantee, that question should not be determined on a motion to dissolve a preliminary injunction.

[Ed. Note.—For other cases, see *Injunction*, Cent. Dig. § 388; Dec. Dig. § 175.*]

2. RAILROADS (§ 89*)—RIGHTS OF WAY—CROSSING RIGHT OF WAY OF ANOTHER RAILROAD.

Where the owners of a tract of land granted a right of way across it for a railroad to be used in carrying on timber operations, the right of way does not exclude the right of the owner to use the land subject thereto, and where they subsequently granted the timber rights and a right of way for a railroad to another company, the prior grantee is not entitled to enjoin the subsequent grantee from crossing the line of his right of way.

[Ed. Note.—For other cases, see *Railroads*, Cent. Dig. §§ 224-239; Dec. Dig. § 89.*]

Gary, C. J., dissenting.

Appeal from Common Pleas Circuit Court of Colleton County; R. W. Memminger, Judge.

Action by V. D. S. Wilkins against the Hilton-Dodge Lumber Company. From an order refusing to dissolve a temporary restraining order, the defendant appeals. Order reversed.

Benj. H. Rutledge and Hagood & Rivers, all of Charleston, and Padgett, Lemacks & Moorer, of Waltersboro, for appellant. Logan & Grace, of Charleston, for respondent.

WATTS, J. This is an appeal from an order of his honor Judge Memminger, dated December 28, 1912, refusing to dissolve a temporary restraining order issued by his honor Judge Prince, on November 27, 1912.

The facts involved in the appeal in brief are: That on July 23, 1912, the plaintiff respondent, Wilkins, and H. E. Savage obtained from William B. Fields and Rebecca Bissell, for valuable consideration, an option to purchase a right of way, 30 feet in width, across the lands of said Fields and Bissell, known as Deer Island, for the purpose of building a railroad to carry on timber operations. That after that time, on September 10, 1912, Fields conveyed all of his undivided one-half interest in the timber on said Deer Island tract of land, together with a right of way 30 feet in width over said land, to the Savannah Timber Company; the stock of which said company is owned by the defendant appellant. That in September, 1912, Rebecca Bissell, for valuable consideration, conveyed her one-half interest in the timber on the same tract of land, known as Deer Island, together with a right of way over the land 30 feet in width, to the Savannah Timber Company. That the stock of this company is owned by the defendant appellant. That on October 19, 1912, Fields and Bissell in pursuance of the agreement, previously by option given to Wilkins and Savage, conveyed to them the right of way of 30 feet in width, and on the same day, to wit, October 19, 1912, Savage conveyed to Wilkins his interest in the right of way, conveyed to him, and Wilkins by Fields and Bissell. That after this time the appellant, the Hilton-Dodge Lumber Company, owner of the

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

Savannah Timber Company, began to locate a right of way on said Fields, or Deer Island, tract of land, which would incumber the right of way of respondent, and, as alleged in the complaint, result in a practical confiscation of his property, and irreparable damage; and in order to prevent this the respondent began this proceeding by summons and complaint, and obtained from Judge Prince a temporary restraining order. The appellant moved to set aside this order before Judge Memminger, and he refused this motion. The grounds relied on by appellant before Judge Memminger were mainly two: First, that the appellant was a bona fide purchaser, without notice, for valuable consideration of the premises of which it was in possession, and that its rights of way were exclusive, and that respondent's rights, if any, were obtained subsequent to his; and, secondly, that he was the owner, unquestionably, of the timber, and the rights of way across said premises, and that the crossing of the respondent's rights of way, alleged to be about to be made, could work no irreparable injury, nor in fact injury of any kind, to respondent. On hearing this motion Judge Memminger in his order says: "A clear-cut question of fact is made as to whether defendant had actual notice of plaintiff's option before it purchased. The option was recorded, but it appears that its execution by one of the owners of the land shows on the record no subscribing witnesses; whereas, the original, it is claimed for plaintiff in reply, has the names of the witnesses, which it is claimed were left off the record by error of the clerk of court." But there was testimony before his honor clearly showing that the appellant had actual notice of the option of respondent to purchase the right of way before the appellant purchased. The respondent and others make affidavits to this, and appellant denies it under oath. From the order of Judge Memminger, appellant appeals, and alleges error on practically three grounds: That he erred in not holding that appellant had no actual notice, and even if it did, it did not affect its rights; the appellant had no constructive notice, as the option is not a recordable instrument, and consequently, no notice, and if a constructive notice by recording, it was improperly recorded as to one-half of the premises; and the third ground, that the injuries specified in the complaint as irreparable were remote and speculative, and were subject for action for damages, and not for injunction.

[1] We do not think that his honor was in error in refusing to dissolve the injunction, on the grounds there was no actual or constructive notice to the appellant of the option of the respondent; to have done so would have required him to determine a question of fact on affidavits, which this court has repeatedly held is unsatisfactory, and by refusing to do so the circuit court followed the decisions of this court in a number of cases.

Alderman v. Wilson, 69 S. C. 156, 48 S. E. 35; *Kelly v. Tiner*, 86 S. C. 160, 68 S. E. 465; *Childs v. Columbia*, 87 S. C. 568, 70 S. E. 296, 34 L. R. A. (N. S.) 542.

[2] We, however, think that his honor was in error in not dissolving the injunction, under the authority of *Miller v. Seaboard Air Line Ry.*, 94 S. C. 105 (*Advance Sheets*), 77 S. E. 748. Admitting for the purpose of this case that the respondent had a valid instrument anterior and prior to that of appellant from Fields and Bissell to the right of way claimed by them across Deer Island, and that the appellant knew this before its purchase from Fields and Bissell, yet Fields and Bissell still owned the land; the fee was in them subject to the right of respondent's right of way, and it would be both unreasonable and absurd to say, because they had sold a right of way across their land, that the purchaser of the right of way could prevent them, the owners, from crossing this right of way, in going to and fro across their lands, and not enjoy the use of the lands, of which they were the owners, and the record shows that the appellant here purchased the timber on these lands from Fields and Bissell, and now is the owner of the timber in question and right of way. The respondent would only have the right to claim its right of way as purchased, and could not prevent the owners of the land in crossing this right of way. Mr. Justice Woods in *Miller v. Seaboard Ry. Co.*, on page 109 of 94 S. C., on page 749 of 77 S. E., supra, uses this language: "The rule established by authority and reason, from which we find no dissent, is that where a railroad company acquires a right of way, either by deed or by condemnation, which divides one tract of land into two parts, the law will not impute an intention so unreasonable as that the railroad company intended to exclude the owner from the right to pass from one part of his land to the other, or that the owner of the land meant to part with such right, but, on the contrary, will hold that the intention was that the owner of the land would of necessity have the right of crossing, if a crossing could be made so as not to interfere materially with the use of the right of way acquired by the railroad company. *Baltimore & O. Ry. Co. v. Slaughter*, 167 Ind. 330, 79 N. E. 186 [7 L. R. A. (N. S.) 597, 119 Am. St. Rep. 503]; *Kansas City & E. R. Co. v. Kregelo*, 32 Kan. 608, 5 Pac. 15; *Atchison, T. & S. F. Ry. Co. v. Conlon*, 9 Kan. App. 338, 61 Pac. 321; *New York & N. E. Ry. Co. v. Board of Railroad Commissioners*, 162 Mass. 81, 38 N. E. 27; *Kirk v. Railway Co.* [51 La. Ann. 664] 25 South. 463, etc. While the precise point is not involved in *Simkins v. Columbia & G. R. R. Co.*, 20 S. C. 258, that case was decided on the same principle."

Order appealed from reversed.

HYDRICK and FRASER, JJ., concur.

GARY, C. J. (dissenting). The sole object of the plaintiff's action is to obtain a permanent injunction. In such cases the rule is thus stated in *Cudd v. Colvert*, 54 S. C. 457, 32 S. E. 503: "Where the action is brought solely for the purpose of obtaining an injunction, and where, if the facts alleged in the complaint are found to be true, a proper case for injunction would be presented, it is error to dissolve a temporary injunction upon a mere motion, heard upon affidavits, as that would deprive the plaintiff of his legal right to have the facts determined in the mode provided by law, instead of by affidavits—a most unsatisfactory mode of eliciting truth. Indeed the practical result in a case like this would be to dismiss the complaint upon a mere motion, heard upon affidavits, without any opportunity being afforded the plaintiff to have the facts upon which he bases his claim for relief determined in the mode prescribed by law."

I, therefore, dissent.

(95 S. C. 196)

GAMBLE v. METROPOLITAN LIFE INS. CO.

(Supreme Court of South Carolina. July 12, 1913.)

INSURANCE (§ 665*)—LIFE INSURANCE—DEFENSES—FRAUD—WAIVER.

A life insurance company held not entitled, under the showing made, to defeat a recovery on a life policy, on the ground of fraudulent representations in the application, in view of the evidence on the question of waiver.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 1555, 1707-1728; Dec. Dig. § 665.*]

Hydrick, J., dissenting.

Appeal from Common Pleas Circuit Court of York County; T. S. Sease, Judge.

Action by James M. Gamble against the Metropolitan Life Insurance Company. From a judgment for plaintiff, defendant appeals. Affirmed.

See, also, 92 S. C. 45, 75 S. E. 788, 41 L. R. A. (N. S.) 1199.

Elliott & Herbert, of Columbia, for appellant. Dunlap & Dunlap, of Rock Hill, for respondent.

FRASER, J. This is the second appeal in this case. The first is reported in 92 S. C. 451, 75 S. E. 788, 41 L. R. A. (N. S.) 1199. Appellant's argument contains the following:

"This is a suit on a policy of insurance for \$500 on the life of Maggie Gamble, wife of the plaintiff, in which policy the plaintiff is named as the beneficiary. The application is dated February 10, 1910, the policy was dated February 10, 1910, and Maggie Gamble died on June 14, 1910."

The answer of the defendant sets up the defense that certain statements made in the application for the policy were untrue;

that it was agreed in the application that the answers shall form the basis of the application, and, if they were not correct and wholly true, the policy of insurance shall be null and void; that in said application insured stated she was in sound health, etc., whereas she had been afflicted with disease of the kidneys, had been treated for Bright's disease, and had said questions been truthfully answered the policy would not have been issued, etc.

The fourth paragraph is as follows: "(4) Further answering the said complaint, defendant alleges that said policy of insurance mentioned in the complaint was obtained by fraud, misrepresentation, and deceit, and in consequence of said fraud, misrepresentation, and deceit, the said policy of insurance is null and void."

The case was first tried at the fall term of the court of common pleas in York county before Hon. R. C. Watts, presiding judge, who directed a verdict. On appeal this court reversed the judgment. *Gamble v. Metropolitan Life Insurance Co.*, 92 S. C. 451, 75 S. E. 788, 41 L. R. A. (N. S.) 1199. The case was again tried before Hon. T. S. Sease, presiding judge, at the fall term 1912, and the jury rendered a verdict in behalf of plaintiff for the face of the policy and interest.

Defendant appeals on four exceptions which present two questions. The first three exceptions raise the first point, and the fourth exception raises the second point. These grounds of appeal are: (1) That the presiding judge erred in charging the jury upon the law of waiver by the agent of the defendant company, where there was no such issue made by the pleadings or evidence, and refused, when requested, to charge that there was no evidence of waiver by the agent. (2) That the presiding judge erred in not granting a new trial upon the evidence in the whole case, and because of the wrong charge above."

1. The first ground of appeal cannot be considered. The case does not show that his honor's attention was called to the misstatement of the issues. The case shows the following:

"Mr. Herbert: Your honor, I will ask that you supplement your charge to the extent of instructing that there is *no evidence* that the agent knew Mrs. Gamble's condition or varied any stipulation in the contract.

"The Court: I am afraid that would be charging on the facts.

"Mr. Herbert: I just asked for it. I don't know whether it would be competent or not.

"The Court: You will write your verdict on this paper, that blue paper. Take the record."

The difference between no evidence and no issue is great. The rule stated in many cases is that, where the presiding judge misstates the issues, the judgment will not be

reversed for that reason, unless his attention was called to the misstatement on the issues. One reference is sufficient. *Plunkett v. Insurance Co.*, 80 S. C. 410, 61 S. E. 894. "It will be seen by referring to the case of *Nickles v. Ry. Co.*, 74 S. C. 102, 136, 54 S. E. 255, 266, that 'whatever may be the view elsewhere, our cases support the view that an instruction upon an issue as to which there is no evidence whatever or a mistake in stating issues is not reversible error, unless the attention of the court is called to the matter.' See *Vann v. Howle*, 44 S. C. 546, 22 S. E. 735; *Crosswell v. Association*, 51 S. C. 469, 29 S. E. 236; *State v. Still*, 68 S. C. 38, 46 S. E. 524 [102 Am. St. Rep. 657]. This first ground of appeal is overruled." So here, this first ground of appeal is overruled.

2. The second ground of appeal must also be overruled. The fourth exception, to which this ground of appeal refers, complains of error in not granting a new trial because the overwhelming preponderance of the evidence was against the verdict. The overwhelming preponderance of the evidence is a question for the circuit judge, and this court cannot consider it.

We cannot say that there was no evidence. An examination of the deceased by a physician chosen by the insurer is some evidence of one or two things, either that the disease did not exist, or that its existence was known to and waived by the insurer.

The judgment appealed from is affirmed.

GARY, C. J. (concurring). One of the provisions in the policy is that "all statements made by the insured shall, in the absence of fraud, be deemed representations and not warranties." Therefore, even if the statements contained in the application were not true, this fact alone was not sufficient to defeat the plaintiff's right of recovery. The burden of proof rested upon the defendant to prove, as alleged by it, that the policy of the insurance was obtained by fraud, misrepresentation, and deceit, which unquestionably would render it null and void. The testimony upon this question was conflicting, and the case was properly submitted to the jury. Indeed, the defendant's attorneys neither made a motion for a nonsuit nor requested the direction of a verdict. We have stated these facts for the purpose of showing the issues raised by the pleadings.

His honor, the presiding judge, was not requested to charge that there was no testimony tending to show waiver. He, however, was requested to charge that there was no evidence that the defendant's agent knew of Mrs. Gamble's condition or varied any stipulations in the contract, which is an entirely different proposition, and which he could not have charged without invading the province of the jury. The question of waiver was not

involved in the case, and nothing was said in regard to it that was prejudicial to the rights of the appellant.

For these reasons I concur.

HYDRICK, J., dissents. WATTS, J., disqualified.

(98 S. C. 347)

GREGORY-CONDER MULE CO. v. RODDEY.

(Supreme Court of South Carolina. June 14, 1913.)

APPEAL AND ERROR (§ 1122*) — REMAND — OPINION.

The Supreme Court should not, in its opinion upon reversing and remanding for a new trial, unnecessarily make a statement of the facts and their consequences, so as to raise or suggest questions which the parties have not raised at trial.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. § 4420; Dec. Dig. § 1122.*]

Appeal from Common Pleas Circuit Court of Richland County; T. H. Spain, Judge.

Action by the Gregory-Conder Mule Company against J. B. Roddey. From a judgment for plaintiff, defendant appeals. Reversed and remanded for a new trial.

Frank G. Tompkins, of Columbia, for appellant. Lyles & Lyles, of Columbia, for respondent.

FRASER, J. This is an action on account for a set of furniture sold to Mr. Roddey by Mr. H. A. Taylor. The plaintiff claimed that the account was assigned to it, and that no part thereof had been paid. The defendant, Roddey, claimed that the account had been paid by certain commissions, to which he was entitled on a sale of an automobile by the plaintiff to Taylor. The presiding judge directed a verdict for the plaintiff, from which defendant appealed.

There was much conflict of testimony as to whether the account was assigned or not and as to the terms of the contract between the plaintiff and Taylor in the sale of the automobile. These questions ought to have been submitted to the jury. There are four exceptions, but the above statement disposes of all that are necessary to a determination of this case. This court might make a statement of the facts and their consequences at the various times; and, as they were affected by the change in the relations of the parties, it would be manifestly unfair to do so, as it might raise questions that the parties have not seen fit to raise, and might practically determine the facts, and this court should do neither.

The judgment is reversed and the cause remanded for a new trial.

GARY, C. J., and HYDRICK, and WATTS, JJ., concur.

(95 S. C. 190)

DIMERY v. BENNETTSVILLE & C. R. CO.

(Supreme Court of South Carolina. July 11, 1913.)

1. TRIAL (§ 29*)—ADMISSION OF EVIDENCE—STATEMENTS BY COURT.

In an action against a railroad company for running over plaintiff's foot, caught in a switch, defendant's engineer testified that when he first saw plaintiff his engine was 150 yards away. On cross-examining the witness plaintiff's attorney asked him if his idea at the time was that it was 150 yards, to which he replied that he did not recall exactly, but that it was further than 200 yards, whereupon the court interposed, stating to plaintiff's attorney, "His statement is more favorable to you than it was before, isn't it?" to which the attorney replied in the affirmative. *Held*, that such statement amounted to a mere suggestion to plaintiff's attorney that there was no necessity for laying a foundation for contradiction, as the witness had given testimony more favorable to plaintiff than he gave before, and the remark was therefore not prejudicial to defendant.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 80-83, 508; Dec. Dig. § 29.*]

2. RAILROADS (§ 401*)—PERSONS ON TRACK—INJURIES TO CHILD—DISCOVERED PERIL.

In an action against a railroad company for running over a child's foot, which had become caught in a switch while she was walking on the track, where there was evidence that those in charge of the train saw the child in peril and made no effort to stop until it was too late, the court properly charged that after having discovered plaintiff's peril it was the duty of defendant's servants to use every reasonable way to stop the train and prevent the injury if possible, whether plaintiff was a licensee or a trespasser.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 1382-1390; Dec. Dig. § 401.*]

Appeal from Common Pleas Circuit Court of Marlboro County; Jos. A. McCullough, Special Judge.

Action by Georgia Dimery against the Bennettsville & Cheraw Railroad Company. Judgment for plaintiff, and defendant appeals. Affirmed.

See, also, 92 S. C. 169, 75 S. E. 399.

Stevenson, Stevenson & Prince, of Bennettsville, for appellant. J. K. Owens, of Bennettsville, for respondent.

FRASER, J. This was an action for damages. The plaintiff, by her guardian ad litem, alleges that she is an infant of about nine years of age, and that on or about the 7th of March, 1910, was walking in company with her older sister along, by, and then upon, the track of the defendant railroad company, when her foot became fastened in the irons forming the switch, and when the plaintiff and her sister were engaged in endeavoring to rescue her therefrom, the defendant grossly, recklessly, carelessly, and wantonly ran its engine and tender backwards upon the plaintiff and cut off her foot. The defendant denied negligence on its part, and pleaded contributory negligence. The jury found a verdict in favor of the plaintiff, and judgment was entered upon the verdict.

From this judgment the defendant appealed upon six exceptions.

[1] The first exception complains of a remark by the presiding judge to plaintiff's attorney, and the other five to the charge of the judge. The first exception is as follows:

"(1) The defendant excepts to the following incident of his honor, the presiding judge, at the trial:

"Question by Mr. J. K. Owens in cross-examination of J. W. Page: 'Q. That is 200 or 250, and your idea at that time was it was 150? A. I do not recall exactly; it was further than 200 yards.'

"The Court: 'His statement is more favorable to you than it was before isn't it?' (addressing Mr. Owens).

"Mr. Owens: 'Yes, sir.'

"The defendant respectfully submits that this was a discussion of the evidence by the court in the presence of the jury, and an expression of opinion that this witness was giving more favorable testimony at this time than he had on a former occasion, and we submit was error."

This was defendant's witness. The plaintiff's attorney was laying the foundation for a contradiction. In effect, his honor said, "There is no use for this, as the witness is giving testimony more favorable to you than he did before." The remark was really a protection to the defendant's witness, and was a question to counsel, and not a charge to the jury. This exception is overruled.

[2] The other exceptions are not separately considered in argument and will not be considered separately here. They are as follows:

"(2) The defendant excepts to the following charge of his honor, the presiding judge: 'Now, gentlemen, whether one is a licensee, or whether one is a trespasser, makes very little difference under certain circumstances,' and also by the following statement, referring back to this statement, to wit: 'Now, if you see a person in a line of danger, whether that person be a licensee, or whether that person be a trespasser, from the moment you discover that they are in a position of peril, then the law says you are due them care, due care, not to injure them, the moment it is discovered that they are in a position of peril'—the error being that he had previously told the jury that in this case and in cases like this there is practically no difference between a licensee and a trespasser from the standpoint of the defendant; the same being error of law, in that a higher degree of care is required under the circumstances not to injure a licensee than is required as to a trespasser.

"(3) In laying down the rule in his charge that a trespasser is entitled to due care instead of being entitled merely to exemption from willfulness, in the following language: 'It is for the jury to say whether or not there is anything in their condition or situation or

surroundings that ought to apprise the engineer or other parties in charge of the train that they are not in possession of their faculties, or have not absolute control over their movements, and if they appear disabled or otherwise in a condition where they are not prepared to take care of themselves, then the law says it is the duty of those in charge of the train of cars to use due care to prevent injuring them. And right here, gentlemen, is a very important and material fact to consider in this case. Was the plaintiff in a position of peril?

"(4) He further erred in making the following charge: 'By the exercise of ordinary care and prudence after having discovered the presence of the plaintiff upon the railroad track, if the plaintiff was upon the track, was there anything in the surrounding circumstances that ought to have apprised those in charge of this train that this party was in a position of peril, or was disabled? If you believe those to be the facts, and if so, were they apprised in time to stop the train and prevent the injury? If so, it was their duty to use every reasonable facility at their hands so to do'—in that he required a higher degree of care, to wit, the use of every reasonable facility at their hands to avoid injuring the plaintiff, and this under a charge that made no difference between a licensee and a trespasser, and thereby allowing the jury to base their verdict against the defendant, not on failure to use ordinary care, but on failure to use every reasonable facility or means to avoid injury to the plaintiff; and he erred in laying down this rule, especially where he embraced a trespasser and a licensee under the same rule.

"(5) The court erred, it is respectfully submitted, in charging the jury as follows: 'But, if gentlemen of the jury, they discovered the presence of these people upon the track, and if they saw after that discovery, or could have seen by the exercise of ordinary care, that they did not recognize or obey the signals, then it is for you to say just what the distance was. Could they have stopped the train by the exercise of ordinary care? If so, and they did not do it, and the girl was injured, then the railroad company would be respon- (sic) in order to stop the train and avoid the injury, if they did everything after discovering the perils of the party, the dangerous position, everything that a reasonable party could do in order to stop the train and avoid the injury; if they did that, then they are not responsible. Now, that is a fact for you to consider, and in considering it you will take into consideration all of the testimony. You have heard it; you were there, and you have heard the various witnesses testify as to what they did. You will consider how much time must have elapsed from the time the party was placed in a position of peril, if you believe she was so placed, until the engine ran over her foot, and it is undisputed

that the engine did run over her foot. Answer whether or not the railroad company did everything that a reasonable person could do under the circumstances after discovering the peril of the party, in order to stop the train'—the error being that he again placed in two or three paragraphs, and emphasized it in the last paragraph, the burden of showing that the defendant did everything that a reasonable person could do under the circumstances, after discovering the peril of the party, whether the party was a trespasser or licensee; and we submit it was error in applying this rule to all classes of persons on a railroad track, and especially under the evidence in this case.

"(6) The court erred, it is respectfully submitted, in charging the jury as follows: 'Assuming, for the purpose of inquiry, that this girl was guilty of contributory negligence in going on the track in the first instance, assuming that, yet if she became in a position of peril and danger, and the railroad company saw it in time to have avoided injuring her, and didn't use due care after it discovered her position of peril, and that was the sole cause of her injury, then the plaintiff's prior negligence, if she were guilty of negligence, would not defeat a recovery, because under the circumstances that negligence would not be a proximate cause of the injury. Ordinarily the proximate cause is a question of fact for the jury, but under the facts as I stated to you, I charge you that, if notwithstanding her negligence, the railroad company could have avoided the injury to her by the exercise of due care, after they discovered her peril, if she were in peril, and did not exercise that due care after they discovered that she negligently put herself in that position, if she did so she would nevertheless be entitled to recover at your hands'—the error being that he told them that if by the exercise of due care, although the plaintiff was guilty of contributory negligence, the railroad could have avoided the injury, then the contributory negligence was not the proximate cause of the injury; the error being, first, in undertaking to say that the negligence which brought about the injury was not a proximate cause, thereby taking that issue from the jury; and, second, requiring the railroad company to exercise due care when there was no question but that she was nothing but a licensee, and the railroad company was ordinarily required to exercise ordinary care, and if she were a trespasser, the railroad company was only required to refrain from willfulness in injuring her. It is respectfully submitted that error in all these particulars was committed by the said charge."

In the Carter Case Mr. Justice Watts, then circuit judge, charged the jury fully as strongly as did Special Judge McCullough in this case. Appellant's eighth exception was as follows (93 S. C. pages 334, 335, 75 S. E. 953): "(8) Because his honor erred in charg-

ing the jury as follows: 'Now, I charge you further, as a matter of law, that a railroad company in running its cars over its track has a right to assume, in the absence of anything to the contrary, or any proof to the contrary, that when a person is walking on its track, and they see or hear the approach of a train, or if they give the necessary signals, and everything of that sort, they have a right to assume that the party walking on the track will get off the track and get out of the way of the approaching train. At the same time the law requires the engineer, the party in charge of the train, the locomotive running it, to observe due care and due precaution not to inflict injury to any person that is on the track. They must observe due care and due precaution, exercise the ordinary care, do what an ordinarily prudent person would do, under similar circumstances, not to inflict any injury on any person on the track, and give the necessary signals, and they don't get off, and there is any reasonable way whereby he can stop the train and prevent the injury, and he doesn't observe due care and due precaution, but is careless and negligent, and doesn't observe due care and due precaution, and injures any one under circumstances of that sort, and the party injured doesn't, by any act of carelessness and negligence on his part, in any manner contribute to the direct and proximate cause of his injury, then the party injured, or the party suing for him, would have a right to recover such actual damages as sustained, proportionate to the injury sustained—the error being that such charge was confusing to the jury, inasmuch as his honor failed to distinguish between the duty owed a licensee and a trespasser, and thus charged the jury that, even if, under the facts, the jury should find that plaintiff's intestate was a trespasser, still the defendant company would be liable if it failed to observe due care and due precaution, or failed to exercise ordinary care; whereas the law is that if he was a trespasser the mere failure to observe due care or ordinary care would not render the defendant liable.' This exception was overruled. He charged that, after seeing a person in a perilous position, those who handle dangerous machinery must exercise due care, and if there is *any reasonable way* whereby they can stop the train and prevent the injury, they are bound to do it. That charge was sustained.

This is a very much stronger case for respondent than the Carter Case. In that case the person injured was an adult. In this case there were two children, the oldest about 14, and the injured about 9. There was only an engine and tender, with no alleged reason to hurry. Those in charge of the train saw these children in a perilous position, and made no effort to stop until it was too late to avoid injury. In the Carter

Case, Mr. Justice Watts said "If they see any one" in a position of danger on the track, they are bound to use any reasonable way to prevent injury. There was no charge on the facts. His honor said "if you find." These exceptions are overruled. The judgment appealed from is affirmed.

GARY, C. J., and WATTS and HYDRICK, JJ., concur.

(95 S. C. 187)

LATIMER v. ANDERSON COUNTY.

(Supreme Court of South Carolina. July 11, 1913.)

1. HIGHWAYS (§ 213*)—LIABILITY FOR INJURIES TO PERSONS ON HIGHWAY—ACTIONS—JURY QUESTION.

In an action against a county for injuries received by the plaintiff owing to the presence of a rope stretched across the highway, the question of the negligence of defendant's officers *held* for the jury.

[Ed. Note.—For other cases, see Highways, Cent. Dig. §§ 535-537; Dec. Dig. § 213.*]

2. TRIAL (§ 194*)—INSTRUCTIONS—INSTRUCTIONS ON FACTS.

A charge in an action against a county for injuries suffered by plaintiff, who was hurt while riding in an automobile owing to the presence of a rope stretched across the highway by the county officers, that, if the county officers placed the rope across the highway, the jury should ask themselves whether a person of ordinary prudence would have so placed it without a warning or a light, is not a charge on the facts.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 413, 436, 439-441, 446-454, 456-466; Dec. Dig. § 194.*]

3. APPEAL AND ERROR (§ 216*)—PRESENTATION OF GROUNDS OF REVIEW IN COURT BELOW—NECESSITY.

A defendant cannot complain that the charge did not present his theory of defense where no special charge was requested below.

[Ed. Note.—For other cases, see Appeal and Error, Dec. Dig. § 216.*]

4. HIGHWAYS (§ 214*)—INSTRUCTIONS—APPLICABILITY TO EVIDENCE.

In a personal injury action against a county by a girl who with her mother and brother was riding in an automobile when the injury, which was caused by a rope stretched across the highway, occurred, mere evidence that plaintiff was having a good time when hurt is no basis for a charge on the question of whether she was talking to the driver of the car, and distracting his attention or acquiescing in his negligent driving.

[Ed. Note.—For other cases, see Highways, Cent. Dig. §§ 538-540; Dec. Dig. § 214.*]

5. NEGLIGENCE (§ 117*)—CONTRIBUTORY NEGLIGENCE—PLEADING.

Contributory negligence must be pleaded.

[Ed. Note.—For other cases, see Negligence, Cent. Dig. §§ 195-197; Dec. Dig. § 117.*]

6. NEGLIGENCE (§ 98*)—LIABILITY FOR INJURIES TO PERSONS ON ROAD.

Under Civ. Code 1912, § 1972, a county is liable for injuries to travelers upon the highway caused by its negligence, unless plaintiff's own act caused the injury or contributed thereto; consequently, where plaintiff was riding in an automobile when injured by an obstruction

in the highway, the negligence of the driver is not imputable to her.

[Ed. Note.—For other cases, see Negligence, Cent. Dig. §§ 147-150; Dec. Dig. § 93.*]

7. HIGHWAYS (§ 214*)—INJURIES ON HIGHWAY—MEASURE OF LIABILITY.

The liability of a county under Civ. Code 1912, § 1972, declaring that any person who shall be injured by a defect in a highway may recover, is in effect the same as that of a city, and consequently in such an action it is not improper for the court to so charge the jury.

[Ed. Note.—For other cases, see Highways, Cent. Dig. §§ 538-540; Dec. Dig. § 214.*]

Appeal from Common Pleas Circuit Court of Anderson County; S. W. G. Shipp, Judge.

Action by Miss Virginia Latimer, a minor, by Mrs. Marion Kirkpatrick, her guardian ad litem, against Anderson County. From a judgment for plaintiff, defendant appeals. Affirmed.

Breazeale & Pearman, of Anderson, for appellant. Bonham, Watkins & Allen, of Anderson, for respondent.

FRASER, J. This was an action for damages. The following statement appears in the case:

"The plaintiff, by her guardian ad litem, brings this action against the defendant for damages for personal injuries caused by the automobile in which she was riding running into a rope stretched across the highway, alleging negligence of the agents of the county in placing said rope across said highway at a dark place in the woods, and no light or sign nor notice of any sort was posted to show it was there; and it was stretched at such a height as not easily to be seen, said rope was being used in the repair of the highway, and was far removed from the place where the road hands were at work, that no person would look for a rope across the road at such place. That she was not negligent nor did she in any way contribute to the injuries received. The defendant admitted its corporate capacity, and its duty to keep the roads in repair, and denied all the allegations of the complaint.

"On the trial of the case, before Judge Shipp and a jury, at February term, 1913, the defendant, at the conclusion of plaintiff's testimony, moved for a nonsuit, which was overruled. The jury found for the plaintiff \$1,000 damages. Motion for new trial was made and refused. Judgment was entered upon the verdict. The defendant gave notice in due time of intention to appeal to this court, and now appeals upon said judgment upon the case and exceptions following.

"(Defendant's attorneys admit that on trial of the case they did not contend that the negligence of the driver of the car was imputable to the plaintiff.)"

The exceptions are as follows:

[1] Exception 1: "That his honor, the presiding judge, erred in overruling the defendant's motion for nonsuit and made on the

grounds that the testimony of plaintiff failed to prove that the injuries complained of were through the negligent repair of the highway or that the rope across the road was being used in repair of the highway, or that said injuries were caused by the negligence of the defendant; and he should have therefore granted the said motion because the plaintiff had failed to prove the necessary facts to make the defendant liable under the provisions of section 1972, vol. 1, of Civil Code." In the recent case of *Stone v. Florence*, 94 S. C. 377, 78 S. E. 24, we have: "To keep a street in repair means to keep it in such physical condition that it will be reasonably safe for street purposes. It is not enough that its surface should be safe; a street is not in repair when poles or wires or other structures are so placed in or over it as to be dangerous to those making a proper use of the street." See other cases there cited. The complaint is made that his honor said that the statute governing city and county is the same. So far as it applies to this case that is not error. There was evidence that the plaintiff was riding along the public road at the rate of 12 miles an hour, less than is permitted by the statute, and that the driver of the car was looking ahead of him at the road, and did not see the rope until he struck it. There was evidence that the rope was put there by one Cochran, who was in charge of the work for the county on that road. There was no evidence that the driver was looking, and did not see. Now, as to whether it was negligence to tie a rope across the road without any sign, other than the rope, to indicate its presence, particularly where there is testimony to show that the place was dark, was a question for the jury, and his honor committed no error in refusing the nonsuit. This exception is overruled.

[2] Exception 2: "That his honor erred in charging the jury as follows: 'Now, if you come to the conclusion that the county officers engaged in the repair of the public highway placed the rope in question in this case across the public road, you ask yourselves the question, Did they place it there in a way in which a person of ordinary prudence would have placed it there under the same circumstances? Did they place it at such a height that a person of ordinary prudence would have placed it? Did they place it in such a place as would be sufficient to warn people who were legitimately using the highway, or would a person of ordinary prudence have placed something more than a rope there? You ask yourselves the question, Was the rope itself sufficient warning for the travelers who were legitimately using the highway? Or would a person of ordinary prudence have done something more than place the rope there? Would they have placed a warning there to warn the people or would they have hung a light there, or would they

have done anything? Did the county officers manage that rope in the way that a person of ordinary prudence and care would be expected to do under the same circumstances? Now that is the test in this case. Now, if the county did not do that, did not do what a person of ordinary prudence would have done under the circumstances, why then I charge you that would be negligence.' The error being that said charge was on facts and in violation of section 26, article 5, of the Constitution of the state, in that it was a statement in interrogative form of the facts in issue in the case, and contained a strong intimation to the jury as to his opinion of the facts. And, further that it was a statement of what facts constituted negligence, in that it was a statement that, if the county did not do these things which he had asked the jury to inquire if they had done, then that would be negligence. And there was further error in said charge, in that it assumed that the plaintiff was legitimately using the highway, which the defendant had denied." This charge was not on the facts, as one sentence will show: "Now, if you come to the conclusion that the county officers engaged in the repair of the public highway placed the rope in question in this case across the public road, you ask yourselves the question did they place it there in a way in which a person of ordinary prudence would have placed it there under the same circumstances." That is not a charge on the facts. It simply says that it is negligence to do anything negligently; that is all. That is a proposition of law, and not a statement of fact. This exception is overruled.

Exceptions 3 and 4: "That his honor erred in charging the jury as follows: 'Now I charge you that, where a person is a passenger in a private vehicle or automobile, that the negligence of the driver of the automobile cannot be imputed to the passenger unless the passenger had some right to manage or control the driver, unless some relation of master and servant existed between them or some relation of principal and agent, unless the driver, was the agent of the passenger, that there was relation of master and servant, that is, unless the passenger had employed the driver as his servant, as his agent. So, unless there is testimony in this case showing that Virginia Latimer had the right to control the operation of the machine and give directions about the operation and control of it, why she cannot be held liable, and it would not affect her case if you should find that the driver was negligent.' The error being that by said charge his honor eliminated from the consideration of the jury the question whether the plaintiff, 'in any way brought about such injuries by her own act' as the defendant contended she did by laughing, talking, and entertaining the driver, and attracting his attention from his business of driving the machine, and, further, that it did not contain the correct

law as to imputed negligence by not including in said charge the exception of persons engaged in a common enterprise, as said exception was pertinent to the case and applicable to the facts as contended for by the defendant."

"(4) That his honor erred in charging the jury as follows: 'If the county was not negligent, the county would not be responsible at all. Or if the county was negligent, and notwithstanding that fact the accident happened entirely by the negligence of the driver, the county would not be responsible. But if the county was negligent, and the negligence of the county concurred and combined with the negligence of the driver, why then the county would be responsible. If the county was negligent and the negligence of the county, in connection with the negligence of the driver, if the driver was negligent, combined as the proximate cause of the injury of Virginia, if she was injured, why, Virginia could recover.' The error being that it eliminated from the consideration of the jury the question of the negligence of the plaintiff in attracting the attention of the driver from looking out for obstacles; and, further, that said proposition of law was not applicable under section 1972 of 1 Civil Code, and made the county liable for the injuries, whether or not its negligence was the proximate cause thereof. And, further, it eliminated the question as to whether the plaintiff knew and acquiesced in the violation of law in running the automobile at an unlawful rate of speed; further because said proposition of law was not applicable to a case for damages under section 1972 of Civil Code, vol. 1, when the injury was due in part to the negligence of the driver, not because the negligence of the driver is imputed to the passenger, but because the obstruction was not the sole cause of the injury."

These exceptions are overruled.

[3] It does not appear from the case that there was a request to charge as to the question raised as to the responsibility for each other's conduct among those engaged in a common enterprise. It cannot be raised here for the first time.

[4] There is no evidence that Miss Virginia, the plaintiff, was talking to the driver, or that she was talking at all, even though she admits that she was having a good time. There was evidence that she was not talking to the driver, and there is no evidence that she was. Surely a person may have a good time and not talk, even though it is a lady. It is true that there was a conflict of testimony as to what the driver was doing, but there was no evidence that Miss Virginia was talking to him or interfering with him in any way, or had any right to interfere with the management of the automobile. Her mother was there and she was under her control; and, if the automobile had been running too fast, it was not the province, nor was it even proper, for a young lady to di-

rect the movements of her mother and older brother.

[5] The doctrine which seems to be maintained by the appellant is that the plaintiff could not recover if the driver was negligent, and his negligence contributed to the injury. That is the doctrine of contributory negligence, and contributory negligence is an affirmative defense, which must be pleaded. It was not pleaded here.

[6] The contention by the appellant that the injury must be the result solely of the negligence of the county cannot be maintained with success, because, where there is an injury which arises from the defect in the highway, the county is liable, unless it appear (1) that the injury was brought about by the plaintiff's own act, or (2) that he negligently contributed thereto. See *Cooper v. Richland County*, 76 S. C. 206, 56 S. E. 958, 121 Am. St. Rep. 948. These exceptions are overruled.

Exception 5: "That his honor, after reading the statute as to the unlawful speed of automobiles, erred in adding the following: 'Now that is the law about the driver. But take now in connection with what I told you in regard to a passenger in an automobile is not imputable to a passenger in the automobile, unless the passenger had the right to control, unless the relation of master and servant existed between them, or the relation of principal and agent existed.' But should have charged instead of the above: That, if the automobile in which the plaintiff was riding was running at an unlawful rate of speed, it was conclusive of negligence, and the plaintiff could not recover because it was at her own peril that she was riding in an automobile running at an unlawful speed, especially if she acquiesced therein. And, further, the charge intimated to the jury that a passenger in an automobile running at an unlawful rate of speed could not be negligent, and that any negligence in that particular could only be attributed to the driver of the machine." There was no error in the judge's charge. If the appellant desired to have the charge as he says it ought to have been charged, then it was his duty to have so requested. This exception is overruled.

Exception 6: "That his honor erred in charging the jury that the negligence of the driver could not be imputed to a passenger as quoted in exception 3 and 5 above, when he should have charged instead: 'Passenger in an automobile cannot recover for personal injuries caused from running into an obstruction across a highway if the negligence was due in part to the negligence of the driver, not because the negligence of the driver is imputed to the passenger, but because the

obstruction was not the sole cause of the injury.' And further he should have charged that: 'A passenger in an automobile running at an unusual rate of speed on a public highway and acquiescing in said unlawfulness and consenting thereto cannot claim to be absolutely free from contributory negligence or that she did not in any way bring about the injury by her own act.'" What is said in regard to exception 5 applies here. If appellant desired to have the law charged as he says it ought to have been charged, he ought to have so requested. This exception is overruled.

[7] Exception 7: "That his honor erred in charging the jury as follows: 'Or as stated in a particular case—a case I refer to here—the case of *Irvine v. Town of Greenwood* [89 S. C. 511, 72 S. E. 228, 36 L. R. A. (N. S.) 363]. And what they say about the duty of a town or a city to keep its streets up would be equally true in regard to the duty of a county to keep up public roads, because the statutes are very similar (reading to the jury from said decision). But we are unable to give to the duty of keeping the streets in repair the narrow meaning contended for by the respondent. To keep a street in repair means to keep it in such physical condition that it will be reasonably safe for street purposes. It is not enough that its surface shall be safe. A street is not in repair when poles or wires or other structures are so placed in or over it as to be dangerous to those making a proper use of the street. * * * The error being that the case of *Irvine v. Greenwood* was against a city and this is a case against a county; the statutes making cities and towns and counties liable for damages are not 'very similar.' The statute as to towns and cities making municipality liable for the mismanagement of anything under their control, while the statute as to counties makes them liable only for damages through a defect in a highway or the negligent repair of a highway or mismanagement in the negligent repair of a highway; and the said charge was equivalent to saying to the jury that, if a town or city would have been liable under the same facts, then the county is liable in this case." This exception is overruled.

His honor was right when he said, in so far as affects this case, the statutes are similar. This is not a suit for mismanagement of "something under control of the county," but for a defect in the highway.

The judgment appealed from is affirmed.

GARY, C. J., and WATTS, J., concur. HYDRICK, J., concurs in result.

(95 S. C. 235)

TAYLOR et al. v. STRAUSS et al.

(Supreme Court of South Carolina. June 10, 1913. On Petition for Rehearing, July 25, 1913.)

1. TAXATION (§ 805*)—SALE OF LAND FOR NONPAYMENT—ESTATES WHICH MAY BE SOLD—REMAINDER.

Civ. Code 1912, § 115, providing that no action shall be brought to recover possession of land sold for nonpayment of taxes unless brought within one year from the date of sale, does not apply to an action by remaindermen to recover land sold for taxes assessed against the life tenant, since Civ. Code 1912, §§ 288, 290, 393, requiring the property to be listed in the name of the life tenant and making the person to whom it is assessed personally liable for the taxes, do not authorize the assessment of the property of the remaindermen or the sale of their interests.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. §§ 1593-1597; Dec. Dig. § 805.*]

2. TAXATION (§ 617*)—SALE OF LAND FOR NONPAYMENT—INTERESTS OF OWNERS NOT ASSESSED.

The statutes make the amount of taxes due a debt against the person listing the property, and only the property of those whose names are on the tax list are subject to sale for the nonpayment of taxes.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. §§ 1273, 1278; Dec. Dig. § 617.*]

Appeal from Common Pleas Circuit Court of Sumter County; Thos. H. Spain, Judge.

"To be officially reported."

Action by Maud O. Taylor and others against Isaac Strauss and another. Judgment for the defendants, and the plaintiffs appeal. Reversed and remanded.

The exceptions of the plaintiffs are as follows:

"The plaintiffs herein except to the rulings of the presiding judge and his order of nonsuit in the above-stated case as follows:

"First. Because his honor erred in holding that section of the revised statutes of 1893 passed in A. D. 18—was of such effect as that a sale of the land in this state for taxes and a deed to the purchaser made under such sale carried with it not only all right, title, and interest of a life tenant but also all the right, title, and interest of any remaindermen having a right to the title and possession of the property in question upon the termination of the life estate; the property in this case having been sold for taxes assessed against and in the name of the life tenant.

"Second. Because his honor erred in holding a ruling that the statute of laws of this state were so altered and amended and subsequent to the decision of the Supreme Court on the point involved as announced in the case of Shell against Duncan, reported in volume 31, p. 547, of the South Carolina Reports, that under the sale of the land for taxes in this case assessed against the life tenant in 1895 such tax sale carried with it to the purchaser not only all right, title, and interest in the property of the life tenant but

also the rights of the remaindermen in the land in question, some of whom were not born and could not be expected to pay taxes at that time.

"Third. Because his honor erred in that he should have held that a common source of title having been shown in this case in that both that claimed by the plaintiffs and that claimed by the defendants were derived from William Keels, who divided the tract of land in question to his son J. L. Keels for life and after the death of J. L. Keels to the children of J. L. Keels, the fact being disclosed that the defendant's title came through a tax sale of said land assessed against the defaulting taxpayer J. L. Keels, who owned only a life interest in said land, and, having died since said sale, the remaindermen under said will having now the better title to the land according to the proof, and that the issue should have been submitted to the jury to determine who has the better title from such common source.

"Fourth. Because his honor should have held that section 360 of the Revised Statutes of 1893, limiting the right to recover against a tax title, must necessarily be construed with the previous sections of said statute which require taxes to be assessed in the name of the true owner, and therefore persons referred to in section 360 could only be such persons against whom the taxes were assessed or those claiming by, through, or under them.

"Fifth. Because his honor erred in granting the motion for nonsuit in this case in that such application of the statutes referred to would open the door to fraud and permit any life tenant to defeat the title of remaindermen by failure on his part to do his duty in paying taxes on the land assessed against him and his estate; that such was not the intention of the Legislature and such is not the meaning of the statute."

A. B. Stuckey, of Sumter, for appellants. Lee & Moise, Harmon D. Moise, and John H. Clifton, all of Sumter, for respondents.

GARY, C. J. This is an action to recover possession of the tract of land described in the complaint, and the appeal is from an order of nonsuit.

The plaintiffs, some of whom are infants under the age of 21 years, claim title to the land in dispute under and by virtue of the last will and testament of William Keels, deceased, who devised it to J. L. Keels, their father, for and during the term of his natural life, and after his death to be equally divided between his children. The defendants denied the plaintiffs' title and set up the following defenses: (1) That neither the plaintiffs, their ancestor, predecessor, or grantor, were seised and possessed of the premises within ten years next before the commencement of the action; (2) that the

cause of action stated in the complaint accrued more than ten years next before the commencement of the action and is therefore barred by the statute of limitations; and (3) that the cause of action accrued more than two years before the commencement of the action, and the plaintiffs are barred under and by virtue of the provisions of section 462, Code of Laws 1912.

In 1895 the land was sold to pay the taxes which had been assessed against J. L. Keels and was purchased by the defendant Isaac Strauss, to whom a deed of conveyance was made, under which he entered into possession, and which was duly recorded. J. L. Keels died in 1905, and this action was commenced on the 2d day of March, 1911.

At the close of the plaintiffs' testimony, the defendants' attorneys made a motion for a nonsuit on several grounds, but all were overruled except those based on section 115, Code of Laws 1912, which is as follows: "In all cases of sale, the sheriff's deed of conveyance, whether executed to a private person, a corporation, or to the commissioners of the sinking fund, shall be held and taken as prima facie evidence of good title in the holder, and that all proceedings have been regular and all requirements of the law have been complied with. No action for the recovery of land sold by the sheriff under the provisions of this act, or for the recovery of the possession thereof, shall be maintained unless brought within one year from the date of sale, and unless it be sustained by conclusive evidence from the tax duplicates, or from a tax receipt signed by county treasurer, or by a certificate signed by the Secretary of State, or by his agent, showing that all of the taxes and levies for which the land was sold, with the costs that may have accrued thereon, were paid prior to the sale, at the proper time, and to the properly authorized officials." Plaintiffs appealed upon exceptions, which will be reported.

[1] The main question presented by the exceptions is whether section 115, Code of Laws 1912, is applicable to this case.

Section 288, Code of Laws 1912, provides that "every person shall be liable to pay taxes and assessments, on the real estate of which he or she may stand seised in fee, or for life by courtesy, in dower, as husband in right of his wife, or may have the care of as guardian, executor, trustee or committee."

Section 290, Code of Laws 1912, is as follows: "All taxes, assessments and penalties legally assessed shall be considered and held as a debt payable to the state by a party against whom the same shall be charged; and such taxes, assessments and penalties shall be a first lien in all cases whatsoever upon the property taxed; * * * and the county treasurer may enforce the said lien by execution against the said property; or, if it cannot be levied on, he may proceed by action at law against the person holding said property."

Section 297, Code of Laws 1912, contains the following provision: "All persons required by law to list property for others, shall list it separately from their own, and in the name of the owner thereof; but shall be personally responsible for the taxes thereon for the year in which they list it, and may retain so much thereof, or the proceeds of the sale thereof, in their own hands, as will be sufficient to pay such taxes: Provided, that all lands shall be listed and assessed as the property of the person or persons having the legal title to, and the right of possession of, the land at the time of listing and assessment, and in case of persons having possession of lands for life, in the name of the life tenant."

Section 393, Code of Laws 1912, is as follows: "The auditor shall make out, in a book to be prepared for that purpose, in such manner as the comptroller general shall prescribe, a complete list or schedule of all taxable property in his county, and the value thereof as equalized, so arranged as that each separate parcel of real property in each district, * * * shall be contained in a line or lines opposite the names of the owners, arranged in numerical or alphabetical order, * * * and the value of all personal property shall be set down opposite the names of the owners thereof, respectively; and if listed by any other person for and in the name of the owner, the name of such person, and the character in which he acted, shall also be stated in such list."

The deed of the sheriff to Isaac Strauss contains the following recitals: "Whereas, it is provided that immediately upon the expiration of the time allowed by law, for the payment of taxes in any year, the county treasurer of each county shall issue in the name of the state a warrant or execution against each defaulting taxpayer in his county, directed to the sheriff or his lawful deputy, requiring and commanding him to levy the same by distress and sale of so much of the taxpayer's estate, real or personal, or both, as may be sufficient to satisfy the taxes, state, school, county and special, of such defaulters; and further that under and by virtue of such warrant or execution the sheriff shall take exclusive possession of so much of the defaulting taxpayer's estate, real and personal, or both, as may be necessary to raise a sum of money named therein; and, whereas, there appears on the tax duplicate of Sumter county for the fiscal year commencing November 1st, 1892, to '93 and 1893 to '94 certain real estate consisting of one hundred and nine acres of land (under two executions), assessed in the name of J. L. Keels, and valued at three hundred and fifty dollars; the taxes, penalties and assessments thereon amounting under both executions to twenty-seven 81-100 dollars; and whereas, the above named J. L. Keels, having neglected to pay to the county treasurer of Sumter county the above taxes, as-

assessments and penalties as prescribed by law, an execution was issued therefor as directed by said act, on the 20th day of April, 1894, and 16th day of March, 1895, and lodged with the sheriff of Sumter county; and whereas, at a sale made as directed by said act, by the said sheriff, after levy under said execution and due notice, Isaac Strauss became purchaser, and having paid to the sheriff the said amount," etc. (Italics added.)

The statutes provide that property in the possession of a life tenant shall be listed for taxation against him, but they do not contemplate that the taxes should be assessed against the property of the remaindermen. It was no doubt supposed that the value of the life estate would be sufficient to satisfy the taxes; and the intention of the Legislature was to prevent just such a case as the one now under consideration, where the rights of the remaindermen would otherwise be sacrificed, when there is no necessity to resort to their property.

[2] Another reason why there was error in granting the nonsuit was because the property of those alone whose names are on the tax list is subject to sale for nonpayment of taxes. In the case of *Smith v. Cox*, 88 S. C. 1, 65 S. E. 222, one of the reasons why the purchaser at the tax sale therein mentioned was not allowed to hold possession of the property against the owner was because a sale of land under a tax execution, issued on an assessment against one not the owner, is void. A further reason why there was error in granting the nonsuit was because the case comes within the following principles announced in *Black, Tax Titles* (4th Ed.) p. 578 (quoted with approval by Mr. Justice McGowan in *Shell v. Duncan*, 81 S. C. 547, 10 S. E. 330, 5 L. R. A. 821): "In those states where tax is a charge upon the land alone, where no resort in any event is contemplated against the owner or his personal estate, and where the proceeding is strictly in rem, the tax deed will undoubtedly have the effect to destroy all prior interests in the estate, whether vested or contingent, etc. In such case the tax law is notice to the whole world of the liability of the land for all public assessments, etc. If one neglects his duty in this respect, his title becomes extinct, and a new and independent title becomes vested in the purchaser, freed from all prior incumbrances, and indeed of every interest carved out of the old fee. On the other hand, where the law requires the land to be listed in the name of the owner, provides for a personal demand of the tax, and in case of default authorizes the seizure of the body or goods of the delinquent, in satisfaction of the tax, and in terms, or upon a fair construction of the law, permits a sale of the land only, when all other remedies have been exhausted, then the sale and conveyance of the officer passes only the interest of him in whose name

it was listed, upon whom the demand was made, who had notice of the proceedings, and who alone can be regarded as legally delinquent. In such case the title is a derivative one, and the tax purchaser can recover only such interest as he may prove to have been vested in the defaulter at the time of the assessment," etc.

Under the statutes of this state, as we have shown, the amount due for taxes is a debt against the person listing the property for which he may be sued. Furthermore, the real estate cannot be sold until the personal property has been exhausted. *Ebough v. Mullinax*, 34 S. C. 364, 18 S. E. 618.

It is the judgment of this court that the judgment of the circuit court be reversed, and that the case be remanded to that court for a new trial.

HYDRICK, WATTS, and FRASER, JJ., concur.

On Petition for Rehearing.

PER CURIAM. After careful consideration of this petition the court is satisfied that no material question of law or of fact has either been overlooked or disregarded. It is therefore ordered that the order heretofore granted staying the remittitur be revoked and that the petition be dismissed.

(35 S. C. 206)

BATSON v. GREENVILLE & K. RY. CO.

(Supreme Court of South Carolina. July 14, 1913.)

1. TRIAL (§ 145*)—WITHDRAWAL OF ISSUES.

Where just before the court began his charge, plaintiff stated that the allegation as to common-law negligence was withdrawn, but after the charge, where the court stated the issues, such withdrawal was withdrawn by the attorney, defendant was not prejudiced thereby.

[Ed. Note.—For other cases, see *Trial*, Cent. Dig. §§ 328, 341; Dec. Dig. § 145.*]

2. RAILROADS (§ 301*)—CROSSING ACCIDENTS—DUTIES AT CROSSING.

The natural obligations of a railroad company and one crossing the track on a public highway were mutual.

[Ed. Note.—For other cases, see *Railroads*, Cent. Dig. § 956; Dec. Dig. § 301.*]

3. RAILROADS (§ 350*)—CROSSING ACCIDENT—JURY QUESTION.

It is ordinarily for the jury to determine whether it is a willful and reckless disregard of duty for a railroad company to fail to give the required legal warning at a dangerous place, where the track crosses a public highway through cuts.

[Ed. Note.—For other cases, see *Railroads*, Cent. Dig. §§ 1152-1192; Dec. Dig. § 350.*]

Appeal from Common Pleas Circuit Court of Greenville County; J. W. De Vore, Judge.

Action by W. Y. Batson, administrator of J. Asa Batson, against the Greenville & Knoxville Railway Company. From a judgment for plaintiff, defendant appeals. Affirmed.

O. K. Mauldin and Haynsworth & Haynsworth, all of Greenville, for appellant. McCullough, Martin & Blythe, of Greenville, for respondent.

FRASER, J. This is an action for the killing of plaintiff's intestate at the crossing of a public highway and the railroad.

All the exceptions refer to the charge of the presiding judge, and the fact upon which the suit is based need not be set out.

The first and second exceptions are as follows:

"(1) His honor erred in not charging the third request submitted: 'If a person carelessly drives upon a railway crossing in front of an approaching train, by the exercise of slight care he could and would have known that the train was approaching, and that it was dangerous to attempt to cross, then such person may be said to have been guilty of gross negligence, because failure to exercise slight care is gross negligence, and in such case the party could not recover, even though the railway company had negligently failed to ring the bell or blow the whistle.' It is submitted that no part of the charge as given clearly presented to the jury the proposition of law that a person who drives upon a railroad crossing, who knows or ought to know that it is dangerous to attempt to cross at that moment, is guilty of gross negligence.

"(2) He erred in not charging defendant's seventh request as submitted, to wit: 'If one about to cross a railroad track fails to take slight care to ascertain whether the train is approaching, or whether there is any danger in attempting to cross the railroad track, this would constitute gross negligence, and if this operated as the proximate cause of his injury, he could not recover even though the railway company had failed to blow the whistle or ring the bell.' It is submitted that this request correctly stated a proposition of law applicable to the case, not covered by the charge as given, and which was not on the facts."

His honor charged the jury as follows:

"(2) 'Then and under such circumstances it is his duty then to look out for himself, to use reasonable care for the purpose of protecting himself and for his own safety.' The balance of that request, I think, is on the facts, and will not charge it. That request means this, gentlemen, in sum and substance: As I have already explained to you, that while it is the duty of the railroad company to blow the whistle and ring the bell, as I have explained to you, yet if a person has notice in some other way that the train is approaching, and he knows it is approaching the crossing, then he must use that degree of care and caution that a person of ordinary care and prudence would have used under the same or similar circumstances, and look out for himself. He cannot be guilty of gross negligence under such circumstances. And

if he knew on that occasion, if he knew that the train was coming, if he knew it in any other way other than by the blowing of the whistle or the ringing of the bell, and he failed to observe such care and caution and prudence, under those circumstances, as a person of ordinary reason and prudence and care would have done, and his failure to do that contributed to his own death, as a direct and proximate cause thereby, he could not recover, unless you conclude that the act of the defendant was willful and reckless, or that the defendant was guilty of a conscious failure to perform a duty imposed by law.

"(3) 'Then it is for you to say whether such person was guilty of gross negligence or not.' I charge it that way. The failure to exercise slight care is gross negligence. I charge you that: 'Provided his failure to exercise slight care contributed as a direct and proximate cause of his death or injury.' I charge you that with that addition."

His honor charged all it was proper for him to charge.

2. The second exception is: "(3) He erred in not charging defendant's ninth request as submitted, to wit: 'The plaintiff having in open court withdrawn all charges of common-law negligence, and announced that the only charge of negligence upon which he relies is the claim that the railway company failed to give the crossing signals as required by statute, I, therefore, charge that unless you are satisfied by the preponderance of the evidence that the railway company did, in fact, fail to give the crossing signals by blowing the whistle or ringing the bell as required by statute, your verdict must, in that case, be for the railway company.' It is submitted that this request correctly stated a proposition of law applicable to the case which was not covered by the charge." It is true that the plaintiff's attorney did say, just before the charge began, that the allegations as to common-law negligence were withdrawn, but just after the charge began, his honor asked for the issues, and stated them as follows:

"Court: In other words the claim as it stands now is that the first act was done recklessly and willfully; the second was done recklessly and willfully; the third was done recklessly and willfully; and the fourth was done negligently, recklessly, and willfully.

"Mr. Blythe: That's correct, sir."

[1] There were four specifications of negligence in the complaint. They were all included in the statement. Plaintiff had the right to withdraw the withdrawal unless something had been done or omitted that prejudiced the defendant. If the defendant had failed to introduce any evidence, or omitted any argument on account of plaintiff's statement, it would have been different. It seems from the case that both statements were made after evidence and argument had

closed. No prejudice has been shown, and this exception is overruled.

Exception 4: "(4) He erred in not charging defendant's eleventh request as submitted, to wit: 'I charge you further that there is no evidence in this case to carry the question of willfulness or wantonness to the jury. This question, therefore, is withdrawn, and you need not consider that charge in the complaint.' It is submitted that there was no evidence of a willful, wanton, or reckless failure to give the statutory signals; the evidence at most only being open to the inference of ordinary negligence."

[2, 3] The facts were before the jury, and it was their province to say whether there was a failure to give signals of the approach of a train and if there was a failure, whether it was mere inadvertence or willful and wanton disregard of duty. The appellant thinks that crossing was so dangerous that the respondent should have been very careful in approaching it. The natural obligation was mutual, and the statute has added the giving of signals to the appellant. Unfortunately there is no law in this country to prevent a death trap like this, where the public highway and a railroad cross each other, and both are in cuts. It is no part of the duty of the courts to make law. It is the province of the courts to enforce the law and the province of the jury to say whether it is willful and reckless disregard of duty to fail (if it did fail) to give the warning required by law, at a dangerous place.

The judgment is affirmed.

GARY, C. J., and HYDRICK and WATTS, JJ., concur.

(95 S. C. 201)

HARVELEY v. SOUTHERN RY. CO.

(Supreme Court of South Carolina. July 12, 1913.)

1. CARRIERS (§ 39*)—SHIPMENT ON LOGS—REGULATIONS—REASONABLENESS.

Logs shipped on an open car must be made secure by the shipper, as by stakes, etc., to hold them on, and a rule of the company so requiring is reasonable.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. § 98; Dec. Dig. 39.*]

2. CARRIERS (§ 69*)—FREIGHT—ACTION ON CONTRACT.

In order to recover damages against a railway company for breach of a contract of carriage, it must be shown to have failed to perform some duty thereunder.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 217-219, 222, 228, 230, 232-239; Dec. Dig. § 69.*]

Appeal from Common Pleas Circuit Court of Barnwell County; H. F. Rice, Judge.

Action by H. M. Harveley against the Southern Railway Company. From a judgment for defendant, plaintiff appeals. Affirmed.

James M. Patterson and R. P. Searson, Jr., both of Allendale, for appellant. Harley & Best, of Barnwell, for respondent.

FRASER, J. The appellant states his case as follows: "This action was commenced in the court of W. R. Brabham, Esq., magistrate, on summons duly served, and demanding damages of \$100 against the defendant respondent for actual and punitive damages, for willfully, knowingly, maliciously, and unlawfully extorting from him more than a fair and reasonable toll or compensation for the transportation of one car of logs from Barnwell, S. C., to Sumter, S. C. Upon the trial of said case the jury found a verdict for plaintiff in the sum of \$50, from which an appeal was duly had with the circuit court, which resulted in the appeal being sustained and the complaint dismissed in the following order: 'It appears that the 75 cents charged by the defendant for restaking car No. 51515 was charged in accordance with a just and reasonable rule of defendant company, and, there being no evidence to support punitive damage, it is ordered that the company be and the same is hereby dismissed with costs.' From which said judgment the appellants have brought this appeal upon four exceptions, which are duly set out in the case."

It will not be necessary to consider the exceptions separately, because under no view of the case could a judgment for the plaintiff be sustained. The 75 cents charged was not a "toll or compensation for the transportation." The charge was for restaking, and not for transportation.

The first connection of the defendant with this case is when the plaintiff, who is engaged in shipping logs from various places, presents himself to the agent of the defendant at Barnwell, S. C., and gets a bill of lading for a car load of logs that were at Ashley, about three miles away. When the car got to Branchville, it was inspected by the inspector of the defendant and condemned as unfit for the transportation, because there were not stakes enough to hold the logs in place on the car during transit to its destination. The agent at Branchville had additional stakes put in at a cost of 75 cents. This cost of restaking was demanded at Sumter, the point of destination, from the consignee before the logs were delivered. After some delay and some demurrage, which was paid, the shipment was delivered, and this action was brought for actual and punitive damages.

[1] There is no direct evidence as to who loaded the logs, or whose business it was to make them secure. That logs shipped on an open car must be made secure is too manifest to be questioned, and is not questioned. There is not a word to show that the rules are unreasonable. There is no evidence to show that the logs were securely placed up-

on the car. There was testimony to show that the restaking was necessary, and it was uncontradicted.

[2] There was no evidence to show that it was the duty of the defendant to stake or restake the logs; and, in order to recover damages on the contract, there must appear to have been a failure on the part of the defendant to perform some duty. There was evidence of some delay and some expense at Sumter, but there was no evidence of the length of the delay at Sumter, or the loss occasioned by it and no evidence of the expenses. There was no evidence that there was any default on the part of the defendant, or any loss for which it was responsible.

The judgment appealed from is affirmed.

GARY, C. J., and HYDRICK and WATTS, JJ., concur.

(94 S. C. 199)

GROCE v. GREENVILLE, S. & A. RY. CO.
(Supreme Court of South Carolina. March 28, 1913.)

1. RAILROADS (§ 72*)—RIGHT OF WAY—EXTENT OF WAY ACQUIRED BY DEED.

Where a right of way had been granted along a line to be located approximately along a certain survey, the railroad cannot change its line so as not reasonably to approximate the location referred to in the grant.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 168-178; Dec. Dig. § 72.*]

2. EMINENT DOMAIN (§ 56*)—PUBLIC USE—CHANGE OF RAILROAD LOCATION.

If the proposed change from the original line is not reasonably necessary to the proper construction of the railroad, the right to take the land needed cannot be acquired by condemnation, since the power of eminent domain can be exercised only where it is reasonably necessary for some public purpose.

[Ed. Note.—For other cases, see Eminent Domain, Cent. Dig. §§ 147-160; Dec. Dig. § 56.*]

3. EMINENT DOMAIN (§ 69*)—COMPENSATION—NECESSITY—PAYMENT OF MONEY.

Where a railroad company changes the line of its road after acquiring a right of way by deed, it cannot compel the landowner to accept a conveyance of other land in lieu of that taken by the proposed change, since compensation for property taken for public use can be made only in money.

[Ed. Note.—For other cases, see Eminent Domain, Cent. Dig. §§ 171-179; Dec. Dig. § 69.*]

4. EMINENT DOMAIN (§ 274*)—REMEDIES OF OWNER—INJUNCTION—RESTRAINING CONSTRUCTION.

Where a railroad company, which has acquired a right of way by deed along a line as approximately located by a certain survey, changes its route, but still claims a right of way under the deed, and the landowner claims that the new line does not reasonably approximate the line described in the deed and that there is no reasonable necessity for the change, the owner is entitled to a temporary injunction until the hearing on those questions, since neither can be tried in condemnation proceedings.

[Ed. Note.—For other cases, see Eminent Domain, Cent. Dig. §§ 753, 765-768; Dec. Dig. § 274.*]

5. TRESPASS (§ 13*)—ACTS CONSTITUTING TRESPASS—WRONGFUL ACT AFTER A RIGHTFUL ENTRY.

Where a railroad company enters upon the land under a grant of a right of way or with consent, actual or presumed, it is liable for any trespass committed outside the right of way granted or for any invasion of the property rights of the owner not incident to the proper location and construction of its road.

[Ed. Note.—For other cases, see Trespass, Cent. Dig. § 11; Dec. Dig. § 13.*]

6. INJUNCTION (§ 48*)—TRESPASS TO REAL PROPERTY—CONTINUING TRESPASS.

If the trespass is continuing and of such a nature that the legal remedy therefor is inadequate, the owner is entitled to an injunction.

[Ed. Note.—For other cases, see Injunction, Cent. Dig. § 101; Dec. Dig. § 48.*]

7. INJUNCTION (§ 148*)—INTERLOCUTORY INJUNCTION—BOND.

Where a temporary injunction is granted to restrain the construction of a railroad pending a determination of the company's right to construct its road along a certain line over the plaintiff's land, the company is entitled to a bond sufficient to protect it from any loss occasioned by reason of the injunction in case its right should be finally upheld.

[Ed. Note.—For other cases, see Injunction, Cent. Dig. §§ 323-334; Dec. Dig. § 148.*]

Gary, C. J., dissenting.

Action by one Groce against the Greenville, Spartanburg & Anderson Railway Company. From an order denying an interlocutory injunction, the plaintiff appeals. Order reversed.

Bomar & Osborne, of Spartanburg, for appellant. Nicholls & Nicholls and Jno. Gary Evans, all of Spartanburg, for appellee.

HYDRICK, J. Plaintiff brought this action solely for the purpose of obtaining an injunction and appeals from an order refusing an injunction until the case can be heard on the merits. So much of the complaint as is material to the consideration of the appeal is, in substance, as follows: That plaintiff is the owner of a tract of land which is bounded on the west by Middle Tyger river, her line extending to the center of the stream; that, in May, 1912, she granted defendant a right of way over said tract along a certain route which had been surveyed and was agreed upon; that defendant thereafter changed its plans and is proceeding, against her objection and protest, to construct its road over her land along a substantially different route, without legal right or her permission to do so, and is about to cut a new channel for said river for the purpose of diverting the stream from her said lands without her consent or permission; that neither such change in the route of the road or in the channel of the river is necessary for the performance of defendant's functions as a railway company, and that, unless defendant is enjoined, she will be deprived of valuable

property rights, without due process of law, and will be irreparably injured; that defendant never notified her in writing, as required by the statute, that it required a right of way over her land along the route upon which it is now constructing its road, or that it required a change in the bed of the river for its purposes, and, as soon as she learned that defendant was proceeding to take her property without authority and without process of law, she objected and protested against the same, but that her objections and protests were unavailing, and she is without adequate remedy save by the injunctive process of the court; that defendant denies her ownership of said land and her right to compensation for the taking thereof. She prays that defendant be enjoined.

The plaintiff's grant describes the right of way as "running in a general southeasterly direction, and to be finally located approximately as shown by a survey made by Maj. Thos. B. Lee." It also gave defendant the right "to do any and all acts necessary or appropriate for any proper purpose connected with said road or line."

As originally located, the road passed to the east of a certain bend in Middle Tyger river on plaintiff's land. The bend is in the shape of a horseshoe. At the nearest point to the toe of the shoe, the road appears to be only about 10 or 15 feet from the eastern bank of the river. The new route which the company proposes to take begins its departure from the old between a third and a half of a mile south of the river, and it gradually diverges to the west, until it attains a distance of a little over 100 yards from the original location, and then the lines of the two locations converge until they meet about the same distance north of the point of greatest departure. The new location being a shorter curve than the old, it crosses the bend of the river about 200 feet west of the old. The proposed change in the channel of the river consists in throwing it entirely west of the new location within the horseshoe. The part of the horseshoe east of the new location contains about three acres, and, to compensate plaintiff for the proposed change in the channel of the stream and still keep the stream as her western boundary, defendant has offered to convey to her the land within the horseshoe east of the proposed new channel.

The defendant asserts the right to make these changes under and by virtue of the plaintiff's grant—that in the route on the ground that it is "approximately" as shown by the survey referred to in the grant, and that in the channel of the river on the ground that it is necessary to the proper location of its road. These allegations are denied by the plaintiff. Upon both propositions the testimony is conflicting; so much so that, considering all the evidence, the court could not say that it was made so clearly to ap-

pear that plaintiff's action is without merit as to warrant the refusal of a temporary injunction until the hearing on the merits.

[1, 2] If the plaintiff should establish, at the trial, that the revised location is such a departure from the old that, all the circumstances being considered, it is not reasonably approximate to the location referred to in the grant, then the right of way along the new route is not covered by the grant, and plaintiff would be entitled to compensation for the taking thereof; and, if it should be proved that the proposed change in the channel of the river is not reasonably necessary to the proper location and construction of defendant's road, the change cannot be made without plaintiff's consent, because the power of eminent domain cannot be exercised to take the property of the citizen, unless it is reasonably necessary to do so to subserve some public purpose.

[3] Just here it may be said that the offer of defendant to convey to plaintiff the land within the horseshoe east of the proposed new location of the river may be a fair compensation for the change, and it may be that plaintiff is unreasonable in refusing to accept it. But, as has been shown, if the change is not reasonably necessary for a public purpose, it cannot be made at all without plaintiff's consent, which she may even capriciously withhold. Moreover, there is no authority for requiring plaintiff to accept the land within the horseshoe in compensation for her property rights taken. The law provides for compensation only in money. Any other must be by consent of the parties interested.

The necessity for the taking above referred to need not be absolute, but it should be reasonable; otherwise corporations invested with the power to condemn might arbitrarily and oppressively deprive the citizen of his property, when it is not necessary to the public good. 15 Cyc. 632.

[4] In either event above suggested, unless the injunction is granted, the plaintiff might be deprived of her property, not only without compensation, but she might be deprived of it without authority of law. The case falls squarely within the principle of *Riley v. Union Station*, 67 S. C. 84, 45 S. E. 149, and the cases therein cited. This view of the case renders unnecessary, at this time, the consideration of the question whether the defendant's entry upon plaintiff's land for the purpose of construction was by the consent of plaintiff, actual or presumed, for the purpose of relegating her to condemnation proceedings, because the defendant denies her right to compensation, and the plaintiff denies the defendant's right to change the location or the channel of the river either under her grant or under the power of eminent domain. These questions can be decided only in an action. *Railroad Co. v. Burton*, 63 S. C. 360, 41 S. E. 451; *Riley v. Union Sta-*

tion, 67 S. C. 84, 45 S. E. 149; *Glover v. Railway*, 72 S. C. 382, 51 S. E. 917, and cases cited.

[5] But, even if the entry for the purpose of construction was made under the grant or by consent, actual or presumed, the defendant would nevertheless be liable for any trespass committed outside the right of way granted or for any invasion of the property rights of the plaintiff not incident to the proper location and construction of its road, just as it would be in case of an entry without such consent. *Granger v. Telegraph Co.*, 70 S. C. 528, 50 S. E. 193, 106 Am. St. Rep. 750; *Burnett v. Telegraph Co.*, 71 S. C. 148, 50 S. E. 780; *Mason v. Telegraph Co.*, 71 S. C. 152, 50 S. E. 781; *Phillips v. Telegraph Co.*, 71 S. C. 577, 51 S. E. 247; *Burnett v. Telegraph Co.*, 79 S. C. 465, 60 S. E. 1116; 38 Cyc. 998.

[6] The allegation here is that the defendant is trespassing outside the right of way granted, and that the trespass is not only of a continuous nature, but that it is of such a nature that the legal remedy therefor is inadequate; and therefore the remedy by injunction is appropriate. *McClellan v. Taylor*, 54 S. C. 430, 32 S. E. 527; *McClary v. Lumber Corporation*, 90 S. C. 164, 72 S. E. 145, and cases cited.

[7] It appears from the record that no bond was required of plaintiff when the rule to show cause, which carried a temporary restraining order, was granted. It further appears, from affidavits in the case, that defendant is sustaining heavy damages daily by reason of the injunction. Therefore, as a condition of enjoining defendant until the trial, plaintiff should be required to give such bond as will afford the defendant adequate protection, if the court shall finally decide that plaintiff was not entitled to the injunction. Defendant is entitled to such a bond. *Water Power Co. v. Nunamaker*, 73 S. C. 550, 53 S. E. 996. The amount of the bond will be fixed upon application to the circuit court or a judge thereof.

Reversed.

GARY, C. J., dissents.

(96 S. C. 302)

TUCKER v. CLINTON COTTON MILLS.

(Supreme Court of South Carolina. June 30, 1913. On Petition for Rehearing, July 25, 1913.)

1. TRIAL (§ 139*)—NONSUIT—EVIDENCE.

A motion for nonsuit, on the ground of the failure of the testimony to establish the material allegations of the complaint, is properly overruled, where there is testimony tending to prove all the allegations of the complaint.

[Ed. Note.—For other cases, see *Trial*, Cent. Dig. §§ 332, 333, 338-341, 365; *Dec. Dig.* § 139.*]

2. MASTER AND SERVANT (§§ 288, 289*)—ACTION FOR DEATH OF CHILD—EVIDENCE—QUESTION FOR JURY.

In an action by a parent for the death, by wrongful act, of an infant child, where the evidence of decedent's contributory negligence and the parent's assumption of risk was susceptible of more than one inference, the issues were for the jury.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. §§ 1068-1090, 1092-1132; *Dec. Dig.* §§ 288, 289.*]

3. TRIAL (§ 260*)—INSTRUCTIONS—REFUSAL OF INSTRUCTIONS COVERED BY CHARGE GIVEN.

It is not error to refuse requested instructions embraced in the charge given.

[Ed. Note.—For other cases, see *Trial*, Cent. Dig. §§ 651-659; *Dec. Dig.* § 260.*]

4. TRIAL (§ 295*)—INSTRUCTIONS—SUFFICIENCY.

The instructions must be considered in their entirety, and if, when so considered, the issues are fairly presented to the jury, exceptions assigning error in parts thereof must be overruled.

[Ed. Note.—For other cases, see *Trial*, Cent. Dig. §§ 703-717; *Dec. Dig.* § 295.*]

5. APPEAL AND ERROR (§ 216*)—INSTRUCTIONS—OBJECTIONS—NECESSITY.

Exceptions, assigning error in stating in the instructions the issues raised by the pleadings, cannot be sustained, where the trial court was not requested to make the necessary correction.

[Ed. Note.—For other cases, see *Appeal and Error*, Dec. Dig. § 216; *Trial*, Cent. Dig. § 627.]

6. APPEAL AND ERROR (§ 1032*)—QUESTIONS REVIEWABLE—PREJUDICIAL ERROR.

A party complaining of errors must show that they are prejudicial, or the judgment must be affirmed.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 4047-4051; *Dec. Dig.* § 1032.*]

Appeal from Common Pleas Circuit Court of Laurens County; R. W. Memminger, Judge.

Action by Nannie Tucker, administratrix of Roy Tucker, deceased, against the Clinton Cotton Mills. From a judgment for plaintiff, defendant appeals. Affirmed.

F. P. McGowan and Richey & Richey, all of Laurens, for appellant. Cannon & Blackwell, of Laurens, for respondent.

GARY, C. J. This is an action for damages, alleged to have been sustained by the plaintiff, on account of the wrongful acts of the defendant, in causing the death of her intestate son. The allegations of the complaint material to the questions presented by the exceptions are as follows: "(1) That on the 23d day of June, 1911, and prior thereto, the defendant, Clinton Cotton Mills, owned, maintained and used in connection with its cotton mill at Clinton, S. C., a large and deep dam or reservoir, which it kept filled with water, to be used in connection with its said cotton mill, the said dam or reservoir being located near the Clinton Cotton Mills, public streets, and many of the residences of the town of Clinton, where children of tender years were

accustomed to resort for play, the said dam or reservoir not being protected by a fence, guard, or otherwise, but was exposed and easily accessible to children, who, not knowing of the danger, made use of it as a place of amusement. (2) That it was the duty of the defendant, Clinton Cotton Mills, to have securely protected the said dam or reservoir, so that children resorting to it as a place of amusement would not be injured, but the said defendant, not regarding its duty in that behalf, carelessly, negligently, willfully, and wantonly permitted the said dam or reservoir to be and remain uninclosed or unprotected in any way. (3) That the defendant, Clinton Cotton Mills, knew of the unprotected condition of said dam or reservoir, and that children resorted there as a place of amusement, which facts this plaintiff is informed and believes, and so alleges had been more than once called to the attention of the defendant, with the request that the said dam or reservoir be properly protected. (4) That the plaintiff's intestate, Roy Tucker, a small boy of tender years, being about 14 years of age, while playing around said dam or reservoir on the 23d day of June, 1911, fell into said dam or reservoir, which was filled with water, and was drowned. That the plaintiff is the mother of the said Roy Tucker, deceased, for whose benefit this action is brought and maintained. (5) That the dam or reservoir mentioned aforesaid was so constructed and used by the defendant, Clinton Cotton Mills, that the hot water from its boilers and other portions of said mill was run back into said dam or reservoir, and that at the timesaid Roy Tucker fell into said dam or reservoir and drowned the water was almost scalding hot. (6) That Roy Tucker was an employé of the said defendant, Clinton Cotton Mills, at the time of his death, and was at work for the defendant on said date, and that the plaintiff, the mother of the said Roy Tucker, had previously requested the said defendant not to allow her son to leave the said cotton mill until its regular stopping hour for dinner, or otherwise, which the defendant negligently, carelessly, willfully, and wantonly disregarded on the day that her son was drowned." The defendant denied the alleged wrongful acts, and by way of defense alleged: "That the said Roy Tucker was well acquainted with the character, conditions, and surroundings of the said millpond, and was of a sufficient intelligence and capacity to comprehend and understand its dangers, and so carelessly, recklessly, and negligently jumped across a gap in the dam in said pond, and thereby induced his younger brother to attempt to leap across the said gap in said pond, and caused his younger brother to fall therein, and so carelessly and negligently attempted to rescue his younger brother from drowning in said pond that he thereby contributed to his death as a proximate cause thereof, without which his death

would not have occurred." The defendant also set up the defense of assumption of risk, both as to Roy Tucker and the plaintiff. At the close of the plaintiff's testimony the defendant made a motion for a nonsuit, which was refused, and, at the conclusion of all the testimony, it made a motion for the direction of a verdict on the same grounds as the motion for nonsuit, which was also refused. The jury rendered a verdict in favor of the plaintiff for \$1,000. The defendant made a motion for a new trial, which was overruled. The defendant then appealed upon numerous exceptions.

[1] There was testimony tending to prove all the allegations of the complaint hereinbefore mentioned. Therefore the exceptions assigning error, in the refusal to grant the motion for nonsuit, on the ground that there was a failure of testimony to establish the material allegations of the complaint, must be overruled.

[2] Conceding that there was testimony to the effect that Roy Tucker was guilty of contributory negligence, and that Roy Tucker and the plaintiff assumed the risks incident to his employment, nevertheless the testimony is susceptible of more than one inference, and those issues were properly submitted to the jury.

[3] The defendant presented certain requests to charge, which his honor the presiding judge did not charge in the form in which they were presented, but stated that he would endeavor to embrace them in his general charge, which he did. The exceptions assigning error in this respect are therefore without merit.

[4] There are exceptions assigning error in certain portions of his honor's charge; but, when the charge is considered in its entirety, it will be seen that there was no prejudicial error. The charge was full, clear, and able, and fairly presented to the jury the law applicable to the case.

[5] The exceptions assigning error on the part of the presiding judge, in stating the issues raised by the pleadings cannot be sustained, as it does not appear that he was requested to make the necessary correction.

[6] None of the other exceptions can be sustained, for even conceding there was error in the particulars therein specified, it has not been made to appear that it was prejudicial. Judgment affirmed.

HYDRICK, WATTS, and FRASER, JJ., concur.

On Petition for Rehearing.

PER CURIAM. After careful consideration of this petition the court is satisfied that no material question of law or of fact has either been overlooked or disregarded. It is therefore ordered that the order heretofore granted staying the remittitur be revoked, and the petition be dismissed.

(35 S. C. 176)

McNAIR et al. v. JOHNSON et al.

(Supreme Court of South Carolina. July 9, 1913.)

1. MORTGAGES (§ 494*)—FORECLOSURE—DEED—DESCRIPTION.

A mere false description does not make an instrument inoperative; consequently where a judgment of foreclosure adjudged a sale of "the mortgaged premises described in the complaint," which sufficiently described the premises, is not invalid and void as to the parties to the action, the additional description in the judgment itself was inaccurate, the description furnished in the complaint rendering it possible to make the judgment certain.

[Ed. Note.—For other cases, see Mortgages, Cent. Dig. §§ 1441-1445; Dec. Dig. § 494.*]

2. DEEDS (§ 38*)—VALIDITY—DESCRIPTION.

A deed is not void for uncertainty where, though there be errors, yet from the whole description the land sought to be conveyed can be identified.

[Ed. Note.—For other cases, see Deeds, Cent. Dig. §§ 65-79; Dec. Dig. § 38.*]

Appeal from Common Pleas Circuit Court of Chesterfield County; H. P. Green, Special Judge.

Action by B. B. McNair and another against Fanny Johnson and another. From a judgment for defendants, plaintiffs appeal. Reversed and remanded.

Stevenson & Prince, of Cheraw, for appellants. W. P. Pollock and Edward McIver, both of Cheraw, for respondents.

GARY, C. J. This is an action to recover possession of the tract of land described in the complaint, and the appeal is from an order of nonsuit.

Andrew Johnson, the defendants' ancestor, executed a mortgage in favor of Calvin B. McNair and plaintiffs' ancestor on "all that piece, parcel or tract of land situate, lying and being in the county and state aforesaid, and bounded by lands of J. J. Burch and D. T. Redfearn, containing three hundred and five acres. Reference to a deed from Joseph S. Burch to J. J. Johnson will more fully appear." The mortgage was foreclosed and in the judgment of foreclosure it was "adjudged that the mortgaged premises described in the complaint in this action be sold at public auction, in the county of Chesterfield, by the sheriff of said county. * * * At the conclusion of the judgment of foreclosure, the property ordered to be sold is thus described: "All that certain piece, parcel or tract of land situate, lying and being, in the county and state aforesaid, on the waters of Indian creek, containing three hundred acres more or less and is bounded as follows: On the north side, by lands of J. F. Meyers, Jno. D. Barber and Lou W. White, and Indian creek; on the east by lands belonging to the estate of Elizabeth White, deceased; on the south side by lands of Mary J. and Carolina R. Mulloy; and on the west side, by lands belonging to or in the posses-

sion of Dollie Pitts and others"—an entirely different tract from that described in the mortgage. The property described in the mortgage was advertised and sold by the sheriff to Calvin B. McNair, who died intestate in 1905. The description of the property in the deed of conveyance, executed by the sheriff to Calvin B. McNair, was the same as that mentioned in the mortgage; and the mortgaged property was properly described in the complaint for foreclosure.

His honor, the presiding judge, granted the nonsuit on the ground that the wrongful description of the property in the judgment of foreclosure rendered the sale of the property by the sheriff null and void; and the sole question properly before the court for consideration is whether said ruling was erroneous.

[1] One of the maxims recognized in Broom's Legal Maxims (star page 605) is: "Mere false description does not make an instrument inoperative" (*falsa demonstratio non nocet*). The author in commenting thereon uses this language: "Falsa demonstratio may be defined to be an erroneous description of a person or thing in a written instrument; and the above rule respecting it may be thus stated and qualified as soon as there is an adequate and sufficient definition with convenient certainty of what is intended to pass, by the particular instrument; a subsequent erroneous addition will not vitiate it." The judgment of foreclosure refers to "the mortgaged premises described in the complaint in this action" and was sufficient to put all parties (especially those who were parties to the action and their privies) upon inquiry which, if pursued with due diligence, would have shown the true description, not only from the mortgage but from the complaint, to which reference was made. Therefore the description in the judgment of foreclosure was not rendered inoperative by a subsequent erroneous addition. Another maxim of the law applicable to this case is: "That is sufficiently certain which can be made certain."

[2] In Devlin on Real Estate, vol. 2, § 1012, the author says: "A deed is not void for uncertainty because there may be errors or an inconsistency in some of the particulars. Generally the rule may be stated to be that the deed will be sustained, if it is possible from the whole description, to ascertain and identify the land intended to be conveyed." In a note to that section it is said: "As that is certain which can be made certain, the description, if it will enable a person of ordinary prudence acting in good faith and making inquiries, which the description would suggest to him to identify the land, is sufficient." He also says: "Where there are several calls in a deed, and with the exception of one they may all be applied upon the face of the earth, constituting an intelligent

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

and correct description of the lot, to which they refer, the one that does not apply will be rejected as surplusage and the others will prevail. * * * If the deed contains two descriptions, one correct and the other false in fact, the latter should be rejected as surplusage. Where one of two different descriptions applies to land to which the grantor had title, and the other to land which he did not own, the former will be taken as the true description, and the latter will be rejected as false. If sufficient remains after rejecting a part of the description which is false, the deed will take effect." Section 1016.

These principles are applicable to this case and show conclusively that it was error to grant the nonsuit.

It is the judgment of this court that the judgment of the circuit court be reversed, and the case remanded for a new trial.

HYDRICK and FRASER, JJ., concur.
WATTS, J., disqualified.

(95 S. C. 203)

CITY OF SUMTER v. KEELS.

Ex parte KEELS.

(Supreme Court of South Carolina. July 12, 1913.)

CRIMINAL LAW (§ 98*)—JURISDICTION OF RECORDER'S COURT.

Under Civ. Code 1902, § 2003, conferring upon mayors the powers and authorities of magistrates in criminal cases within the police jurisdiction of their respective cities, it was merely intended to give them the same power to try persons charged with the violation of an ordinance that a magistrate had to try a person charged with the violation of a statute or other law of the state in cases where the punishment did not exceed a fine of \$100 or imprisonment for 30 days, and the recorder of the city of Sumter was without power to try offenses other than violations of city ordinances, and hence without jurisdiction to try and convict for petit larceny in violation of the criminal laws of the state.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 129, 137-166; Dec. Dig. § 98.*]

Original proceedings in habeas corpus before Justice Fraser.

John Keels was convicted in the Recorder's Court of the City of Sumter of petit larceny, and from an order in habeas corpus proceedings discharging him, the city appeals. Affirmed.

The order of Justice Fraser was as follows:

"This is a proceeding in habeas corpus. The defendant was convicted by the recorder of the city of Sumter upon six charges of petit larceny and sentenced to 30 days for each offense. There was included in the indictment a charge of carrying concealed weapons. The defendant was also convicted of this offense. The alternative was given in each case of paying a fine. The defendant paid the fine for carrying concealed weap-

ons. The city of Sumter has an ordinance against carrying concealed weapons, but none against larceny. The prisoner raises the question of jurisdiction of the recorder to try offenses other than violations of the ordinances of the city. It is conceded that Sumter is a city of more than 2,000 inhabitants and less than 20,000 inhabitants. I hold that the recorder of the city of Sumter has no jurisdiction to try prisoners for offenses other than offenses against the ordinances of the city of Sumter. It is therefore ordered that the defendant, Jno. Keels, be discharged from custody under the commitment by the recorder of Sumter, and that unless he be held under some other authority he be discharged from custody and allowed to go hence without day."

Lee & Molse, of Sumter, for appellant.
H. D. Molse and A. S. Merrimon, both of Sumter, for respondent.

WATTS, J. The agreed statement of facts in this case shows that John Keels was tried by the recorder of the city of Sumter in 1913 on six charges of petit larceny and convicted on all the charges and sentenced to 30 days' imprisonment on the county chain gang for the county of Sumter or pay a fine of \$100 in each case. Keels having been committed to the county chain gang, a petition for a writ of habeas corpus, in the usual form, was taken before Justice Fraser, based upon the lack of jurisdiction of the recorder of the city of Sumter to try and punish the defendant (respondent here) for petit larceny upon the ground that the city of Sumter had no ordinance prohibiting the same, and that the recorder's powers extended only to the punishment of offenses against the ordinances of the said city of Sumter. Justice Fraser issued the writ and heard the case and sustained the contention of Keels and ordered his discharge from custody. This order of Justice Fraser should be set out in the report of the case. From this order the city of Sumter appeals, and the exceptions practically raise but one point: Did his honor, Justice Fraser, err in holding that the recorder of the city of Sumter was without power or authority to try or convict the defendant for a criminal offense, contrary to the criminal statutes of the state of South Carolina then in force, but only had jurisdiction to try and convict for offenses contrary to the ordinances of the city of Sumter? Under the facts of the case, we have no hesitation in saying the exceptions should be overruled, and judgment affirmed.

The case of City of Anderson v. Seligman, 85 S. C. 16, 67 S. E. 13, is conclusive and controls this case. On page 18 of 85 S. C., on page 13 of 67 S. E., of that case, Justice (now Chief Justice) Gary uses the following language: "When section 2003 of the Code of Laws 1902 conferred upon mayors the powers

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

and authority of magistrates in criminal cases, within the corporate limits and police jurisdiction of their respective cities, it was merely intended to give to mayors the same power to try persons charged with the violation of an ordinance that a magistrate had to try a person charged with the violation of a statute or other law of the state in cases where the punishment did not exceed a fine of \$100 or imprisonment for 30 days. A violation of the provisions of an ordinance of a city and a violation of the statute of the state are two separate and distinct offenses."

Judgment affirmed.

GARY, C. J., and HYDRICK, J., concur.
FRASER, J., disqualified.

(95 S. C. 217)

BROWN & PARLER v. KOLB.

(Supreme Court of South Carolina. July 14, 1913.)

1. COSTS (§ 3*)—TAXATION—STATUTES.

Costs are purely statutory.

[Ed. Note.—For other cases, see Costs, Cent. Dig. §§ 1, 4, 5; Dec. Dig. § 3.*]

2. COSTS (§ 231*)—RECOVERY BY SUCCESSFUL PARTY—STATUTES.

Under Code Civ. Proc. 1912, § 412, declaring that, where the judgment in the appellate court is more favorable to appellant than the judgment appealed from, he shall recover costs, a defendant appealing from a judgment against him in claim and delivery which awards to plaintiff the right of possession of the property in dispute or the value fixed at \$100, is entitled to costs, where the appellate court affirms the judgment, with the exception that it reduces the amount to \$77.50.

[Ed. Note.—For other cases, see Costs, Cent. Dig. §§ 847, 852, 853, 855, 872-875; Dec. Dig. § 231.*]

Appeal from Common Pleas Circuit Court of Sumter County; Ernest Gary, Judge.

Action by Brown & Parler against J. R. Kolb. From a judgment taxing costs in favor of plaintiffs against defendant, the latter appeals. Reversed.

A. B. Stuckey, of Sumter, for appellant.
L. D. Jennings and R. D. Epps, both of Sumter, for respondents.

FRASER, J. The respondent's statement of this case is as follows:

"This is an appeal from the order of his honor, Judge Ernest Gary, in the above-stated case, taxing the costs upon appeal against the defendant, who was the appellant upon the first appeal. This was an action in claim and delivery brought in the court of magis-

trate. Before the case was submitted to the jury, the attorney for the defendant asked that a special verdict be also rendered by the jury, fixing the amount due to the plaintiffs by the defendant. In response to this request, the verdict of the jury was as follows: 'We find for the plaintiffs the right to the possession of the property in dispute, or the value thereof, to wit, the sum of \$100, in case the return thereof cannot be had. We find the defendant is due the plaintiff the sum of \$100. Eugene E. Aycock, Foreman.'

"From the judgment entered on this verdict, the defendant appealed to the Supreme Court upon nine exceptions, asking for a new trial upon four grounds. Upon said appeal the Supreme Court refused the new trial, and affirmed the verdict below, with the exception of the special finding of the jury, which was reduced in amount from \$100 to \$77.55. Thereupon the plaintiffs gave notice of a motion to tax the appeal costs, and the defendant gave a like notice. When the motion came on to be heard by the clerk of the circuit court, the said clerk taxed the costs in favor of the defendant and against the plaintiffs. The plaintiffs thereupon moved his honor, Judge Ernest Gary, to correct said taxation, and to tax the costs in favor of the plaintiffs. When this motion was heard by his honor, the circuit judge, his honor passed an order correcting the said taxation, and ordered that the said costs be taxed in favor of the plaintiffs against the defendant. From this order the defendant now appeals."

[1, 2] Costs are purely statutory. The statute provides as follows (Code 1912, Vol. 2 [Civil Procedure] § 412): "If such offer be not made (none was made here) and the judgment of the appellate court be more favorable to the appellant than the judgment of the court below, or if such offer be made and not accepted, and the judgment in the appellate court be more favorable to the appellant than the offer of the respondent, the appellant shall recover costs: Provided, however, that the appellant shall not recover costs unless the judgment appealed from shall be reversed on such appeal, or be made more favorable to him, to the amount of at least ten dollars."

The judgment was made more favorable to the appellant herein to the amount of \$22.45, and the statute says the appellant shall recover costs.

The judgment appealed from is reversed.

GARY, C. J., and WATTS, J., concur. HYDRICK, J., concurs in result.

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

(95 S. C. 239)

THOMASON v. VICTOR MFG. CO.

(Supreme Court of South Carolina. June 14, 1913.)

1. MASTER AND SERVANT (§§ 101, 102*)—DUTIES OF MASTER—SAFE PLACE TO WORK.

It is the duty of the master to furnish the servant with a reasonably safe place to work, and to keep the place in reasonably safe and suitable repair.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 135, 171, 174, 178-184, 192; Dec. Dig. §§ 101, 102.*]

2. TRIAL (§ 260*)—INSTRUCTIONS—REQUESTS.

Where the court charged on the defendant's liability for negligence, and on the plaintiff's contributory negligence and assumption of risk, and expressly told them that willfulness was not claimed, and that they had nothing to do with that, error in refusing to sustain a motion that there was no evidence of willfulness or wantonness was harmless.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 651-659; Dec. Dig. § 260.*]

3. TRIAL (§ 260*)—INSTRUCTIONS—REQUEST COVERED BY GENERAL CHARGE.

Where the court in his own language charged the jury fully as to all the law in the case, it was not error to refuse requested charges, the law of which was substantially embodied in the court's general charge.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 651-659; Dec. Dig. § 260.*]

Appeal from Common Pleas Circuit Court of Spartanburg County; T. S. Sease, Judge.

Action by Melvin E. Thomason against the Victor Manufacturing Company. Judgment for plaintiff, and defendant appeals. Affirmed.

Haynsworth & Haynsworth, of Greenville, and Bomar & Osborne, of Spartanburg, for appellant. C. P. Sims and Sanders & De Pass, all of Spartanburg, for respondent.

WATTS, J. This was an action for damages (compensatory and punitive) by respondent against appellant for an injury sustained by the respondent while in the employ of the appellant. The answer of appellant was a denial of the material allegations of the complaint, and set up the plea of contributory negligence and assumption of risk on the part of plaintiff respondent. The case was tried before Judge Sease and a jury, and resulted in a verdict in favor of plaintiff respondent, in the sum of \$550. The appellant appeals, and alleges error on the part of his honor in eight exceptions.

[1] The first three exceptions allege error on the part of his honor in not granting a nonsuit at the close of plaintiff's testimony. In the consideration of this question this court will consider all of the testimony in the case, and from the evidence in the case, we see no error on the part of his honor in refusing to grant the nonsuit. There is no question but that it is the duty of the master to furnish the servant a reasonably safe place within which to work, and keep the

place within reasonable repair. There was abundance of evidence to go to the jury to be determined by them whether the place, at which plaintiff was injured, was unsafe, and these exceptions are overruled.

[2] The fourth and fifth exceptions allege error in not directing a verdict for the defendant on the ground there was no evidence of willfulness or wantonness, and also on the whole case. There was sufficient testimony to carry the case to the jury on the question of negligence, and his honor committed no error in this; he should, however, have sustained the motion that there was no evidence to sustain the contention that there was willfulness and wantonness, but this was harmless, and not at all prejudicial to the defendant, for in his charge to the jury later he said to them, "Negligence is inadvertence. Now, on the contrary, as a contrast—but with that you have nothing to do in the consideration of this case—willfulness is advertence. Nobody claims in this case that there is any willfulness"; and throughout his whole charge he nowhere told the jury, in estimating damages, that they could award punitive damages for willfulness or wantonness, but was careful to charge them that in estimating damages they were to consider the question of negligence on the part of defendant, and contributory negligence and assumption of risk on the part of plaintiff. These exceptions are overruled.

The sixth exception alleges error in his honor's charge to the jury. We see no error as complained of. It is the duty of the master to furnish a reasonably safe and suitable place for the servant to work at, and keep the same in reasonably safe and suitable repair. Mr. Justice Woods, in *Green v. Southern Ry.*, 72 S. C. 401, 52 S. E. 46, 5 Ann. Cas. 165, uses this language: "In every suit of a servant against a master for personal injury arising from the use of machinery, inquiry is directed mainly to two forces operating under natural laws, namely, the master's machine supplied to the servant, and the servant's mind and hands acting on the machine. The injury is usually due either to the error of the master in failing to supply safe machinery, or to the error of the servant in the use of his mind and hands, or to both of these causes acting together. But an error of the master in furnishing a defective machine does not conclusively imply negligence by the master, for he may have used due, and even great, care in its selection; nor does an error of the servant in the use of the machinery conclusively imply negligence on his part, for he may be in actual error while doing just what a prudent man would do under like circumstances. Neither the master nor the servant is charged with perfect knowledge of all natural laws and forces under which they act, nor even with errorless conduct in applying their imperfect knowl-

edge of such laws and forces; and hence they are chargeable only with the results of errors which are due to negligence. The servant on entering the employment assumes the risk of his own errors, whether due to negligence or not, and he assumes also the risk of the operation of the machine and of the errors of the master, unless the master fails to use due care in making the machine safe. When an injury to a servant is proved to result from a defective machine, the law puts upon the master the burden of proving that he used due care in making it safe. *Lasure v. Mfg. Co.*, 18 S. C. 275; *Carter v. Oliver Oil Co.*, 34 S. C. 211, 13 S. E. 419 [27 Am. St. Rep. 815]; *Branch v. Ry. Co.*, 35 S. C. 405, 14 S. E. 808"—and his honor committed no error.

[3] We cannot see that he was in error in refusing to charge the seventh and eighth exceptions; he left all of the fact to the jury to find what were the conditions at the time of the injury. He charged the jury carefully and fully as to the issues made by the pleadings and evidence, and in his own language instructed them fully as to the law of the case, and all of the law embodied in these requests were substantially charged in his honor's general charge. Reference to the charge shows that the substance of every sound proposition of law contained in the requests was given to the jury. "The judge has the right to charge the law of the case in his own language, and where he fully discharges this duty, he is not required to charge abstract propositions or sound propositions of the law applicable." *Joyner v. Atlantic Coast Line R. R. Co.*, 91 S. C. 104, 74 S. E. 825.

All exceptions are overruled.
Judgment affirmed.

GARY, C. J., and HYDRICK, J., concur.

(94 S. C. 472)

STATE ex rel. AKER v. MAJOR.

(Supreme Court of South Carolina. May 15, 1913.)

COUNTIES (§ 63*)—OFFICERS—APPOINTMENT.

The clerk of the board of county commissioners of a county, composed of a supervisor and two commissioners, holding for two years, who is appointed over the protest of the supervisor by the commissioners appointed and qualifying in March, is entitled to the office as

against an appointee by the supervisor and the retiring commissioners.

[Ed. Note.—For other cases, see *Counties*, Cent. Dig. §§ 87-90; Dec. Dig. § 63.*]

Quo warranto by the State, on the relation of J. S. Aker, against John J. Major, to determine conflicting claims to office. Judgment for relator.

K. P. Smith, of Anderson, for relator.

PER CURIAM. This is an action, in the nature of quo warranto, to determine the conflicting claims of the plaintiff and defendant to the office of clerk of the board of county commissioners for Anderson county. That board is composed of the county supervisor, who is elected by the people, and two commissioners, who are appointed by the Governor, upon the recommendation of the members of the General Assembly for that county. The term of office of the supervisor and commissioners is two years, and until their successors are elected or appointed and qualified. By statute the supervisor is made chairman of the board. Civil Code 1912, §§ 935, 938, 940.

The present supervisor, being in office, was re-elected, at the last general election, to succeed himself, and was commissioned for his new term in the early part of January. The present commissioners were not appointed and commissioned until the early part of March. Before that time, to wit, in January, the supervisor and outgoing commissioners undertook to appoint defendant clerk of the board for two years from that date. At a meeting of the board held on March 4th, after the present commissioners were appointed and qualified, the plaintiff was appointed clerk of the board by them, over the objection of the supervisor, who contended that the defendant's appointment was good for two years. The principles announced by this court in the case of *Sanders v. Belue*, 78 S. C. 171, 58 S. E. 762, are conclusive of every question involved in this case, and applied to the facts of this case, they show clearly that the plaintiff is entitled to the office.

It is therefore adjudged that the defendant has no right to the office in question, and that he be excluded therefrom, and that he deliver to the plaintiff the books and other property and appurtenances of the office, and pay the costs of these proceedings.

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

(40 Ga. 489)

HAMMOND v. HINMAN.

(Supreme Court of Georgia. July 18, 1913.)

(Syllabus by the Court.)

VENDOR AND PURCHASER (§ 164*)—ACTION BY VENDOR—MISTAKE IN DESCRIPTION—NON-SUIT.

There was no error in granting a nonsuit.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. § 328; Dec. Dig. § 164.*]

Error from Superior Court, Fulton County; J. T. Pendleton, Judge.

Equitable action by Mrs. S. E. Gabbett against George B. Hinman. Mrs. Gabbett dying, W. R. Hammond, executor, was substituted. Judgment for defendant, and the substituted plaintiff brings error. Affirmed.

W. R. Hammond, of Atlanta, in pro. per. Tye, Peoples & Jordan, of Atlanta, for defendant in error.

ATKINSON, J. Mrs. S. E. Gabbett instituted an action to reform a deed, and for other equitable relief, against George B. Hinman. Pending the action Mrs. Gabbett died, and thereafter an amendment was allowed making her executor the party plaintiff. The bill of exceptions assigns error on a judgment of nonsuit.

In the city of Atlanta, Currier street runs east and west. At right angles from the north Ripley street runs into it. Farther east, Lowndes street opens into it, approaching at right angles from the south. On the east side of Ripley street, and the north side of Currier street, Mrs. Hinman owned a lot which fronted on both of these streets. Adjoining this lot on the east, and extending along the north side of Currier street beyond the projection of Lowndes street, was a tract of land belonging to Mrs. Gabbett. She sold a portion of this property to the defendant, the husband of Mrs. Hinman, and executed a deed describing the property as follows: "All that tract or parcel of land lying in land lot fifty (50) of the fourteenth (14th) district of originally Henry, now Fulton, county, Georgia, commencing at a point on the northern side of Currier street, at the corner of Cora F. Hinman's lot, one hundred and sixty-one (161) feet, more or less, east of Ripley street, at which point was the dividing line between Ripley and Gabbett property as per plat made by H. L. Currier April 23, 1862; from thence running easterly along the northern side of Currier street one hundred and seventy-five (175) feet more or less to a point directly opposite the western side of Lowndes street, now opening into Currier street on the southern side thereof; thence running northerly, in a line parallel with Ripley street, one hundred (100) feet; thence in a westerly direction, parallel with Currier street, to a point on the dividing line between Ripley and Gabbett property as per plat as afore-

said; thence following said dividing line in a southerly direction to beginning point."

Two years later Mrs. Gabbett instituted an action to reform the deed, so that it would convey a frontage of 175 feet on Currier street, commencing at a point 27 feet east of the beginning point described in the deed, and extending east to the projection of Lowndes street, the effect of which would be to withdraw from the deed the southwest corner of the land granted, whereby Mrs. Gabbett would retain a triangular shaped parcel of land having as a base 27 feet fronting on Currier street, with the vertex about 80 feet back in the lot, thus preventing to that extent defendant's acquired land from adjoining that of Mrs. Hinman. The alleged grounds relied on for reformation were mistake of the plaintiff and her agent, at the time the land was measured and the deed executed, as to the true location of the dividing line between Mrs. Hinman and Mrs. Gabbett, from which the measurement commenced, whereby, instead of commencing at the true line, the measurement began 27 feet east thereof, and, when incorporated in the deed, resulted in giving defendant 27 feet frontage more than he bought and paid for, and actual fraud on the part of defendant, in that he knew the location of the true dividing line, and that the point at which the measurement commenced was 27 feet east thereof, and knew that the plaintiff and her agent were ignorant thereof, but nevertheless, in order to gain that amount of frontage without paying for it, co-operated with the plaintiff's agent in making the false measurement, knowing that the agent was acting under a mistake, and failed to inform him of it, and after the measurement was so made caused the deed to be executed, whereby it conveyed to him 202 feet frontage, while he only paid for 175. It was alleged that the land was bought by the front foot at \$10 per foot, and the land pointed out to the defendant, and sold to him, and paid for by him, was only the 175 feet frontage next west from the projection of Lowndes street, and did not include the 27 feet frontage that lay next west of it. Based on the same allegations, of fraud and mistake, there were prayers for the recovery of that part of the land which it was alleged was not intended to be conveyed, and, if not entitled to such relief, that plaintiff have a money judgment for \$270 as the price thereof.

When the case was brought to this court on exceptions to a judgment dismissing the petition on general demurrer, the deed was construed as conveying all the land between the projection of Lowndes street and the true line of division between Mrs. Hinman and Mrs. Gabbett; and on the allegations of mistake on the one hand and fraud on the other it was held that a case was alleged for reformation of the deed, and the judg-

ment was reversed. *Gabbett v. Hinman*, 137 Ga. 143, 72 S. E. 924. On the subsequent trial, the agent of plaintiff, who took the measurement, a surveyor, and the defendant were introduced as witnesses for plaintiff. The first-named witness testified that with the assistance of the defendant he measured off the land with a tape line, and, thinking the true line of division was marked by an old fence, he adopted that as the starting point, and held one end of the tape while the defendant carried the other eastward along the line of Currier street, and in that manner they measured down to the projection of Lowndes street, which was found to be 175 feet; that he pointed out to the defendant the land that he was selling, and that it was sold by the foot. There was also evidence that the point at which this measurement commenced was 27 feet east of the true dividing line between Mrs. Gabbett and Mrs. Hinman. The defendant denied that he bought by the foot, but testified that he bought by the tract, intending to buy all of the land between Mrs. Hinman's lot and the projection of Lowndes street. There was no controversy as to the fact that plaintiff intended to sell and defendant intended to buy back to Mrs. Hinman's lot. The plaintiff's agent, who made the sale, admitted, on cross-examination, that the intention was to sell the defendant all the land back to Mrs. Hinman's line, and that he pointed out as an inducement that by making the purchase the defendant would straighten his line. There was no evidence that the defendant knew the true line of division, or that he knew that the plaintiff's agent was acting under a mistake as to the starting point in making the measurement. The evidence that the sale was intended to include all the land back to Mrs. Hinman's lot disproves the charge that the land sought to be carved out of the deed was not sold.

While equity will, in a proper case, so reform a deed to land that it will conform to the contract of sale, it will neither make a contract for the parties nor so reform a deed that it would defeat the contract. The evidence did not make a case for reforming the deed; and as that instrument is conclusive upon the right of plaintiff to recover the land, it did not authorize a verdict for the land. The deed was a conveyance by the tract. The front line, which formed the bone of contention, was described as beginning at the east line of Mrs. Hinman's lot, which was rected to be a given distance from Ripley street, "more or less," and running thence 175 feet, "more or less," to the projection of Lowndes street. The defendant did not know accurately the location of the east line of Mrs. Hinman's lot, and did not know that the plaintiff's agent commenced the measurement east of the true line, or that he was laboring under a mistake in

adopting a starting point. Nor did he do anything to mislead the plaintiff or her agent, either in measuring the line or in drawing the deed. In such case the rule is that, in order for one party to such a sale of land to be entitled to a reduction on account of fraud by the other, the fraud must be actual. *Emlen v. Roper*, 133 Ga. 728, 66 S. E. 934. See, also, *Wylly v. Gazan*, 69 Ga. 506, where the rule was applied to the sale of a city lot when sold by the tract, and the words "more or less" were used in stating the quantity of land sold. The evidence was insufficient to support a verdict in favor of the plaintiff for any of the relief sought, and there was no error in granting a nonsuit.

Judgment affirmed. All the Justices concur.

(140 Ga. 250)

TIDWELL v. CENTRAL OF GEORGIA RY. CO.

(Supreme Court of Georgia. July 18, 1913.)

(Syllabus by the Court.)

MASTER AND SERVANT (§ 244*)—INJURIES TO SERVANT—CONTRIBUTORY NEGLIGENCE.

Under the facts of this case, there was no error in granting a nonsuit.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. §§ 776-777; Dec. Dig. § 244.*]

Error from Superior Court, Fulton County; Geo. L. Bell, Judge.

Action by J. F. Tidwell against the Central of Georgia Railway Company. Judgment for defendant, and plaintiff brings error. Affirmed.

J. F. Tidwell, an engineer, instituted an action for damages against his employer, the Central of Georgia Railway Company. By the pleadings and his evidence the following case was presented:

The defendant maintained three parallel tracks going out of Atlanta in the direction of East Point and other places, which, commencing with the most northerly, were numbered 1, 2, and 3, respectively. These were intersected by the two diverging prongs of a Y approaching from the south, known, respectively, as the "North Y," or "Belt Line No. 1," and "South Y," or "Belt Line No. 2," of the Atlanta & West Point Railroad. Defendant's tracks Nos. 1 and 2 were "main line tracks and operated under a block system." The track No. 3 was a "switch track," used for switching cars and the like, and was not under the "block system"; but to avoid collision with trains on the respective tracks of the Atlanta & West Point Railroad Y's, mentioned above, track No. 3 was operated under an "interlocking system," in which certain "derailing switches" were employed, which were designed to derail trains on track No. 3 before reaching the belt line unless the switches were closed, in which event the

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

trains would pass over the belt line safely. There were two of these derailing switches, one for each of the intersections of the prongs of the Y with track No. 3. The distance along track No. 8 from the point at which it was intersected by the respective prongs of the Y was estimated at from 200 to 400 yards. About midway between these points was a switch tower, from which the derailing switches were operated. In connection with this were certain "dwarf signals," stationed about 6 feet from the respective derailing switches, by means of which the operator in the tower indicated to approaching trainmen on track No. 3 whether the switch was open or closed. If closed, the switch target would show "white"; if open, it would show "red." Defendant promulgated certain rules, one of which provided that these dwarf signals "must never be passed when the switch target shows red."

On a day in December, 1909, the plaintiff was operating his engine, drawing several cars, over track No. 3. He was familiar with the location and object of the "derailing switches" and "dwarf signals," and the manner of operating the latter, and the rule above mentioned, and knew the danger of allowing his engine to enter either of the derailing switches. Going away from Atlanta, on approaching the first derailing switch, the target of the dwarf signal displayed "white," and the plaintiff passed over the switch safely, and proceeded along track No. 3 in the direction of the next derailing switch, running his engine at the rate of about 15 miles an hour. The first dwarf signal having displayed a "white" target, he assumed that the same target would be displayed at the second, and did not discover what signal the latter target displayed. In fact, it displayed "red," and the switch was open, and the engine ran upon it and was derailed, thereby injuring plaintiff. He did not attempt to discover the second signal, giving as his reason therefor that he felt sure it was like the first, and he could not have seen it because of smoke from an engine running slightly in advance of him on track No. 1. Nor did he attempt to stop or slacken the speed of his engine, but continued to run at the rate of 15 miles an hour until he was about to run on the second derailing switch, or, to use his own language, until he was "within 6 feet" of the switch, at which time he discovered that the switch was open, but it was too late to avoid the catastrophe. He also testified that there were no trains in sight on the Y, and, there being none, there was no necessity for the signal to be operated with the derailing switch open. It was the custom and practice of engineers, when they were given a "white" signal at the first switch, to proceed "on through" over the second. A witness testi-

fied, without objection, that in response to the inquiry, "Why was the switch open?" the operator in the tower answered, "He had let a backup on the West Point belt line, and when he let them back on the main line he forgot to close the switch."

At the conclusion of the plaintiff's evidence, the judge, on motion, granted a nonsuit, and the plaintiff excepted.

Westmoreland Bros., of Atlanta, for plaintiff in error. Little & Powell, of Atlanta, for defendant in error.

ATKINSON, J. The substance of plaintiff's case is fairly set forth in the statement of facts. Treating as true all that is stated, and giving the plaintiff the benefit of all reasonable deductions to be drawn from the evidence, it is clear that his evidence did not present a cause of action. Considering the object and character of the "derailing switches" and "dwarf signals," and defendant's promulgated rule, with which plaintiff was familiar, prohibiting the passing of signals where a red light was displayed, the rule was essential to the safe operation of the defendant's trains at that point, and the plaintiff was under duty to observe it, and knew the danger of disregarding it. He disobeyed it by running his train past the dwarf signal which protected the open switch where the injury occurred. He voluntarily took the risk of what it might indicate if he had taken the precaution to see. The defendant's directions for plaintiff's conduct under such circumstances were in plain terms, and he deliberately violated the precautions for his safety and that of his employer's property. It was not a case of defect in the instrument and a failure thereof to give a signal. The derailing switch did accomplish what the plaintiff knew it was designed to accomplish, and the signal was present to inform him that it was in position to bring about the result that followed. It was no answer that engineers were accustomed to disobey this rule, or that there were no trains in sight on the Y of the Atlanta & West Point Railroad, or that smoke from another engine might have so covered the track that the plaintiff could not have seen the signal, had he attempted to do so. That he did not see it was purely his own negligence, which, under the facts, was the proximate cause of the injury. This is the only legitimate inference to be drawn from the evidence as adduced, and it presents a case where there could not be a recovery, even in view of the enlarged liability of railroad common carriers to their employees under the provisions of the act approved August 16, 1909. Acts 1909, p. 160; Civil Code, § 2782 et seq.

Judgment affirmed. All the Justices concur.

(140 Ga. 321)

**FLORIDA YELLOW PINE CO. et al. v.
FLINT RIVER NAVAL STORES CO.**

(Supreme Court of Georgia. July 18, 1913.)

(Syllabus by the Court.)

**1. PLEADING (§ 376*)—ISSUES, PROOF, AND
VARIANCE—MATTERS TO BE PROVED—ADMISS-
SION.**

It was charged in the petition and admitted in the answer, that plaintiff and defendant claimed from a common grantor the title to and the right to box the trees for turpentine purposes on a described lot of land. Such admission relieved the plaintiff of the necessity of showing title into the common grantor in an action to enjoin the defendant from using the timber for turpentine purposes.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 1225-1227; Dec. Dig. § 376.*]

**2. EVIDENCE (§ 265*)—ADMISSIBILITY—RIGHT
TO REFUTE ADMISSION.**

A party to a suit will not be allowed to disprove an admission made in his pleadings, without withdrawing it from the record.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 1029-1050; Dec. Dig. § 265.*]

3. INJUNCTION (§ 48*)—GROUNDS—TRESPASS.

A trespass may be restrained in equity, where it is a continuing one, and will give rise to a multiplicity of suits, although the trespasser may be solvent.

[Ed. Note.—For other cases, see Injunction, Cent. Dig. § 101; Dec. Dig. § 48.*]

**4. INJUNCTION (§ 133*)—MANDATORY INJUN-
TION.**

A temporary injunction, restraining the defendant from entering upon land and boxing for turpentine purposes timber claimed by the plaintiff, is not mandatory in character, although the defendant may be engaged in boxing the timber at the time the preliminary restraining order was granted.

[Ed. Note.—For other cases, see Injunction, Cent. Dig. § 302; Dec. Dig. § 133.*]

Error from Superior Court, Decatur County; Frank Park, Judge.

Action by the Flint River Naval Stores Company against the Florida Yellow Pine Company and others. Judgment for plaintiff, and defendants bring error. Affirmed.

W. V. Ouster, of Bainbridge, for plaintiffs in error. A. H. Russell and M. E. O'Neal, both of Bainbridge, for defendant in error.

EVANS, P. J. [1] 1. The plaintiff sought to enjoin the defendants from cupping, boxing, and extracting gum from the trees on a described tract of land. In the petition it was alleged that W. N. Spear on November 10, 1905, being the owner of the timber, executed to J. J. Calder a turpentine lease for the purpose of boxing, working, and otherwise using the timber for turpentine purposes, the lease providing that the lessee may commence working the timber for turpentine at any time that he may desire, and shall have the right to continue to work the timber for the full term of six years from the time the boxing and working first commenced, which lease was duly recorded February 2, 1906; that Calder assigned his interest in the lease to the plaintiff. In the fifth

paragraph it was alleged that the defendants about March, 1912, entered upon the land and are cupping the timber for turpentine purposes; and in the seventh paragraph it was alleged that the plaintiff and defendants claimed under the same common grantor, to wit, W. N. Spear, and that the plaintiff's title is clear. In their answer the defendants admitted having entered upon the land and worked and cupped the timber thereon under a lease made by W. N. Spear to the defendants on February 17, 1911. In response to the allegations of the seventh paragraph the defendants denied the same, and said that the petitioner had no title in law or in equity to the timber. The effect of the pleadings is to admit that both claim under a common grantor. The defendants expressly admitted that they entered upon the land and worked the timber for turpentine purposes by virtue of a conveyance from the same person that the plaintiff claimed under, and alleged by them to be the owner of the timber. The seventh paragraph of the petition alleged, not only that both parties claimed under the same grantor, but also that the plaintiff's title was clear, and the denial is to the effect that the plaintiff has no title in law or in equity to the timber. So, on the whole, we construe the pleadings of the plaintiff to charge that the defendants claim the right to work the turpentine under a conveyance from the same person under whom the plaintiff claims, who was alleged to be the owner thereof, and the answer of the defendants to admit this allegation. Where it appears from the petition and the answer that each party to the suit claims from the same common grantor, it is not necessary to show title into the common source. *Brinkley v. Bell*, 126 Ga. 482 (2), 55 S. E. 187; *Garbutt Lumber Co. v. Wall*, 126 Ga. 172, 54 S. E. 944.

[2] 2. The defendants did not set up in their answer any other title than the lease from W. N. Spear, which was of subsequent date to the plaintiff's; but on the interlocutory hearing he offered to prove an outstanding title acquired subsequently to the filing of the suit, and the court repelled evidence of such title. Where a defendant in his answer admits that he claims under a common grantor, he will not be permitted to prove a paramount outstanding title. The averment that the defendants claimed title from a common grantor is a solemn admission in *judicio*, and they will not be permitted to introduce evidence to deny any admission in the record until such admission has been withdrawn. *Pinkham v. Gibbs*, 108 Ga. 141, 33 S. E. 945; *Alabama Midland R. Co. v. Guilford*, 114 Ga. 627, 40 S. E. 794. The court properly refused to receive the testimony.

[3] 3. The evidence authorized a finding that the trespass was a continuing one, and that unless the injunction was granted a

multiplicity of suits would ensue. In such case an injunction will issue. *Gray Lumber Co. v. Gaskin*, 122 Ga. 342, 50 S. E. 164; *Loudermilk v. Martin*, 130 Ga. 525, 61 S. E. 122.

[4] 4. The court restrained the defendants from going upon the land, and from cupping, boxing, and working the timber. Inasmuch as the defendants were already upon the land, engaged in cutting, boxing, and working the timber, it is contended that the injunction was mandatory in character. We do not think so. The scope of the court's order was, not to require the defendants to do a particular act, but to refrain from cutting and boxing the timber.

Judgment affirmed. All the Justices concur.

(140 Ga. 323)

FLORIDA YELLOW PINE CO. v. FLINT RIVER NAVAL STORES CO.

(Supreme Court of Georgia. July 18, 1913.)

(Syllabus by the Court.)

LOGS AND LOGGING (§ 3*)—INJUNCTION (§ 148*)—DISCRETION—TIMBER LEASE—FORFEITURE.

An owner of timber made an instrument in the form of a deed, expressing a consideration of \$1 paid, and reciting that the maker "has granted, bargained, leased, and conveyed, and does by these presents grant, bargain, lease, and convey," to the other party, his heirs and assigns, "for the sum of one hundred and fifty (\$150.00) dollars," all of the timber on a described tract of land, for the purpose of cupping, working, and otherwise using such timber for turpentine purposes. There was a habendum clause, a warranty, and a clause giving a right of assignment. The instrument also included the following: "The beginning of the work [of] the turpentine business shall be December 1, 1911, and continue until December 1, 1916, and the payment of the above sum shall be made on or before December 1, 1911." This was attested and recorded like a deed. Held that, although the work did not begin and the payment was not made on December 1, 1911, this did not forfeit all rights on the part of the lessee; and where, early in the year 1913, the same grantor made another lease of the timber for turpentine purposes to one who was affected with notice of the prior lease, there was no abuse of discretion in granting an injunction to restrain the second lessee from using the timber for turpentine purposes, at the same time requiring the plaintiff to give a bond to pay the defendant any amount which the latter might recover on the final trial, and providing that if this should not be done in 10 days the defendant might give a like bond, and in that event the plaintiff should be enjoined.

[Ed. Note.—For other cases, see *Logs and Logging*, Cent. Dig. §§ 6-12; Dec. Dig. § 8; **Injunction*, Cent. Dig. §§ 323-334; Dec. Dig. § 148.*]

Error from Superior Court, Decatur County; Frank Park, Judge.

Action by the Flint River Naval Stores Company against the Florida Yellow Pine Company. An injunction was granted conditionally, and defendant brings error. Affirmed.

On May 11, 1911, J. R. Gholson executed to C. Cunningham an instrument which expressed a consideration of \$1. It then declared that Cunningham "has granted, bargained, leased, and conveyed, and does by these presents grant, bargain, lease, and convey, unto the said party of the second part, his heirs and assigns, for the sum of one hundred and fifty (\$150.00) dollars, all of the timber upon the following described tract of land, for the purpose of cupping, working, and otherwise using said timber for turpentine purposes: All the turpentine timber he owns on lot No. 347 in the Twenty-First district of Decatur county, Georgia. The beginning of the work [of] the turpentine business shall be December 1, 1911, and continue until December 1, 1916, and the payment of the above sum shall be made on or before December 1, 1911." It also contained the usual habendum clause, covenant of warranty, and provision for right of egress and ingress, and the right of assignment. It was recorded, and later assigned by Cunningham to the Bainbridge Naval Stores Company, and by that company to the Flint River Naval Stores Company. Neither Cunningham nor the assignees under him paid the purchase money or began working the timber for turpentine purposes. On March 4, 1913, Gholson executed to the Florida Yellow Pine Timber Company a turpentine lease covering the same timber, and containing the usual habendum clause, covenant of warranty, and right of assignment. That company began working the timber for turpentine purposes. The Flint River Naval Stores Company thereupon filed a petition to enjoin such work, and to recover damages for what had already been done. On the hearing the presiding judge granted the injunction, but required the plaintiff to file a bond to pay the defendants any amount which the jury might find against the plaintiff at the final trial, and provided that if the bond should not be given within 10 days the defendants might give a similar bond, and the plaintiff should then be enjoined. The defendants excepted.

W. V. Custer, of Bainbridge, for plaintiff in error. A. H. Russell and M. E. O'Neal, both of Bainbridge, for defendant in error.

LUMPKIN, J. Each party claimed under what is called a lease of the timber for turpentine purposes from the same owner. The taker of the subsequent lease proceeded to use the timber for these purposes. The holder of the first lease sought to enjoin such operation as a continuing trespass. The presiding judge granted an interlocutory injunction, requiring bond to be given. The case turned on the question: Which of the contestants had the superior right? The instrument under which the plaintiff claimed was in the form of a deed, reciting a present consideration of \$1 paid, and stating that the

further amount of \$150 was to be paid on or before December 1st thereafter. It declared that "the beginning of the work [of] the turpentine business shall be December 1, 1911, and continue until December 1, 1916." This fixed the limits within which the grantee might exercise the right to use the timber for the purpose named, but it did not provide for a forfeiture or loss of the right if he should not begin work on that day. The date mentioned for beginning the work and that for payment were the same; but there was no provision for a termination of the right in case payment should not be made on that date. The paper here involved differs from that considered in *Clyatt v. Barbour*, 111 Ga. 130, 36 S. E. 468. There was no effort in the present case to use the privilege without payment, nor was there any refusal of payment on demand, nor any allegation of insolvency on the part of the holder of such instrument. The lease included also the grant of rights of ingress and egress, a covenant of warranty, and a right of assignment, and was recorded like a deed. The case is more like that of *Baxter v. Mattox*, 106 Ga. 344, 32 S. E. 94, than that above cited. The grantor, on March 4, 1913, made another lease of the same timber for the same purpose to the defendant company. There was no denial that this lessee was affected with notice, and that it was proceeding to use the timber for turpentine purposes; and there was no abuse of discretion in granting the interlocutory injunction, with the protective provisions as to requiring bond. *Florida Yellow Pine Co. v. Flint River Naval Stores Co.*, 78 S. E. 900.

Judgment affirmed. All the Justices concur.

(140 Ga. 248)

PRITCHETT et al. v. KENNEDY.

(Supreme Court of Georgia. July 16, 1913.)

(*Syllabus by the Court.*)

1. PARTNERSHIP (§ 324*)—ACCOUNTING—INJUNCTION—RECEIVER.

On an interlocutory hearing of an application for injunction and receiver by one partner against another, in an action for dissolution of the firm and an accounting, where both parties prayed for dissolution and accounting, and the judge was authorized to find that both parties violated the reciprocal duties of each to the other as partners, among others, in the matters of properly accounting to the other, and in taking exclusive possession of firm assets, consisting of products and earnings of the business, there was no abuse of discretion in granting the injunction and appointing a receiver, although neither partner was insolvent, and the excepting partner offered to give bond for proper accounting as to the assets in his hands.

[Ed. Note.—For other cases, see *Partnership*, Cent. Dig. §§ 755, 756; Dec. Dig. § 324.*]

2. PARTNERSHIP (§ 327*)—ACCOUNTING—PETITION—SUFFICIENCY.

The case was tried on the pleadings. The petition was sworn to by the plaintiff positively in so far as it referred to matters derived from his own knowledge, but in so far as derived

from the knowledge of others he believed the allegations to be true. Most of the allegations of the petition related to personal acts of the plaintiff, and acts of the defendant and her agent concerning which the plaintiff had personal knowledge, and practically everything alleged which did not thus fall within plaintiff's knowledge was admitted in the answer. See *Bennett v. Smith*, 108 Ga. 466, 34 S. E. 156; Civil Code 1910, §§ 5475, 5476, 5477.

[Ed. Note.—For other cases, see *Partnership*, Cent. Dig. §§ 769-778; Dec. Dig. § 327.*]

Error from Superior Court, Laurens County; K. J. Hawkins, Judge.

Action by J. O. Kennedy against Lella Pritchett and others. Judgment for plaintiff, and defendants bring error. Affirmed.

J. S. Adams, of Dublin, and Hines & Jordan, of Atlanta, for plaintiffs in error. Howard & Hightower, of Dublin, for defendant in error.

ATKINSON, J. Judgment affirmed. All the Justices concur.

(140 Ga. 400)

OLDS MOTOR WORKS v. OLDS OAKLAND CO.

(Supreme Court of Georgia. July 15, 1913.)

(*Syllabus by the Court.*)

1. JUDGMENT (§ 217*)—PLEADING (§ 225*)—AMENDMENT—DEMURRER—DISMISSAL.

Where a demurrer to a petition was filed, and on the hearing the court made an order sustaining all the grounds of the demurrer except three, and directing that the case be dismissed unless the plaintiff would, within five days, offer an amendment to meet the grounds of demurrer which were sustained, and within the time allowed the plaintiff did amend the petition to meet the grounds of demurrer, which amended petition was likewise demurred to, and the court, on hearing the second demurrer, overruled the same, except two grounds, which were sustained, the original order of the court is to be treated as a conditional, and not an absolute and final, judgment, as it did not finally dispose of the case.

(a) A trial judge may, in an order sustaining a demurrer, provide that the plaintiff have an opportunity to amend his petition so as to meet the grounds of demurrer. *Lamar Drug Co. v. First Nat. Bank*, 127 Ga. 448, 452 (4), 56 S. E. 486; *Buchan v. Williamson*, 131 Ga. 501, 507, 62 S. E. 815; See, in this connection, *Dudley v. Mallory*, 4 Ga. 52.

(b) Where, in such a case as above set forth, the amended petition is sufficient to withstand the amended demurrer, the case is still in court, and will not be dismissed.

[Ed. Note.—For other cases, see *Judgment*, Cent. Dig. § 394; Dec. Dig. § 217; * *Pleading*, Cent. Dig. §§ 575-583; Dec. Dig. § 225.*]

2. DEMURRERS TO AMENDED PETITION.

The court did not err in overruling the demurrers to the amended petition.

Error from Superior Court, Fulton County; J. T. Pendleton, Judge.

Action by the Olds Oakland Company against the Olds Motor Works. From a judgment for plaintiff, defendant brings error. Affirmed.

Candler, Thomson & Hirsch, of Atlanta, for plaintiff in error. Napier, Wright & Cox, of Atlanta, for defendant in error.

HILL, J. Judgment affirmed. All the Justices concur.

(140 Ga. 217)

HOLMES v. HOLMES.

(Supreme Court of Georgia. July 15, 1913.)

(*Syllabus by the Court.*)

1. EXECUTORS AND ADMINISTRATORS (§ 373*)—SALES—ACTION AGAINST BIDDER—DEFENSES—MISTAKE OF LAW.

A mutual mistake of law is a good defense against an action to recover money, under contract of purchase, where there is full knowledge of all the facts, provided the mistake be clearly proved and the plaintiff cannot in good conscience receive the money sued for.

[Ed. Note.—For other cases, see *Executors and Administrators*, Cent. Dig. §§ 1519-1527; Dec. Dig. § 373.*]

2. EXECUTORS AND ADMINISTRATORS (§ 367*)—ADMINISTRATOR'S SALE—ACTION AGAINST BIDDER—DEFENSES—MISTAKE OF LAW.

A husband and wife owned a tract of land in common. The wife died, leaving her husband and eight children as her heirs at law. Subsequently the husband died. The adult heirs agreed to sell to one of their number their respective shares; but, as one of the shares was owned by the minor children of a deceased heir, it was agreed that one of the heirs should administer upon both estates and sell the land at administrator's sale for the purpose of investing the purchaser with a good title to the whole. Accordingly application was made to the ordinary for administration on both estates. The attorney for the applicant and the ordinary were of the opinion, and so advised, that upon the death of the wife her estate in the land passed to the husband as sole heir, and, acting on this mistake of law, administration was had upon the estate of the husband alone. An order of sale was granted, and the heir who had contracted to buy became the purchaser at administrator's sale, bidding upon the land under the mistake of law and the representation of the administrator, who was a coheir, that the title of both parents would pass to the purchaser by virtue of the sale. Afterwards the purchaser discovered the mistake of law under which he acted, and refused to pay his bid. In an action by the administrator to recover the amount of the bid, held that a verdict for the defendant was proper.

[Ed. Note.—For other cases, see *Executors and Administrators*, Cent. Dig. §§ 1545-1549; Dec. Dig. § 367.*]

Error from Superior Court, Dade County; A. W. Fite, Judge.

Action by J. D. Holmes, administrator, against Wm. Holmes. Judgment for defendant, and plaintiff brings error. Affirmed.

The action is by an administrator against the highest bidder at an administrator's sale of land, to recover the amount of the bid. The defendant pleaded that he had bid upon the land upon the representation of the administrator, and under a mistake of law induced by him, that his intestate owned the land, and that the administrator had the right to sell and convey the entire lot, where-

as the administrator's intestate had only title to a part of the lot of land, and that for this reason he is relieved from liability for the purchase money of the land, and the sale is invalid. It appeared at the trial that James C. Holmes and his wife owned a lot of land. Mrs. Holmes died before her husband, and upon the death of Mr. Holmes, the defendant, who was a son, contracted to buy the shares of his codistributees in the land. He took conveyances from several of them, and, as some were minors, an administration was deemed necessary in order that the defendant might acquire a complete title. Accordingly a son, J. D. Holmes, applied for letters of administration on the estates of his father and mother in one petition. The defendant submitted evidence that, on the day letters of administration were granted, the ordinary, acting on the advice of an attorney of the applicant that upon the death of Mrs. Holmes all her estate in the land passed by inheritance to her husband, to the exclusion of her children, issued letters of administration only upon the estate of James C. Holmes to J. D. Holmes, who duly qualified as administrator. The administrator applied for leave to sell the land of his intestate, the order was duly granted, and the land was advertised and sold as the land of James C. Holmes, and was bid off by the defendant. Since the sale the defendant has acquired the interests of all the heirs except that of the minors, who own the interest of their father, a deceased son of Mr. and Mrs. J. C. Holmes. The administrator and the defendant at the time of the sale were fully informed of the respective ownership of James C. Holmes and his wife in the land, and that Mrs. Holmes died about three years before her husband, leaving eight children, including the administrator and the defendant. The administrator testified that he did not have sufficient money to discharge the debts of his intestate without a sale of the land (the amount of the debts did not appear, though the inference was that they were not large); that he offered the land for sale as being the sole property of his intestate, but it was his understanding that his intestate owned but $1\frac{1}{2}\%$ of the land; that by an arrangement with the defendant he had accepted \$500 for his share in the land. The estate was worth more than the amount at which the adult heirs had agreed to sell it to the defendant, and the administration was had solely for the purpose of perfecting title and protecting the minor heirs. Upon the conclusion of the evidence the court directed a verdict for the defendant.

Foust & Payne, of Chattanooga, Tenn., for plaintiff in error. W. U. Jacoway, of Trenton, for defendant in error.

EVANS, P. J. (after stating the facts as above). [1] The disposition of this case de-

pends upon a decision whether or not its facts bring it within the rule that, under the doctrine of caveat emptor, a purchaser at an administrator's sale cannot repudiate his bid because of a defective title, or want of title in the decedent. The principle of caveat emptor has never been carried to the extent that a purchaser at an administrator's sale is not relievable against the fraud or misrepresentation of an administrator. If an administrator is guilty of imposition, and the purchaser is influenced in making his bid on account of the fraud or misrepresentation of the administrator, he is relievable of his bid. *Colbert v. Moore*, 64 Ga. 502; *Jones v. Warnock*, 87 Ga. 484; *Kingsbery v. Love*, 95 Ga. 543, 22 S. E. 617. If the administrator had been guilty of such conduct as to induce the purchaser to bid upon the faith that his intestate was the owner of the whole fee, and knew that such bidding was made under such misapprehension, it would be inequitable for him to hold the purchaser to a bid induced by his own misrepresentation. There is no pretense, however, in the present case that the administrator has been guilty of any intentional fraud or misrepresentation. The parties seem to have acted with a full knowledge of all the facts, but under a misapprehension of the law as applied to these facts. There was a conference among the children of Mr. and Mrs. Holmes. One of the children desired to purchase the land. A price was agreed upon. In the negotiations all parties conceded that the minor children of the deceased brother were entitled to his share, and that their interest could not be conveyed on account of their minority. To meet this difficulty in the matter of conveyance of title, an administration upon the estates of Mr. and Mrs. Holmes was deemed necessary. Accordingly, the eldest brother was selected to apply for administration on both estates, with a view of obtaining an order to sell the land at administrator's sale in effectuation of the agreement among the adult heirs. Application was made to the ordinary pursuant to this arrangement; but it appears that both the applicant's attorney and the ordinary labored under a misapprehension of law that upon the death of Mrs. Holmes her entire estate was inherited by her husband to the exclusion of her children, and it was upon this assurance by the ordinary and attorney for the applicant that administration upon the estate of Mrs. Holmes was abandoned, and letters granted upon the estate of Mr. Holmes. There is no dispute that this sale was planned and made solely for the purpose of perfecting title of the prospective bidder. At the time of the suit the bidder was in possession of the land, having purchased the interests of the adult heirs of his father and mother. Some of these purchases were made prior to the sale and some afterwards.

The law does not look with favor upon

private agreements to divest the title of minors in property in pursuance of such agreement, whether made with the minors themselves or with others who have the minors' interest at heart. The policy of the law is that sales where the interest of minors is involved, under judicial process, shall be unfettered by any private arrangement. The minors are entitled to their share of the land at the price fixed by a sale pursuant to the statute. Likewise creditors are interested in having a sale of the property of their decedent free from any entanglements growing out of a private arrangement among heirs that the property should bring a specific price at the sale. It is therefore no argument in favor of the collection of a bid made at an administrator's sale, under a mistake of law, that the sale was pursuant to an arrangement to which the bidder was a party having for its purpose the divestiture of the title of the heirs of the intestate to the property offered for sale.

The rule is the same respecting purchases at sheriffs' sales as it is at administrators' sales. We have a case of an execution sale, where the purchaser thereat was a mortgagee whose lien was superior in date to the judgments under which the property was sold. He purchased the property under a mistake of law that the effect of the sale would be to divest the lien of his mortgage and entitle him to participate in the proceeds. His competitive bidder was laboring under the same mistake of law. Immediately after the land was knocked off, he was apprised of his mistake, and notified the sheriff that he would not comply with his bid. The land was immediately resold, and the sheriff, for the use of the defendant in execution, brought suit against him to recover the difference in the two sales. The court denied him a recovery, on the principle that a mistake of law is a good defense against an action to recover money, provided the mistake is clearly proved, and the plaintiff cannot in good conscience receive the money. *Collier v. Perkerson*, 81 Ga. 117.

[2] This is not a case where the purchaser simply bids upon property exposed to public sale by the administrator on the assumption that the title of the administrator's intestate is good; nor is it a case where he relied entirely upon the personal assurance of the administrator that the title of his intestate was good. Other elements enter into it. It is a family arrangement, entered into by all the parties who were able to contract, and the bid by the defendant in the execution of such plan was made under a mistake of law, induced by the plaintiff's counsel and the ordinary, that the husband inherited the wife's estate, to the exclusion of the children. Now it would be inequitable to allow the heirs of Mrs. Holmes to have her interest in the land administered upon and sold for distribution among her heirs, when some of them have

already received their share of the purchase price of the entire land. The minor children of the deceased child of Mr. and Mrs. Holmes will not be hurt, because the undisputed testimony is that the land is worth as much or more than the amount which was paid for it at the administrator's sale. It would be inequitable to allow them to have the benefit of a portion of the land as being the property of their grandmother's estate, and also receive their share of the proceeds of the entire tract as being the property of their grandfather. Neither does it appear that the creditors of James C. Holmes will sustain any loss; for, while the amount of the debts is not made to appear, yet the inference is strong that they are of very small value. It does not appear that Mrs. Holmes owed any debts at all. So that, under all the circumstances, we believe that the sale was made under a mutual mistake of law, participated in by the administrator and the bidder, and that it would be inequitable to require compliance with the bid. Civil Code, § 4576.

Judgment affirmed. All the Justices concur.

(140 Ga. 245)

GEORGIA TALC CO. v. COHUTTA TALC CO.

(Supreme Court of Georgia. July 16, 1913.)

(Syllabus by the Court.)

1. BOUNDARIES (§ 52*)—PROCESSIONING PROCEEDINGS—BURDEN OF PROOF.

On the issue formed by a protest to the return of processions, the burden is on the applicant to make a prima facie case.

[Ed. Note.—For other cases, see *Boundaries*, Cent. Dig. §§ 253-260, 262, 263; Dec. Dig. § 52.*]

2. TRIAL (§ 293*)—PROCESSIONING PROCEEDINGS—INSTRUCTIONS—ADVERSE POSSESSION.

The statute provides that land processioners, in the location of the line between coterminous landowners, shall follow certain rules, one of which is that acquiescence for seven years, by acts or declarations of adjoining landowners, shall establish a dividing line, and another is that actual possession under a claim of right for more than seven years shall be respected, and the lines so marked as not to interfere with such possession. An instruction applying these rules was not cause for new trial, because the court referred to the time of acquiescence and actual possession as "a term of years as the law prescribes" and "a number of years," where in immediate connection therewith he also instructed the jury, in the language of Civil Code 1910, §§ 3821, 3822, that such acquiescence or actual possession must exist for seven years. The evidence authorized the charge complained of.

[Ed. Note.—For other cases, see *Trial*, Cent. Dig. §§ 705-713, 715, 716, 718; Dec. Dig. § 293.*]

3. APPEAL AND ERROR (§ 1066*)—BOUNDARIES (§ 52*)—HARMLESS ERROR—PROCESSIONING PROCEEDINGS—NATURE.

The issue formed by a protest is not of title, but of boundary; and though the charge

of the court on adverse possession for 20 years as giving a prescriptive title may have been inapplicable, it was not injurious to the losing party.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. § 4220; Dec. Dig. § 1066;* *Boundaries*, Cent. Dig. §§ 253-260, 262, 263; Dec. Dig. § 52.*]

4. APPEAL AND ERROR (§ 1066*)—HARMLESS ERROR—INSTRUCTION—PROCESSIONING PROCEEDINGS.

Civ. Code 1910, § 3819, which declares that, when the surveyor's plat shall be filed with the ordinary, in all future disputes arising in reference to the boundary lines of the tract surveyed, such plat shall be considered prima facie correct, is inapplicable to the issue before the court formed by a protest to the processioners' return. But the giving of this section in charge was not prejudicial to the losing party, because in the trial of an issue formed by a protest the return of the processioners is to be deemed prima facie correct.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. § 4220; Dec. Dig. § 1066.*]

5. TRIAL (§ 210*)—INSTRUCTIONS—WITNESSES.

As it was not sought to impeach any witness by evidence introduced for that purpose, it was not error to instruct the jury: "The law presumes all witnesses are honest, and tell the truth, until the contrary appears by proof."

[Ed. Note.—For other cases, see *Trial*, Cent. Dig. §§ 490-494, 501; Dec. Dig. § 210.*]

6. ESTABLISHMENT OF BOUNDARY.

Other assignments of error are without merit, and the evidence supports the verdict.

Error from Superior Court, Murray County; A. W. Flite, Judge.

Processioning proceedings by the Georgia Talc Company against the Cohutta Talc Company. The applicant, being dissatisfied with the return of the processioners, protested, and the papers were returned to the superior court for trial. The jury sustained the return of processioners, and from the judgment the applicant brings error. Affirmed.

W. E. Mann, of Dalton, for plaintiff in error. C. N. King, of Spring Place, for defendant in error.

EVANS, P. J. The Georgia Talc Company and the Cohutta Talc Company own adjoining lots of land. The former gave notice to the latter, in order to have the line between the respective lots processioned in accordance with the statute. The processioners caused the land to be surveyed and a plat of the same made by the county surveyor, which plat was returned by them pursuant to the statute and filed in the office of the ordinary. The applicant, being dissatisfied with the line as run and marked by the processioners and surveyor, filed his protest, and the papers were returned to the superior court for trial. The jury sustained the return of the processioners.

[1] 1. The court ruled that the burden of proof was upon the applicant. This ruling is sustained by the decisions in *Rattares v. Morrow*, 71 Ga. 528, and *Chism v. Wilkerson*, 134 Ga. 636, 68 S. E. 425. In the former case

Hall, J., said: "There is no direct rule upon the subject, and no reason occurs to us why the applicant for the proceeding is differently situated from any other plaintiff or movant in respect to this question. Where there is evidence on both sides, the plaintiff has the right to open and conclude the argument."

[2] 2. Complaint is made of an instruction that if the jury should find that the line had been acquiesced in by the owners of the adjoining land for a number of years, or if the Cohutta Talc Company had actual possession of the land between the two lines for a term of years as the law prescribes, they should find against the protest. The criticism is that the jury were not told the term or number of years necessary to fix a line by acquiescence or actual possession. This particular excerpt is open to such criticism, but in immediate connection therewith the court read to the jury the Code provisions as follows: " * * * Acquiescence for seven years, by acts or declarations of adjoining landowners, shall establish a dividing line." "Where actual possession has been had under a claim of right, for more than seven years, such claim shall be respected, and the lines so marked as not to interfere with such possession." Civil Code, §§ 3821, 3822. There was evidence to authorize the charge, both upon acquiescence and actual possession.

[3] 3. The primary object of our processioning laws is to settle disputes of boundary lines between coterminous landowners. It is a summary proceeding, and is not designed to be a substitute for an action of ejectment. Title is not directly involved. In the instant case the court read to the jury certain sections of the Code relating to adverse possession as constituting prescription. While these sections may have been inapplicable to the case, we do not think the losing party was injured by the court's reading them to the jury.

[4] 4. Civil Code, § 3819, declares it to be the duty of the county surveyor to make out and certify a plat of the lines as run by him and the processioners, and to deliver a copy thereof to the applicant, and that "in all future disputes arising in reference to the boundary lines of such tract, with any owner of adjoining lands, having due notice of such processioning, such plat, and the lines so marked, shall be prima facie correct, and such plat * * * shall be admissible in evidence, without further proof." The subject-matter of this section is the effect to be given to a plat made by the surveyor under the superintendence of the processioners, and filed as provided by law, in subsequent disputes between the coterminous landowners. It is inapplicable to the issue formed by a protest to the correctness of the plat. The return of the processioners and the plat of the surveyor are admissible in evidence in the trial of an issue formed by a protest to

the processioners' return. They serve to make out a prima facie case, and, in the absence of any other evidence, would authorize a verdict sustaining the return. *Castleberry v. Parrish*, 135 Ga. 527, 69 S. E. 817. Inasmuch as their introduction in evidence makes a prima facie case, the giving in charge of the section referred to was harmless error.

[5] 5. There was no attempt to impeach any witness by evidence introduced for that purpose. The court charged that "the law presumes all witnesses are honest, and tell the truth, until the contrary appears by proof." This charge was not erroneous. *Cornwall v. State*, 91 Ga. 277 (5), 18 S. E. 154; 40 Cyc. 2555.

[6] 6. There are other assignments of error; but we do not think they are of such a character as to require a new trial. They involve propositions which are well settled, and a discussion of them would be without any practical benefit. The evidence was sufficient to authorize the verdict, and no sufficient reason is made to appear for vacating it. Judgment affirmed. All the Justices concur.

(140 Ga. 353)

MAYOR, ETC., OF SAVANNAH v. STANDARD FUEL SUPPLY CO.

(Supreme Court of Georgia. July 19, 1913.)

(Syllabus by the Court.)

1. DEDICATION (§ 15*) — STREETS — IMPLICATION.

Dedication to the public of a use of land for a street rests upon the intent of the owner to make such dedication. Where the dedication is not express, the acts of the owner relied upon to imply a dedication must be such as clearly indicate an intent to exclusively devote the property to use as a street.

[Ed. Note.—For other cases, see *Dedication*, Cent. Dig. § 18; Dec. Dig. § 15.*]

2. DEDICATION (§ 20*) — USED BY PUBLIC — WHARF PROPERTY.

Wharf property on a navigable stream is a place of a quasi public character, to which the public are invited. The fact that, without intent to make a dedication, the wharf owner permits its use by some of the public, who do not come thereon for the purpose of transacting business, should not operate to defeat his title. In the absence of proof of express dedication and acceptance, such use by the public will be regarded in the nature of a license, and, of itself, will be insufficient to raise an application of its dedication as a street by the owner.

[Ed. Note.—For other cases, see *Dedication*, Cent. Dig. §§ 17-30; Dec. Dig. § 20.*]

3. MUNICIPAL CORPORATIONS (§ 648*) — STREETS — ACQUISITION OF TITLE — WHARF PROPERTY.

In such a case, where the wharf owner retains dominion over and use of the dockyard, although he may permit the public to travel over it as if it was a part of the street longitudinally adjacent thereto for upwards of 20 years, such use by the public is so lacking in the elements of adverseness and exclusiveness as

to be insufficient to establish a prescriptive right thereto.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. §§ 1421, 1422; Dec. Dig. § 648.*]

4. DEDICATION (§ 44*)—MUNICIPAL CORPORATIONS (§ 654*)—OBSTRUCTION OF STREETS—INJUNCTION—SUFFICIENCY OF EVIDENCE.

The facts examined, and held insufficient to show that a street over the locus in quo existed, either from implied dedication or prescriptive use.

[Ed. Note.—For other cases, see *Dedication*, Cent. Dig. §§ 85-87; Dec. Dig. § 44.* *Municipal Corporations*, Cent. Dig. § 1428; Dec. Dig. § 654.*]

Error from Superior Court, Chatham County; W. G. Charlton, Judge.

Action by the Mayor, etc., of Savannah against the Standard Fuel Supply Company. Judgment for defendant on directed verdict, and plaintiff brings error. Affirmed.

H. E. Wilson and David C. Barrow, both of Savannah, for plaintiff in error. R. R. Richards and Saussy & Saussy, all of Savannah, for defendant in error.

EVANS, P. J. The issue between the parties is whether a certain area in the city of Savannah is a part of River street. The controversy is between the owner of a wharf lot and the city. The wharf owner was proceeding to build a structure on the locus in quo, when the city filed a petition to enjoin him from so doing on the ground that he was obstructing a public street. On the trial a nonsuit was refused, and after all the evidence was in the court directed a verdict for the defendant.

[4] The evidence is very voluminous; great latitude having been allowed in its reception. We will not undertake a discussion of all of it, and will refer only to such portions as will serve to illustrate the legal propositions which must control the case. The city of Savannah does not claim ownership of the fee, or express dedication of the locus in quo as a street, but does claim that a street existed by prescription or by implied dedication and acceptance. The wharf owner claims legal title to the land and denies the city's claim of a street over any part of it.

In the original plan of the city of Savannah as laid off by Gen. Oglethorpe there was no River street. The Savannah river runs east and west along the northern boundary of the city. In the original plan of the city the lots along the river front extended southward over the high bluff as far as what is now known as Bay street, which runs parallel with the river. The streets of the city running north and south run down to the river, and at the foot of each street there is a public dock. The north and south streets which include the locus in quo are Lincoln and Abercorn; the wharf lot in controversy abutting Lincoln street. In the early maps of the city no street appears between the river and Bay street under the bluff. The deed

to John David Mongin, in 1821, from whom the defendant derives his title, does not indicate any street along the bluff. In the muniments of title we first discover a reference to a street in the deed from Stoddard to Willis, dated March 7, 1864. In this conveyance lot No. 1 in Reynolds ward is described as running back on its eastern boundary on Lincoln street 96 feet and 4 inches from the water line and on the western boundary 88 feet and 4 inches, and lot No. 2, Reynolds ward, is described as running back on its eastern boundary from the water line 88 feet and 4 inches, leaving back of these two blocks (and two others), and between them and the buildings on the remaining portion of the lots, the space of 20 feet in width, which is reserved as a street. The locus in quo is a part of lot No. 1 of Reynolds ward. The wharf owner contends that he is entitled to use all of lot No. 1 as described in this and successive deeds down to him, which will leave a street of 20 feet width on the south side of the property. The city contends that it has acquired by prescription and implied dedication an expansion in the width of this street in front of the wharf property, so as to encroach upon it to the pillars of the wharf shed and under the eaves, nearly one-third of the area of the lot.

The evidence most strongly relied on by the city to establish its contention is that about 40 years ago it paved the locus in quo; that over 20 years ago a railroad company built a railroad track over the disputed territory under permission from the city to lay it on River street, which is now upon the property; and that upwards of 20 years the public has used it as a street. The evidence shows that wharf property is treated by the municipality very differently from other property. Many ordinances have been enacted in which quite extensive municipal control has been asserted by the city over wharves and wharf lots owned by private individuals. They relate to regulations of dockage and wharfage, mode and manner of building and repairing such wharves, the control of harbor lines, prohibiting the incumbering of wharves with cotton, coal, brick, lumber, etc., so as to prevent use of wharves to vessels wishing to load, and fixing the dockage rates and charges which the wharf owner may make. Indeed, so broad was the power of superintendence of private wharf property asserted by the city that in 1866 the petition of the owners of this wharf to permit the use of it exclusively for steamships was refused by the city. It appears from the evidence that in 1867 the city paved the locus in quo with cobble stones, and charged the cost of the pavement against the docks and wharves account. When the streets were paved as streets a charge was made by the city against the streets and lanes account, and if wharves were paved the expense was charged against docks and

wharves account. The cost of the paving of a wharf by the city was collectible from the wharf owner. The evidence is silent as to whether or not the city reimbursed itself for the paving of this area from the wharf owner, as it had the right to do under its ordinance. There was no curbing or sidewalk laid on the locus in quo, or other interference with an entrance from the 20-foot street to any part of the wharf lot. The pavement extended to the posts which supported the roof of the wharf shed, and the eaves projected over it. During this time many steamers, including the New York and Philadelphia lines, used this wharf. It was one of the busiest spots in the city. The area in dispute was used by the patrons of the wharf in delivering and receiving freight. Busses and hacks were stationed on it for the reception of passengers, debris and rubbish were thrown upon a portion of it, and it was generally used by the wharf owner in connection with the business of the wharf, before and after the laying of the cobble stones. In 1889 the Central Railroad & Banking Company constructed a track over a part of the wharf property, under permission of the municipality to lay it on River street. A spur track was also built thereon for the use of the wharf. The spur track extended beyond this property for the use of other wharf owners, but has been discontinued in part. In the ordinance authorizing the construction of the railroad along River street, it was provided that "all damages that may be sustained by private individuals or corporations from the use and occupation of their property in exercising the rights herein granted shall be met and paid by said company." The evidence showed that Lincoln street sloped from the bluff to the water's edge, and that most probably to avoid the expense of regrading, and on account of a jog in a building on the east side of Lincoln street, the railroad was constructed upon the wharf front, where the ground was more level, instead of upon the 20-foot street. The evidence does not disclose whether this was done with the assent or over the protest of the wharf owners. The railroad track was used mostly for the handling of freight cars, and frequently dead cars were left standing on the track on this area for a day or more at a time. Whatever may be the respective rights of the railroad company and the wharf owners inter sese, it is clear that the construction of a track along the wharf front, under an ordinance granting permission to lay it upon a street and exempting the city from damages if laid upon private property, is too inconclusive an act on which to base dedication or prescription of the wharf front occupied by the railroad as being a part of the street.

Since the paving of the wharf the general public had been accustomed to travel over the area covered both by the 20-foot street and that portion of the wharf lot, which was

paved. But the use by the public of the paved area on the wharf lot was never of such a character as to interfere with its use by the wharf owner for his own business, or to indicate that the owner, by tolerating such use by the public, intended to dedicate his property to the public as a street. The owner paid the public taxes on the property, which were received by the city, without giving notice of any adverse claim; and the general trend of the testimony was that the area in front of the shed on the wharf was left open, on account of the peculiar nature of wharf property, for use in connection with the owner's business upon the wharf. The circumstances to which we have just alluded, as well as other matters embraced in the testimony, were insufficient to show an intent by the wharf owner to dedicate any part of his property to a public use, or that the public authorities attempted to accept any such dedication, or that the use by the public was so adverse as to exclude the owner from the use of his own property.

[1, 2] The idea of dedication to the public of a use of land for a public street depends upon the intent of the owner in some way to make such dedication. "The acts relied upon to establish such dedication must be such as clearly showed a purpose on the part of the owner to abandon his personal dominion over such property and to devote the same to a definite public use." *Swift v. Mayor, etc., of Lithonia*, 101 Ga. 706, 710, 29 S. E. 12; *Irwin v. Dixon*, 9 How. 10, 18 L. Ed. 25. In *Georgia Railroad v. Atlanta*, 118 Ga. 486, 45 S. E. 256, Mr. Justice Lamar, in discussing this proposition, said: "The case comes squarely within the rule applicable to squares and areas around stations, depots, wharves, and other places of a quasi public character, and to which the public at large are invited. The fact that streets or roads enter such open spaces from various directions, and that pedestrians and vehicles pass across the square for the purpose of going from one road to another, does not of itself show that the space has been dedicated to a public use. * * * The fact that, without intent to make a dedication, the company permits the land to be used by those who do not come thereon for the purpose of business with the company, should not operate to defeat its title. Its indulgence ought not to be charged against it, and used as a means of depriving it of property allowed to be enjoyed, but not intended to be given. That it does not capriciously warn off persons crossing the strip will not wipe out the effect of acts showing an intention to hold the property as its own. The public in a proper case may obtain the title by condemnation, if the other essential elements are present. But no law of force in this state intends to take private property for public purposes without payment therefor; nor will this end be attained under the

name of dedication, where there has not been an express gift by the owner, or where his long-continued acts have not indicated a purpose to set apart the property for the public good."

The paving of the area, under the facts submitted, will be attributable to the municipality's regulatory control over this quasi public property, rather than as an acceptance of an implied dedication. The Savannah river is a navigable stream, and the public authorities have from the earliest times exercised regulatory control of privately owned wharves on navigable waters. In this state the Railroad Commission is given jurisdiction over wharves and docks. Civil Code, § 2662. Had the municipality, as it had the right to do, compelled the payment of the amount expended for the pavement of this area, then, of course, no implication of dedication or acceptance could be implied from such an act. If the municipality failed to enforce its rights in this regard, then its pavement of the street will be deemed voluntary. It is of great significance that no gutters or sidewalks were constructed upon this area, that nothing was done by the city to prevent an easy approach to the shed, that the pavement was extended under the eaves of the roof of the shed, and that taxes were accepted by the city upon this very area as being a part of the wharf lot, without any notice from the municipality that it claimed an easement over it.

[3] The doctrine of title by prescription is founded on the presumption of a right by grant or license to the easement, after 20 years of uninterrupted adverse enjoyment. To authorize such presumption from possession alone, the enjoyment must not only be uninterrupted for the space of 20 years, but it must be exclusive and adverse, and under a claim or assertion of right, and not by the consent or favor of another claimant or owner. The fact that the user must be adverse must exist in every such case to authorize the necessary presumption. *Mitchell v. Rome*, 49 Ga. 19, 15 Am. Rep. 669; *McCoy v. Central of Georgia Ry. Co.*, 131 Ga. 382, 62 S. E. 297. In all cases of prescription the prescriber must show a possession hostile to that of the owner of the land. From the nature of wharf property the approaches must be kept open for the convenience of the owner and his customers. It would be inequitable to impose a public easement on the wharf owner's property because he tolerated liberties from the public which did not interfere with his private enjoyment. From a careful consideration of all the testimony, we think the circumstances relied on to show dedication and prescription too inconclusive to deprive the wharf owner of a part of his property.

Judgment affirmed. All the Justices concur.

(140 Ga. 240)

DAVID v. TUCKER.

(Supreme Court of Georgia. July 16, 1913.)

(Syllabus by the Court.)

1. TRIAL (§ 343*)—VERDICT—CONSTRUCTION.

Where one died, leaving a wife and children in possession of certain land to which he had title, and subsequently the grantee in a deed executed by the husband before his death, and purporting to convey title to such grantee, evicted the widow, and after such eviction she filed a petition to have this deed canceled on the ground that it was not an absolute conveyance of the property, but merely a security deed or a mortgage to secure a debt, asserting in the petition that the grantee in the deed held the lands "in trust for the grantor," and a verdict was rendered in favor of the widow, finding that she be restored to possession and that the deed be canceled, such verdict, construed, as it must be, in the light of the pleadings and undisputed facts, and the decree upon the same (which is not broader than the verdict), has the effect merely of annulling the deed and restoring the widow to such possession as she had before her eviction; and the verdict does not have the effect, nor does it purport to have the effect, of declaring or vesting title in the widow.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 809-812; Dec. Dig. § 343.*]

2. TRIAL (§ 253*)—INSTRUCTIONS—IGNORING ISSUES OR DEFENSES—EVIDENCE.

An exception to a charge on the ground that "it ignored the defendant's contention that defendant claimed the land in controversy under a gift by her father, who had a valid title thereto," is without merit, where from the undisputed evidence it appears that the defendant's father never had title.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 613-623; Dec. Dig. § 253.*]

3. ADVERSE POSSESSION (§ 112*)—BURDEN OF PROOF.

Inasmuch as the evidence for the plaintiff showed title in his intestate, as alleged in the petition, and the defendant relied upon her assertion that she had acquired a good prescriptive title, the court did not err in so charging the jury as to place upon the defendant the burden of establishing, by a preponderance of evidence, the prescriptive title asserted.

[Ed. Note.—For other cases, see Adverse Possession, Cent. Dig. §§ 651, 653, 654, 657-659, 661-663, 665, 666; Dec. Dig. § 112.*]

4. ADVERSE POSSESSION (§ 74*)—COLOR OF TITLE—WHAT CONSTITUTES—DECREE.

A verdict and decree, which, properly construed, did not purport to find title in a party, or to vest such party with the title, did not amount to color of title.

[Ed. Note.—For other cases, see Adverse Possession, Cent. Dig. §§ 443-447; Dec. Dig. § 74.*]

5. APPEAL AND ERROR (§ 1066*)—HARMLESS ERROR—INSTRUCTIONS.

Under the evidence, the defendant, who set up prescriptive title by virtue of seven years possession under color of title, was not entitled to a charge on the subject of the effect of possession under color of title, and was not injured by the charge upon that subject, even though the same was not strictly accurate.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 4220; Dec. Dig. § 1066.*]

6. ESTOPPEL (§ 68*)—CLAIM IN JUDICIAL PROCEEDING.

The court did not err in instructing the jury in substance that the defendant could not prevail upon the theory that she had title derived from her father, when in a former suit she

had caused it to be judicially ascertained and declared that the father's title, based upon an invalid conveyance from her husband, was void.

[Ed. Note.—For other cases, see Estoppel; Cent. Dig. §§ 165-169; Dec. Dig. § 68.*]

7. ADVERSE POSSESSION (§ 116*)—INSTRUCTION—NOTICE.

"There can be no adverse possession against a cotenant until actual ouster, or exclusive possession after demand, or express notice of adverse possession." Civ. Code 1910, § 3725. And the substitution of the expression "actual notice" for "express notice," in charging this section to the jury, was not error.

[Ed. Note.—For other cases, see Adverse Possession, Cent. Dig. § 66; Dec. Dig. § 116.*]

8. TRIAL (§ 252*)—REFUSAL OF INSTRUCTIONS.

The court properly refused to give a charge not authorized by the evidence.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 506, 596-612; Dec. Dig. § 252.*]

9. APPEAL AND ERROR (§ 1050*)—HARMLESS ERROR—ADMISSION OF EVIDENCE.

Upon examination of the evidence objected to as irrelevant, it is apparent that, even if it was irrelevant, it could not have the effect of harming or prejudicing the defendant's case before the jury, and consequently its admission is no ground for a new trial.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1068, 1069, 4153-4157, 4166; Dec. Dig. § 1050.*]

10. APPEAL AND ERROR (§ 273*)—EXCEPTION BELOW—SUFFICIENCY—ARGUMENT OF COUNSEL.

Where, during the argument of the case by the plaintiff's attorney, the defendant's counsel interposed the objection that the argument then being advanced was improper, and asked the court to disallow the same, and the court ruled upon the question in the following language: "If there is any legitimate evidence on which to base that as a legitimate conclusion, I will let that go in; whatever is in, and not ruled out, can be argued"—a general exception assigning this ruling as error is without merit, in the absence of an allegation or showing, in the ground of the motion itself, that the argument was not authorized by any evidence in the record.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1590, 1606, 1620-1623, 1625-1630, 1764; Dec. Dig. § 273.* Trial, Cent. Dig. §§ 256, 257, 689, 690, 694-696, 965.]

Error from Superior Court, Hart County; D. W. Meadow, Judge.

Action by J. H. Tucker, administrator, against Mary David. Judgment for plaintiff, and defendant brings error. Affirmed.

A. G. & Julian McCurry, of Hartwell, and Dorough & Adams, of Royston, for plaintiff in error. Jas. H. Skelton and A. S. Skelton, both of Hartwell, for defendant in error.

BECK, J. J. H. Tucker, as administrator de bonis non of the estate of James David, applied to the court of ordinary of Hart county for leave to sell a certain tract of land. Authority was given by an order from the court, as prayed. Upon his proceeding to bring the land to sale, a claim was filed by Mary David; she being in possession, and being the widow of James David, who died in the year 1862. The administrator brought a petition, setting forth that

the land in controversy belonged to the estate of his intestate, and that it was necessary for him to have possession of the same for sale, for the payment of the debts of the estate and for distribution among the heirs. Mary David answered, alleging that the property was her own: First, because she had a prescriptive title resulting from 20 years' adverse possession of the land; second, because she had prescriptive title resulting from possession under color of title for 7 years; and, third, because the property had been given to her by her father, William Ray. The verdict was for the plaintiff. The defendant filed a motion for a new trial, and, this being overruled, she accepted.

It was established on the trial, by uncontroverted evidence, that the land in question was the property of James David at the time of his death, unless he had been divested of title by a certain deed, which, it appears from certain parts of the record, he had executed in the year 1862 to William Ray, the father of the defendant, purporting to convey this property, though the deed itself was not introduced in evidence. The execution of a deed absolute in form, which purported to convey the land involved, but which in fact did not have the effect of conveying it, appears from the record of a suit which was introduced in evidence by the defendant in this case. That suit was begun by a bill in equity brought in the year 1875, wherein Mary David alleged that she was the widow of James David; that on the 3d day of May, 1862, her husband was in possession of and held title to the land in controversy; that James David, being about to leave home to join the Confederate States army, and being indebted to William Ray some small amount, and reposing full confidence in him, executed a deed purporting to convey the land to Ray, without any other consideration than the small amount so owing by David to Ray, with the understanding that the deed was a security deed merely; that soon after the execution of this deed she moved into the house of William Ray and became one of his family, where she remained until 1873, when Ray told her to go back to the old home place, known as the David place, without paying anything for it, which she did; that she did not know that Ray claimed the land absolutely, but believed that he only claimed a lien for the amount due him, until, the year before bringing her equitable petition, he demanded rent from her, and subsequently, in 1875, sued out a warrant and evicted her from the land. She prayed that Ray be required to account for the difference between the true value of the land at the time the deed was made and the amount due him, with interest thereon, or that he be required to turn over to her the land, and that the deed be declared null and void, and be delivered up and canceled.

By amendment she alleged that the agreement between James David and William Ray was that Ray was to hold the land in trust for David until the payment of the debt, and that Ray took possession of the land affected by said trust, and that there was no intention on David's part to make an absolute conveyance of the land to Ray. It does not appear that any demurrer to this bill was filed; but Ray filed his answer, denying that he had received the deed merely as a security deed for any amount of money due him, and insisting that the deed, as it purported to be, was an absolute deed conveying title to him in fee simple upon a sufficient consideration. Upon the trial of that case the jury returned the following verdict: "We, the jury, find and decree that the deed to the David place, copy of which is attached to bill as Exhibit B, be and is hereby declared null and void, and be delivered up to be canceled, and that defendant restore possession of said David place to complainant, and that said defendant pay to complainant the sum of \$200 and the cost of this case." This verdict was made the decree of the court, and Ray was ordered to restore possession of the David place (the land in controversy) to Mary David.

[1] 1. The court properly instructed the jury in this case that, in the suit brought to cancel the deed from the plaintiff's intestate to Ray, the effect of the decree was to leave the title to the property which that deed purported to convey where it was before the deed was executed; that is, in James David, or rather in his estate, as he had died leaving a wife and children. Nowhere in the bill brought by Mary David to have the deed from James David to Ray set aside and canceled does she assert title in herself, or make any allegation from which an inference could be drawn that she was asserting title in herself. She distinctly alleged that under that deed Ray held the "property in trust for said James David"; and while she did not mention the fact that she had children, she nowhere alleged that at the time of her eviction her possession was in her own right or under claim of title. Throughout that petition she treated the deed from James David to her father as a mere security deed, or as a mere mortgage. She called it a mortgage in her petition. And a decree canceling that paper, as the court said in the charge, had no other effect than to leave the title to the property where it was before. While it restored her to the possession of the land, the possession thus restored was of the same character as it was before she was evicted; and before the security deed was canceled; and there is no pretense that up to the time of the eviction her possession was in her own right. For, up to the time of her eviction, as she shows herself, she did not know that Ray was making such a claim of title to the property as would enable him to make any gift of it to her. "Verdicts are to have a

reasonable intendment, and are to receive a reasonable construction." Civil Code, § 5927. And the entire pleadings and all undisputed facts proved upon the trial may be examined and considered in construing the verdict. Mayor, etc., of Macon v. Harris, 75 Ga. 761.

[2] 2. Another ground of the motion for a new trial complains of the following charge of the court: "She [the defendant] does not deny the fact, as I understand, that upon the death of the father of the children, and her husband, that in law the land in dispute vested in her and the children, share and share alike, unless she saw fit to claim a year's support or a dower, neither of which, they contend, has been applied for." This charge is excepted to on the ground that "it ignores the contention of the defendant that her husband, David, conveyed said land to her father, and received the full purchase money therefor, and that defendant claimed said land through her father, W. C. Ray, who had a valid title thereto." Clearly the exception is without merit, inasmuch as, under the evidence introduced by the defendant in this case herself, W. C. Ray had never had title to the land; and if he had ever claimed title, it was under and by virtue of a deed which she had canceled on the ground stated in her petition therefor, as set forth above.

[3] 3. Inasmuch as the evidence for the plaintiff showed title in his intestate, as alleged in the petition, and the defendant relied upon her assertion that she had acquired a good prescriptive title, the court did not err in so charging the jury as to place upon the defendant the burden of establishing the prescriptive title asserted by a preponderance of evidence.

[4] 4. The defendant's assertion of a good prescriptive title by virtue of seven years' possession under color of title was based entirely upon her possession under the verdict and decree set forth in the opening paragraph of this opinion; and inasmuch as that decree does not purport to vest her with title, or to find that she was vested with title, it did not amount to color of title. *Beverly v. Burke*, 9 Ga. 440, 54 Am. Dec. 351; *Street v. Collier*, 118 Ga. 470, 45 S. E. 294; *Hansen v. Owens*, 132 Ga. 648, 64 S. E. 800.

[5] 5. Inasmuch as the evidence failed entirely to show that the possession of the land in controversy by the plaintiff was under color of title, the instruction of the court in reference to the defendant's contention that she had a prescriptive title, based upon seven years' possession under color of title, will not be examined critically to see if they are entirely accurate; for, having shown no color of title in herself, the plaintiff was not injured by a charge upon that subject, even though it was not in all respects accurate.

[6] 6. The court did not err in charging the jury in substance that the defendant could not set up a title in this case derived

from a gift by her father, William O. Ray; for, as against the defendant in this case, under the evidence introduced by her, it had been judicially ascertained and declared that Ray never had title to the land, and she will not now be permitted to assert that he once actually had title. It would be playing fast and loose, indeed, with all principles of equity, to allow this defendant in one suit to set up her husband's title to defeat her father, and in such proceeding have the deed which he held from her husband declared void, and now, in order to defeat her husband's estate, have the court declare that the deed from him to her father was valid.

[7] 7. "There can be no adverse possession against a cotenant until actual ouster, or exclusive possession after demand, or express notice of adverse possession." This is the language of the statute. Civil Code, § 3725. And the substitution of the expression "actual notice" for "express notice," in charging this Code section, was not error. *Morgan v. Mitchell*, 104 Ga. 598, 80 S. E. 792.

[8] 8. The request to charge was neither adapted to nor authorized by the evidence, and it was not error to refuse and fail to charge the same.

[9, 10] 9, 10. The rulings in the ninth and tenth headnotes require no elaboration.

Judgment affirmed. All the Justices concur.

(140 Ga. 326)

WADLEY v. OERTEL et al.

(Supreme Court of Georgia. July 18, 1913.)

(Syllabus by the Court.)

1. JUDGMENT (§ 670*)—DESIGNATION—DEFENDANT IN REPRESENTATIVE CAPACITY—WAIVER OF DEFECT.

Where a statutory action was brought to recover land and mesne profits, against two persons, the name of one of whom in the petition was followed by the words "executor" of a named person, and where such defendant filed a plea of prescription as executor of his testator, and after the case was lost, and a motion for a new trial was overruled, he, in his representative character, joined in a bill of exceptions and in executing a supersedeas bond, after affirmance of the judgment, an injunction will not be granted to restrain the execution by the sheriff of a writ of possession, on the ground that the judgment only bound him individually, and did not preclude him from asserting the title claimed by the estate.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 1181, 1185; Dec. Dig. § 670.*]

2. EXECUTION (§ 171*)—INJUNCTION—GROUNDS—EXISTENCE OF OTHER REMEDY.

If the judgment for mesne profits and the execution issued thereon only authorized the realizing of the amount de bonis propriis, and not de bonis testatoris, this would not require an injunction, but the levy could be met by affidavit of illegality.

[Ed. Note.—For other cases, see Execution, Cent. Dig. §§ 497-518; Dec. Dig. § 171.*]

Error from Superior Court, Richmond County; H. C. Hammond, Judge.

Action by W. M. Wadley, executor, against T. E. Oertel, executor, etc., and others. Judgment for defendants, and plaintiff brings error. Affirmed.

On August 21, 1906, Benjamin A. Chew and others brought an action to recover land against H. L. Chichester, Jr., and "W. M. Wadley, executor of Wm. O. Wadley, deceased," in the superior court of Jenkins county. It was alleged that the defendants were in possession of certain described land, to which the plaintiffs claimed title; that the defendants had received the profits therefrom, and refused to deliver the land or the profits to the plaintiffs. An abstract of title under which the plaintiffs claimed was attached. The caption of the process stated the case to be against "H. L. Chichester, Jr., and W. M. Wadley, executor of W. O. Wadley," and commanded H. L. Chichester, Jr., of the county of Jenkins, and W. M. Wadley, executor, of the county of Monroe, "to be and appear, etc. The sheriff of Jenkins county made an entry of service "on defendant" by leaving a copy at his most notorious place of abode. An answer was filed, which began, "And now come the defendants in the above-stated case," etc. They admitted possession of the land and the receipt of profits therefrom, but denied that the plaintiffs had title. Pending the suit, an amendment was offered, so as to make the plea read, "And now comes defendant, H. L. Chichester, in the above-stated case," etc., and to change the plural to the singular number in other parts of the answer. The court refused to allow this amendment. Subsequently one Oertel, as executor of Benjamin A. Chew, and W. E. Platt, as administrator of another of the original plaintiffs, presented their petition, alleging that these two plaintiffs had died, and that the petitioners were their legal representatives, and desired to be made parties in their stead. On this petition service was acknowledged by a firm of attorneys "for H. L. Chichester, Jr., and W. M. Wadley, executor of the estate of W. O. Wadley, deceased." An order was passed making the petitioners parties in lieu of the two deceased plaintiffs. The jury found for the plaintiffs the premises sued for and a certain amount as mesne profits, and a judgment was entered accordingly. A motion for a new trial was made by the defendants. It was overruled, and they excepted.

The bill of exceptions so filed recited that there came on to be heard the case of "Ruth Chew Le Cato, T. E. Oertel, executor of Benj. A. Chew, and W. E. Platt, administrator of Hull S. Chew, against H. L. Chichester, Jr., and Wm. M. Wadley, executor of W. O. Wadley." After reciting the overruling of the motion for a new trial, it then concluded: "Wherefore the plaintiffs in error, W. M. Wadley, as executor of W. O. Wadley, deceased, and H. L. Chichester, Jr., come now

within 30 days of the overruling of their said motion for new trial," etc. A supersedeas bond was given. In the caption the defendants were named as "H. L. Chichester, Jr., and W. M. Wadley, executor of W. O. Wadley." In the body of the bond it was declared: "Now, therefore, we, H. L. Chichester, Jr., and W. M. Wadley, as executor of W. O. Wadley, as principals, and Georgia Life Insurance Company as surety, do hereby acknowledge ourselves safely and firmly bound unto the said plaintiffs," etc. It was signed: "Wm. M. Wadley, as Executor of W. O. Wadley; Estate of W. O. Wadley, by Wm. M. Wadley, Executor; H. L. Chichester, Jr."—as principals. In the Supreme Court counsel for both parties entered into a stipulation in writing as follows: "It is hereby stipulated and agreed by and between counsel for both sides in this case that a plea of prescriptive title of the premises in dispute was duly filed in the court below by the defendant, W. M. Wadley, as executor of W. O. Wadley, deceased." The judgment of the trial court was affirmed. *Wadley v. Le Cato*, 139 Ga. 177, 77 S. E. 47. A motion for a rehearing was made by "W. M. Wadley, executor of the estate of W. O. Wadley." It was denied. A writ of possession was issued. The sheriff returned that he had executed it by putting plaintiffs into possession, and that he had levied on certain land as the property of the estate of W. O. Wadley, deceased, in possession of W. M. Wadley, as executor, for the purpose of making the amount of a judgment for mesne profits.

William M. Wadley, as executor of the estate of William O. Wadley, deceased, filed his equitable petition against the plaintiffs in the former action and against the sheriff of Jenkins county. He alleged in substance as follows: The former suit was against him as an individual, and not in his representative capacity as the executor of the estate of W. O. Wadley. The estate was not bound by the judgment, but the plaintiffs obtained only a judgment against Chichester and W. M. Wadley as individuals. The land belongs to the estate. The writ of possession issued by the clerk of the superior court followed the description of the land sued for, except that the clerk also attached to it certain maps, plats, and court proceedings, which formed no part of the original pleadings in the ejectment suit, or of the verdict and judgment therein. The sheriff, in company with one of the counsel for the plaintiffs in ejectment, entered upon the lands of the estate of W. O. Wadley, and attempted to find the lands covered by the description in the writ of possession. Failing to do this, he handed to a young man, who was temporarily in charge of the place, a notice which to petitioner is wholly unintelligible. He then left the premises with instructions to the young man to deliver the paper to counsel for the estate of W. O. Wadley. The

petitioner apprehends that further steps will be taken to enforce the writ of possession and to evict him, of the tenants holding under him, as executor of the estate of W. O. Wadley. The writ of possession issued by the clerk included a clause in the nature of an execution for money, commanding the sheriff "that of the goods and chattels, lands and tenements, of W. M. Wadley, executor of W. O. Wadley, and W. M. Wadley, as administrator of H. L. Chichester, and the Georgia Life Insurance Company, security on the supersedeas bond filed by said defendants, you make or cause to be made by levy and sale the sum of \$3,200, besides interest," etc. The sheriff, when attempting to execute the writ of possession, levied "this execution clause of said writ" on certain lands of the estate of W. O. Wadley other than those described in the ejectment suit, and unless prevented from so doing will sell the lands thus levied on. It was prayed that the plaintiffs in the former action to recover the land be enjoined from further proceeding to have the writ of possession and the judgment and execution enforced against the estate of W. O. Wadley, and from claiming or asserting any rights as against such estate by virtue of the proceedings in the former action, and that the sheriff be enjoined from further proceeding to execute the writ of possession or to sell the land levied on by him.

The defendants answered in substance as follows: Chichester was the son-in-law of W. O. Wadley, deceased, and was the tenant in possession of the land claimed to belong to the estate of W. O. Wadley. The executor of the estate moved to make the amendment which is stated above. The court refused to allow the amendment, and held that both Chichester and the executor of W. O. Wadley were in court, and that all imperfections in service had been waived by their appearance and pleading, and the suit would have to be defended by them. The entire proceedings show that W. M. Wadley, as executor of the estate of W. O. Wadley, deceased, was a party, and defended the case, and that the estate is bound by the judgment. The sheriff executed the writ of possession and put the plaintiffs in possession. There was no difficulty in finding the property. W. M. Wadley was not in possession of the land as an individual, and he defended the suit in his representative capacity. In addition to the records of the former suit, certain affidavits were introduced which need not be set out. The presiding judge refused to grant an interlocutory injunction, and the plaintiff excepted.

Miller & Jones, of Macon, for plaintiff in error. W. K. Miller and Pierce Bros., all of Augusta, and H. M. Holden, of Athens, for defendants in error.

LUMPKIN, J. (after stating the facts as above). [1] 1. The little word "as" is quite an important word in determining whether a suit is by or against an administrator or executor in his representative character or as an individual. But it is neither a sine qua non of pleading in a case against an executor in that capacity, nor is it a ne plus ultra of legal construction. The general rule is that an instrument signed by one as agent, trustee, guardian, administrator, executor, or the like, without more, is the individual undertaking of the maker, "such words being generally words of description." Civil Code, § 3570. A suit by one with the word "administrator," or "executor," added to his name, especially on a contract made by him, will ordinarily be treated as being his individual suit; and likewise when the suit is against him. Woodward v. Harris, 138 Ga. 751, 76 S. E. 49. But this is not an inflexible rule, where the context makes it clear that the suit was brought by or against him in his representative character, although the word "as" is not employed for that purpose. In Jennings v. Wright & Co., 54 Ga. 537, a suit was brought in the statutory short form against the administrator of a named decedent, but the petition did not expressly state that it was against him as administrator. It alleged that the defendant was indebted to the plaintiff on a note, of which a copy was attached. The copy annexed was that of a joint note of the decedent and another. It was held that the suit was against the defendant, not individually, but in his representative capacity. In the opinion, Bleckley, J., said: "Let the declaration and the copy note, in this case, be read together in a spirit of candor, and there is not one man in a thousand who would be likely to misunderstand them. To miss the meaning, the reader would have to be a man of much learning, and one whom much learning hath made mad." In Tinsley v. Lee, 51 Ga. 482, a decree for money was rendered against a defendant, with the words "executor" of a specified person added to his name. The execution commanded that the money be realized of the property of the defendant, naming him, and adding the words "executor" of a certain person, and nothing else appeared. Such decree and execution were held to be against the defendant as an individual, and not in his representative character. But if it appears from the face of an execution that it is against an administrator, and to be levied upon the property of the decedent, it is valid, though the word "as" be omitted. Fry v. Shehee, 55 Ga. 208 (11); Dozier v. McWhorter, 117 Ga. 786, 45 S. E. 61. In Anderson v. Foster, 105 Ga. 563, 32 S. E. 373, suit was brought by Anderson, administrator of A. W. Foster, against F. C. Foster, executor of A. G. Foster, deceased, and against E. W. Butler, executor of Joshua Hill. In beginning the opinion, Mr. Justice Fish said:

"This case, as the record shows, was treated in the trial below, by all the parties thereto and the judge, as an action against F. C. Foster and E. W. Butler as the executors, respectively, of the wills of A. G. Foster and Joshua Hill, deceased. It was argued before this court by both sides upon this theory. Whatever, therefore, may have been the true legal character of the petition, this court, under the circumstances, will consider it as against the defendants in their representative capacities." Lavery v. Woodward, 16 Iowa, 1; Keyes v. Minneapolis & St. L. R. Co., 36 Minn. 290, 30 N. W. 888. In Braswell v. Hicks, 106 Ga. 791, 32 S. E. 861, it was held that where, in defense to an action brought against one as an individual, he files an answer which practically, though not in express terms, makes him in his character as administrator of a deceased person a defendant to the action, and defends in the right of his intestate's estate, the estate is concluded by the judgment rendered in that action. Lamar v. Lamar, 118 Ga. 684, 688, 689, 45 S. E. 498; Emmett & Co. v. Dekle, 132 Ga. 693, 64 S. E. 682; Daniel v. Gum, 45 S. W. 468; Russell v. Mallon, 38 Cal. 259.

Tested by these principles, how stands this case? A suit to recover land was filed against Chichester and "W. M. Wadley, executor of W. O. Wadley, deceased." Both defendants answered. According to a stipulation filed later by counsel in the Supreme Court, a plea of prescription was filed by "the defendant, W. M. Wadley, as executor of W. O. Wadley, deceased." He thus put the title of the estate in issue, if it was not already so. Whether he introduced evidence to sustain this plea is immaterial. The case having been lost by the defendants in the trial court, it was brought to this court. The bill of exceptions stated that "W. M. Wadley, as executor of W. O. Wadley, deceased," and Chichester excepted. The supersedeas bond was joined in by Wadley as executor of the decedent. He thus placed in issue the title of the decedent, and litigated in the superior court and in this court in his representative capacity. He lost his case in both courts, after a litigation extending over more than six years. To allow him now, in his representative capacity, to say that he is not bound in that capacity, but only individually, because in the original action the word "as" was not employed in describing the defendant or praying process, would be to ascribe to that word or its absence more potency than we are willing to concede to it. When the former case was in this court, counsel for all parties signed and filed the stipulation above mentioned as a basis of procedure. It became a part of the record. In the present petition there is no allegation that their conduct was wrongful. It is not an admission in a case between different parties. It is a solemn agreement between these parties in a litigation over the same land. The present

plaintiff has had his day in court. He must abide the result as to the land.

[2] 2. If the judgment, so far as it is for money, and the execution, are de bonis propriis, and not de bonis testatoris, this can be met by affidavit of illegality, and does not require an injunction. Doubtless such an irregularity, if it exists, is curable by amendment. *Jennings v. Wright & Co.*, 54 Ga. 538 (3), *supra*. The interlocutory injunction was properly refused.

Judgment affirmed. All the Justices concur.

(140 Ga. 284)

FRATERNAL LIFE & ACCIDENT ASS'N
v. EVANS et al.

(Supreme Court of Georgia. July 18, 1913.)

(Syllabus by the Court.)

1. INSURANCE (§ 818*)—ACTION ON BENEFIT CERTIFICATE—EVIDENCE.

Civ. Code 1910, § 2471, provides that all life and fire insurance policies issued upon the life and property of persons within this state, referring to the application for insurance, or the constitution, by-laws, or other rules of the company, shall contain or have attached a copy of same, in order to authorize the introduction thereof in evidence, as part of the policy, or as an independent contract. Civ. Code 1910, § 2869, provides that fraternal beneficiary orders or associations shall be governed by the provisions of the Code relating to such orders or associations, and shall be exempt from the provisions of the insurance laws of this state. The first section (2471) declares what shall constitute the policy of insurance, and is a distinct provision of the law of life and fire insurance; and the last section has the effect to take from its operation benefit certificates issued by fraternal beneficiary orders or associations, as defined in Civ. Code 1910, § 2869. It follows that, where a benefit certificate by a fraternal association refers to the application, constitution, and by-laws of the association as being a part of the contract, in an action on such benefit certificate, the application, constitution, and laws of the association are receivable in evidence as part of the contract of insurance.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 2003-2005; Dec. Dig. § 818.*]

2. INSURANCE (§ 818*)—ACTION ON BENEFIT CERTIFICATE—EVIDENCE—APPLICATION.

Under an issue of fraud in the procurement of a benefit certificate from a fraternal beneficiary association, where the fraud is alleged to consist in the applicant's false statements, willfully and intentionally made in the application, inducing the issuance of the certificate, the application is admissible in evidence, independently of Civ. Code 1910, § 2869, not as forming a part of the contract, but as tending to show its fraudulent procurement.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 2003-2005; Dec. Dig. § 818.*]

Error from Superior Court, Jefferson County; B. T. Rawlings, Judge.

Action by W. D. Evans and others, administrators, against the Fraternal Life & Accident Association. Judgment for plaintiffs, and defendant brings error. Reversed.

W. A. Thompson, of Atlanta, and Jno. R. L. Smith, of Macon, for plaintiff in error. R. L. Gamble and W. L. Phillips, both of Louisville, for defendants in error.

EVANS, P. J. The Fraternal Life & Accident Association, formerly known as the Fraternal Relief Association, a corporation of the state of Virginia, issued a benefit certificate to William J. Evans, a member of the association, in the sum of \$2,000, payable to S. C. Evans, the member's father, upon satisfactory proof of the death of the member while in good standing upon the books of the association. William J. Evans died, and the beneficiary furnished proof of his death to the association, which refused to pay the amount of the certificate. Thereupon the beneficiary brought suit. The association set up the defense that the certificate was issued upon the condition that the laws and constitution of the association constituted a part thereof; that by section 18 of the general laws of the association no action shall be maintained nor recovery had for any claim arising under any certificate of membership after a lapse of one year from the date of the member's accident or death, unless proceedings for such recovery shall be commenced within one year from such accident or death, and a delay for a longer period shall be deemed and held a waiver and conclusive evidence against the validity of such claim, and the present action was not commenced within a year from the member's death; that in his application for membership and for the benefit certificate W. J. Evans stated, in response to specific questions, that no member of his family (wife or children) had ever suffered from consumption or chronic cough, and that his wife was healthy, and warranted the statements to be true; that the statements were false, in that at that time his wife was not healthy, but was afflicted with consumption; that by the terms of the application and the certificate the former was the basis of the latter and constituted a part of the contract; that these statements were made to induce the association to accept the applicant as a member and to accept the risk of issuing the certificate, and were material to the contract entered into, and that the nature, character, and extent of the risk were changed by the variations of the facts from the statements; that under the laws of the association, if a member should die after two years and before three years from the date of his membership, the beneficiary's recovery would be limited to 80 per cent. of the certificate; and that, as the member died within that period, no greater recovery could be had. By amendment it was averred that the statements of W. J. Evans respecting the health of his wife were made intentionally, falsely, and fraudulently, for the purpose of deceiving the as-

sociation as to the condition of his wife's health, and they did deceive the association, and that by this fraud and deceit he procured the issuance of the benefit certificate. A verdict was returned for the plaintiff, and the court refused a new trial.

[1] 1. The defendant offered in evidence its original minute book, containing the record of its proceedings, including its constitution and general laws and the constitution governing all of its lodges, the original application of W. J. Evans for membership, and the testimony of its superintendent and state counsel that "we organize lodges throughout the state for the benefit of members of the Odd Fellows, a secret order. We have ritual, pass-word, grip, signs, signals, and paraphernalia. We admit Odd Fellows, and no one else. We have what are called subordinate lodges located in places throughout the country. We have a supreme lodge or general association." This evidence was repelled by the court, on the ground that the evidence was incompetent, because the constitution, by-laws, and rules were not contained in, nor a copy thereof attached to, the benefit certificate sued on. The court predicated his ruling upon Civil Code, § 2471, which is as follows: "All life and fire insurance policies issued upon the life and property of persons within this state, whether issued by companies organized under the laws of this state or by foreign companies doing business in this state, which contain any reference to the application for insurance, or the constitution, by-laws, or other rules of the company, either as forming part of the policy or contract between the parties thereto or having any bearing on said contract, shall contain, or have attached to said policy, a correct copy of said applications signed by the applicant, and of the by-laws referred to; and unless so attached and accompanying the policy, no such constitution or by-laws shall be received in evidence either as part of the policy or as an independent contract in any controversy between the parties to or interested in the said policy, nor shall such application or by-laws be considered a part of the policy or contract between such parties."

The contention of the plaintiff in error is that this section of the Code does not apply to fraternal beneficiary orders or associations, to which class it belongs, but that such associations are expressly taken from the operation of the insurance laws by virtue of section 2869, which provides: "Such orders or associations shall be governed by this section, and shall be exempt from the provisions of the insurance laws of this state; and no law hereafter passed shall apply to fraternal beneficiary orders or associations unless it is expressly designated therein." One of the objects in offering this evidence was to show that the defendant corporation was a fraternal beneficiary association, and not an insurance company which came within the pur-

view of Civil Code, § 2471. A fraternal beneficiary association, order, or society is defined by Civil Code, § 2868, to be "a corporation, society, or voluntary association which has no capital stock, but is formed or organized and carried on for the benefit of its members and their beneficiaries, and having a representative form of government and a lodge system, with ritualistic form of work for the meeting of its lodges, chapters, councils, or other designated subordinate bodies, and the benefits, insurance, charity, or relief shall be payable by a grand or supreme body of the same, excepting sick benefits, which may also be paid by local or subordinate bodies. Such grand or supreme bodies may be composed of its officers, incorporators, representatives elected by local, district or grand bodies, past officers, and standing committees. Such orders or associations may make a constitution, by-laws, rules, and regulations consistent with the existing laws of the state, for the government of all under its authority, for the management of its properties, and the due and orderly conduct of its affairs."

The rejected evidence tended to show that the purpose and form of organization of the defendant corporation was such as to classify it as a fraternal association as thus defined. The act of 1900 (embraced in the second title, chapter 2, art. 9, § 7, of the Civil Code, including sections 2866 to 2877) declares that such associations may provide for the payment of benefits in case of death, sickness, disability, or old age, and, as we have already indicated, they are by section 2869 expressly exempted from the provisions of the insurance laws of the state. It is the insurance law (Civil Code, § 2471) which requires the policy to contain or have annexed thereto the constitution, by-laws, and application of the company issuing it. A fraternal association may issue its formal certificate, or the contract may be found in its constitution and by-laws. *Social Benevolent Society v. Holmes*, 127 Ga. 587, 56 S. E. 775. The provisions of Civil Code, § 2471, are applicable to mutual co-operative and assessment insurance companies. *Purveyor v. Farmers' Mutual Ins. Ass'n*, 137 Ga. 580, 73 S. E. 851. The General Assembly have differentiated fraternal beneficiary associations from co-operative and assessment companies; the latter are classed as insurance companies (Civil Code, §§ 2412, 2450), while the former are exempt from the provisions of the insurance laws (Civil Code, § 2869).

There is a well-defined difference between an insurance company which indemnifies solely against loss, and fraternal beneficiary societies for beneficial and protective purposes. The manifest purpose in the enactment of Civil Code, § 2869, was to treat fraternal benefit societies differently from insurance companies. The Code provision as to rejecting evidence of the application, consti-

tution, and by-laws, when not contained in a policy of insurance or attached thereto, not being applicable to fraternal associations, the application, constitution, and by-laws were admissible in evidence as a part of the contract, and material misstatements in the application would prevent a recovery (*Supreme Conclave v. Wood*, 120 Ga. 328, 47 S. E. 940), and a failure to bring suit within a reasonable contractual period would also bar a recovery. *Melson v. Phenix Ins. Co.*, 97 Ga. 722, 25 S. E. 189.

[2] Independently of the provisions of Civil Code, § 2809, the application for membership and a benefit certificate were admissible on the issue of fraud. Under such an issue it was competent to show fraud in the procurement of the policy; and if the fraud consisted in making false statements regarding the health of the member's wife in the application, the application would be admissible, not as forming a part of the contract, but as tending to show a fraudulent procurement of the contract. *Johnson v. Am. Natl. Life Ins. Co.*, 184 Ga. 800, 68 S. E. 781. While it is true that in the cited case the application was rejected, nevertheless the verdict was for the defendant, and this court did not rule that the application was inadmissible, but the reasoning of the court was that it would have been competent evidence on this issue.

Judgment reversed. All the Justices concur.

(140 Ga. 235)

PENTON et al. v. HALL.

HALL v. PENTON et al.

(Supreme Court of Georgia. July 16, 1913.)

(Syllabus by the Court.)

1. CHATTEL MORTGAGES (§ 18*)—VALIDITY—INCREASE OF PROPERTY.

Where an owner of land and certain personality thereon agreed to sell them, took notes from the purchasers, and entered into a written contract with them, by one of the terms of which it was agreed that "all increase of personality and improvements made by said parties of the second part shall become and be the property of said party of the first part until the notes and obligations herein specified of said parties of the second part are paid in full," such agreement constituted an effort to mortgage any increase in personality which might be made. As to personal property which might be thereafter acquired by the purchasers and moved upon the place, such a mortgage was not valid.

[Ed. Note.—For other cases, see *Chattel Mortgages*, Cent. Dig. §§ 61-66; Dec. Dig. § 18.*]

2. ESTOPPEL (§ 71*)—CHATTEL MORTGAGES—FORECLOSURE—INTERVENTION.

Although a third person may have stated to one contemplating a sale of land and personality thereon that certain personal property situated on another place belonged to the intended purchasers, yet where the parties to the sale recognized that for certain reasons the personality situated on the other property could not be given as a security at that time, and the clause quoted in the first headnote was in-

serted in the instrument for the purpose of giving to the seller a mortgage on such property, not presently, but at a later date, and where, in a proceeding solely to foreclose such mortgage, a receiver was appointed, who took possession of both lots of personality, his right of possession of the property which was not included in the sale depended upon the validity of the mortgage upon it; and, it being invalid to that extent, the person who made the representation mentioned above, and who was the real owner of the property, was not estopped from reclaiming it from the possession of the receiver by means of an intervention.

(a) No ruling is made as to what effect such representations might have had in some form of action, dependent, not upon the validity of the mortgage as to this property, but upon the question of the general title of the debtors.

[Ed. Note.—For other cases, see *Estoppel*, Cent. Dig. §§ 173-182; Dec. Dig. § 71.*]

3. CHATTEL MORTGAGES (§ 284*)—FORECLOSURE—INTERVENTION—DIRECTION OF VERDICT.

Under the pleadings and evidence, there was no error in directing a verdict in favor of the intervener.

[Ed. Note.—For other cases, see *Chattel Mortgages*, Cent. Dig. § 573; Dec. Dig. § 284.*]

Error from Superior Court, Chatham County; W. G. Charlton, Judge.

Equitable action by George H. Penton against Leo G. Hall and others, wherein a receiver was appointed and W. W. Hall filed an intervention. A verdict was directed for intervener, and plaintiff and the receiver bring error, and intervener files a cross-bill of exceptions. Affirmed on main bill of exceptions, and cross-bill dismissed.

George H. Penton agreed to sell to Leo G. Hall, Robert C. Hall, and Charles H. Richardson a tract of land used as a dairy farm, and the personal property situated upon it, consisting of 25 cows, a horse, a wagon and harness, a buggy and harness, and certain described cans, buckets, barrels, etc., for the sum of \$6,000. The parties entered into a written contract in regard to such sale, specifying that of the purchase price \$100 was payable in cash, and that 78 notes for \$75 each should be given for the balance, maturing monthly, and one note for \$50, maturing in 79 months, all bearing interest. It was agreed that the notes should be delivered to a named person to collect as they should fall due, and to apply the proceeds on a loan of \$4,500 made by another person to Penton, and secured by a deed. After the payment of such loan, any overplus was to be paid to Penton. Upon payment in full of the notes given by the purchasers, Penton bound himself to convey to them the property above described. Then occurred the following clause: "It is understood and agreed that said parties of the second part buy said property upon the terms above mentioned, and agree that they meet all of their obligations promptly at maturity, and in the meantime will keep said property in good repair and condition, will pay all taxes and insurance upon the property, and will conduct a dairy farm thereon, and keep up said herd

of cattle to the present number and standard; and the said parties of the second part shall be at liberty to make any advantageous trade of the personalty hereinbefore described, provided as valuable property is bought [brought?] on said farm through said trade as that which may be taken off. All increase in personalty and improvements made by said parties of the second part shall become and be the property of the said party of the first part until the notes and obligations herein specified of said parties of the second part are paid in full." It was further agreed that, upon failure of the purchasers to comply with any of the conditions of the contract, a default might be claimed, and Penton might proceed to foreclose the agreement.

Penton filed an equitable petition against the purchasers, alleging various defaults, and praying for judgment; that the property covered by the agreement be sold, and the proceeds applied to the payment of the debt due to him; that the purchasers be enjoined from removing or disposing of any part of the personalty located upon the land; that a receiver be appointed; and for general relief. It was alleged that at that time there were 57 cows, several calves, 4 horses, and certain agricultural implements on the place. A receiver was appointed. W. W. Hall filed his intervention, claiming that certain described cows which had been seized by the receiver belonged to him, and praying that they be delivered to him. The plaintiffs in error contended that the intervenor had represented that these cows belonged to the purchasers of the property from Penton before he made the sale, and that the clause above quoted was inserted in the instrument so as to include them; they not being at the time on the place which he sold.

As to the making of such a representation there was some controversy. The evidence showed that in fact the intervenor had bought the cows from another person before the sale, which was made by Penton to the purchasers of the land and certain cattle from him. The plaintiff, Penton, testified that he offered to sell the dairy farm to the intervenor, but the latter declined to buy; that he said that "the boys" (the persons who later purchased from Penton) wished to buy one; that the intervenor told him that the dairy business at the place where the cows now in controversy were then located belonged to "the boys," and that the cattle belonged to them; and that nothing was said by the intervenor as to what would be done with such cattle. He also testified that one of the three purchasers, who acted as the spokesman for the others, said that the cattle now in controversy belonged to them, and that they would move such cattle from the place where they were to the place which they were buying from Penton; that, under these representations, he made the agreement

with the purchasers, with the understanding that the cattle would be moved over to his place. He testified further: "The reason that I wanted to know if they were going to be moved to my place was because I asked the boys to give me further security on the purchase," and that the spokesman of the purchasers said that he had not quite finished paying for the cattle, that he owed a couple of hundred dollars on them, and that he would move them to the place which they were buying. The clause in regard to all increase in personalty was put into the contract to cover the cattle on the other farm, "because they couldn't give them to me as security until they were paid for."

The presiding judge directed a verdict in favor of the intervenor. The plaintiff and the receiver moved for a new trial, which was refused, and they excepted. The defendant in error filed a cross-bill of exceptions, complaining of the admission of certain evidence.

Edward S. Elliott, of Savannah, for plaintiffs in error. Thos. F. Walsh, Jr., of Savannah, for defendants in error.

LUMPKIN, J. (after stating the facts as above). [1] The case turns upon the clause of the agreement that "all increase in personalty and improvements made by said parties of the second part shall become and be the property of the said party of the first part until the notes and obligations herein specified of the said parties of the second part are paid in full." It is not contended that the cows claimed by the intervenor were received in exchange for any of those which were on the place at the time it was sold, or were bought to keep up the herd to the same number, or that they were the natural increase of the cows sold. They were cows which were on another place at the time the contract was made, and were subsequently moved to the place bought from the plaintiff. It was contended by counsel for the intervenor that the clause in regard to the increase referred only to the natural increase of the cows sold. But we do not think this is a proper construction. The expression, "all increase in personalty and improvements made by said parties of the second part," included something more than calves which might be borne by the cows already on the place and included in the sale. Other personalty besides cows was sold, and this provision covered "all increase in personalty," which included a wagon, buggy, cans, harness, umbrellas, and other articles, which, though unquestionably personalty, are not capable of having natural increase. The language is not fairly susceptible of that limited construction.

If we look to the evidence of the plaintiff, he testified that the clause was inserted so as to give him additional security for the notes of the purchasers of certain property from him. It was provided that any increase in

personalty should become the property of Penton, the vendor, "until the notes and obligations herein specified of said parties of the second part are paid in full." This form of words, containing a provision that property which had never belonged to the creditor should be his until the notes were paid, was appropriate for the creation of a mortgage. *Ward v. Lord*, 100 Ga. 407, 28 S. E. 446; *Burckhalter v. Planters' Loan & Savings Bank*, 100 Ga. 428, 432, 433, 28 S. E. 236; *Lubroline Oil Co. v. Athens Bank*, 104 Ga. 376, 380, 30 S. E. 409; *Scott v. Hughes*, 124 Ga. 1000, 53 S. E. 453. But, except in the instance provided for by statute, a mortgage cannot be given on property to be thereafter acquired. Civil Code, § 3256; *Ga. Southern, etc., Ry. Co. v. Barton*, 101 Ga. 466, 28 S. E. 842; *Lubroline Oil Co. v. Athens Bank*, supra; *Durant v. Duchesse D'Auxy*, 107 Ga. 456, 33 S. E. 478.

[2] This was not a general description of property, where parol proof could serve to apply the description to the property. But it was an effort to create a mortgage on property which the parties recognized could not then be mortgaged. The plaintiff testified in his own behalf that one of the purchasers stated that he could not give the plaintiff any security on those cows, because the title was not in him, but as soon as they were paid for they would be included; thus showing that the parties did not consider them as being then included.

It was contended that the intervener was estopped from claiming title to the property, by reason of his representation that the cows belonged to the person with whom the plaintiff was contemplating making a trade. In addition to what has been said above, it must be borne in mind that this was not a proceeding against all of the property of the purchasers, nor was the receiver appointed for all of their property. The action was for the purpose of foreclosing the written contract of purchase, and the receiver only had the right to the possession of those things which fell within the contract, and which he could seize for that reason. It was an equitable foreclosure, and, as to the cattle in controversy, it was an effort to foreclose a mortgage on property which might be acquired after the mortgage was given. We have shown that it was invalid as to such property. The evidence proved that the property belonged to the intervener, unless he was prevented from claiming it by estoppel. Assuming that he made the representation stated by the plaintiff, this was not sufficient to change the mortgage, which was invalid as to this property, into a valid mortgage upon it; nor was it sufficient, in a proceeding of the character of the present one, to estop him from claiming that the property was not subject to a lien thus sought to be created upon after-acquired property.

[3] As the receiver's right to the possession of these cattle depended upon the validity of the mortgage sought to be given upon them, and we have held that such lien was not valid, it follows that he was not entitled to hold them as against one who in fact had title to them.

Judgment on main bill of exceptions affirmed. Cross-bill of exceptions dismissed. All the Justices concur.

(140 Ga. 368)

NASHVILLE, C. & ST. L. RY. v. HUBBLE.
(Supreme Court of Georgia. July 19, 1918.)

(Syllabus by the Court.)

1. ABATEMENT AND REVIVAL (§ 12*)—GROUND FOR ABATEMENT—OTHER ACTION PENDING—WHAT LAW GOVERNS.

Where an action was brought in this state by a woman for a personal injury alleged to have been caused by the negligence of a railway company in Alabama, which action was removed to the Circuit Court of the United States, and after her death her administrator was made a party thereto, and where, after the death of the original plaintiff, her administrator instituted an action in the state court to recover damages on account of her death caused by the same injury, under Code Ala. 1907, § 2486, the pendency of the former action did not furnish ground for abatement of the latter.

(a) The injury having occurred in Alabama, and the suits having been brought in Georgia (it not appearing where the death took place), and the statute of Alabama having been pleaded as a basis for recovery, the question of the effect of the one action upon the other is to be determined according to the law of that state.

[Ed. Note.—For other cases, see Abatement and Revival, Cent. Dig. §§ 87-91, 94, 95, 98; Dec. Dig. § 12.*]

2. DEMURRER PROPERLY OVERRULED.

The demurrer was without merit, and there was no error in overruling it.

Error from Superior Court, Dade County; A. W. Fite, Judge.

Action by O. R. Hubble, administrator, against the Nashville, Chattanooga & St. Louis Railway. Judgment for plaintiff, and defendant brings error. Affirmed.

See, also, 76 S. E. 1009.

Mary L. Hubble brought suit in this state against the Nashville, Chattanooga & St. Louis Railway for a personal injury alleged to have occurred in Alabama. The case was removed to the Circuit Court of the United States. She died, and her administrator, O. R. Hubble, was made a party in her stead. Later the administrator brought suit in Dade superior court for the homicide of his intestate, alleging that the injury on which the first suit was predicated caused her death. The defendant filed a plea in abatement, setting out the pendency of the case in the United States court. The plaintiff then dismissed that case. The plea was overruled. Defendants demurred to the petition. The demurrer was overruled, and the defendant excepted.

Foust & Payne, of Chattanooga, Tenn., for plaintiff in error. J. P. Jacoway and B. T. Brock, both of Trenton, for defendant in error.

LUMPKIN, J. (after stating the facts as above). [1] 1. The alleged tort was committed in Alabama, and the law of that state was pleaded as a basis for recovery. If an action is brought in a state court, and removed to the federal court, and while it is there pending another suit is brought in the state court for the same cause of action, a plea in abatement will be sustained. *Louisville & Nashville Railroad Co. v. Newman*, 132 Ga. 523, 64 S. E. 541, 28 L. R. A. (N. S.) 960. It has been held by a decision rendered by two judges that where an action is pending, and a second suit is brought for the same cause of action, and a plea in abatement is filed, it cannot be met by dismissing the first case. *Singer v. Scott*, 44 Ga. 659.

The question which we have to determine is whether, under the law of Alabama, the first and second suits were for the same cause of action, so that the former would furnish ground for plea in abatement, or a judgment therein for a plea in bar, to the latter. On this subject the decisions are in distressing conflict in various states, as will be seen from *Tiffany on Death by Wrongful Act* (2d Ed.) §§ 43, 44, 73, 126-128. So far as we have been able to ascertain, the exact point has not been decided in Alabama, and we therefore tread upon somewhat unexplored ground in attempting to determine what the decision of the highest court in that state will be, when the question is presented to it. But we have certain indicia from which we think we may fairly formulate an opinion upon the subject, at least until that court shall have spoken.

Section 2486 of the Code of Alabama of 1907 reads as follows: "A personal representative may maintain an action, and recover such damages as the jury may assess, for the wrongful act, omission, or negligence of any person or persons, or corporation, his or their servants or agents, whereby the death of his testator or intestate was caused, if the testator or intestate could have maintained an action for such wrongful act, omission, or negligence, if it had not caused death. Such action shall not abate by the death of the defendant, but may be revived against his personal representative, and may be maintained, though there has not been prosecution, or conviction, or acquittal of the defendant for the wrongful act, or omission, or negligence; and the damages recovered are not subject to the payment of the debts or liabilities of the testator or intestate, but must be distributed according to the statute of distributions. Such action must be brought within two years from and after the death of the testator or intestate." The Supreme Court of that state has held that the damages recoverable under the statute quoted

are punitive in their nature and to prevent homicides by wrongful acts of negligence. *Buckalew v. Tennessee Coal, Iron & R. Co.*, 112 Ala. 146, 20 South. 806; *Richmond & Danville R. R. Co. v. Freeman*, 97 Ala. 294, 11 South. 800. Also that evidence of pecuniary loss and mental suffering is not admissible, in such a case. *Alabama Great So. R. Co. v. Burgess*, 116 Ala. 509, 22 South. 913; *Louisville & Nashville R. Co. v. Tegner*, 125 Ala. 593, 28 South. 510.

By section 2496 of the Code of Alabama of 1907 it is declared: "All actions on contracts, express or implied, and all personal actions, except for injuries to the reputation, survive in favor of and against the personal representatives." If it be assumed that this section provides for survival of the action for a personal injury which results in death after action has been brought for damages by the injured party, in such an action the damages recoverable are compensatory in character, and evidence of pecuniary loss and pain and suffering is admissible. Moreover, as death terminates all expectancy of further life on this earth, it would seem that, when an action by a person for an injury to him survives to his administrator, the actual death would prevent the recovery of damages based on tables of further expectancy of life. At any rate, here are two suits, one of which is a common-law action for an injury to the person (claimed under the statute to survive to the administrator), and in which compensatory damages can be recovered, the other a purely statutory cause of action, arising upon death, in which suit punitive damages are recoverable. The evidence to sustain the one is not admissible in the other. The recovery in one forms a part of the estate in the hands of the administrator, subject to the payment of the debts of the deceased. In the other the administrator is only a statutory plaintiff, and the damages recovered are not subject to the payment of the debts of the deceased, but must be distributed according to the statute of distributions. The heirs are the real beneficiaries.

In *Wynn, Adm'r, v. Tallapoosa County Bank*, 168 Ala. 469 (50), 53 South. 228, it was held that section 2496, above quoted, did not include causes of action or rights of action. *Mayfield, J.*, distinguished between an action and a cause or right of action, as those terms are used in the English common law, and said: "We have no statute in this state which provides for the survival of such causes of action against the personal representative. We have a few, which either give a new right of action, or provide for the survival of a cause of action for the personal representative. Whether this is a new cause of action given, or the survival of an old one, it is not necessary to be now decided. We refer to the homicide statute and the employer's liability act." As to the survival of a cause of action in Alabama, it was said to be necessary to look to the common

law. In *Kennedy v. Davis*, 171 Ala. 608, 55 South. 104, Ann. Cas. 1913B, 225, it was held that the action authorized by section 2486 of the Code of 1907 was purely statutory, as no such right of action existed at common law; that the damages collected in an action under the homicide act for the wrongful death of an intestate vested exclusively in the distributees of the estate, and were not assets subject to administration, the personal representative being the agent merely to collect and pay over; and that, accordingly, where one liable to such a suit compromised a claim therefor and obtained a release from the decedent's sole heir and distributee, it was a good defense to a suit thereafter brought by the administrator of the decedent. In *Sloss-Sheffield Steel & Iron Co. v. Milbra*, 173 Ala. 658 (8), 55 South. 890, it was held that a plea in abatement was not available unless the judgment which would be rendered in the prior action would be conclusive between the parties and operate as a bar to the second action.

It is not easy to perceive how a common-law right of action by a man to recover compensatory damages for injuring him is the same cause of action as a statutory right to sue for punitive damages for his homicide, or how the former can furnish ground for a plea to abate the latter. The two are so utterly different in origin, in right of recovery, in evidence admissible, and in beneficiaries, that it seems illogical to hold them to be identical, though some courts, under certain survival statutes and statutes authorizing suits for homicide, have held that the one abated or barred the other, apparently in some cases on the theory that, although on their face legislative acts permitted two actions to be brought or maintained—one of common-law origin and in which there might be a certain character of recovery, and the other of purely statutory origin and with a different recovery for different beneficiaries—the Legislature did not intend to do so. In other words, these courts hold that if legislative acts provided for the survival of one action, and also authorized the bringing of another, they did not intend to allow two, but only one.

It should be further noted that in certain cases, where it was intended that one action sounding in tort should bar another growing out of the same transaction, the statutes of Alabama have so expressly stated. Thus by section 2482 of the Code of 1907 it is declared that an unmarried woman may sue for her own seduction. Under section 2483 a father, or under certain circumstances a mother, may sue for the seduction of a daughter; "but a suit by the daughter is a bar to an action by the father or mother." By section 2485 provision is made for a suit for the death of a minor caused by wrongful act, omission, or negligence. It is declared that the father, or in certain instances the mother, may sue, and that if both are dead,

or if they decline to sue, or fail to do so in six months from the death of the minor, the personal representative of the minor may sue; "but a suit by any one of them for the wrongful death of the minor shall be a bar to another action; either under this section or under the succeeding section" (the general section authorizing a personal representative to maintain an action for a wrongful act causing death). This express exclusion of duplication of actions in certain cases would seem to indicate a legislative intent not to exclude two suits where not so prohibited—as a suit for a personal injury to the plaintiff, with survival of the action to his administrator, and a statutory action for punitive damages by an administrator for the benefit of distributees.

The act of Congress commonly known as the Employer's Liability Act of 1908 (Act April 22, 1908, c. 149, 35 Stat. 65 [U. S. Comp. St. Supp. 1911, p. 1822]), as amended (Act April 5, 1910, c. 143, 36 Stat. 291 [U. S. Comp. St. Supp. 1911, p. 1325]), provides that railroad companies engaged as common carriers in interstate commerce "shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce, or, in case of death of such employé, to his or her personal representative, for the benefit of the surviving widow or husband and children of such employé, and, if none, then of the next of kin dependent upon such employé, for such injury or death resulting in whole or in part from the negligence," etc. In *Michigan Central Railroad Co. v. Vreeland*, 227 U. S. 59, at page 68, 33 Sup. Ct. 192, 195 (57 L. Ed. —), Mr. Justice Lurton, referring to the clause in regard to death, said: "This cause of action is independent of any cause of action which the decedent had, and includes no damages which he might have recovered for his injury if he had survived. It is one beyond that which the decedent had—one proceeding upon altogether different principles." In *Tiffany on Death by Wrongful Act* (2d Ed.) § 127, after referring to different decisions, the author says: "Upon the ground that the two causes of action arising under a survival act and under a death act are separate, distinct, and independent causes of action arising out of the same wrongful or negligent act, the damages in the one case being limited to such damages as the decedent himself might have recovered, and in the other being the pecuniary loss suffered by the persons entitled to the benefit of the action, it has been logically held in Maryland that a recovery in one action is not a bar to the other and that the two actions may be maintained concurrently. And such appears to be the rule in Arkansas, Ohio, and Wisconsin."

Under the statute of this state authorizing an action for the homicide of a husband or father, it was held in *Southern Bell Telephone & Telegraph Co. v. Cassin*, 111 Ga. 575,

36 S. E. 881, 50 L. R. A. 694, that where an injured person brought suit to recover damages, and settled with the wrongdoer therefor, and discharged him from all liability, if he subsequently died because of the injury, the settlement prevented a recovery by his wife or children. From this decision two of the six judges vigorously dissented. In *Spradlin v. Georgia Railway & Electric Co.*, 77 S. E. 799 (March 1, 1913), suit was brought by an injured person for damages, and upon his death his administrator was made party under the survival statute. After such death, his widow brought suit against the same defendant, to recover for his homicide, alleging that he died in consequence of the injuries which had furnished the basis of his suit. The administrator lost his case, and the judgment was pleaded in bar to the widow's action for the homicide. It was held not to be a good plea. From this decision two justices dissented. As Mr. Tiffany points out in his work, the decisions of the courts on this subject may not be entirely logical, but the writer entertains no doubt of the soundness of the decision in the *Spradlin Case*.

Realizing the delicacy of the task of construing the statutes of a sister state, in the absence of direct adjudication on the point of controversy by the Supreme Court of that state, and in the presence of the conflicting decisions of other courts, we believe that, under a proper construction of the provisions of the Alabama statutes above mentioned, the suit brought by the injured woman, to which her administrator was made a party after her death, did not furnish a ground for a plea in abatement to the subsequent action brought by the administrator of the decedent on account of her homicide.

[2] 2. There was no merit in any of the grounds of the demurrer, and it was properly overruled.

Judgment affirmed. All the Justices concur.

(140 Ga. 423)

EMORY et al. v. GRAND UNITED ORDER OF ODD FELLOWS et al.

(Supreme Court of Georgia. July 21, 1913.)

(Syllabus by the Court.)

1. CORPORATIONS (§ 49*)—NAME—USE OF SIMILAR NAME BY OTHERS—"COLORABLE IMITATION."

Under the evidence, the court did not err in holding that the name of the defendants' order was "substantially similar" to the name of the plaintiffs' order, and a "colorable imitation" thereof.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. § 137; Dec. Dig. § 49.*]

2. CORPORATIONS (§ 49*)—NAME—USE OF SIMILAR NAME BY OTHERS—INJUNCTION.

There being evidence authorizing the court to find that the plaintiffs' order first existed in this state, and had been incorporated under the laws of this state prior to the date upon which

the defendants' order sought to organize and become incorporated, and that (so far as the record disclosed) there was no other order of a similar name having an existence and incorporation prior to that of the plaintiffs in this state, it was not error to grant the injunction, under the provisions of the act of 1909, embodied in Civ. Code 1910, § 1994.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. § 137; Dec. Dig. § 49.*]

3. STATUTES (§ 146*)—TITLE—ADOPTION OF CODE—BENEFICIAL ASSOCIATIONS.

Whether the act of 1909 (Laws 1909, p. 139) at the time of its passage was violative of the Constitution of the state of Georgia (article 3, § 7, par. 8), which declares that "no law or ordinance shall pass which refers to more than one subject-matter, or contains matter different from what is expressed in the title thereof," the defect was remedied by the subsequent adoption of the Code of the state, containing all the provisions of the act referred to.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. § 215; Dec. Dig. § 146.*]

4. CONSTITUTIONAL LAW (§§ 206, 211*)—CORPORATIONS (§ 49*)—PRIVILEGES AND IMMUNITIES—EQUAL PROTECTION—NAMES.

The act in question is not violative of those parts of the Constitution of the United States, contained in the fourteenth amendment, which prohibit any state from making or enforcing any law which abridges the privileges or immunities of citizens of the United States, or which has the effect of denying to any person within the jurisdiction the equal protection of the laws.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. §§ 625-648, 678; Dec. Dig. §§ 206, 211;* Corporations, Cent. Dig. § 137; Dec. Dig. § 49.*]

Error from Superior Court, Bibb County; H. A. Mathews, Judge.

Action by the Grand United Order of Odd Fellows and others against W. O. Emory and others. Judgment for plaintiffs, and defendants bring error. Affirmed.

The subcommittee of management of the Grand United Order of Odd Fellows in America, a corporation under the laws of Pennsylvania, and of the District Grand Lodge, No. 18, Grand United Order of Odd Fellows of America, Jurisdiction of Georgia, a corporation under the laws of Georgia, hereinafter referred to as the plaintiffs, brought their petition against W. O. Emory and others, alleging as follows: The Grand United Order of Odd Fellows in America is a fraternal, social, benevolent, and charitable organization existing in the state of Georgia, the same having been organized as a benevolent and friendly society in the state of New York in the year 1843 or 1844, and having adopted, at the time of its organization, the name Grand United Order of Odd Fellows in America, and ever since having kept and promoted said organization in and under said name. The order established its first branch in the state of Georgia in the year 1870, and has ever since kept up and promoted its organization by maintaining branches thereof and by organizing numerous lodges, and it has now a numerous membership. This order, Grand United Order of Odd Fellows in

America, was incorporated under the laws of the state of Pennsylvania in the year 1886, having as its object the purposes aforementioned. A District Grand Lodge of the order was organized in the state of Georgia in the year 1882, and this has been in continuous existence throughout the state, using the name of said Order of Odd Fellows with the consent of the constituted authorities of the order. The branches of said Order of Odd Fellows organized and existing within the state of Georgia, composing the District Grand Lodge of said order in Georgia, itself a branch of the first-named petitioner, became incorporated as a body politic in the state of Georgia in the year 1902 under the corporate name and title of the "District Grand Lodge, No. 18, Grand United Order of Odd Fellows of America, Jurisdiction of Georgia." Petitioners are the duly constituted authorities for the maintenance and management of said Grand United Order of Odd Fellows in America in the United States of America and in the state of Georgia and all the branches of said Order of Odd Fellows within the state of Georgia; the branches being called lodges, and, where composed of women, called Households of Ruth. The Order of Odd Fellows is a secret organization, having seals, signs, passwords, emblems, and insignia. The words "Odd Fellows" are the distinctive words in the name of said order, "which ever have and do cardinally distinguish the name and style of said order and of your petitioners from other fraternal orders of a like kind in the United States of America and in the state of Georgia," and said order and petitioners have acquired a proprietary right in said name, and have exclusive right as against the defendants to the use of the name aforesaid and the words "Odd Fellows" and the phrase "Order of Odd Fellows," which form a part of the name. The continued existence and success of petitioners' order is largely dependent upon its name and repute, in which name it has acquired property and established its reputation as a fraternal organization. The defendants were formerly members of petitioners' Order of Odd Fellows, but are not now members, having ceased to be such during the year 1910, and they are now associating themselves together for the purpose of organizing a like organization with that of the plaintiffs under the name of "Ancient Order of Odd Fellows, Leeds Unity," and are proceeding to organize branches to be known as subordinate lodges of Odd Fellows and Households of Ruth. The name and style of the organization proposed by the defendants and their associates is substantially identical with the name and style of petitioners' order. The prayer is that the defendants may be restrained and enjoined from organizing under the proposed name and instituting subordinate lodges, etc., and that they be further restrained from representing themselves to

be Odd Fellows or members of that order in the state of Georgia, and be also restrained from infringing on the name of petitioners and its emblems and insignia.

At the interlocutory hearing the judge granted the injunction as prayed for, to be of force until the verdict of a jury upon final trial. He found that the following facts were either admitted or proved: The plaintiffs are and have been for a number of years duly incorporated, and their order has built up in the United States and in Georgia, among the colored people, a large membership, and has established an extensive organization for social, benevolent, and friendly purposes, and also an insurance business. This order was identical or closely connected with an order of the same name in England, and was established by virtue of due authorization of the English society. The defendants are colored people, and are acting under authorization of an order of the Odd Fellows in England, independent of the Grand United Order Odd Fellows, to wit, the Ancient Order of Odd Fellows, Leeds Unity, and unless prevented by some legal or equitable right of the plaintiffs, growing out of their prior occupation of the field, the defendants have as much right to proceed with their organization as the plaintiffs had when they proceeded to establish their lodges and extend their membership in this state. The defendants, shortly before the filing of this suit, were all members of the plaintiffs' order. They became dissatisfied with the management of the order, on account of alleged wrong, and of illegal and oppressive conduct of the order and its officers; and they joined in a movement (after receiving authority from a regular English order of Odd Fellows to organize and extend a branch of this English order in Georgia) to denounce the management of the plaintiffs' order, etc. The distinctive and popular name of the plaintiffs' order is the "Order of Odd Fellows." This is also a part of the name in and by which the defendants are seeking to establish their order, and the words in the formal designation of the defendants' order do not make such a difference as would prevent it from being so similar to that of the plaintiffs as to cause confusion of names and work injury to their order and business.

R. Douglas Feagin, Robt. L. Berner, and R. K. Hines, all of Macon, for plaintiffs in error. C. P. Goree and Rosser & Brandon, all of Atlanta, and John P. Ross, of Macon, for defendants in error.

BECK, J. (after stating the facts as above.) [1] We are of the opinion that the court below correctly held that the distinctive name of the plaintiff's order is "Order of Odd Fellows," and that this is also the essential and distinctive part of the name in and by which the defendants are seeking to establish their order, and that the other words in

the formal designation of the defendants' order do not make such a difference of designation as would prevent its being "a colorable imitation" of the name of the plaintiff's order. Considering the character and purpose of the two organizations, the names are "substantially similar." From the report of the case of *Creswill v. Knights of Pythias*, 133 Ga. 837, 67 S. E. 188, 134 Am. St. Rep. 231, 18 Ann. Cas. 453, it appears that the Grand Lodge of Knights of Pythias of Georgia and others filed a petition to enjoin *Creswill* and others from prosecuting an application to be incorporated under the name "Grand Lodge Knights of Pythias of North America, South America, Europe, Asia, Africa, and Australia, Jurisdiction of Georgia"; one of the grounds of the application for injunction being that the name of the defendants was a colorable imitation of the name of the plaintiff in that case. In the opinion rendered by this court, reviewing the judgment of the court below granting the injunction prayed for, it was said: "Counsel for defendants contend that the name they are seeking to appropriate by incorporation is not substantially the same or a colorable imitation of the plaintiff's name. They say they make the name essentially different by adding the names of the continents, North America, South America, Europe, Asia, Africa, and Australia. We could not agree with this contention of the defendants if the names of the continents thus used as suffixes were employed in every instance where the order is designated, for it is well established by the proof that the distinctive words in both orders are the words, 'Knights of Pythias.' At one time in the history of the plaintiff's order, from the time of its incorporation under the act of 1870 to the time of its incorporation by the special act of Congress of 1894, the Supreme Order was known as the 'Supreme Order Knights of Pythias of the World.' The defendants, in specifying their field of operation, do not specify the entire earth, but the main continents thereof. These words denoting latitude of operation are not distinctive, and they are not always added in the use of the name. It is the use and colorable or imitative character of the name that controls, and the use made of the name by the association alleged to have infringed is a question of fact for the jury. *Foster, Milburn & Co. v. Blood Balm Co.*, 77 Ga. 216, 3 S. E. 284; *Lies v. Daniel*, 82 Ga. 272, 8 S. E. 432; *Whitley Grocery Co. v. McCaw Mfg. Co.*, 105 Ga. 839, 32 S. E. 113. The addition of the word 'Artificial' by suffix to the name 'Carlsbad Sprudel' does not prevent infringement; 'Carlsbad' being the distinguishing word. The name 'National Folding Box & Paper Company' is infringed by the name 'National Folding Box Company Limited.' 'The imitation need only be slight, if it attaches to what is most salient.' *Johnson v. Bauer*, 27 C. C. A. 374, 82 Fed. 662; *McCann v. Anthony*, 21

Mo. App. 83; *Saxlehner v. Eisner & Mendelson Co.*, 179 U. S. 19, 31, 21 Sup. Ct. 7, 45 L. Ed. 60; *Paul on Trade-Marks*, §§ 59, 168, 170, 188. The plaintiffs in error rely upon the case of *Supreme Lodge Knights of Pythias v. Improved Order Knights of Pythias*, 113 Mich. 133, 71 N. W. 470, 38 L. R. A. 658, in which it was held that these names are not so similar as to cause one to be taken for the other. We do not believe that this case is in line with the trend of authorities on the subject of similarity of names." We think that what is said in the *Creswill Case*, from which the above quotation is taken, and in the cases cited, is decisive of the question in hand, and renders any more elaborate discussion unnecessary here. The decision in the *Creswill Case* relative to this question supports the ruling of the court below, holding that the name of the defendants' order is substantially similar to the name of the plaintiff's order, and is a colorable imitation thereof.

[2] 2. Section 1993 of the Code reads as follows: "No person or organization shall assume, use, or adopt, or become incorporated under, or continue to use the name and style or emblems of any benevolent, fraternal, social, humane, or charitable organization previously existing in this state, and which has been incorporated under the laws of this or any other state, or of the United States, or a name and style or emblem so nearly resembling the name and style of such incorporated organization as to be a colorable imitation thereof. In all cases where two or more of such societies, associations, or corporations claim the right to the same name, or to names substantially similar as above provided, the organization which was first organized and used the name, and first became incorporated under the laws of the United States or of any state of the Union, whether incorporated in this state or not, shall be entitled in this state to the prior and exclusive use of such name and the rights of such societies, associations, or incorporations, and of their individual members shall be fixed and determined accordingly." The court was authorized to find from the evidence that the plaintiff's order existed in this state, and had been incorporated under the laws of this state prior to the date upon which the defendants' order sought to organize and become incorporated, and that so far as the record discloses there was no other order of a similar name having a prior existence and incorporation to that of the plaintiffs in this state, and it followed that, under the provisions of section 1994 of the Civil Code, the plaintiffs were entitled to injunctive relief.

[3] 3. The court below evidently based its decision upon the provisions of sections 1993 and 1994 of the Code, and did not pass upon the question which, but for that act, it might have been necessary to decide, to wit,

whether, under the general law as to the infringement of trade-names and trade-marks and the laws relating to unfair competition in trade, the plaintiffs were entitled to injunction; and it is unnecessary for us to consider that question, in view of the express provisions of the two sections of the Code referred to. But it is recited in the bill of exceptions, that plaintiffs in error "except to so much of the opinion as holds that the act of 1909 therein referred to was a legal and valid law, and applicable and controlling in the present case, and that the same was error, for the reason that said law, as contended in the argument of defendants (plaintiffs in error) before the chancellor, was void for the following reasons: (a) That said act was violative of paragraph 8, § 7, art. 3, of the Constitution of Georgia, to wit: 'No law or ordinance shall pass which refers to more than one subject-matter, or contains matter different from what is expressed in the title thereof.'" Whatever force such an objection might have in case it had been urged in the constitutionality of the act prior to the adoption of the Civil Code of 1910, the objection lost its force completely upon the adoption of the Code, as the provisions of the act of 1909 are embodied in the two sections of the Civil Code above referred to and in section 258 of the Penal Code. *Central of Georgia Ry. Co. v. State*, 104 Ga. 831, 31 S. E. 531, 42 L. R. A. 518; *McFarland v. Donaldson*, 115 Ga. 567, 41 S. E. 1000.

[4] 4. The act in question is not violative of those parts of the Constitution of the United States, contained in the fourteenth amendment, which prohibit any state from making or enforcing any law which abridges the privileges or immunities of citizens of the United States, or which has the effect of denying to any person within the jurisdiction the equal protection of the laws.

Judgment affirmed. All the Justices concur.

(140 Ga. 254)

SEABOARD AIR LINE RY. v. ANDREWS.
(Supreme Court of Georgia. July 18, 1913.)

(Syllabus by the Court.)

1. CARRIERS (§ 234*)—EVIDENCE (§ 80*)—LAWS OF ANOTHER STATE—INJURY TO PASSENGER—WHAT LAW GOVERNS.

In an action for damages instituted in this state by a passenger against a common carrier, on account of personal injuries caused by the negligence of the defendant's servants, where the injury occurred in the state of Alabama, the liability of the defendant will depend upon the laws of the latter state; and where no particular law of Alabama is pleaded or proved, the presumption is that the common law prevails there, and the case will be considered as governed by the common law.

[Ed. Note.—For other cases, see *Carriers*, Cent. Dig. §§ 965, 1263, 1538; Dec. Dig. § 234;* *Evidence*, Cent. Dig. § 101; Dec. Dig. § 80.*]

2. CARRIERS (§§ 234, 280, 320*)—NEGLIGENCE—INJURY TO PASSENGER—QUESTION FOR JURY—"EXTRAORDINARY CARE."

The motion for nonsuit was properly overruled.

[Ed. Note.—For other cases, see *Carriers*, Cent. Dig. §§ 965, 1085-1092, 1098-1103, 1105, 1106, 1109, 1117, 1118, 1126, 1149, 1153, 1160, 1167, 1179, 1190, 1217, 1233, 1244, 1248, 1263, 1315-1325, 1538; Dec. Dig. §§ 234, 280, 320.*

For other definitions, see *Words and Phrases*, vol. 3, p. 2626.]

3. CARRIERS (§ 348*)—INJURY TO PASSENGER—INSTRUCTIONS.

The judge charged the common-law doctrine, which prevents a plaintiff from recovering if by the exercise of ordinary care he could have avoided the consequences to himself caused by the defendant's negligence; and the assignment of error which complained of his failure so to do was without merit.

[Ed. Note.—For other cases, see *Carriers*, Cent. Dig. §§ 1408-1405; Dec. Dig. § 348.*]

4. TRIAL (§ 256*)—CARRIERS (§ 234*)—INJURY TO PASSENGER—INSTRUCTIONS.

The judge in effect also charged the common-law doctrine that the plaintiff cannot recover damages for an injury to himself, where the same is done by his consent or is caused by his own negligence. If further instructions in this regard had been desired, there should have been an appropriate request.

(a) So much of Civil Code 1910, § 2781, as relates to comparative negligence and diminution of damages is not a common-law doctrine, and it was not erroneous to omit reference to it in the charge.

[Ed. Note.—For other cases, see *Trial*, Cent. Dig. §§ 628-641; Dec. Dig. § 256;* *Carriers*, Cent. Dig. §§ 965, 1263, 1538; Dec. Dig. § 234.*]

5. EXCEPTIONS TO INSTRUCTIONS.

Other exceptions to the charge afford no ground for a new trial.

6. VERDICT SUSTAINED.

The evidence authorized a finding for the plaintiff, and the verdict was not excessive.

Error from Superior Court, Fulton County; Geo. L. Bell, Judge.

Action by W. A. Andrews against the Seaboard Air Line Railway. Judgment for plaintiff, and defendant brings error. Affirmed.

W. G. Loving, of Atlanta, for plaintiff in error. Lawton Nalley, of Atlanta, for defendant in error.

ATKINSON, J. This was an action for damages against a railroad company by a passenger, where it was sought to recover on account of personal injuries resulting from the negligence of the defendant. The plaintiff obtained a verdict for \$650. The defendant moved for a new trial, upon the general grounds, and upon others which complained: (a) Of the judge's refusal to grant a nonsuit; (b) of his omission to charge on specified subjects, and of one part of the charge as delivered by him; and (c) that the verdict was excessive. The motion for new trial was denied, and error was assigned upon this judgment. The case as

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

made by the plaintiff was substantially as follows:

On January 28, 1911, between half past 2 and 3 o'clock in the afternoon, the plaintiff purchased a ticket in Birmingham, Ala., over the line of defendant's railroad, from Birmingham to Piedmont, Ala. The defendant's train was standing in the car shed in Birmingham, and was due to leave at 3 o'clock. When the plaintiff went to get on the train, he was directed by the gatekeeper where to go. He went as directed to the train, which was in charge of the flagman, who was standing at the steps directing passengers into and off the train, and he was directed by the flagman to enter a designated car, which he did. He carried a valise in his right hand, and walked down the aisle of the car in quest of a seat. When about two-thirds of the distance he stumbled over a suit case, valise, or some other obstruction in the aisle, and struck his side on the arm of a seat. Two ribs were broken, and he was totally disabled for five or six weeks, suffered physical pain, and incurred physician's bills. He was a traveling salesman, earning a salary of \$100 a month, and a certain percentage on sales made by him. The car was not lighted at all. There were furnaces near the car shed, which produced large quantities of smoke in that vicinity; other cars were standing near by on a parallel track, and the day was dark and cloudy; all of which, in addition to the fact that the train was under the car shed, tended to darken the inside of the car which plaintiff entered. He could not see or detect the obstruction in the aisle, and did not know of its presence until he came in contact with it. There was a general custom, known to the plaintiff and the defendant, for passengers to carry their hand baggage into the car and place it in the aisles opposite their seats. Other passengers had entered the car before the plaintiff, carrying hand baggage of the character mentioned. The facts relied on for recovery by the plaintiff, as stated above, were contested by the defendant. There was considerable evidence to show that the car was not dark, that hand baggage could readily be seen when in the aisle, and that the plaintiff was not injured at all.

[1] 1. The injury occurred in Alabama, and the liability of the defendant will depend upon the law of that state. No special law of Alabama was pleaded or proved, and the presumption is that the common law prevails there. *Sou. R. Co. v. Cunningham*, 123 Ga. 90, 50 S. E. 979. The case, therefore, must be considered as governed by the common law.

[2] 2. Stress is laid on the assignment of error which complains of the refusal of the judge to grant a nonsuit. At the time of the injury the plaintiff was rightfully on the defendant's car as a passenger. The defendant was bound to exercise extraordinary care for

his safety. The train was a regular passenger train, and extraordinary care would have required defendant to exercise that extreme care and caution which every prudent and thoughtful person would use with a like train under like circumstances. *Sou. R. Co. v. Cunningham*, 123 Ga. 90 (2-4), 50 S. E. 979; *Hutchinson on Carriers*, § 895 et seq. Failure to exercise such care relatively to a passenger would constitute negligence. What facts would suffice to show the exercise of such care is ordinarily a question for the jury. The facts of this case, relatively to negligence of the defendant, were not such as would take the case out of the general rule. It could not be said, as a matter of law, that a very thoughtful and prudent person, engaged as a common carrier, knowing the custom of obstructing the aisle (the only way of ingress and egress to seats in the car) with valises and other hand baggage, and the danger incident thereto, would have directed his passenger to enter the car at a time when there were no artificial lights and it was too dark within for a passenger to readily detect obstructions before coming in contact with them. If it were dark in the car, extraordinary care would, at least, require that the employees of the company should see to it that the way was clear for the passenger to take his seat before directing him to enter, or to provide some means to prevent his injury by falling over baggage, which, under the known custom, was likely to be placed in the aisle. No similar case has been decided by this court.

Counsel for plaintiff in error cites the case of *Burns v. Pennsylvania R. Co.*, 233 Pa. 304, 82 Atl. 246, Ann. Cas. 1913B, 811. On its facts the case was somewhat similar, except that there was no evidence of custom of passengers known to defendant to deposit their baggage in the aisle, and the question for decision was not upon the grant of a nonsuit. In the opinion it was said: "It is argued that the evidence was not sufficient to show negligence on the part of the appellant, and that appellee was so clearly guilty of contributory negligence as to require the court to so hold as a matter of law. We are not prepared to accept these extreme views of the case. We agree with the learned court below that, both as to the negligence of the defendant and the contributory negligence of the plaintiff, the case was for the jury." This clearly shows that, had the question merely involved a nonsuit, the plaintiff's action would have been sustained. The judgment was reversed on other grounds. In the further course of the opinion it was remarked: "There is no Pennsylvania case directly in point, but the weight of authority elsewhere seems to be that the employees of the railroad company must have had actual notice of the baggage being in the aisle, or that it must have remained there a sufficient

length of time to affect them with constructive notice. This means that the baggage must have remained in the aisle so long as to have been discovered by the officers in charge of the train if they had properly performed their duties." In support of this, the case of *Stimson v. Milwaukee R. Co.*, 75 Wis. 381, 44 N. W. 748, among others, is cited. None, however, except the *Stimson Case*, was upon the question of nonsuit, and the facts of that case differed from those involved in the case now under consideration.

There was no question of inability upon the part of the passenger to see the obstruction because of darkness in the car, or of permission by the carrier, arising from the prevailing custom of the passengers, to place their baggage in the aisle, presented by the evidence. As will be seen in other divisions of the opinion, the plaintiff could not recover if his own negligence was the proximate cause of his injury, or it was by his consent, or, being due to the negligence of the defendant, the plaintiff could have avoided the consequences to himself by the exercise of ordinary care. But these matters of defense arose also on the facts, and generally they are for determination by the jury. The plaintiff knew of the custom to deposit hand baggage in the aisles; but he testified that it was dark, and he could not have seen such baggage, by looking down the aisle, and did not know that any baggage obstructed the aisle until he came in contact with the parcel over which he stumbled. Circumstances of this character do not show, as a matter of law, the absence of ordinary care upon the part of the plaintiff to avoid the consequences of defendant's negligence, or that his injury was caused by his consent, or that his negligence was the proximate cause. The evidence did not authorize any finding that the injury was inflicted by consent of the plaintiff, but the negligence of plaintiff and the want of ordinary care upon his part to avoid the consequences of the defendant's negligence were for decision by the jury. It follows that there was no error in denying the motion for nonsuit.

[3] 3. One assignment of error complains of the omission of the judge, without having been requested, to charge the principle of section 4426 of the Civil Code, declaring: "If the plaintiff by ordinary care could have avoided the consequences to himself caused by the defendant's negligence, he is not entitled to recover. But in other cases the defendant is not relieved, although the plaintiff may in some way have contributed to the injury sustained." This provision embraces a doctrine of the common law (*Hill v. Callahan*, 82 Ga. 109, 8 S. E. 730), and its applicability to this case is due to the fact that it is the common law, rather than the fact that in Georgia, since the adoption of the Code, it has the force of a statute. But

under this rule of the common law the assignment of error upon the alleged omission to charge is without merit. In one portion of the charge the judge instructed the jury: "The law imposes upon the plaintiff the duty of exercising ordinary care to avoid being injured." In another he informed them that the plaintiff could not recover "if the plaintiff by the exercise of ordinary care could have avoided the injury." It thus appears that, in substance, so far as beneficial to the defendant, the judge charged the doctrine which it is insisted should have been charged. The charge harmonizes with the reasoning in *Macon, etc., R. Co. v. Johnson*, 38 Ga. 409, where the common law was applied.

[4] 4. Another assignment of error complains of the omission of the judge to charge the principle of section 2781 of the Civil Code, which declares: "No person shall recover damages from a railroad company for injury to himself or his property, where the same is done by his consent or is caused by his own negligence. If the complainant and the agents of the company are both at fault, the former may recover; but the damages shall be diminished by the jury in proportion to the amount of default attributable to him." The first part of this provision goes to the right of the plaintiff to recover at all, and prevents him from recovering if the injury was done by his consent or was caused by his negligence—that is, if his negligence was the proximate cause of the injury. This is also a doctrine of the common law. See *Macon, etc., R. Co. v. Johnson*, supra, and *Macon, etc., R. Co. v. Winn*, 19 Ga. 440, in which latter case there is elaborate discussion. The judge instructed the jury that "the plaintiff must recover, if at all, upon the specific acts of negligence set out in his petition; he cannot recover upon any other act of negligence than those alleged to be the acts of negligence which caused his injury; and you will be confined in your investigation, in determining the acts of negligence, to those as laid in the petition." He also instructed them that the plaintiff could not recover if they should find that the "injury was not the direct, proximate result of the defendant's negligence." This plainly told the jury that a verdict for plaintiff could not be based on any other act than negligence of defendant causing the injury, and that the grounds of negligence would be limited to those alleged in the petition. Negligence of defendant as the proximate cause is the antithesis of negligence of the plaintiff or consent of the plaintiff to the injury. An intelligent jury would readily understand the above restriction to negligence of defendant, as a basis of recovery by plaintiff, to mean that the injury must have resulted from plaintiff's consent or from his negligence. If further instruction on that point had been desired, an appropriate request should have been made. The latter part of the section

deals with the subject of comparative negligence, which does not defeat, but merely affects the amount of, the recovery. This much of the Code is not from the common law, but is of statutory origin (*Macon, etc., R. Co. v. Johnson, supra*); and, as the case is to be considered under the common law, the judge properly omitted to charge on the subject of diminution of damages.

[5] 5. Error was also assigned upon the following charge, as being incomplete and misleading: "The plaintiff sues for pain and suffering, for doctors' bills, and for lost time. These are legitimate items of damages. If the plaintiff is entitled to recover at all, he would be entitled to recover for pain and suffering endured by reason of the injury." But this, in the light of the entire charge, affords no cause for the grant of a new trial.

[6] 6. The evidence authorized a finding for the plaintiff, and the amount found was not excessive.

Judgment affirmed. All the Justices concur.

(140 Ga. 380)

HOLLOWAY et al. v. HOARD.

(Supreme Court of Georgia. June 18, 1913.)

(Syllabus by the Court.)

1. TRIAL (§ 296*) — INSTRUCTIONS — CURE BY OTHER INSTRUCTIONS.

The court charged the jury as follows: "If a child hold exclusive possession of land originally belonging to the father for seven years without the payment of rent, I said, the law presumes that to be a gift, and the child has the right under those circumstances to file her suit to compel specific performance of the voluntary agreement." This charge, standing alone, would be objectionable as not sufficiently stating the rule relative to the presumption of gift created by seven years' possession without payment of rent; but a reference to the entire charge on the subject shows that the instructions of the court upon this subject were properly qualified, when what is set forth above is considered in connection with the language of the charge immediately preceding the excerpt complained of.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 705-713, 715, 716, 718; Dec. Dig. § 296.*]

2. APPEAL AND ERROR (§ 1033*) — HARMLESS ERROR — INSTRUCTION.

Although a charge may be somewhat confusing and misleading, if it is apparent that the confusion and misdirection of the charge could only have the effect of placing a heavier burden upon the plaintiff than the law imposes, it affords no ground for a new trial at the instance of the defendant.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4052-4062; Dec. Dig. § 1033.*]

3. GIFTS (§ 50*) — GIFTS INTER VIVOS — EVIDENCE — POSSESSION.

The consent of the wife, before the expiration of the period of seven years after she went into possession of the land in controversy under an alleged parol gift, to the purchase of a small part of the tract of land by her husband from her father, the alleged donor, while a circumstance to be considered by the jury together with other evidence in the case,

is not, as a matter of law, inconsistent with the claim of the wife that there was a gift by the father, and that she had not disclaimed title, and that there had not been a claim of dominion by the father, acknowledged by the donee.

[Ed. Note.—For other cases, see Gifts, Cent. Dig. § 101; Dec. Dig. § 50.*]

4. GIFTS (§ 51*) — GIFTS INTER VIVOS — INSTRUCTIONS.

Where, in instructing the jury as to the effect of voluntary promises and agreements, and the surrender of possession under such promises and agreements, and the making of improvements on the lands, of which possession is given on the faith of the agreement, the court uses the language "substantial improvements," instead of the expression "valuable improvements," even if this is an inaccuracy, it will not afford ground for the grant of a new trial, especially where in another portion of the charge the court, referring to the same subject, used the very language of the statute.

[Ed. Note.—For other cases, see Gifts, Cent. Dig. § 102; Dec. Dig. § 51.*]

5. GIFTS (§ 49*) — GIFTS INTER VIVOS — SUFFICIENCY OF POSSESSION.

Where it is claimed by the alleged donee under the provisions of section 4151 of the Civil Code that possession has been had by her for the statutory period, this allegation is supported by proof of possession by the donee for a part of that period and by her tenants for the remainder of the period, even though one of the tenants was the father of the donee, where it appears that the father actually paid rents to the donee during the period of his occupancy and recognized the donee as his landlord.

[Ed. Note.—For other cases, see Gifts, Cent. Dig. §§ 95-100; Dec. Dig. § 49.*]

6. GIFTS (§ 48*) — APPEAL AND ERROR (§§ 206, 231*) — OBJECTION BELOW — NECESSITY — SUFFICIENCY — GIFTS INTER VIVOS — "INCOMPETENT EVIDENCE."

Testimony to the effect that the defendant, the alleged donor of certain lands, had said, in conversation with the witness a short time before buying the land in controversy, that he had the money and wanted to buy a home for both his children (the alleged donee being one of the children), and that he had asked the advice of the witness in regard to this matter, and that she had advised him to buy it and give it to the child, and that he did buy it and give it to the alleged donee, is not objectionable on the ground that it is irrelevant.

(a) An objection to it on the ground that it was incompetent is not sufficiently specific.

(b) The witness being the wife of the alleged donor, an objection to the testimony on the ground that it was in the nature of confidential communications between husband and wife, and therefore to be excluded under the provisions of section 5785 of the Civil Code, is urged entirely too late when urged for the first time in the brief of counsel for plaintiff in error (citing 4 Words and Phrases, 3510).

[Ed. Note.—For other cases, see Gifts, Cent. Dig. §§ 87-94; Dec. Dig. § 48.* Appeal and Error, Cent. Dig. §§ 1273, 1283-1288, 1299, 1352; Dec. Dig. §§ 206, 231.* Trial, Cent. Dig. § 194.*]

7. VERDICT SUSTAINED.

There was sufficient evidence to support the verdict.

Error from Superior Court, Butts County: R. T. Daniel, Judge.

Action by Belle Hoard against J. W. Holloway and another. Judgment for plaintiff, and defendants bring error. Affirmed.

Mrs. Belle Hoard brought her action against J. W. Holloway and Ed. Cole to recover possession of certain lands described in the petition and for specific performance. It is alleged in the petition that the lands described originally belonged to Holloway, who is the father of the plaintiff, that plaintiff relied for her right of recovery upon seven years' possession without the payment of rents, and without a claim of dominion by the father or any disclaimer of title on her part, and also upon a parol gift by the father, and valuable and substantial improvements placed upon the land by the donee and her husband. The evidence was conflicting upon the material issues. It appeared from the evidence for the plaintiff that the donee was in possession of the land for about five years, when her father and Cole, the other defendant, went into possession of the land; that they were there as the tenants of the plaintiff; that the father paid rent for two years, only refusing to pay rent for the years 1909 and 1910; that the plaintiff's possession of the land began in 1900. The jury returned a verdict in favor of the plaintiff. The defendants made a motion for a new trial on various grounds, and upon its being overruled they excepted.

H. M. Fletcher, of Jackson, and O. M. Duke, of Florilla, for plaintiffs in error. C. L. Redman and J. T. Moore, both of Jackson, for defendant in error.

BECK, J. (after stating the facts as above). [1] Exception is taken to the following charge of the court: "If a child hold exclusive possession of land originally belonging to the father, for seven years, without the payment of rent, I said, the law presumes that to be a gift, and the child has the right under those circumstances to file her suit to compel specific performance of the voluntary agreement." This charge, standing alone, might be objectionable, as being an incomplete statement of the provisions of section 4151 of the Code, which reads as follows: "The exclusive possession by a child of lands belonging originally to the father, without payment of rent, for the space of seven years, shall create conclusive presumption of a gift, and convey title to the child, unless there is evidence of a loan, or of a claim of dominion by the father acknowledged by the child, or of a disclaimer of title on the part of the child." For instructing the jury in the language of the first part of the above quoted section as to the effect of exclusive possession by a child of land originally belonging to the father, without payment of rent, for the statutory period, which makes the mere possession for the stated period create the presumption of a gift, the court should not omit the latter part of the section as to the effect of evidence of a loan, or of a claim of dominion by the father acknowledged by the child, or of a disclaimer of title on the part of the child.

But an examination of the charge in this case shows that, while the court did charge the rule as stated in the motion, the court had, immediately before giving the charge complained of, stated fully the provisions of the section of the Code above quoted, and it is only by separating that portion of the charge set forth in the ground of the motion referred to from the entire charge that it apparently excludes the defenses set up. The complete charge of the court upon the particular subject dealt with in that part of the charge excepted to is as follows: "Now, gentlemen, the law I have read means this: That if the plaintiff in this case (Mrs. Hoard) went into possession of this land, and she was the daughter of the defendant (Mr. Holloway), if she had exclusive possession of the land without the payment of rent for the space of seven years, the law presumes that the father gave the land to the child, and that will be sufficient to authorize the jury to say that there was a gift, that it was the intention of the father to give the land to the child, and conveys the title to the child, unless there is evidence of a loan of the land to the child—that is, that the father let the child have it as a loan, that it was not his intention to make a gift of it to her—or unless it appears that the father still held dominion over the land, which was acknowledged by the child, or unless during that time there was a disclaimer of the title to the land on the part of the child. If a child hold exclusive possession of land, originally belonging to the father, for seven years without the payment of rents, I said, the law presumes that to be a gift, and the child has the right under those circumstances to file her suit to compel specific performance of the voluntary agreement." The charge, then, upon the subject of presumption of a gift arising from seven years' possession, seems to be unexceptionable.

[2] 2. The following charge of the court is also complained of: "If possession was given under the agreement, and the donee went forward and made substantial improvements on the place in faith of that gift, and the child held exclusive possession of the land originally belonging to the father, for the space of seven years, the presumption of law is that it is a gift to the child, and conveys the title to the child, unless there is evidence of a loan, or a claim of dominion by the father acknowledged by the child, or of a disclaimer of title on the part of the child, from the evidence in this case." This excerpt immediately follows that complained of in the ground of the motion considered in the foregoing division of this opinion, and is to be considered in connection with that portion of the instructions. While the partial blending of sections 4634 and 4151 of the Code might be misleading, and for that reason the provisions of the two sections should be kept separate and distinct, we do not think that

the plaintiff in error here could have been injured by the apparent confusion of the two sections, because the only effect of the blending of the two sections as it was done in this charge was to place a heavier burden upon the plaintiff than the law imposes; for while the plaintiff might have recovered in this case on the ground that there was a gift of the premises in controversy and valuable improvements made on the land on the faith of that gift, or because of the presumption of a gift created by possession of the land for seven years without payment of rent, this part of the court's instructions might have been understood by the jury to require that the burden was upon the plaintiff to show both that substantial improvements on the land had been made on the faith of the gift and also that the plaintiff had held exclusive possession of the lands for the space of seven years.

[3] 3. Before the completion of the period of seven years' possession by the plaintiff, the plaintiff's husband, with the knowledge and consent of the plaintiff, or the plaintiff herself, according to the testimony of another witness, and at the instance of her husband, treated with the defendant for the purchase of one acre of the 100 acres of land involved in this controversy, and it is claimed that this constituted such an acknowledgment of dominion in the defendant as to conclusively prevent the creation of the presumption of a gift by continuous possession for seven years without payment of rent. We do not think so. We think it was a circumstance to be considered by the jury with the other evidence in the case submitted upon the issue as to whether or not there was a gift or a presumption of a gift. It might have been that, although there was no controversy as to there being a parol gift and continued possession for a period less than that necessary to create the conclusive presumption in favor of the donee, the written title being in the defendant, the husband was desirous of having the perfect title to the one acre of land which he sought to purchase, with written evidence of his title, and the wife, although claiming that there had been a gift to her, was willing that the husband should have that particular portion of the tract of land and evidence of his title in writing, and for this reason consented that her husband should treat with her father with a view to acquiring title directly from the father to the one acre of land. This conduct upon the part of the wife was not necessarily inconsistent as a matter of law with her assertion of such a gift to her as would be conclusively presumed after a possession of seven years without the payment of rent.

[4] 4. Complaint is made that in instructing the jury upon the subject of voluntary promises and agreements, and the effect of going into possession of the lands thereunder and making the improvements on the

faith thereof, the court used the expression "substantial improvements," instead of "valuable improvements." While it would have been better to use the exact language of the statute, including the term "valuable," instead of "substantial," we do not think that the variance between the language of the charge and the language of the statute itself is a very material one, and, if it amounts to an inaccuracy, that inaccuracy will not be cause for a new trial, especially where in another portion of the charge the court, referring to the same subject, instructed the jury that the improvements must be valuable.

[5] 5. Where it is claimed by the alleged donee, under the provisions of section 4151 of the Code, that possession has been had by her for the statutory period, this allegation is supported by proof of possession by the donee for a part of that period and by her tenants for the remainder of the period, even though one of the tenants was the father of the donee, where it appears that the father actually paid rents to the donee during the period of his occupancy and recognized the donee as his landlord.

[6] 6. The wife of Holloway, the alleged donor, during the trial testified as follows: "I know of the gift that Mr. Holloway made of the 100 acres of land described in the petition in this case. He told me that he had the money and wanted to buy a home for both his children. He wanted to give both of them a home. He bought 100 acres of land and gave it to this child, Mrs. Hoard, the land in this petition, and she moved on it. He gave it to her in 1900, I think. When Mr. Holloway gave Miss Belle the land, he said he had some money he wanted to invest in land for our children. He asked me my advice about giving this piece of land to Belle, and of course I said it was best to settle our children close to us. He bought the 100 acres of land in controversy and gave it to her. I was at home the time he told me this. Miss Belle was not present. When this conversation took place that I say he gave her the land, Miss Belle was not present. It was in 1900, and before he bought this land. He asked my advice when he bought it. I said, 'Buy it, and give it to this child;' that I wanted the children settled close around us. He bought it and gave it to her. I think he gave it to her in 1901. I was not present when Holloway had a conversation with Miss Belle in regard to the land he gave her. I didn't go over there."

The defendant made a motion to rule out that evidence, on the ground that it was incompetent and irrelevant. The court overruled the motion, and this was excepted to. Clearly the evidence was not irrelevant. The objection to it on the ground that it was incompetent is not sufficiently specific; it is entirely too vague to avail on appeal. See Words and Phrases Judicially Defined, vol. 4, p. 3510.

And an objection to the testimony on the ground that it was in the nature of confidential communications between husband and wife, and therefore to be excluded under the provisions of section 5785 of the Code, is urged entirely too late, when urged for the first time in the brief of counsel for plaintiff in error.

[7] 7. There was sufficient evidence to support the verdict.

Judgment affirmed. All the Justices concur.

(140 Ga. 309)

CENTRAL OF GEORGIA RY. CO. v. MACON RY. & LIGHT CO.

(Supreme Court of Georgia. July 18, 1913.)

(Syllabus by the Court.)

1. INDEMNITY (§ 13*)—IMPLIED CONTRACTS—PERSON PRIMARILY LIABLE.

The plaintiff's petition showed that it had been required under a judgment in a prior suit to pay a certain sum as damages for the homicide of the plaintiff's husband, and that in that suit it had by notice duly served vouched in the present defendant, and that the injuries which resulted in the homicide were caused by wrongful acts and negligence upon the part of the defendant, in which wrongful acts and negligence the plaintiff had in no way participated, and that it was not guilty of the same or like negligence as that of the defendant which resulted in the injury.

Held, that a right of action in the plaintiff was stated in the petition, and it was error for the court to sustain a general demurrer thereto.

[Ed. Note.—For other cases, see Indemnity, Cent. Dig. §§ 29-35; Dec. Dig. § 13.*]

2. JUDGMENT (§ 570*)—RES JUDICATA—AFFIRMANCE OF NONSUIT.

The fact that the plaintiff had formerly brought suit for the same cause of action and had been nonsuited, which judgment of nonsuit was affirmed upon appeal to the Court of Appeals of this state, does not prevent the bringing of the suit again within six months from the date of the affirmance of the judgment of nonsuit. Civ. Code 1910, § 4381.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 1028-1034, 1036-1040, 1042-1045, 1165; Dec. Dig. § 570.*]

(Additional Syllabus by Editorial Staff.)

3. JUDGMENT (§ 707*)—RES JUDICATA—NEGLIGENCE.

That the petition in the action in which judgment was obtained against plaintiff for the death of an employé was based upon alleged positive acts of negligence as well as failure to inspect did not preclude plaintiff in its subsequent action against another company, which was guilty of the sole positive acts of negligence causing the death, from showing that its liability in the prior suit was based entirely upon its failure to inspect, and that in fact it was guilty of no positive acts of negligence.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. § 1230; Dec. Dig. § 707.*]

Error from Superior Court, Bibb County; W. H. Felton, Judge.

Action by the Central of Georgia Railway Company against the Macon Railway & Light Company. Judgment for defendant, and plaintiff brings error. Reversed.

Plaintiff is seeking to recover from the defendant the amount of a judgment rendered against the plaintiff, and which the latter was compelled to pay, in favor of the widow of one E. O. Minor, in a suit brought by her for the homicide of her said husband; it being now alleged that the proximate cause of Minor's death was the negligence of the defendant in the present case. In the original suit it was alleged that Minor, being in the employment of the Central of Georgia Railway Company, was required to assist in coaling an engine of that company at a coal chute in its yards; that he was directed to go upon the tender of the engine and pull down an apron, in order that the coal from the bin might be conveyed into the tender; that the apron, which was of sheet metal, was held in position by a steel cable, used in raising and lowering the apron; that, when Minor took hold of the apron to lower it, the cable attached thereto came in contact with an electric light wire, which wire was fastened to the coal chute and from there carried to a pole some distance off, upon which an arc light was situated; that when the cable came in contact with this wire, which was heavily charged with electricity, the electric current passed into and through Minor's body, so shocking him that he then and there died. In her petition plaintiff alleged that the Central of Georgia Railway Company was guilty of negligence in the following particulars: That the wire had been maintained in that place where it was likely to come in contact with the cable, and where it was likely to so charge the same with electricity, for a great length of time, and that it was under the entire control and management of the said Central of Georgia Railway Company; that the proximity of said wire to said cable, and the danger of its coming in contact with the same, and the current of electricity passing from said wire into said cable and being conveyed to said apron, was well known to the said Central of Georgia Railway Company, or could easily have been ascertained by the exercise of ordinary care and diligence on its part; that the danger to employes of said company, in the use of said appliance, could easily have been discovered and guarded against, had it used ordinary care and diligence; that the wire was originally placed in said position, unnecessarily and carelessly; that it could have been placed in another position, where it would have served the purpose and not have come in contact with said appliance; that the danger to the lives of defendant's employes was imminent at all times, and this fact was well known to defendant, or by the exercise of ordinary care could have been known. Before that suit was tried the defendant, Central of Georgia Railway Company, vouched the Macon Railway & Light Company into court to defend the suit; the latter company having

erected the pole and the arc light and strung the wire, and owning the same. The Macon Railway & Light Company did not appear and make defense. Upon the trial a verdict was rendered against the Central of Georgia Railway Company, and judgment entered thereon, which that company had to pay. The Central of Georgia Railway Company then filed suit in the city court of Macon against the Macon Railway & Light Company to recover the amount it had to pay in the above-stated case, which suit upon the trial was nonsuited. Upon appeal to the Court of Appeals, the judgment granting a nonsuit was affirmed. Within six months after the affirmance of the judgment the present suit was brought by the same plaintiff against the Macon Railway & Light Company, being filed in the superior court of Bibb county. The allegations in this latter suit are sufficiently set forth in the opinion. Upon general demurrer to the petition, the court below dismissed the same, and plaintiff excepted.

R. C. Jordan, of Macon, for plaintiff in error. Guerry, Hall & Roberts, of Macon, for defendant in error.

BECK, J. (after stating the facts as above). [1] While it may be true that as a general rule one of two or more joint tort-feasors has no right of action over against those connected with him in the tort for either contribution or indemnity, where he alone has been compelled to satisfy the damages resulting from the tort, yet in some cases one who is liable as a tort-feasor, because he has failed to exercise due diligence to discover a defect or danger in machinery, appliances, or place where the injured person is required to work, and has been compelled to pay damages for injuries growing out of the tort, may have a right to recover over against another whose negligence produced or brought about the defect or dangerous condition in the machinery, appliances, or place, which defect was the proximate cause of the injury; and the present case seems to us to belong to the latter class. The plaintiff charges that the defendant was negligent in respect to certain acts upon the part of the latter which was the proximate cause of the death of Minor, for which Minor's widow recovered damages in the previous suit.

It is charged in the petition that the plaintiff employed the defendant to erect and maintain an arc light near petitioner's coal chute for the purpose of furnishing light to its employes engaged in performing their duties about the coal chute. The plaintiff pointed out to the defendant the place where it desired the light to be erected, but left it with the defendant as to how the wires should be strung in order to furnish the arc light with electricity; that the arc light and the wires connected therewith were the sole property of the defendant. Petitioner was

entirely inexperienced as to electricity and in the matter of electrical appliances, and had to rely upon the skill and knowledge of the defendant to so construct and insulate its wires that there would be no danger to the property of the petitioner or its employes while engaged about their work. It is alleged in the petition that the defendant strung its wires connected with the light along the side of the coal chute in such a way that the steel cable used in operating the "apron" which is used for coaling the engine would come in contact with the electric wire while lowering and raising the apron, and that the defendant company was negligent in not properly insulating the wire and in not keeping it insulated, in failing to guard and protect the wire, and in not so placing the wire that it would have been impossible for the cable operating the "apron" to come in contact with it; that it was negligent in failing to make the necessary inspection, and that the defendant negligently and improperly maintained and operated its electric circuit, known as the arc circuit, to which said wire is connected and which it formed a part thereof; that it was maintained with a "ground" and allowed the circuit to become "grounded"; that the grounding of the circuit was not necessary for the transmission and distribution of electricity for lighting purposes, and that if the circuit had not been grounded in its construction it would have been impossible for any person coming in contact with the wires thereof to have been injured by the electric current conveyed by it. And it is further charged that negligence upon the part of the defendant in the respects hereinabove set forth was the proximate cause of the homicide of E. O. Minor, for whose death the plaintiff had been compelled in a former suit to pay a large amount as damages.

[3] From this enumeration of the acts of negligence upon the part of the defendant it is clearly made to appear that the defendant maintained its wires and the circuit with which they were connected in a dangerous condition, and that this construction of the circuit and maintenance of it in a dangerous condition was the principal and moving cause resulting in the injury sustained to the employe referred to above. The improper construction and placing of the wires, or placing of them as they were without proper insulation, the grounding of the wires, when considered in connection with the fact that the wires were placed in such close proximity to the "apron" that it would come in contact with it while the latter was being operated, amounted to positive acts of misfeasance relatively to any one who should receive injury in consequence of the negligent construction of the circuit and its wires and the way in which it was maintained. Now, if the railroad company was guilty of the same wrong, or like wrong, if it participated in the

positive act of constructing and maintaining the dangerous circuit and the wires constituting the same, then it would have no right of indemnity from the defendant, after having been required to pay damages; but under the allegations of the petition—and these allegations are to be taken as true as against the demurrer—the plaintiff was not guilty of any of these positive acts of wrongdoing and negligence. And while it had been successfully shown in the prior suit against the plaintiff that it was guilty of such negligence as rendered it liable, that liability may have grown out of negligence which may be described as of a negative character—negligence consisting in a failure to make inspection of the electric circuit and the wires connected therewith. Such negligence as this was sufficient to render it liable in damages to its injured employé, and the mere fact that the widow of an injured employé recovered a verdict for his homicide against this plaintiff in a former suit wherein negligence of both kinds was charged—that is, negligence which we have referred to as positive acts of negligence, as well as negligence consisting in omission to inspect—should not preclude this plaintiff from now showing that its liability in the other suit was based entirely upon its failure to inspect, and that no positive acts causing the injury were proven against it; that it was not as a matter of fact a participant in the positive acts of the original wrongdoer, the Macon Railway & Light Company, according to the allegations of this petition.

[2] While it is true that in the case of *Central of Georgia Railway Co. v. Macon Ry. & Light Co.*, 9 Ga. App. 628, 71 S. E. 1076, the judge delivering the opinion in that case uses language showing that the court was of the opinion that the negligence of both the plaintiff and the defendant was of the same kind, and that they were mere joint tortfeasors, so that there could be no right to indemnity to the one who was first held liable, that is not an adjudication of the issues in this case. The only issue in that case to be decided was whether a nonsuit had been properly granted. The conclusions which we have announced above, as to the liability over by one guilty of positive acts which resulted in injury, when another has been held liable in the first instance because of a failure to exercise due diligence in the matter of making inspection, find support in decisions by other courts.

Attention is called to the case of *Union Stockyards Co. v. C., B. & Q. R. R. Co.*, 196 U. S. 217, 25 Sup. Ct. 226, 49 L. Ed. 453, 2 Ann. Cas. 525. In that case the Circuit Court of Appeals certified the following question: "Is a railroad company which delivers a car in bad order to a terminal company, that is under contract to deliver it to its ultimate destination on its premises for a fixed compensation to be paid to it by the railroad

company, liable to the terminal company for the damages which the latter has been compelled to pay to one of its employes on account of injuries he sustained, while in the customary discharge of his duty of operating the car, by reason of the defect in it, in a case in which the defect is discoverable upon reasonable inspection?" Accompanying the question, and for the purpose of illustrating it, was a statement of the facts as follows: "The plaintiff, the Stockyards Company, is a corporation which owns stockyards at South Omaha, Neb., railroad tracks appurtenant thereto, and motive power to operate cars for the purpose of switching them to their ultimate destination in its yards from a transfer track which connects its track with the railways of the defendant, the Burlington Company. The Burlington Company is a railroad corporation engaged in the business of a common carrier of freight and passengers. The defendant places the cars destined for points in the plaintiff's yards on the transfer track adjacent to the premises of the plaintiff, and the latter hauls them to their points of destination in its yards for a fixed compensation, which is paid to it by the defendant. The plaintiff receives no part of the charge to the shipper for the transportation of the cars, but the defendant contracts with the shipper to deliver the cars to their places of ultimate destination in the plaintiff's yards and receives from the shipper the compensation therefor. The defendant delivered to the plaintiff upon the transfer track a refrigerator car of the Hammond Packing Company, used by the defendant to transport the meats of that company, to be delivered to that company by the plaintiff in its stockyards. This car was in bad order, in that the nut above the wheel upon the brake was not fastened to the staff, although it covered the top of the staff and rested on the wheel as though it was fastened thereto, and this defect was discoverable upon reasonable inspection. The plaintiff understood to deliver the car to the Hammond Company, and sent Edward Goodwin, one of its servants, upon it for that purpose, who, by reason of this defect, was thrown from the car and injured while he was in the discharge of his duty. He sued the plaintiff and recovered a judgment in one of the district courts of Nebraska for the damages which he sustained by his fall, on the ground that it was caused by the negligence of the Stockyards Company in the discharge of its duty of inspection to its employé. This judgment was subsequently affirmed by the Supreme Court of Nebraska (*Union Stockyards Co. v. Goodwin*, 57 Neb. 138 [77 N. W. 357]), and was paid by the plaintiff."

The Supreme Court of the United States, conceding for the sake of argument that the injured employé could have sued either company or both of them, said: "The case then

stands in this wise: The railroad company and the terminal company have been guilty of a like neglect of duty in failing to properly inspect the car before putting it in use by those who might be injured thereby. We do not perceive that, because the duty of inspection was first required from the railroad company, the case is thereby brought within the class which holds the one primarily responsible, as the real cause of the injury, liable to another less culpable, who may have been held to respond for damages for the injury inflicted. It is not like the case of the one who creates a nuisance in the public streets, or who furnishes a defective dock, or the case of the gas company, where it created the condition of unsafety by its own wrongful act, or the case of the defective boiler, which blew out because it would not stand the pressure warranted by the manufacturer. In all these cases the wrongful act of the one held finally liable created the unsafe or dangerous condition from which the injury resulted. The principal and moving cause, resulting in the injury sustained, was the act of the first wrongdoer, and the other has been held liable to third persons for failing to discover or correct the defect caused by the positive act of the other. In the present case the negligence of the parties has been of the same character. Both the railroad company and the terminal company failed by proper inspection to discover the defective brake. The terminal company, because of its fault, has been held liable to one sustaining an injury thereby. We do not think the case comes within that exceptional class which permits one wrongdoer who had been mulcted in damages to recover indemnity or contribution from another. For the reason stated, the question propounded will be answered in the negative."

It will be observed that in the opinion in the case from which the foregoing quotation is taken the Supreme Court of the United States recognized the doctrine that there will be a final and ultimate liability and liability over in all cases where the wrongful act of the one held finally liable was of a positive and creative nature, bringing about the unsafe or dangerous condition from which the injury resulted; and that court makes a distinction between negligence consisting in omission or failure to make proper inspection, and negligence in the performance of positive or creative acts as where one creates or maintains the unsafe or dangerous condition causing the injury. It did hold in the case which it was dealing with that there was no liability over, but based the holding on the ground "that the negligence of the parties" was "of the same character. Both the railroad company and the terminal company failed by proper inspection to discover the defective brake." And if, upon a trial of this case, it should appear that the negligence which resulted in the injury for which the plaintiff was held liable in the first in-

stance was the result, not of positive and creative acts upon the part of the defendant in the present case, but grew out of a failure to inspect merely, and the duty of inspecting was one resting upon this plaintiff and this defendant, then, both having been guilty of the same or like negligence, there would be no liability over, so as to make the company now sued indemnify the one held liable in the first instance.

The doctrine of liability over on the part of one who creates or maintains an unsafe and dangerous condition to another one who has been held liable primarily because negligently allowing the dangerous conditions to remain was recognized by this court in the case of *Western & Atlantic R. Co. v. City of Atlanta*, 74 Ga. 774. From the report of that case it appears that one Montgomery had brought suit against the city of Atlanta and recovered a judgment for a certain amount, which judgment the city had had to pay. Montgomery had been injured while passing along one of the streets of the city and down certain steps, which steps the railroad had negligently and wrongfully allowed to be out of repair and in a defective and dangerous condition, and it was in consequence of this negligence upon the part of the railroad company—the steps being at a crossing of one of the streets over the tracks of the railroad—that Montgomery was injured and recovered the verdict and judgment already referred to. The city of Atlanta vouched in the *Western & Atlantic Railroad Company* in the first suit, and, after having paid the judgment recovered by Montgomery, sued the railroad, and in this last suit recovered of the defendant the amount which they had been held to be primarily liable for. The railroad company brought the case to this court for review, and in a decision affirming the judgment of the court below, and in the course of the opinion, it was said: "First. That a municipal corporation, having the care and control of the streets, is bound to see that they are kept safe for the passage of persons and property. If this duty be neglected, and one should be injured on account of such neglect, the corporation will be liable for damages. * * * Second. If the injury should occur in a street and on account of defects in the same, and if the street, at the point where the injury occurred, was used as a right of way of a railroad company, in such case the municipal corporation would have a remedy over against the railroad company for the amount which it had been compelled to pay, provided it be shown that the injury resulted from the negligent conduct of the agents of the railroad company. In such case, the railroad company would be allowed to show that it was under no obligation to keep the street in safe condition where the injury occurred, or that it was not the fault of the railroad company that the accident happened, or

that both the agents of the railroad company and municipal corporation were at fault." See, also, in this connection, the cases of *Washington Gaslight Co. v. District of Columbia*, 161 U. S. 316, 16 Sup. Ct. 564, 40 L. Ed. 712, *Oceanic Steam Nav. Co. v. Compania Transatlantica Espanola*, 134 N. Y. 461, 31 N. E. 987, 30 Am. St. Rep. 685, *Gray v. Boston Gaslight Co.*, 114 Mass. 149, 19 Am. Rep. 324, and *Boston Woven Hose Co. v. Kendall*, 178 Mass. 232, 59 N. E. 657, 51 L. R. A. 781, 86 Am. St. Rep. 478, which are referred to in the case of *Union Stockyards Co. v. C. B. & Q. R. R. Co.*, supra.

We do not think that the plaintiff's case should have been dismissed upon general demurrer, but the case should be tried, and the plaintiff be permitted to show, if it can, by competent evidence, that the proximate cause of the injury to the plaintiff's employé for which it has already been mulcted in damages was the result of positive wrongful acts and negligence upon the part of the defendant in the instant case, and that the plaintiff had not participated in these wrongful acts and was not a mere joint tort-feasor, in the sense that it had been guilty of the same or like negligence with the defendant which resulted in causing the fatal injuries.

Judgment reversed. All the Justices concur.

(140 Ga. 141)

EMPIRE LIFE INS. CO. v. MASON et al.
(Supreme Court of Georgia. June 14, 1913.)

(Syllabus by the Court.)

1. DEMURRER TO COMPLAINT—INSUFFICIENCY. The demurrer was without merit, and was properly overruled.

2. EXECUTORS AND ADMINISTRATORS (§ 160*)—LIFE INSURANCE POLICY—ASSIGNMENT—APPROVAL.

If an administratrix assigned at private sale a policy of insurance on the life of her intestate, this was illegal; and the ordinary of the county had no authority, either in term time or vacation, to pass an ex parte order approving such transfer, and thereby to render it valid.

[Ed. Note.—For other cases, see *Executors and Administrators*, Cent. Dig. § 637; Dec. Dig. § 160.*]

3. EXECUTORS AND ADMINISTRATORS (§§ 269, 375*) — CLAIMS — COMPROMISE — ILLEGAL TRANSFER—VACATION.

If a decedent left a policy of insurance on his life, and his administratrix obtained an order from the ordinary to allow her to "compromise" such policy as a disputed and doubtful claim (under Civ. Code 1910, §§ 4004-4006), it would not be necessary to institute a proceeding to set aside such order, so as to attack a private transfer, which had previously been fraudulently obtained from the administratrix by the agent of the insurance company, in his own name and for his own benefit.

(a) Such an order was not an adjudication of a court of competent jurisdiction as to the validity of the private transfer which the agent of the company had previously procured by

fraud to be made to him individually by the administratrix.

[Ed. Note.—For other cases, see *Executors and Administrators*, Cent. Dig. §§ 941, 1092, 1529-1538; Dec. Dig. §§ 269, 375.*]

4. INSURANCE (§ 594*) — LIFE POLICY — ASSIGNMENT—FRAUD—NOTICE.

Where the company recognized and did not question the validity of the policy, which was payable in installments, and, before making payments to its agent as transferee thereof, or an assignee under him, knew of the necessity of a valid transfer from the administratrix of the deceased, and where it had knowledge of the private transfer by such administratrix to the agent of the company as an individual, and of the ex parte order purporting to permit or confirm a compromise of a disputed and doubtful claim of the estate, when there was in fact neither dispute nor doubt on the part of the company, this was sufficient to put it upon inquiry, and to affect it with notice as to the title claimed by its agent individually, or one to whom he assigned the policy, and if nevertheless the company continued to pay to such assignee of its agent the installments due on such policy, it did so at its peril.

(a) Moreover, direct notice of the fraud perpetrated by its agent on the administratrix was given to the company when only a few installments had been paid.

[Ed. Note.—For other cases, see *Insurance*, Cent. Dig. §§ 1455-1458, 1483, 1485; Dec. Dig. § 594.*]

5. ATTORNEY AND CLIENT (§ 101*) — EXECUTORS AND ADMINISTRATORS (§ 168*)—LIFE POLICY—ILLEGAL ASSIGNMENT—ESTOPPEL—ATTORNEYS—AUTHORITY.

The fact that the administratrix put the claim in the hands of an attorney to prosecute, and that, upon suggestion by the attorneys of the company that he might enjoin further payments, he replied that he did not see how he could prevent payment of the installments by the company, and that he later retired from representing the administratrix, without having brought any suit, whereupon she promptly employed other counsel, and proceedings were properly begun, cannot be declared, as matter of law, to have estopped her from proceeding to set aside the transfer obtained from her by fraud and recovering from the company the amount due on the policy.

(a) An attorney who had a claim placed in his hands for the purpose of proceeding to set aside a transfer of an insurance policy obtained by fraud of a third party, and to recover from the company the amount due on the policy, which was payable in installments, and who had brought no action, had no implied power to agree that a certain installment might be paid by the company to the person who procured the transfer by fraud, in order not to embarrass him.

[Ed. Note.—For other cases, see *Attorney and Client*, Cent. Dig. §§ 209-216; Dec. Dig. § 101.* *Executors and Administrators*, Cent. Dig. §§ 644, 646; Dec. Dig. § 168.*]

6. INSURANCE (§ 212*)—LIFE POLICY—ILLEGAL ASSIGNMENT—FRAUD.

Under the evidence contained in the record, there was nothing in the contention that the plaintiff entered into a scheme to defraud the company.

[Ed. Note.—For other cases, see *Insurance*, Cent. Dig. §§ 481, 482; Dec. Dig. § 212.*]

7. VERDICT—EVIDENCE—MOTION FOR NEW TRIAL—GROUNDS FOR REVERSAL.

The verdict against the company was right and proper, under the evidence; and none of the grounds of the motion for a new trial, made by it, present any sufficient reason for a reversal.

Error from Superior Court, Fulton County; W. D. Ellis, Judge.

Action by Abbie L. Mason, as administratrix of the estate of A. J. Mason, deceased, against the Empire Life Insurance Company and others. Judgment for plaintiff, and defendant Insurance Company brings error. Affirmed.

Abbie L. Mason, as administratrix of the estate of A. J. Mason, filed an equitable petition against the Empire Life Insurance Company, S. E. Jones, and Z. Whitehurst, alleging, in substance, as follows: On September 6, 1905, the company issued to Mason an annuity policy for \$3,000, payable in sums of \$150 every three months for five years. In 1907 they issued to him another policy. All premiums were paid on both policies, and they were in force at the time of his death on August 19, 1907, and were in his possession. Jones, the soliciting agent for the company, who solicited and wrote both of the policies, knew of their existence and maturity. A few days after the death of Mason, Jones called for the alleged purpose of preparing proofs of death to be sent to the company. He took the policy first mentioned, saying that he desired to get certain dates from it, and then said it was void for nonpayment of premium. He manifested great friendship for the family, and obtained one Linder to be appointed as temporary administrator. The first installment due on the policy thus held by Jones was paid to Linder, and was delivered by him to Jones. The plaintiff qualified as administratrix in October, 1907. Jones, realizing that she would discover that the policy was being paid, stated to her that he could get a thousand dollars out of it for her without cost, and procured from her a transfer of it. Subsequently he informed her that it was impossible to obtain that amount, represented that it was doubtful if anything could be collected on the policy, and urged her to accept \$500 in cash, which she agreed to do, relying on his representation. On December 12, 1907, Jones, without her knowledge, transferred the policy to Whitehurst, who collected installments falling due after that date. On January 4, 1908, Jones again repeated his statement in regard to the invalidity of the policy and its doubtful collectibility and procured her to sign a petition to the ordinary, which he had caused to be prepared, and which he represented was necessary in order to enable him to effect a settlement with the company. She did not know of the validity of the policy, or that payments were being made under it. The petition to the ordinary recited the doubtful and contested character of the claim, and prayed for authority to compromise and to "carry into effect, with official approval, the terms of said compromise already agreed upon with the said Jones." The ordinary thereupon in term time passed an order authorizing the administratrix to compromise the claim, "and to carry into effect the negotiations of set-

tlement and assignment heretofore made by her with said Jones, subject to the order and approval of the court." It was further ordered that "when said settlement is finally made, the said administratrix make official report to this court of her actings and doings." On March 24, 1908, she received by mail a voucher from the company for \$150, being an installment due on the policy, and also a rider to be attached to the policy. She thus learned that, instead of the policy being void and uncollectible as Jones had represented, the company was paying it in accordance with its terms. Jones endeavored to get her to return the check which had been sent to her. She employed an attorney, who notified the company of the fraud which had been perpetrated upon her, and that further payment should not be made to Jones or Whitehurst. Subsequently the attorney, who had been employed by her to take action, retired from representing her, and she at once obtained other counsel, and filed this petition for the purpose of canceling the transfers of the policy and recovering the amount of the policy, less the sum which was paid to her for the transfer. She prayed a judgment against the company for the installments which it had already paid out and for the amount still unpaid. She prayed a judgment against Jones and Whitehurst for the amounts received by them, with interest, after crediting the amount received by her for the policy. She also prayed for cancellation.

The company admitted the issuance of the policy. It stated that it could neither admit nor deny the allegations in regard to the transactions between the plaintiff and Jones for want of sufficient information, but denied any notice or knowledge of fraud perpetrated on her. It admitted making the payments on the policy, but stated that they were made by reason of false representations on the part of Jones. It alleged that the payments made were with ample authority from the plaintiff, and that the company was protected both by the transfer and power of attorney signed by the administratrix, and also by the order of the ordinary. It alleged that since the filing of the petition it had received a letter from Jones, stating that the policy now involved had been replaced by another policy, but that Jones induced the company to issue the second policy as additional insurance upon the life of the deceased, and retained the policy now in controversy, inducing the defendant to believe that it was in full force. It also alleged that the plaintiff had participated in an effort to defraud the company, and after notice of the fraud perpetrated on her by Jones, if any, had permitted the defendant to make payments without interruption, and was thus estopped. It alleged that, by reason of the fraudulent conduct of Jones, it had been induced to pay out \$1,950, and it prayed that judgment be rendered in its

favor against Jones and Whitehurst for that amount, with interest.

Whitehurst claimed to have taken the transfer from Jones as a security for an indebtedness of the latter, that he acted in good faith, and that he was protected both by the transfer and by the order of the court of ordinary. No answer of Jones appears in the record.

The jury found in favor of the plaintiff against the company, Jones, and Whitehurst for \$1,800 (the amount paid by the company and received by the two latter defendants), with interest, less \$500 (the amount paid by Jones to the plaintiff for the transfer of the policy) with interest. They also found in favor of the plaintiff against the company for the balance of the policy remaining unpaid, in accordance with the terms thereof. They further found in favor of the company against Jones and Whitehurst for \$1,350, with interest, being the total amount of installments which had been paid out by the company.

The company moved for a new trial, which was overruled, and it excepted. It also assigned error on the overruling of a demurrer filed by it. Whitehurst made a separate motion for a new trial, and to the overruling thereof filed a separate bill of exceptions. The other facts necessary to an understanding of the decision are stated in the opinion.

F. A. Hooper and H. H. Turner, both of Atlanta, for plaintiff in error. Dorsey, Brewster, Howell & Heyman and Anderson, Felder, Rountree & Wilson, all of Atlanta, for defendant in error.

LUMPKIN, J. It appears from Jones' own statement that he undertook to defraud the insurance company, whose agent he was, by issuing and reporting a policy as new business, which he subsequently said was really issued as a substitute for the one involved in this case, thus getting the commission on issuing a new policy, and further that, after the death of the insured, he obtained a transfer of this policy at a cheap rate and, through himself or his assignee, sought to collect the full amount. This he unblushingly set forth in a letter to the company. He filed no answer to the charge of fraud. According to the evidence, he undoubtedly swindled a confiding negro woman, whom he induced to believe that the policy was not valid and would be contested, and obtained from her, as the administratrix of the insured, a transfer to him, under the guise of being a compromise, paying her about one-sixth of the value of the policy. But "the best laid schemes o' mice and men gang aft agley," and Jones' double dealing was discovered by the accident of the company's sending an installment (the policy was payable in installments) directly to the administratrix instead of to its agent. The plaintiff instituted an equitable action to cancel the transfers and to recover from the

company the amount of the policy, less what she had received, and from the agent and his assignee the amounts which they had received, after deducting what had been paid to her for the policy, which they declined to accept in rescission. The verdict for the plaintiff against the company was the just and proper result under the evidence, and no good reason is shown for setting it aside. The assignee filed a separate motion for a new trial, and it will be dealt with separately.

[1] 1. There was a demurrer, but it was without merit, and was rightly overruled.

[2-4] 2-4. It was contended that the company relied on the transfer of the policy by the plaintiff to Jones, and an order later obtained from the ordinary, and that there was nothing to put the company on notice of any fraud. It admitted in its answer that until after this suit was brought it considered the policy good, and that it received a copy of the order of the ordinary. An administrator must have authority in order to sell the property of the estate. Civil Code, § 4039. There is no law which empowers an ordinary to grant an ex parte order, ratifying a previous illegal transfer of an insurance policy on the life of the deceased, under a private sale, by an administratrix, and thus to validate it. The order of the ordinary did not purport on its face to authorize a sale, but rather a compromise of a doubtful or disputed claim, under Civil Code, §§ 4004-4006. While it used the words "compromise and assign," and referred to approving "the settlement so made," there was nothing to "compromise" between Jones as an individual and the administratrix. He obtained from her by fraudulent representations a transfer to him, naming him also as her attorney in fact, on October 12, 1907. In January thereafter he procured, with her assent and in her name, an order to allow a "compromise" and approve a "settlement," and thus sought to make valid the illegal transfer, under the guise of a compromise. The transaction carried on its face notice of its illegality. The company must have known that, if there was anything about the policy to compromise, it was between the company and the policy holder, and that it was no "compromise" for its agent to buy the policy for himself at a small amount and collect it in full. Its letters in the record show that it appreciated the fact that the administratrix had no power to make a private sale, and that there must be a valid transfer, duly authorized; and it knew what sort of authority there was.

It was contended that the judgment of the ordinary was binding. If the order should be treated as an attempt to ratify and make valid the previous illegal transfer, as above stated, there is no such power in the ordinary or his court. The fact that the court of ordinary is one of general jurisdiction as to certain matters gives no power to pass any

such order. If the order should be treated as authority for the administratrix to compromise a doubtful and contested claim against the company, this has never been done. An authority to compromise does not have to be revoked or set aside in order to attack a previous private transfer procured by fraud.

[8] 5. It was argued that the plaintiff put the matter in the hands of an attorney who, in response to a suggestion of the company's attorneys that he might enjoin the company from making further payments, wrote a letter stating that he did not see any way to enjoin the company from so doing. No action was pending. Such an opinion was not an agreement, within the scope of the general power of an attorney to make, so as to bind his client. The attorney had no implied power to consent to give away his client's property by agreeing that one installment might be paid to the person who had obtained the transfer by fraud, in order not to embarrass him. The company had been put on notice of Jones' fraudulent procedure. The somewhat despondent view taken by the attorney first employed by the plaintiff did not operate as an estoppel on his client, or at least cannot be declared to have done so as matter of law. When she was advised of his opinion and unwillingness to proceed, she promptly employed other counsel, who took a more hopeful view and one more in accord with the law. When the company had notice of the facts, it acted at its peril. If there was doubt, it could have filed a petition in the nature of a bill of interpleader. Merely suggesting an injunction would not relieve it.

[8] 6. It was claimed that the plaintiff entered into a scheme with the agent of the company to defraud the latter. But it does not appear from the evidence how the company was to be defrauded. The applications for the policies (the second showing on its face that the other policy was of force and not superceded), the receipts for payments of premiums on this one, the deduction by the company from the first payment made after the death of the insured of an unpaid premium, and its entire conduct show conclusively that the policy was valid and in force. What fraud did the plaintiff undertake to perpetrate upon it except to get money to which she was entitled? Jones' language, like his conduct, was not free from indirection. But no fraud or attempted fraud by the plaintiff was shown.

[7] 7. It is needless to take up separately the grounds of the motion for a new trial filed by the company. Some of the charges, especially as to collaterally attacking a judgment for fraud, may not have been correct, but none of them show any reason for a reversal, under the evidence.

Judgment affirmed. All the Justices concur.

(140 Ga. 145)

WHITEHURST v. MASON et al.

(Supreme Court of Georgia. June 14, 1913.)

(Syllabus by the Court.)

1. EXECUTORS AND ADMINISTRATORS (§§ 158, 302, 363*)—PERSONAL PROPERTY—SALE—REQUISITES.

Under the statute law of this state an administrator cannot sell the personal property of his intestate (annual crops excepted) without first obtaining leave to sell from the ordinary and the sale must be public after due advertisement. A sale without an order of the ordinary is void, and passes no title to the purchaser or his vendee.

(a) Nutting v. Thomason, 46 Ga. 34, distinguished.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. §§ 634, 635, 646½, 1484-1487, 1488-1494; Dec. Dig. §§ 158, 362, 363.*]

2. EXECUTORS AND ADMINISTRATORS (§ 171*)—INSURANCE POLICY—ASSIGNMENTS—FRAUD—PAYMENT OF INSTALLMENTS.

An administratrix sued to recover the amount of a policy of life insurance payable in installments to her intestate's administrators or executors. It was alleged that she had been induced by fraud to assign the policy, that her immediate assignee had transferred it to another, both transfers having been made without obtaining leave to sell the policy, and the sale or transfer in each instance having been privately made, and that certain installments due on the policy had been paid by the insurance company to the second assignee. The insurance company and both assignees were parties to the suit. On the trial it did not appear that the second assignee had knowledge of the fraud practiced by the first assignee on the administratrix, but did have notice that the transfer was made without order of court. *Held*, that the second assignee did not acquire a legal title to the policy, on the ground that it was not legally assigned, but that, in the absence of any proof of the insurance company's insolvency or other equitable reason, the administratrix could not recover against the second assignee the amount of the installments paid to him by the insurance company.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. §§ 649, 650; Dec. Dig. § 171.*]

3. INSURANCE (§ 601*)—PAYMENT (§ 84*)—MISTAKE OF LAW—RECOVERY.

Money paid through mistake of law, with full knowledge of all the facts, cannot be recovered back, unless it is made to appear that the person to whom it was paid cannot in good conscience retain it.

(a) An insurance company issued a policy of insurance payable in installments. This policy was assigned to a person as a result of a fraud practiced upon the assignor, who was the administratrix of the insured, the assignment being made without authority of the court of ordinary or public sale. The assignee of the administratrix bought property from a third person (who had knowledge of the fraud), and gave therefor his purchase-money notes of the same amounts and at the same maturities of the installments of the policy, and assigned the policy as collateral security for the notes. The insurance company, with full knowledge of all the facts, paid several installments due on the policy to the second assignee, who applied the same in discharge of the purchase-money notes. Under these circumstances the insurance com-

pany could not recover back the installments paid to the second assignee.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 1500, 1501; Dec. Dig. § 601; Payment, Cent. Dig. §§ 267-271; Dec. Dig. § 84.*]

4. WRIT OF ERROR—QUESTIONS DETERMINED. Other points raised are decided on the writ of error sued out by the insurance company.

Error from Superior Court, Fulton County; W. D. Ellis, Judge.

Action by A. L. Mason, as administratrix of A. J. Mason, deceased, against the Empire Life Insurance Company and others. Judgment for plaintiff, and defendant Whitehurst brings error. Reversed.

Anderson, Felder, Rountree & Wilson, of Atlanta, for plaintiff in error. Twiggs & Gazan, of Savannah, Dorsey, Brewster, Howell & Heyman and F. A. Hooper, all of Atlanta, for defendant in error.

EVANS, P. J. This case is a prong of Empire Life Insurance Company v. Mason, Administratrix, 78 S. E. 935, this day decided. The administratrix of Mason sued the insurance company to recover an amount alleged to be due on a policy of insurance issued by the company on the life of her intestate, and joined in the suit as parties defendant one Jones, the agent of the company, who was alleged to have fraudulently procured an assignment of the policy from her, and Z. Whitehurst, the assignee of Jones. The jury found in favor of the plaintiff, and the insurance company and Whitehurst made separate motions for new trial, which being overruled, they sued out separate writs of error. We are now considering that of Whitehurst.

1. The evidence authorized a finding that Jones practiced a fraud on the administratrix of Mason in procuring an assignment of the policy to him, but there was no evidence that Whitehurst participated in the fraud. The policy was payable to the administrators or executors of A. J. Mason in quarterly installments, and was assigned by the administratrix of Mason to Jones, who assigned it to Whitehurst as collateral security for a debt. At that time no judgment had been granted by the court of ordinary authorizing a compromise with the company ratifying the transfer to Jones. This statement is made in order to be historically accurate, and not to intimate that such order was valid. Under these facts did the transfer of the policy by Jones to Whitehurst vest the valid legal title thereto in Whitehurst?

[1] In the various rulings to which exception is taken, the trial judge held that if the assignment to Jones was invalid, and did not serve to vest title to the policy in him, his transfer to Whitehurst was likewise invalid. An administrator has no right, under the statutes of this state, to sell the property of his intestate (except annual crops) with-

out an order from the court of ordinary granting him leave to sell. At common law an administrator could sell personal property either at private or public sale; but, as was said by Simmons, C. J., in *Poullia v. Brown*, 82 Ga. 412, 423, 9 S. E. 1181, 1182: "Our statute has changed the common law, and requires the executor or administrator to apply to the ordinary for leave to sell (which application in the case of personal property shall be made at least 10 days before the order is granted), and that advertisement be made of the day and time of sale. The intention of the law of this state seems to be that all sales of the property of decedents shall be public, after full notice to all parties interested therein." It is contended, however, that a sale made without an order of the court of ordinary is only voidable, and that an innocent vendee from a purchaser at an administrator's sale, made without an order, takes a good title to the property. This point was before the court in *Patterson v. Lemon*, 50 Ga. 232, where it was said: "We recognize the well-settled rule that in order to divest the heirs at law of their title by an administrator's sale, the administrator must have authority to sell. This is a *sine qua non*. Without it the sale is void. [*Williams v. Peyton*], 4 Wheat. 77 [4 L. Ed. 518]; [*Clements v. Henderson*], 4 Ga. 148. Under our law this authority is the judgment and order of the ordinary having jurisdiction of the administration, duly had and rendered. [*McDade v. Burch*], 7 Ga. 559 [50 Am. Dec. 407]. It is also true that to make a perfect sale to divest the title regularly, the administrator must comply in full with the provisions of the law as to the mode of sale. [*Worthy v. Johnson*], 8 Ga. 236 [52 Am. Dec. 399; *Id.*], 10 Ga. 358 [54 Am. Dec. 393]. But whilst a sale without authority is void, a sale without a strict compliance with the requirements of the law is only voidable. Even an innocent purchaser gets nothing under a void sale; but if the sale be voidable only, innocent purchasers, those having no notice, either actual or constructive, of the irregularity, are protected." The holding in this case has been codified as follows: "To divest the title of the heir at law, the administrator must have authority to sell; if there be irregularities, or if he fail to comply with the law as to the mode of sale, the sale is voidable, except as to innocent purchasers." Civil Code 1910, § 4039. This section protects innocent purchasers against nothing except irregularities in carrying out a valid order of the court of ordinary granting leave to sell (*Horne v. Rodgers*, 113 Ga. 231, 38 S. E. 768), and is applicable to choses in action. *Thompson v. Thompson*, 77 Ga. 692, 8 S. E. 261.

Strong reliance is made by the plaintiff in error on the case of *Nutting v. Thomason*, 46 Ga. 34, as deciding that no order of the

ordinary is required for the sale by an administrator of stock of an incorporated railway company, and that a sale without such order is only voidable, and that a bona fide purchaser from the administrator's vendee, without notice that the sale was made at private sale and without order, gets a good title. Let us concede that at the time of the transaction inquired of in that case that the law did not require an administrator to obtain leave to sell stock before making a sale of it; certainly under the Code, as construed in many decisions of this court made since then, an order of the court of ordinary, granting leave to sell the personal and real property of his intestate by an administrator, is essential to the validity of the sale. Moreover, in that case there had been successive transfers of the stock on the books of the company, new certificates issued, and the last purchaser was not put on notice that the stock he was buying was that which was sold by the administrator. In the instant case Whitehurst had notice from the transfer of the insurance policy by Mason's administratrix to Jones, accompanying the policy, that the administratrix of Mason was without authority to transfer the policy to Jones. So that whether we hold the original transfer to be absolutely void or only voidable, Jones' assignment to Whitehurst was invalid as against the administratrix, and she was entitled, under the evidence, to have it canceled as preliminary to her recovery against the insurer on the policy. In view of this conclusion the various rulings of the court in this regard were not prejudicial to the plaintiff in error.

[2] 2. The plaintiff prayed judgment against Whitehurst for the installments collected by him, and a verdict was returned against him, Jones, and the insurance company for such amounts. The petition sought to recover the amount of the policy which had been assigned by the administratrix to Jones and by him to Whitehurst, less the amount received from Jones. Inasmuch as Whitehurst was the assignee of Jones, to whom the policy was assigned by the plaintiff, it was necessary that these assignments be vacated before the plaintiff established her right to sue. He was properly made a party, but neither the pleadings nor evidence authorized a recovery by the plaintiff against him for the amount of the installments paid by the company to him.

[3] 3. The insurance company pleaded that if the plaintiff recovered a verdict against it, it have judgment over against Whitehurst for the amount of the installments which it had paid to him. The jury found in favor of the insurance company on this contention. The plaintiff in error insists that these payments were voluntary, with knowledge of all the facts, and so far as he is concerned, there was no misplaced confidence, and no artifice, deception, or fraud-

ulent practice, and such payments cannot be recovered back. It appeared that after Jones procured the transfer of the policy from the administratrix he proposed to buy from Whitehurst certain real estate. A trade was effected, Whitehurst taking Jones' notes in amounts and at such maturities as to be paid off by the quarterly installments under the policy, and took a transfer of the policy as collateral security. About three months after this transaction the plaintiff discovered that Jones had perpetrated a fraud on her, and promptly employed counsel, who notified the insurance company of the fraud of its agent Jones in procuring an assignment of the policy to himself. Notwithstanding this notice, the insurance company continued to pay Whitehurst the installments as they fell due, which were applied to the discharge of Jones' notes. Jones has since sold the real estate. Whitehurst has a solvent indorser on the unpaid notes of Jones.

Our Code declares that "payments of taxes or other claims, made through ignorance of the law, or where the facts are all known, and there is no misplaced confidence and no artifice, deception, or fraudulent practice used by the other party, are deemed voluntary, and cannot be recovered back, unless made under an urgent and immediate necessity therefor, or to release person or property from attention, or to prevent an immediate seizure of person or property." Civil Code 1910, § 4317. In England and in some other jurisdictions no distinction is made between money paid in ignorance of law and under mistake of law. Lord Ellenborough went so far as to hold that money paid under mistake of law with full knowledge of the facts cannot be recovered, although it is against conscience for the defendant to retain it; his lordship basing his conclusion on the ground that "every one must be taken to be cognizant of the law, otherwise there is no saying to what extent the excuse of ignorance might be taken." *Bilbie v. Lumley*, 2 East, 469.

This question underwent elaborate analysis in *Culbreath v. Culbreath*, 7 Ga. 64, 50 Am. Dec. 375, and *Nisbet, J.*, declined to follow the rule announced in *Bilbie v. Lumley*. In the *Culbreath* Case a decedent died, leaving neither wife nor children, and his nearest of kin were seven surviving brothers and sisters and the children of a deceased sister. The administrator in a family settlement, and under a misapprehension of the law, divided the estate equally between the seven surviving brothers and sisters to the exclusion of the children of a deceased sister. Subsequently these children recovered a judgment against the administrator for their share of the estate, and the administrator sued two of the distributees to recover the amount overpaid on account of this mistake. The court differentiated payments made in ignorance of law from those

made under mistake of law, and held that "money paid by mistake of the law may be recovered back in an action for money had and received, where there is full knowledge of all the facts; provided that the mistake is clearly proven, and the defendant cannot, in good conscience, retain it." Our Code recognizes this distinction to some extent in the sections which declare that "mere ignorance of the law on the part of the party himself, where the facts are all known, and there is no misplaced confidence, and no artifice or deception or fraudulent practice is used by the other party either to induce the mistake of law or to prevent its correction, will not authorize the intervention of equity." "An honest mistake of the law as to the effect of an instrument on the part of both contracting parties, when such mistake operates as a gross injustice to one, and gives an unconscious advantage to the other, may be relieved in equity." And that a "mistake of law, if not brought about by the other party, is no ground for annulling a contract of sale. Mistake of a material fact may, in some cases, justify a rescission of the contract; mere ignorance of an act will not." Civil Code 1910, §§ 4575, 4576, and 4115. Judge Nesbit took pains to hedge in and qualify the rule allowing a recovery of money paid under mistake of law by requiring, as indispensable to its recovery, that the plaintiff show that the defendant cannot in good conscience retain the money. The rationale of the rule allowing a recovery of money paid with knowledge of the facts, and under a mistake of law, is that the plaintiff is not attempting to throw a loss upon any one. If the plaintiff's recovery would lead to a loss on the part of the defendant, then, the parties being equally innocent, that fact of itself is sufficient reason for denying the right of recovery on the plaintiff's part. Keener on Law of Quasi Contracts, 913.

In the instant case Whitehurst sold property to Jones and took the policy as security. The installments collected by Whitehurst were applied to the payment of Jones' note. Whitehurst did not participate in the fraud which Jones practiced on the administratrix of the insured, in order to procure her to transfer the policy to Jones. He failed to get a title to the policy by virtue of the transfer to him because the law does not authorize an administrator to sell choses in action without first obtaining leave to sell from the ordinary, and then only at public outcry. When reduced to its ultimate facts, the case stands thus: Jones fraudulently procured a transfer of the policy of insurance to himself, which transfer was attempted to be made without an order of the ordinary and at private sale. Without notice of the actual fraud, but with notice that the transfer was attempted to be accomplished by a sale without order of court and privately made, Whitehurst in the course of business sold

property to Jones, and received part payment in the installments paid by the company, who paid the installments with knowledge of all the facts. Under such circumstances Whitehurst paid value received to Jones for the money received from the insurance company as payment on the policy, and he could retain the payments in good conscience. In effect the transaction is the same as if the insurance company paid the money to Jones and Jones paid it to Whitehurst. Whitehurst has changed his status in reliance on the validity of the assignment of Jones to him, and it would be inequitable to allow the insurance company to recover the installments voluntarily made by it with knowledge of all the facts.

The verdict rendered was special in form. It allowed a recovery by the administratrix against the insurance company, Jones, and Whitehurst, for the installments which had been paid, less amount received from Jones, a recovery by her against the insurance company for the unpaid installments, and a recovery by the insurance company against Whitehurst for the installments paid to him by the insurance company. As will be seen in the opinion in the case of the Insurance Co. v. Mason, Administratrix, the verdict against the insurance company in favor of the administratrix should stand. But so much of the verdict as gives a recovery in favor of the administratrix against Whitehurst, and in favor of the insurance company against Whitehurst, is erroneous. A new trial is not necessary, and direction is given to eliminate the recoveries against Whitehurst.

[4] 4. Some of the instructions complained of contained abstract principles of law not strictly appropriate to the case, but these instructions were not of such a character as to be prejudicial to the plaintiffs in error. Other points made in the record are ruled in the companion case of Empire Life Ins. Co. v. Mason, Administratrix, and reference is made to that case.

Judgment reversed, with direction. All the Justices concur

(13 Ga. App. 123)

MORGAN v. STATE. (No. 4,724.)

(Court of Appeals of Georgia. July 22, 1913.)

(Syllabus by the Court.)

INTOXICATING LIQUORS (§ 16*)—LICENSES—PROSECUTION—DEMURRER TO INDICTMENT.

The indictment in this case was based upon section 7 of the general tax act of August 16, 1909 (Laws 1909, p. 62; Pol. Code 1910, § 988), to which a demurrer was interposed, on the ground that this act was unconstitutional for the reasons stated in the demurrer. The constitutional question thus made was certified by this court to the Supreme Court for instruction, and that court instructs this court that so much of the act in question as seeks to impose a greater tax where the goods handled are manufactured beyond the limits of the state is obnoxious to the uniformity clause of this state, § 2, par. 1, of the Constitution of this state,

and therefore is void. It follows from this decision of the Supreme Court that the trial judge erred in overruling the demurrer to the indictment, and for this reason his judgment must be reversed.

[Ed. Note.—For other cases, see *Intoxicating Liquors*, Cent. Dig. §§ 19, 20; Dec. Dig. § 16.*]

Error from Superior Court, Glynn County; C. B. Conyers, Judge.

J. H. Morgan was convicted of violating General Tax Act, § 7 (Pol. Code 1910, § 983), requiring a license to be procured by wholesale dealers in near beer, etc., and brings error. Case certified to Supreme Court, and on opinion of Supreme Court (78 S. E. 807) reversed.

A. D. Gale and H. F. Dunwoody, both of Brunswick, for plaintiff in error. J. H. Thomas, Sol. Gen., of Jesup, for the State.

HILL, C. J. Judgment reversed

(13 Ga. App. 112)

PETERSON v. HARPER. (No. 4,448.)

(Court of Appeals of Georgia. July 22, 1913.)

(Syllabus by the Court.)

1. VENDOR AND PURCHASER (§§ 145, 214*)—BOND FOR TITLE—EXECUTION OF DEED—RIGHTS OF ASSIGNEE.

The judge erred in directing the verdict.

(a) The maker of a bond for title, wherein the maker binds himself to execute a deed to the obligee named in the bond upon the payment of certain notes therein referred to, is not required to execute a deed in pursuance of his bond until the bond is surrendered, or until it is shown that the bond is lost or destroyed or is not in any event enforceable against him.

(b) The assignee of a bond for title acquires all the rights and equities to which the assignor was entitled thereunder.

[Ed. Note.—For other cases, see *Vendor and Purchaser*, Cent. Dig. §§ 276, 436, 442-448; Dec. Dig. §§ 145, 214.*]

2. VENDOR AND PURCHASER (§§ 151, 214*)—BOND FOR TITLE—BREACH—DEFENSES.

One who has executed a bond for title, obligating himself to convey certain land therein described to a named obligee or his assigns, cannot, in the absence of an express stipulation to that effect, or unless the bond has been surrendered to him, convey the land to a person other than the obligee or his assigns without breaching the bond; and the fact that the bond has been assigned by the obligee to a third person will not relieve the obligor from any of the liabilities resulting from the breach.

[Ed. Note.—For other cases, see *Vendor and Purchaser*, Cent. Dig. §§ 298-303, 436, 442-448; Dec. Dig. §§ 151, 214.*]

3. VENDOR AND PURCHASER (§ 214*)—BOND FOR TITLE—BREACH—DEFENSES.

Where one who has executed a bond for title to land, without requiring its surrender and without inquiring whether it had been transferred or destroyed, executes and delivers a deed to a third person in disregard of the obligation assumed in the execution of the bond for title, he is estopped to defend upon the ground that the assignee of his outstanding obligation knew of the execution of the deed, unless he can show in addition that the assignee

acquiesced in or consented to the execution of the deed.

[Ed. Note.—For other cases, see *Vendor and Purchaser*, Cent. Dig. §§ 436, 442, 448; Dec. Dig. § 214.*]

Error from City Court of Ocilla; H. E. Oxford, Judge.

Action by B. Peterson against Henry Harper. Judgment for defendant, and plaintiff brings error. Reversed.

Newbern & Meeks, of Ocilla, and F. W. Dart, of Douglas, for plaintiff in error. H. J. Quincey and J. J. Walker, both of Ocilla, for defendant in error.

RUSSELL, J. Peterson brought suit against Henry Harper for the breach of a bond for title. The court directed a verdict in favor of the defendant, and the plaintiff excepts.

According to the evidence, the defendant executed to Stone on July 25, 1908, the bond for title which appears in the record, whereby he obligated himself to convey to Stone, upon the payment of two promissory notes therein specified, the land therein described. The two notes amounted to something over \$300. The bond for title does not contain a stipulation to the effect that time is the essence of the contract or confer power upon the holder of the notes to sell the land either at public or private sale. The land was worth from \$2,500 to \$3,000. The defendant testified that he had no other interest in the land than as security for the debt evidenced by the notes. One of the notes fell due January 1, 1909, and the other January 1, 1910. On January 12, 1910, neither note having been paid, Henry Harper, the defendant, made to L. C. Harper a warranty deed conveying the land covered by the bond for titles. On December 20, 1910, Stone, the holder of the bond for title, transferred the bond to the plaintiff, Peterson. It also appeared in the evidence that on December 31, 1908, Stone executed a deed to the land in question to Annie Harper. Stone knew, before he transferred the bond for title to Peterson, that the defendant had already deeded the land to L. C. Harper, but Peterson testified that he did not know this, and there is no testimony that Peterson actually knew this at the time he took the assignment of the bond for title from Stone. Peterson was charged with constructive notice, however, as it appears from the record that the defendant's deed to L. C. Harper had been recorded before Stone formally assigned his bond for title to Peterson.

The foregoing were the material facts developed upon the investigation in the court below. Any apparent conflict in the testimony related to minor matters is immaterial to a consideration of the substantial questions presented. It appears also, without contradiction, that, nearly a year before the formal assignment of the bond for title from

Stone to Peterson, Peterson paid to Stone the full consideration for his equity in the premises, upon his promise to assign the bond for title, which Stone did not have with him at that time, and it was uncontradicted that the delay in the execution of the assignment was due wholly to Stone, whom Peterson frequently requested to formally execute the assignment. Of course this testimony does not affect the rights of the parties (because necessarily the assignment had to be in writing), but it does show that the assignment was not fraudulent and was based upon valuable consideration.

[1, 2] Since it appears, without dispute, that there was a breach of the bond in which Harper obligated himself to convey a certain tract of land to Stone or his assigns, our inquiry must necessarily be confined to ascertaining whether the reasons given by Harper for actually disregarding his obligation are sufficient to relieve him from the liability to which he was subjected *prima facie* whenever the plaintiff proved the execution and assignment of the bond, and that Harper, as obligor, had placed himself in a position where he could not comply with its terms.

It was not necessary for Peterson to demand that Harper comply with his obligation, for the evidence showed (as the declaration had alleged) that the defendant had put it out of his power, before the suit was brought, to comply with such a demand. *Gibson v. Carreker*, 82 Ga. 53, 54, 9 S. E. 124. The testimony as to the sale by Stone to Mrs. Annie Harper cuts no figure in the case, because there is no evidence that Stone ever assigned his bond for title to Mrs. Harper, or that he, in writing, conveyed to her his interest in this land. Even if a written instrument apart from the assignment and transfer of the bond for title had been introduced, it would not necessarily have relieved Harper from liability to Peterson, because there is no evidence that at the time he executed the deed to L. C. Harper he had any reason to believe that his bond for title was not still outstanding (perhaps in the hands of an innocent purchaser of Stone's equitable interest), and he neither inquired as to its whereabouts nor demanded its surrender as a condition precedent to the execution of this deed. He certainly knew, at the time he executed the deed to L. C. Harper, that he had given a bond for title to Stone, covering the same tract of land. He knew that he could not be required to give a deed in pursuance of that bond until it was surrendered or until it was satisfactorily shown that he could not in any event be liable in future upon the obligation.

The maker of a bond for titles, wherein he binds himself to execute a deed to the obligee named in the bond upon the payment of certain notes therein referred to, is not required to execute a deed in pursuance of

his bond until the bond is surrendered or until it is shown that the bond is lost or destroyed or is not in any event enforceable against him. *Hardin v. Neal Loan & Banking Co.*, 125 Ga. 820, 54 S. E. 755. The defendant seems to have recognized this principle, because there was testimony to the effect that Stone, the holder of the bond, agreed that he should execute the deed. But the judge could not direct a verdict upon this testimony, since it was contradicted by Stone, and it was for the jury to say what was the truth as to this point: The facts of the instant case demonstrate the wisdom of the ruling of the Supreme Court in the *Hardin Case*, *supra*, because, were any other rule adopted than that of requiring the maker of a bond for title to be certain that that obligation has been legally canceled and its binding force avoided, many disasters in daily commercial transactions would ensue. A bond for title is not only the evidence that the obligee therein named has an equitable interest, in some amount, in the premises therein described, which he can sell or pledge as security for debt, but daily many transactions of this kind in fact occur. So much so that the Legislature has seen fit to provide for the recording of bonds for title; and the courts have uniformly held that the rights of the holders of a bond for title must be regarded and respected by third persons, as well as by the obligor of the bond. The holder of a bond for title has an equitable interest in the land, which may be perfected without the execution of a deed, by payment of the purchase price in full, either by the original obligee or by his assignee. He cannot be deprived of this equitable interest through a sale of the land by the original vendor, even if the purchase-money notes are not paid promptly at maturity, unless it be expressly so stipulated in the notes or the bond itself. *Buck v. Duvall*, 11 Ga. App. 853, 76 S. E. 1053. He can proceed against a trespasser upon the premises, although he has not paid the purchase price in full, and even though his notes are past due. *Prima facie*, at least, one who, in disregard of a bond for title, in which he has obligated himself to convey the premises therein described, conveys them to another has breached his bond, and it devolves upon him to disclose why he should be relieved from this apparent liability.

That the assignee of a bond for title acquires all the rights and equities to which the assignor was entitled thereunder is well settled. *Walker v. Maddox*, 105 Ga. 253 (2), 31 S. E. 165; *Burney Tailoring Co. v. Cuzzort*, 132 Ga. 852 (1), 65 S. E. 140. Therefore, *prima facie* at least, upon the introduction of the bond for title, with the assignment entered thereon, Peterson was entitled to recover if the jury believed the testimony of Stone that he did not consent for Harper to exe-

cute the deed to L. C. Harper, and that in fact he had no knowledge of it.

[3] The evidence is undisputed that Peterson had no actual knowledge, at the time of the transfer by Stone of the bond for title, that Harper had executed a deed to L. C. Harper. It is insisted, however, that Stone did know that Harper had executed and delivered this deed before Stone executed his assignment to Peterson; and, as the assignee of a bond could get nothing more than his assignor had, that as Stone had nothing Peterson could get nothing under the bond for title. We consider this argument as one without force for the reason that, even if it had been shown that Peterson knew that Harper had executed a deed to L. C. Harper at the time he purchased Stone's equitable interest in the land and had the bond for title assigned to him, his right to recover for the breach of the bond would not be defeated, unless he further knew, or had reason to know, that Stone had consented to the execution of the deed. Intrinsically there is no difference between actual and constructive notice. The effect of each and both is to show that the person whom it is sought to charge with notice had knowledge of a particular fact. When this notice is implied by law, from certain conditions, it is called "constructive notice" and dispenses with the necessity of proof of actual knowledge, whereas, to impute actual notice, the proof must show that the party whom it is sought to charge with notice actually knew of the existence of the fact or condition in question. One who has voluntarily executed an obligation, by which he has assumed to execute title to another to a certain tract of land described in a bond, cannot be permitted to breach the bond merely because the obligee (who for this reason is the owner of an equitable interest in the land) possibly knew that the maker of the bond had breached it. Of course, if the obligor in the bond executed a deed, either with the consent or assent of the obligee or his assignee, this would be a perfect defense. But it would never do to hold that the voluntary act of the obligee, in violating his obligation, without the consent of the holder of the bond for title, and perhaps even over his protest, would relieve the maker of the bond for title merely because it was done in the presence of the obligee. In such a case knowledge is not the equivalent of either assent or consent. If the jury, upon the trial of the case, had believed that Stone consented for Harper to make the deed, and further believed that Harper did not execute the deed until he had taken proper means to ascertain that the bond could never in future subject him to liability, then it might be possible that Peterson could not recover. But, in the absence of such proof, Harper would be estopped to set up, in defense of his apparent breach of the bond, mere knowledge of

his act in executing the deed, on the part of either Stone or his assignee. The proof would have to show assent or consent in addition to knowledge. For this reason, where nothing more is shown than that the obligee in the bond for title, or his assignee, had knowledge of the fact that the maker of the bond had executed a deed in violation of his obligation, this proof alone constitutes no defense to the breach of the bond; and it is immaterial whether the knowledge is actual or constructive.

All actions for breaches of bonds for title could be prevented and defeated if the law were to the contrary, for then, if the maker of a bond wished to avoid it, it would only be necessary for him to put himself in the presence of the obligee, and, after calling his attention, to deliver to some third person in his presence a deed which the maker of the bond had previously executed, conveying to him the premises described in the bond.

Where one who has executed a bond for title to land, without requiring its surrender and without inquiring whether it has been transferred or destroyed, executes and delivers a deed to a third person, in disregard of the obligation assumed in the execution of the bond for title, he is estopped to defend upon the ground that the assignee of his outstanding obligation knew of the execution of the deed, unless he can show in addition that the assignee acquiesced in or consented to the execution of the deed.

Judgment reversed.

(12 Ga. App. 124)

COLLINS v. AUGUSTA-AIKEN RY. & ELECTRIC CORPORATION. (No. 4,837.)

(Court of Appeals of Georgia. July 22, 1913.)

(Syllabus by the Court.)

1. STREET RAILROADS (§ 81*)—DUTY OF MOTORMAN.

It is the duty of the motorman of a street railway car in propelling a car through the public streets to notice the presence of pedestrians, and at all times to be watchful to see that the way is clear; and, where he has reason to apprehend danger or should in the exercise of ordinary care become cognizant of danger, he should regulate the speed of his car so that it could be quickly stopped, should the occasion require it.

[Ed. Note.—For other cases, see Street Railroads, Cent. Dig. §§ 172-177; Dec. Dig. § 81.*]

2. NEGLIGENCE (§§ 80, 136*)—RIGHT OF RECOVERY—CONTRIBUTORY NEGLIGENCE—QUESTION FOR JURY—DISMISSAL OF PETITION.

One cannot recover damages for the negligence of another, the consequences of which he could have avoided by the exercise of ordinary care after the negligence became apparent or should have been reasonably apprehended. Generally negligence is a question of fact, to be determined by the jury. A petition seeking to recover damages on account of alleged negligence should not be dismissed on the ground that the plaintiff could by the exercise of ordinary care have avoided the consequences of the negligence alleged, unless the petition discloses

facts demanding such a conclusion as a matter of law.

[Ed. Note.—For other cases, see *Negligence*, Cent. Dig. §§ 84, 85, 277-353; Dec. Dig. §§ 80, 138.*]

Error from City Court of Richmond County; W. F. Eve, Judge.

Action by R. C. Collins against the Augusta-Aiken Railway & Electric Corporation. Judgment for defendant, and plaintiff brings error. Reversed.

Isaac S. Peebles, Jr., and Thos. F. Harrison, both of Augusta, for plaintiff in error. Boykin Wright and Geo. T. Jackson, both of Augusta, for defendant in error.

POTTLE, J. The plaintiff brought his action to recover of the defendant street railway company damages for alleged personal injuries. The allegations of the petition made substantially the following case: Broad street is one of the main public thoroughfares in the city of Augusta, running approximately east and west. About 3 o'clock in the afternoon the plaintiff started to cross Broad street from the south side thereof to watch out for one of the defendant's street cars going westward up Broad street. When about two feet from the track, and looking eastward along Broad street to discover the approach of the car for which he was watching, one of the defendant's cars came down Broad street, going in an easterly direction, and suddenly and without any warning to the plaintiff struck him, knocking him to the ground, as a result of which he sustained serious injuries. He was in full view of the motorman in charge of the car, and by the exercise of ordinary diligence his presence could have been discovered and warning given him of the approach of the car, but the motorman failed to keep a lookout so as to discover his presence. The plaintiff was without fault, and his injuries were the result of the defendant's negligence in failing to discover his presence and give him warning of the approach of the car, and in failing to stop the car in order to avoid striking him. By amendment it was alleged that just prior to the time when he was struck by the car the plaintiff looked up the track in the direction from whence the car came and saw only one car, which passed him. He then stepped near the track to look for the car which was to come down the street westward. It was raining, and he could not by the exercise of ordinary diligence have discovered the presence of the car that struck him, which was running at a high rate of speed and was off its schedule, and he had no reason to anticipate its presence on the track at the time. He stood near the track for a minute before he was struck, and was in full view of the motorman, who knew and should have known his peril. The court sustained an oral motion to dismiss the petition as amended, on the

ground that it set forth no cause of action; and the plaintiff excepted.

[1]. 1. If the petition sufficiently charges actionable negligence as the proximate cause of the injury, the suit should not have been dismissed, unless it also alleges facts which show that by the exercise of ordinary care the plaintiff could have avoided the consequences of the defendant's negligence. The plaintiff was not a trespasser. The defendant had no exclusive right to use the public street. If the plaintiff had no right to be where he was when the injury occurred, the defendant was under no duty to anticipate his presence, and consequently would be liable to him only for the failure to exercise ordinary care after he had been discovered in a perilous situation. The employes in charge of a car of a street railway company are under the duty to exercise ordinary care to discover pedestrians and others using a street, whether at a street crossing or elsewhere. It does not appear from the petition that the plaintiff was at a street crossing, or that he was at a place where the cars usually stopped to take on passengers; but all this is immaterial. The plaintiff had a right to cross the street or to stand upon the street at any point on it. The street railway company was bound to know that he had this right, and was therefore under the duty to be on the lookout. As was said in *Perry v. Macon Con. St. R. R. Co.*, 101 Ga. 410, 29 S. E. 308: "It is undoubtedly the duty of the motorman, in propelling a car through the public streets, to notice the presence of other vehicles and pedestrians ahead of his car, and at all times be watchful to see that the way is clear; and where he has reason to apprehend danger, or should in the exercise of ordinary care become cognizant of danger, he should regulate the speed of his car so that it may be quickly stopped should occasion require it." See, also, *Booth on Law of Street Railways*, § 311; *Cowart v. Savannah Electric Co.*, 5 Ga. App. 664, 63 S. E. 804. In *Cordray v. Savannah Electric Co.*, 5 Ga. App. 629, 63 S. E. 714, this court said: "Except as to that portion of the street used by the tracks of a street car company, and the additional lateral space necessary for the passage of its cars, pedestrians have rights to the use of streets of a city which are equal to those of a street car; and failure to ring the bell or to give some other warning that a car which has stopped is about to resume its journey may be negligence as to a pedestrian who is either passing in the street or has stopped in a position where it is probable that he may be injured unless he is advised of the approach of the car."

It being alleged that the plaintiff was in full view of the defendant's motorman who negligently failed to keep on the lookout to discover the plaintiff's presence, or, if his presence was discovered, failed to give any

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

warning of the approach of the car, the petition sufficiently charges negligence to withstand a motion to dismiss. By way of defense the company is entitled to the benefit of the rule that generally "if a person be seen upon the track, who is apparently capable of taking care of himself, the motorman may assume that he will leave the track before the car reaches him; and this presumption may be indulged so long as the danger of injuring him does not become imminent, but no longer." *Perry v. Macon Con. St. R. R. Co.*, supra. But there is nothing in the allegations of the petition which authorized the court to apply this principle in the defendant's favor, and hold as a matter of law that upon its application the plaintiff was not entitled to recover. Whether the plaintiff's position was such as to authorize the motorman to assume that he could and would leave his perilous position, and whether the motorman was negligent in failing to give him warning of the approach of the car, were questions of fact, to be settled by the jury.

[2] 2. The fact that one who sued another for damages resulting from negligence could by the exercise of ordinary care have avoided the consequences of such negligence is a matter of defense. As to whether it should be affirmatively pleaded in order to enable the defendant to take advantage of it, see *Savannah Electric Co. v. Lackens*, 12 Ga. App. 765, 79 S. E. 53; *Atlantic Coast Line R. Co. v. Canty*, 12 Ga. App. 411, 77 S. E. 659. But even though the defense may be raised under a general denial of an allegation that the plaintiff was free from fault, a petition will not be dismissed on the ground that the plaintiff could by the exercise of ordinary care have avoided the consequences of the negligence alleged, unless the petition affirmatively discloses facts from which such a conclusion would be required. If a pedestrian enters upon a portion of the highway devoted primarily to vehicles, the environment may require him to exercise greater care for his own protection than if he remained on the sidewalk. *William Bensel Construction Co. v. Homer*, 2 Ga. App. 369, 58 S. E. 489. But the mere fact that he does use a portion of the highway primarily intended for vehicles does not as a matter of law convict him of such negligence as would altogether defeat a recovery for damages resulting from the negligence of the driver of a vehicle along the highway. The duty to exercise ordinary care to avoid the consequences of another's negligence does not arise until the negligence becomes operative, and is apparent, or the circumstances are such that an ordinarily prudent person would have reason to apprehend its existence. *Western & Atlantic R. Co. v. Ferguson*, 113 Ga. 708, 39 S. E. 306, 54 L. R. A. 802; *Savannah Electric Co. v. Lackens*, supra.

Questions of negligence are peculiarly for the jury. It is rare that the court can say as a matter of law that a given state of

facts demands a finding that the person was guilty of such negligence as would authorize a recovery of damages against him, or of such negligence as would defeat a recovery of damages on account of negligence of another person. It is equally difficult for the court to hold as a matter of law that one party was guilty of a greater quantum of negligence than another where the injury results from the concurrent negligence of both. In most cases it is for the jury to compare the negligence of the respective parties and determine which preponderates. From the exhaustive and well-prepared brief of counsel for defendant in error, it is apparent that the trial judge dismissed the petition mainly upon the ground that the plaintiff could by the exercise of ordinary care have avoided the consequences of the defendant's negligence, and that his injury was attributable to his failure to exercise due care for his own safety. We think this issue should not have been resolved against the plaintiff as a matter of law, but rather that the question should have been submitted to the jury, to be determined by them as an issue of fact. Let it be conceded that the plaintiff was negligent in taking the position near the defendant company's track along which a car was likely to move at any moment. In this position ordinary care would require him to look out for cars, and generally to exercise such diligence as an ordinarily prudent person should exercise under the like circumstances and in a like situation. But this duty did not relieve the company of its obligation to exercise ordinary care to be on the lookout for the plaintiff, and to take such precautions as ordinary prudence would dictate, to prevent injury to him. Even if it be conceded under the allegation of the petition that both the plaintiff and the defendant were negligent in failing to exercise the duty which the law imposed upon them respectively, the court could not say as a matter of law that the plaintiff's injuries were due solely to his failure to exercise ordinary care rather than to the defendant's negligence.

But the plaintiff alleges that he was on the lookout; that the car was off schedule, and that he had no reason to anticipate the defendant's presence on the track; that at the time the motorman was running at a high and negligent rate of speed. He says that the motorman could have seen him, and that his failure to do so was negligence. It is true it is alleged that it was raining, and that the plaintiff could not see the car. This may likewise be a good reason why the defendant's motorman could not see the plaintiff. But, taking the allegations of the petition all together, it cannot be said that the plaintiff has alleged facts from which it must be determined as a matter of law that the motorman could not see him. This was a question for the jury. If the motorman ought to have seen the plaintiff and could

have seen him, and negligently struck him with the street car and injured him, the plaintiff would be entitled to recover, unless the jury should find that he himself was lacking in diligence, and by the exercise of ordinary care could have avoided the consequences of the defendant's negligence after it became apparent to him, or while he was in a position where ordinary care required him to apprehend the existence of such negligence.

Judgment reversed.

(13 Ga. App. 38)

BISHOP et al. v. GEORGIA NAT. BANK.
(No. 4,421.)

(Court of Appeals of Georgia. July 8, 1913.)

(Syllabus by the Court.)

1. EVIDENCE (§ 423*)—PAROL EVIDENCE OF SURETYSHIP.

After giving proper notice to a defendant sued with him, one who is in reality a surety only, but who is sued as principal, upon a contract upon the face of which the fact of suretyship does not appear, may, upon proper notice to the defendant sued with him as indorser, sustain by parol evidence his plea of suretyship, establishing or tending to show the true relationship of the parties to the contract.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 1957-1965; Dec. Dig. § 423.*]

2. PRINCIPAL AND SURETY (§ 45*)—SURETYSHIP—CIRCUMSTANTIAL EVIDENCE.

Upon the trial of the issue as to the precise relationship occupied by the signers of the contract in such a case, the truth as to the real relation of the parties to the contract and to each other can be disclosed by circumstances as well as by direct proof. Generally the determination of this issue would depend wholly upon such circumstances as the comparative interest of the parties in the subject-matter, the ascertainment of which party derived benefit from the circumstance, or any other reason which might originally have induced either or both of the parties at issue to sign the contract. There was no error in the admission of evidence.

[Ed. Note.—For other cases, see Principal and Surety, Cent. Dig. § 22; Dec. Dig. § 45.*]

3. TRIAL (§ 295*)—INSTRUCTIONS.

A fragmentary excerpt from the charge of the court, isolated from its context, may be amenable to criticism, yet when this fragment is replaced in its proper setting, and the instruction upon the subject to which it is applicable is viewed as a whole, every semblance of error therein may be dissolved and disappear.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 703-717; Dec. Dig. § 295.*]

4. TRIAL (§ 255*)—INSTRUCTIONS—NECESSITY OF REQUEST.

In the absence of an appropriate request, it is not error for the trial judge to omit specific reference to particular points or phases of the evidence confirmatory of the contentions of either of the parties. Before the judge is required to direct the attention of the jury to a matter of fact which a party may deem to be material, though only collaterally involved, a ruling upon its materiality must be invoked.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 627-641; Dec. Dig. § 255.*]

Error from City Court of Athens; H. S. West, Judge.

Action by the Georgia National Bank against W. H. Bishop and another. Judgment for plaintiff, and Bishop brings error. Affirmed.

Green & Michael and W. L. Erwin, all of Athens, for plaintiff in error. Cobb & Erwin and T. S. Mell, all of Athens, for defendant in error.

RUSSELL, J. The Georgia National Bank sued Brown as principal and Bishop as surety, upon a promissory note for \$2,188 and interest and attorney's fees. It appears from the record that Brown signed the note and Bishop indorsed it upon the bank. Neither of the defendants contested the right of the plaintiff to recover. The only issue in the case was as to the relation of the parties, the primary and secondary liability of the respective defendants to the plaintiff. Brown pleaded that although he was presumptively the principal, by reason of the fact that he was ostensibly the maker of the note, in reality the original obligation was Bishop's, and that he (Brown) signed only as a matter of accommodation, to enable Bishop to borrow the sum of money for which the note was originally given. Brown supported this plea by proof. On the other hand, Bishop testified in the most emphatic manner that he signed the note simply as surety for Brown. This issue seems to have been fairly submitted to the jury by the trial judge; and, since a verdict in favor of either of the parties would have been authorized, we have no disposition to disturb the discretion of the trial judge, nor have we jurisdiction to set aside the verdict, unless the finding was induced by or dependant upon error in the trial.

[1] 1. As the judge very correctly instructed the jury that Brown was presumptively the maker of the note and Bishop was only an indorser, the form of the note made a prima facie case in favor of Bishop, and the burden of proof was on Brown to show that, while he appeared to be the maker of the note, he was in fact only a surety. Brown's right to file the plea upon which he relied is not disputed, and cannot be questioned. Under the provisions of section 3556 of the Civil Code, "If the fact of suretyship does not appear on the * * * contract, it may be proved by parol, either before or after the judgment (the creditor not being delayed in his remedy by such collateral issue between the principal and the surety), if before judgment the surety shall give notice to the principal of his intention to make such proof." The fact of suretyship does not appear on the face of the note, and Brown gave Bishop the proper notice and filed a plea properly raising the issue, as required by the ruling of the Supreme Court in *Carlton v. White*, 99 Ga. 385, 27 S. E. 704. It was then permissible for Brown to sustain his plea by

parol evidence. See, in this connection, *Buck v. Bank of State of Georgia*, 104 Ga. 660, 30 S. E. 872; *Whitley v. Hudson*, 114 Ga. 669, 40 S. E. 838; *Trammell v. Swift & Co.*, 121 Ga. 780, 49 S. E. 789; *Shank v. Bank, etc.*, 124 Ga. 509, 52 S. E. 621; *Camp v. Simmons*, 62 Ga. 73; *Cauthen v. Bank, etc.*, 69 Ga. 733; *Underwood v. Bass & Heard*, 1 Ga. App. 623, 57 S. E. 953.

[2] 2. In the first, second, third, fourth, fifth, and sixth grounds of the amended motion for a new trial Bishop complains of the admission of certain testimony over the objection that it was immaterial and wholly irrelevant to the issue, to wit, what was the true relationship of Brown and Bishop to the note in the suit? And he insists that the error was prejudicial because it tended to inject an impertinent issue into the case, and draw attention away from the real issue. While it is true, as held in *Shank v. Bank*, supra, that the mere failure of consideration cannot change the relationship of the several parties to a note, nevertheless we think that where there is no dispute as to the consideration of the note, the determination of the question as to who received the consideration (if one of the parties received all of it) might aid the jury in deciding which was the more reasonable of two statements directly in conflict as to the understanding of the parties at the time of the execution of the note. Of course, the real issue between the parties in this case was whether the debt evidenced by the note was in fact Bishop's debt, and so understood to be by all of the parties at the time the note was given, or whether it was Brown's debt with Bishop as surety, as it appeared to be. In order to ascertain the truth in an issue of this kind, where the truth must be discovered by matters extrinsic of the contract, any pertinent circumstance which may tend to illustrate the reasonableness of the testimony of either of the parties or corroborate material facts sought to be disproved, is admissible. In such a case error is more apt to be committed by too strict an adherence to the technical rules of evidence than by allowing a reasonable latitude in the investigation. Generally, in cases of this kind, the real truth is known only by the parties, each of whom is seeking to evade primary liability and shift it to the other. The point is rarely susceptible of direct proof. The issue must be determined by circumstantial evidence. It would be error to exclude any circumstance which could throw light upon the transaction, or in a case of direct conflict, such as this, would enable the jury to decide which party to believe.

Upon an issue such as that now before us, the comparative interest of the parties in the subject-matter, which party derived benefit from the transaction, or any fact which would illustrate what originally induced either or both of the parties to sign the contract, is a matter pertinent to the investiga-

tion. The fact that Bishop guaranteed the automobile truck involved in this case might be immaterial if the jury took a certain view of the evidence, and yet the fact that Bishop had agreed to guarantee it (if he did guarantee it), or else Brown was not to buy it, tends strongly to corroborate Brown's statement that he had, with Bishop's acquiescence, declined to buy it, and that he signed the note as maker at the suggestion of the bank and of Bishop, with the express agreement that Bishop, and not himself, was to pay the note. It is undisputed that Bishop received the money which was the consideration of the note, and for that reason the consideration, in the sense in which that term is ordinarily used, is not involved. The purpose of the testimony to which objection was made was to show why the note was given, to whom the benefit accrued, that Brown had no interest in the proceeds of the note, and that the loan was made entirely for the benefit of Bishop. In a certain sense the consideration was not involved; that is to say, as between the plaintiff and the defendants there was no issue as to the consideration, but as between the two defendants in the case consideration was involved. See *Underwood v. Bass*, supra. There was no error in overruling the objections to the evidence.

[3] 3. An examination of the record plainly shows that there is no merit in the exception that the court expressed an opinion that the car should make a certain demonstration, in charging the jury that "there has been certain evidence allowed to go to you in regard to the guaranty of this car in question, as to certain demonstration this car should have made." The words "as to certain demonstration this car should have made" were qualified by the words "there has been certain evidence allowed to go to you." The court did not attempt to declare whether this evidence was true or untrue. The context shows the absence of anything which can be construed as leaning toward an intimation. A fragmentary excerpt from a charge, isolated from its context, may be amenable to criticism; but, when this fragment is replaced in its proper setting, and the instruction upon the subject to which it is applicable is viewed as a whole, every semblance of error therein may be dissolved and disappear.

[4] 4. In the motion for a new trial it is insisted that the court erred in failing to charge the jury that they might consider that, by constantly renewing the original note and signing the renewals as principal, Brown had waived his right to claim that he was only a surety on the note. In the absence of an appropriate request, it is not error for the trial judge to omit specific reference to particular points or phases of the evidence, confirmatory of the contentions of either of the parties. Before the judge is required to direct the attention of the jury to a matter of fact, which, though only collaterally in-

volved, a party may deem to be material, a ruling by the court upon its materiality must be first invoked.

Judgment affirmed.

(12 Ga. App. 849)

AUGUSTA RY. & ELECTRIC CO. v. BEAGLES. (No. 4,678.)

(Court of Appeals of Georgia. June 25, 1913.)

(Syllabus by the Court.)

APPEAL AND ERROR (§§ 999, 1050*)—ELECTRICITY (§ 19*)—INJURIES FROM ELECTRIC CURRENT—PRESUMPTIONS—BURDEN OF PROOF—RES IPSA LOQUITUR.

The controlling questions in this case were perplexing problems of fact; the law applicable to these questions was fully, clearly, and correctly presented in the charge of the court; and this court cannot say that the solution by the jury was not supported by evidence or that the trial judge committed any material error in the admission of testimony. The record shows no reason for another trial.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1068, 1069, 3912-3921, 3923, 3924, 4153-4157, 4166; Dec. Dig. §§ 999, 1050.* Electricity, Cent. Dig. § 11; Dec. Dig. § 19.*]

Error from City Court of Richmond County; Wm. F. Eve, Judge.

Action by G. W. Beagles against the Augusta Railway & Electric Company. Judgment for plaintiff, and defendant brings error. Affirmed.

The Augusta Railway & Electric Company, plaintiff in error, is a Georgia corporation engaged in the manufacture of electricity, which it supplies for hire to the inhabitants and manufacturing plants of Augusta, in the state of Georgia, and North Augusta, in South Carolina. The Industrial Lumber Company is a corporation located in North Augusta, S. C., and the Augusta Railway & Electric Company furnishes to it electric power both for lighting and for motor purposes. The electric company carries 2,300 volts on its primary wires, which voltage is cut down to 220 volts for motor power in the lumber company's plant and 110 volts for lights in the plant. The plaintiff in the court below was employed by the lumber company in its plant as a machinist and saw filer, and while engaged in his duties as such on December 24, 1910, was called by the general manager to fix a light in the plant, which was out of order. In compliance with this order, the plaintiff went to repair the defective light and, while in the act of turning it on, received a severe shock from an electric current, which caused injuries for which he sought to recover damages. His petition alleged that the electric company was negligent in the following particulars: First, that it permitted a high and dangerous voltage to be transmitted to the secondary wires in said plant, rendering it dangerous for him to handle said lights, and that he was un-

aware of the existence of this dangerous condition; second, that it permitted its transformer, connecting its primary wire with the secondary wire entering the plant, to become and remain out of repair, without sufficient insulation and in a burnt-out or punctured condition, so that the electricity escaped therefrom and became grounded and liable to be communicated to persons using the electric light lamps on the secondary wire; third, that the defendant left said primary and secondary wires at the transformer uninsulated and hanging near enough together to come in contact outside the transformer, and thus to transmit the full current to the secondary wire, upon which was attached said electric lamp, so that connection with the primary wire caused the circuit to be complete, and the secondary wire to become charged with the full current of the primary wire, a voltage of more than 1,000 volts, or a voltage greatly in excess of 110 volts, the proper amount for said secondary wire.

The defendant relied upon the following defense: (1) That the injury complained of was the result of the plaintiff's own negligence; (2) that the plaintiff, by the exercise of ordinary care and diligence, could have avoided the consequences of the alleged negligence; (3) that, if otherwise, the alleged injury was the result of an accident pure and simple, for which the defendant is in no wise responsible; (4) that the defendant and its servants at the time and place of the alleged injury were in the exercise of all ordinary care and diligence; (5) that the plaintiff at the time and place of the alleged injury was himself guilty of contributory negligence, which, combining and concurring with the alleged negligence of the defendant, contributed to the injury as a proximate cause thereof, and without it the injury would not have occurred, in that the plaintiff, being employed by the lumber company to look after and keep in repair the electric lighting wires and appliances in said building, negligently failed to do so and negligently undertook to take hold of and handle with his naked hand an electric lighting wire and appliances which he knew to be, or in the exercise of ordinary care should have known to be, in a defective and dangerous condition and carrying a dangerous current and voltage of electricity, liable to shock and seriously injure any one handling the same, and without the exercise of ordinary care to protect himself against the same. The jury found a verdict for \$5,000 in favor of the plaintiff, and defendant's motion for a new trial was overruled, and it brings error. The motion for a new trial was based upon the usual general grounds and special assignments of error directed to certain alleged errors in excerpts from the charge and in the admission of testimony.

Boykin Wright and Geo. T. Jackson, both of Augusta, for plaintiff in error. Isaac S. Peebles, Jr., and T. F. Harrison, both of Augusta, for defendant in error.

HILL, O. J. (after stating the facts as above). 1. As to the general grounds, it may be stated that the evidence is in some conflict as to the exact cause of the plaintiff's injuries. Unquestionably he received a severe shock from an electric current when he attempted to turn on an electric light in the lumber company's plant. But the electric company insists that the mere fact that he did receive this shock is not sufficient to raise an inference of negligence against it, under the doctrine of *res ipsa loquitur*, in any of the ways alleged in the petition; and it is insisted that his injuries could well have resulted from some defect of the lamp socket or in the interior wiring, for which the electric company was in no way responsible, or that they might have resulted from the plaintiff's own negligence, because it was shown by testimony of the highest expert character, and by an actual demonstration in the courtroom on the trial of the case, that he could have received the injuries by grasping a defective light socket through which no more than 110 volts were passing; that the evidence shows that the plaintiff stood upon the damp earth or brick floor when he took hold of the socket of the light for the purpose of turning the light on; and that, standing on such damp earth or brick floor, even a current of 110 volts would have been sufficient to give him the shock he received. There was evidence that the light socket was defective, and that by reason of this defect, for which the lumber company and not the electric company was responsible, the current of electricity passed out into the plaintiff. There was evidence also which tended to support the theory of the petition on the question of negligence. There was positive evidence that the primary and secondary wires had been permitted to come in contact with each other outside of the plant or the transformer, and by this contact the full current carried by the primary wires had been transmitted to the secondary wires and on into the plant. It was also shown by the evidence for the plaintiff that it would have required from 400 to 1,000 volts of electrical current to produce the effect on the plaintiff which was caused by the shock he received. These theories of the evidence presented perplexing problems, which were for the exclusive solution of the jury, and this court cannot legally say that the solution which a jury has made of a problem thus presented is incorrect, where it is supported by any evidence or by reasonable deductions from the evidence.

There were only two ways so far as the evidence discloses, by which the plaintiff could have been injured by the shock from the electric current. He received it by taking hold of a defective light socket inside the

building through which no more than 110 volts of electricity were passing, and which was rendered dangerous because he was at that time standing on the damp earth or brick floor; or by reason of a contact of the primary wires with the secondary wires, which transmitted into the building the high voltage from the primary wires, he received this high voltage while turning on this light. There was evidence in support of both theories, and it was for the jury to say which theory was the truth. It has been held by high authority that, where the plaintiff shows that he has received a shock from a high and dangerous voltage, the law raises a presumption of negligence against the electric company furnishing the electricity, and the burden is then upon the electric company to negative the presumption. *Brown v. Edison Elec. Co.*, 90 Md. 400, 45 Atl. 182, 46 L. R. A. 745, 78 Am. St. Rep. 442, and cases cited. It cannot be said that the company in the present instance carried this burden successfully where it only presented a theory as to what may have caused the shock and the injuries to the plaintiff. It should have gone further and shown that this was the only way in which the injuries could have been received, and should have fully rebutted the evidence in behalf of the plaintiff, which tended to prove the allegations of negligence against the company, and that this negligence caused the shock and its consequent injuries. The learned trial judge instructed the jury very favorably on behalf of the defendant company. He charged that the defendant would not be liable for any injury that was received from defective appliances or wires inside of the plant, but that the electric company was only responsible for the condition of the wires outside of the lumber plant. And he instructed the jury that this cause of action arose in South Carolina, where, under the law, the plaintiff would have no right to recover if he was guilty of any contributory negligence, however slight.

Another contention of the plaintiff in error which is urged with a great deal of earnestness is that the evidence shows that the plaintiff himself was an electrical engineer; that his duty was, among other things, to look after the interior wiring and fix any wires that might be out of shape, and that, in pursuance of this very duty and for this very reason, he was sent to the light which was reported out of order; that he occupied, relatively to the lights and interior wiring, the same position as trouble finder of an electric company, and that as such he assumed the risks of the trouble he was sent to find and remedy; that in endeavoring to fix the light he acted with full knowledge that something was wrong; that he took absolutely no precaution for his own safety, and he did not cut off the current, but negligently grasped the lamp socket in his naked hands while standing on a damp floor. The evidence did not show that the plaintiff was

an expert electrician. He was called upon occasionally to fix the wires in a mechanical way, but, where there was any electrical or dangerous work to do, a more expert electrician was called upon to do it. In other words, the evidence was not of such character as would show that the plaintiff was the expert inspector whose duty it was to find out defects in the electrical appliances of his master and remedy such defects. But these were questions for the jury. It is deemed unnecessary to discuss further the general grounds of the motion. An examination of the very able and exhaustive charge of the trial judge shows that all the contentions of the defendant were fully and clearly given to the jury in a manner favorable to these contentions. All of these contentions were issuable under the facts, and, having been fully and favorably given to the jury, their solution by the jury must be considered as conclusive. This brings us to the consideration of the special grounds of error assigned in the motion for a new trial.

The sixth and seventh grounds of the amended motion for a new trial except to the admission of testimony, over the objection of defendant, that the lightning arrester had fallen from the pole in the vicinity of the lumber company's plant, where the injury is alleged to have occurred, and that the wire that goes in the top of the arrester was out and dangling, after the arrester itself had fallen to the ground. The objection to this evidence was that the petition contained no allegation of negligence in having a defective lightning arrester. The judge instructed the jury that there could be no recovery for damages resulting from a defective lightning arrester and stated that this testimony was admitted solely for the purpose of showing (if it did show) how the primary and secondary wires came in contact. This condition of the wires in connection with the lightning arrester may have been considered by the jury as the cause for the contact of the primary with the secondary wires, thus permitting the transmission of the high voltage from the primary to the secondary wires in the plant of the lumber company and causing the shock when the plaintiff turned the fixture and received this high voltage of electricity. We think this condition of the wires outside the plant was clearly admissible for the purpose of showing at least all the circumstances constituting what might be called the *res gestae* of the transaction, although this condition might not have been fully covered by the allegations of the petition. *Palmer Brick Co. v. Chenall*, 119 Ga. 837, 47 S. E. 329. But this same testimony was admitted without objection by the defendant when it was brought out on a cross-examination of another witness introduced by the plaintiff, and therefore, even if there was error in admitting such testimony the first time over the

defendant's objection, the error was cured by the introduction of the subsequent testimony without objection. Certainly it would not constitute reversible error. *Becker v. Shaw*, 120 Ga. 1003, 48 S. E. 408. But, as we before stated, this evidence, it seems to us, was clearly admissible for the purpose of showing how the primary and secondary wires came together and as illustrative of the means by which the excessive current was transmitted from the primary to the secondary wires.

The other grounds of the motion for a new trial consist of exceptions to excerpts from the charge of the court. We have examined the excerpts in connection with the general charge and we fail to find any material error. Indeed, we are impressed with the idea that the charge as a whole was a very fair and able presentation of all the issues in the case and of the law applicable thereto, and that the defendant has had a fair trial, and no reason is shown why the verdict in behalf of the plaintiff should be disturbed by this court.

Judgment affirmed.

(95 S. C. 233)

HORN v. CONWAY, C. & W. R. CO.

(Supreme Court of South Carolina. July 19, 1913.)

RAILROADS (§ 400*)—INJURY TO PERSON ON TRACK—NEGLIGENCE—SUFFICIENCY OF EVIDENCE.

In an action for injuries to plaintiff while walking along a railroad track constantly used by the general public, by being struck by a train running backwards, evidence held sufficient to go to the jury on the issues of defendant's negligence and plaintiff's contributory negligence.

[Ed. Note.—For other cases, see *Railroads*, Cent. Dig. §§ 1365-1381; Dec. Dig. § 400.*]

Watts, J., dissenting.

Appeal from Common Pleas Circuit Court of Horry County; G. W. Ragsdale, Special Judge.

Actions for damages by N. E. Horn against the Conway, Coast & Western Railroad Company. From a judgment in favor of plaintiff, defendant appeals. Affirmed.

C. P. Quattlebaum and L. B. Singleton, both of Conway, and F. L. Willcox, of Florence, for appellant. H. H. Woodward, of Conway, for respondent.

GARY, C. J. This is an action for damages, alleged to have been sustained by the plaintiff through the wrongful acts of the defendant. The allegations of the complaint, material to the questions involved, are as follows: "(1) That for a distance of about one mile from its depot at Conway, towards Myrtle Beach, the railroad of the defendant runs parallel with and near to the Waccamaw river, and very close to large factories and lumber plants, employing a large number

of hands, and having tenants' houses along and almost immediately adjoining the defendant's said track and right of way; that a large and remunerative freight business is transacted by defendant with and by means of said factories and plants; that impassable swamps and creeks are close to this portion of defendant's track on both sides, and especially on the side away from the said river, and the said track and right of way of the defendant is the only practicable and convenient way in which pedestrians may reach said factories and plants and the houses along said track, or to pass between the said town of Conway and a section of the county lying between that point and Myrtle Beach; that for a long number of years past the employes of the said factories and plants, and the public generally, have been using daily the portion of defendant's track and right of way above referred to, for the purpose of going to and returning from their work, or business, at the said plants and factories, and in passing through, to, and from other points in said county, all of which has been, not only with the full knowledge of the defendant, its agents, servants, and employes, but with its and their encouragement, consent, and invitation, and acquiescence; that this portion of defendant's track and right of way passes through a very populous section, where people are constantly passing, and were passing at the dates hereinafter mentioned, and for a long number of years before, and ever since said date, the defendant allowing the public to use a footway on each side of its track throughout the portion of its track and right of way above mentioned, with its full knowledge, consent, and acquiescence, and without any warning, protest, or notice of any kind on its part. (2) That some noise is produced at all times along the said way, by means of the machinery and operations in said factories and plants, sufficient to confuse pedestrians as to the ordinary noise of an approaching train, unless the whistle is blown or the bell is rung to give warning of the approach of defendant's train, which fact was well known to the defendant, its servants, agents, and employes, but was not so well known to the plaintiff, at the time of his injury hereinafter stated. (3) That on the early morning of the 13th day of July, A. D. 1911, while the plaintiff was passing along the defendant's track and right of way, near the said factories and plants, on his way from Conway to one of them, the defendant willfully, recklessly, wantonly, and in a grossly negligent manner, and without regard to the rights of humanity, without blowing the whistle or ringing the bell, and without giving any notice or warning of its approach whatever, in open daylight, in plain view of plaintiff for a half mile or more, without keeping any lookout, ran a train of flat cars, attached to a locomotive, backwards up behind the plaintiff, at a great rate of speed, and

hit the plaintiff with said cars a severe and terrible blow in the back and legs, whereby he was thrown from the path, and sustained very painful, agonizing, and permanent injuries." The defendant denied all the allegations of the complaint, except its corporate existence, and set up the defense of contributory negligence on the part of the plaintiff. At the conclusion of all the testimony, the defendant's attorneys made a motion for the direction of a verdict, on the ground that there was no testimony tending to show negligence on the part of the defendant and on the further ground that the plaintiff was guilty of contributory negligence. His honor, the presiding judge, granted the motion as to the cause of action for punitive damages, but refused it as to the cause of action for actual damages. The jury rendered a verdict in favor of the plaintiff for \$700, and the defendant appealed.

The exceptions raise practically but two questions, to wit: Was there any testimony tending to sustain the allegations of negligence? And did the testimony show that the plaintiff was guilty of contributory negligence?

N. E. Horn, the plaintiff, testified as follows:

"Q. When did that accident occur that is mentioned in the complaint? A. July 13, 1911. Q. Describe how it happened. A. I was walking on the sidewalk on the side of the railroad, which is a very plain path on each side of the track, and was going along there— Q. What caused the plain path? A. Where people walked frequently. Q. State how it happened to you? A. I was going along and right against the mill— Q. Was it pretty near opposite this plant? A. Yes, sir; pretty near opposite, and I heard somebody hollering, and I turned my head and saw the train, and as I turned my head and saw it, it struck me. I didn't have time to step or move any way. Q. How long before they hollered did you turn? A. I turned as quick as I could, and it struck me on my right hip. Q. Now, was that engine exhausting; did you hear it exhaust? A. No, sir; I think it was running very easily. Q. Why? A. I think it was a little downgrade. Q. Did you hear it blow? A. No, sir; it didn't blow; if it had blown I would have heard it. Q. Did it ring the bell? A. No, sir. Q. Was that plant in operation? A. Yes, sir. Q. How much noise did that make? A. It would make right smart noise, but not enough to drown the noise of a whistle or bell close to you. Q. Now, Mr. Horn, explain what kind of use the public made, if any, of that track there. How long have you known that place? A. I have known it about four years. I have known it longer than that, but I have not been passing along on it, to know the public used it, only something like three or four years. Q. State how frequently the public used it. A. I worked at the Conway Lumber

Company, I reckon something like three years ago, or four, and boarded over there at the old Kanawha plant. Q. Is that another plant on the railroad? A. Yes, sir; it comes to the railroad. Q. How far from this plant where you were injured? A. It is something like a half or three-quarters of a mile. I boarded with Mr. Grainger, and in passing I would see lots of people I didn't know; every day in passing I would see people traveling the road. Q. Did they travel it every day? A. Yes, sir; some days I would see as high as 25 walking along the road, and other days I would see them passing. Q. Did the hands of these plants use it? A. Yes; they used it frequently. Q. Did they use it every day? A. Yes; the hands that worked over here at the Wood Product Mill used it every day, twice a day, going and coming. Q. Was there any notice or protest made as to the use of that part of the track? A. No, sir; only at the bridge. Q. There was a notice at the bridge? A. Yes, sir; this: 'This bridge is no thoroughfare. Keep off bridge.' Q. That is the bridge at Conway? A. Yes, sir. Q. Could anybody see you from Conway, if you were standing on the bridge at Conway, and looking towards the place where you were injured; could they see you on the track? A. Yes, sir. Q. Did the train come up behind you? A. Yes, sir. Q. What other ways are there to go or come from that direction, from those plants? Do people live in the section of the county over there? A. Yes, sir; some live over there, and some live at the old Kanawha plant, and some at the Red Hill. Q. Do the farmers over there use that track in passing into town? A. Yes; those at Red Hill do. Q. Frequently? A. Yes, sir. Q. What other way could they go? A. No other except by going around by the ferry above there. Q. A long way out of the way? A. Yes, sir; I suppose three or four miles out of the way. Q. How about a boat on the river? A. They could come down the river on a boat. Q. Did the railroad do any business with these plants? A. Yes, sir; they haul lightwood for them. Q. Was there any obstruction in that path; how did you happen to step upon the track? A. There was some iron lying down here. Q. Explain how that came about. A. There was some iron lying down there, and to keep from walking on the iron, I stepped upon the ties to get by. The train had changed schedule; the last account I had of it it had been going over there in the afternoon, and I was not expecting the train. Q. You say there was a pile of railroad iron? A. Yes, sir; where they had torn up the old track and put heavy iron down. Q. Could you pass on the off side of it? A. Yes; there was nothing over there. Q. Could you have passed on the off side of the iron? A. Next to the ditch? Q. Yes. A. Not very well; it was grown up in bushes, and I would have had to go down in the edge of the ditch. Q. Can you hear well?

A. Yes, sir. Q. You are not hard at hearing?

A. No, sir."

W. H. Crisp, a witness for the plaintiff, thus testified:

"Q. Were you working at a place where you could see to Conway? A. Yes, sir. Q. What did you see? A. I saw him step up on the end of the ties, about the time the engine came to him. Q. Did it strike him about the time he stepped up there? A. Yes, sir. Q. Did that accident happen immediately opposite that plant? A. About 12 or 15 feet south of the 'hog.' Q. What did he step upon the track for? A. I don't know. Q. Was there anything to show what he did it for? A. I didn't see it. He had plenty of room between the ties and the railroad; about 18 inches, if not more than that, between the end of the ties and the railroad iron, where they had taken it out and thrown it to one side. Q. Just as the engine got opposite the Chemical Works, Mr. Horn, who up to that time had been walking on the path on the south side, stepped up on the track? A. Yes, sir. Q. How far did that engine stop from Mr. Horn? A. Not over an engine length. Q. Was the 'hog' running on this occasion? A. Yes, sir. Q. Isn't it a fact that the 'hog' makes considerable noise when it is in operation? A. Yes, sir."

P. H. Sasser, the conductor on the train when the plaintiff was injured, testified in behalf of the defendant, as follows:

"Q. Where were you on that occasion?

A. I was sitting in the cab of the engine, on the fireman's seat. Q. How was that engine equipped as to a pilot? A. It had a pilot on both ends, one on the tender, and one at the front. Q. How far could your engine be seen from the point that Mr. Horn was first observed by you? A. Three-quarters of a mile. Q. What was the first you saw of Mr. Horn that morning? A. I saw him walking by the side of the track. Q. How far was the Kanawha plant, beyond the point where Mr. Horn was struck? A. Probably half a mile or three-quarters. Q. About how fast was this train running? A. Eight or ten miles an hour, or it might not have been that fast. After getting the signal, we stopped probably in the length of the engine, or a little further than that. Q. Were there any cars in front of the engine as it was then running? A. No, sir; nothing but an engine; we were handling a light engine. Q. What was the first notice you had that Mr. Horn had got up on the track? A. I saw the signal of the fireman and flagman; they threw their hands up and hollered, 'Stop.' Q. How far did it take to stop the engine? A. I don't think the engine went over twice its length. Q. Were there any obstructions there, such as would, in your opinion, lead a reasonable man to suppose, that one walking along there was going to cross without any warning? A. No, sir; just a string of rails. The track had been relaid and the

rails were stretched out all along there. Q. Is it or not a fact that this pathway is used for the convenience of the people who happen to live in that section, or have work over there, and not by the public at large? A. I guess so; some of the public people may use it."

Cross-examination:

"Q. Didn't you frequently see people on the track where Mr. Horn was hurt? A. Yes; and always looking out for them. Q. Did you ring the bell or let him know you were coming with an engine? A. There was nothing to ring the bell for; there was no obstruction on the track. Q. You remember the iron at the track where he was injured; you knew it was there? A. Yes; I knew it was there. Q. You didn't blow the whistle? A. If he had been on the track, I would have blown the whistle. Q. You saw him walking on the side of the track? A. Yes sir."

Redirect examination:

"Q. Was it only at this point where Mr. Horn stepped up on the track that the iron was lying? A. No, sir; the iron was all the way on the ground there.

"The Court: How far were you from him when you first saw him? A. I saw him 200 or 300 yards of us, and then I saw him about 50 yards, and when I saw him he was about 4 feet clear from the track."

Henry Baldwin, the engineer, testified as follows:

"Q. Were you running at any more than your customary speed? A. We were running slower than anywhere else. Q. Were you running as you usually do on that road? A. Yes, sir; always take precautions along there. Q. Was there anything to obstruct Mr. Horn from being seen? A. Nothing in the world. Q. Had you seen him at all? A. I had seen people down the road, as is an everyday occurrence about that plant. They were walking along by the track, and sometimes people walk ahead of you on the road, and they turn out before you get to them. I saw people in the road before I left Conway. Q. How far were you from where Mr. Horn was struck before you stopped? A. When I stopped the engine and jumped off, the back pilot of the engine was just a little past him. From the time the word was given me, I think I stopped the engine in its length and a half. I know I skidded the drivers."

George Clark, the flagman, thus testified:

"Q. What was the first you saw of Mr. Horn? A. On the side of the track, walking along. Q. Was there anything unusual, to see people walking along there? A. No, sir. Q. When did you first see that Mr. Horn was going into a place of danger? A. Just about 8 or 10 feet before we got to him he stepped right up on the track. Q. What did you do when he did that? A. I threw up my hand and signed the engineer down and hollered."

The facts in *Sanders v. Railway*, 90 S. C.

331, 73 S. E. 356, were very similar to those in the present case. In that case there was testimony to the effect that the plaintiff was injured while walking in a well-beaten path alongside of defendant's track, at a place where the public had been accustomed to walk for many years, without objection on the part of the railway company; that the train which struck him was running backwards at a rate from 12 to 20 miles an hour, through a populous section of the city of Charleston, where men, women, and children were constantly passing and repassing upon defendant's right of way, and upon and near its tracks; that the train ran upon him from behind, without giving any signal or warning of its approach. In that case the court said: "We think this testimony made out a prima facie case for plaintiff. From it the jury *might* reasonably have inferred that the use of its right of way by the public was known to and acquiesced in by the defendant, and therefore that plaintiff was a licensee and entitled to ordinary care on the part of defendant to prevent injury to him; and, also, from the frequency of the use by the general public, that defendant should have anticipated the presence of persons on or near its track at that place, and should have exercised due care to prevent injury to them. * * * We think his honor erred, also, in holding that plaintiff was guilty of negligence in walking too close to the track, where there was room enough for him to walk at a safe distance from it. The testimony was that he was walking in a well-defined path. From this the jury might have inferred that the path had been used by many people before, and that in walking where many others had gone before plaintiff was exercising ordinary care. In *Lamb's Case* [86 S. C. 109, 67 S. E. 930, 138 Am. St. Rep. 1030], the court said: 'In the cases cited (that is, the *Jones Case* [61 S. C. 553, 39 S. E. 753] and the cases following it), it was entirely consistent with reason to say that it was not negligence per se for a person to walk on the right of way expecting to step off on the approach of a train.'" Even a cursory glance at the foregoing testimony will show clearly that the present is a much stronger case than that of *Sanders v. Railway*, 90 S. C. 331, 73 S. E. 356.

I do not deem it necessary to cite other authorities to show that there was negligence on the part of the defendant, and that the issue as to contributory negligence was properly submitted to the jury.

Judgment affirmed.

HYDRICK and FRASER, JJ., concur.

WATTS, J. (dissenting). This was an action for damages alleged to have resulted from personal injuries sustained by plaintiff respondent by reason of being struck by a train of defendant appellant company on Ju-

ly 13, 1911. The case was tried before Special Judge G. W. Ragsdale and a jury at October term, 1912, and resulted in a verdict for \$700 in favor of plaintiff; after entry of judgment appellant appeals, and asks reversal by six exceptions.

The first exception complains of error in not directing a verdict for the defendant on the ground that all of the testimony tends to show that the injuries to the plaintiff resulted, not from any negligence upon the part of the railroad company, but by reason of plaintiff's own negligence; that according to all of the testimony, including that of the plaintiff, plaintiff stepped on the railroad track immediately in front of a moving train, without looking or listening, or taking any other precaution to ascertain whether or not the train was approaching, being at that time surrounded by noise which prevented his hearing the approach of the train, and for these reasons his injuries were solely due to his own negligence.

The second exception complains of error in not directing a verdict on the ground that, even if it is conceded that the defendant was negligent, the proof of contributory negligence on the part of the plaintiff was so complete that only one conclusion could be arrived at, to wit, the plaintiff's contributory negligence was the proximate cause of his injury, without which such injury would not have resulted. It appears from the record that his honor, in refusing to direct a verdict for defendant, directed the jury that there was no testimony in the case from which willfulness might be inferred. We think these exceptions should be sustained, and that his honor was in error in not directing a verdict for the defendant appellant. The evidence shows that the appellant operated a railroad, a portion of which extends from Conway across Waccamaw river, in the direction of Atlantic Ocean, to Myrtle Beach. Respondent was injured by locomotive of appellant about half a mile from Conway. Near the point at which he was injured there was a plant known as the Wood Products Plant. Between one-half to three-fourths of a mile beyond the Wood Products Plant traveling from Conway, was the Kanawha Lumber Plant. The railroad tracks between Conway and the point at which plaintiff was injured crosses a drawbridge over Waccamaw river, and another long trestle. At each of these trestles was a sign maintained by the railroad, warning people not to use the trestle. Plaintiff lived about two miles from Conway, on the opposite side of the river from the place where he was injured, and on this occasion was traveling in the direction of Kanawha Plant. He knew that the trains run over this track four times a day. On this occasion he used the trestles in defiance of the warning on the signboards not to use them. It does not appear in evidence what object he had in view, or what business he was on in traveling towards the

Kanawha Plant at the time of his injury. The evidence shows that the railroad track was perfectly straight from Conway to the point at which he was injured, and if he had looked he could have seen the locomotive at any point between Conway and that point. The injury was received between 8 and 10 o'clock in the daytime. The injury was received almost opposite the Wood Products Plant, where the machinery made a considerable noise in running while grinding up lightwood. The evidence shows at the time of the injury that the locomotive by which plaintiff was injured was equipped with a pilot at each end; left Conway between 8 and 9 o'clock in the morning, on schedule time, as a regular schedule train, in the direction of Myrtle Beach; that day was clear; that the engineer was at his regular post, and conductor was in the cab of the engine, on the fireman's seat; that the fireman and flagman were sitting on tender at the front end of the locomotive, as it was running, for the purpose of looking out, according to the rules. The locomotive was running at a slow rate of speed, owing to the fact that a good many people were working around the Wood Products Plant, where there was considerable noise. When the locomotive, by which plaintiff was injured, left Conway plaintiff was walking in the direction of Myrtle Beach, on the right of way of railroad, on the south side of the track, and had he remained here would not have been injured. If he had looked at all, immediately before he stepped on the track, there was nothing to prevent his seeing the locomotive approaching. But being on the right of way, and not on the railroad track, when the locomotive had about reached him he stepped up on the track immediately in front of it, about 12 or 15 feet south of the "hog," then being operated at the Wood Products Plant. As he stepped on the railroad track the brakeman and fireman gave the alarm, which was heard by a bystander at some distance, but failed to attract plaintiff's attention. Plaintiff failed to heed the warning when given, and, having failed to exercise ordinary care or precaution for his safety, he was struck and knocked in the ditch alongside the track. The evidence shows there was plenty of room between the ties piled on the right of way and the track for him to walk without getting on the track. The evidence shows conclusively to my mind that the plaintiff's injury was due solely to his own carelessness and negligence in not exercising the slightest degree of care or taking any precaution for his safety. He had crossed two trestles in defiance of notice; that no one was permitted to do so. He was not going from one town to another town; he was not attempting to go from one public road to another public road. The place was not a populous community, but, on the contrary, does not seem to have been settled at all, or any one living on the railroad. There was absolutely not a jot or

title of evidence to prove the assumption that the right of way and railroad track of the defendant at the location in question had been dedicated to the public use, and that the plaintiff, or any one else, had acquired the license to so use it. The undisputed evidence in this case shows that the defendant exercised more than ordinary good care at the place of injury; the track was clear. There was no obstruction in the view. The train was running at a moderate speed. The evidence shows that the conductor and the engineer were looking out; two employes, in addition to this, were stationed in front of the locomotive, as it was then running, and these two gave at the first opportunity ample warning of his danger. The plaintiff, on the contrary, neglected to look or exercise any care and precaution whatsoever to avoid the danger. By looking he could have seen the locomotive; by listening he could have heard the moving of the locomotive, or warning given by the two employes of the defendant. The evidence shows that he did not even exercise slight care. He was not traveling at such a place as *Mrs. Jones* was in the case of *Jones v. Ry. Co.*, 61 S. C. 556, 39 S. E. 758. Nor does the case of *Carter v. Railroad*, 93 S. C. 329, 75 S. E. 952, fit this case.

In the *Jones* Case the allegation and proof showed she lived in a populous section of Anderson, and she was injured at a place where the general public had been accustomed to walk for many years, and where men, women, and children had been accustomed to walk. In the *Carter* Case the evidence showed that the public generally for over 20 years had walked the railroad between two small towns, and that the deceased was deaf and dumb. There is no proof in this case of any infirmity on the part of the plaintiff, either as to hearing or seeing. There was no proof in this case sufficient to show that the public had acquired by uninterrupted use for the statutory period, and there was no evidence at all that any one had used the track previously for, a crossing at the point where plaintiff got on the railroad track and was injured. As was said by this court in the case of *Cable Piano Company v. Southern Railroad Co.*, 94 S. C. 143, 77 S. E. 868: "The law imposes upon every capable person the duty of observing due care for his own safety when about to cross a railroad track, which necessarily involves the exercise of his senses. And while it is ordinarily a question of fact for the jury to say whether, under the circumstances of the particular case, the traveler did exercise such care, when the facts are undisputed and susceptible of only one inference, it becomes a question of law for the court. *Zeigler v. Railroad*, 5 S. C. 221; *Edwards v. Railway*, 63 S. C. 271 [41 S. E. 458]; *Bamberg v. Railway*, 72 S. C. 389 [51 S. E. 988]; *Osteen v. Railway*, 76 S. C. 378 [57 S. E. 196]; *Drawdy v. Railway*,

78 S. C. 379 [58 S. E. 960]; *Griskell v. Railway*, 81 S. C. 193 [62 S. E. 205]." In the case at bar the plaintiff was injured, not at a public crossing, as was the case in *Cable Piano Company*, *supra*, but on a railroad track, not at a public crossing but by his stepping on the track in front of an approaching locomotive without exercising the slightest care for his protection by the exercise of his senses. By the exercise of his senses of sight or hearing the injury would have been prevented. The plaintiff did not look or listen for the train before stepping on the track. He failed to observe its approach; he disregarded the warnings of the employes in the engine, and the only inference that can be drawn from the evidence is that his own negligence was the sole cause of his injury. There is no proof that the injury was in any manner due to any actionable negligence on the part of the defendant railroad. The railroad company, as the evidence shows, did its full duty; it kept a reasonable lookout. It gave warning of the approaching of the train, and ordinary care under the circumstances of the case to avoid injury to the plaintiff. "One going on or near a railroad track is bound at his peril to make diligent uses of his senses of sight and hearing in order to detect the approach of trains, and a disregard of such duty, and a stepping on the track without looking or listening, would be negligence; and, if plaintiff had reason to believe that trains might be approaching, the fact that he was an employe did not release him from the necessity of exercising reasonable care under the circumstances for his own safety, and that he had no right to rely wholly on the railroad company to protect him from passing trains. *Illinois Cent. R. Co. v. Nelson*, May 29, 1913, 203 Fed. 957."

In my view of the case the judgment should be reversed, and complaint dismissed, as motion to direct for defendant should have been allowed, and it is unnecessary to consider the other exceptions, and for these reasons I dissent.

(95 S. C. 220)

HAYES v. SOUTHERN POWER CO. et al.
(Supreme Court of South Carolina. July 14, 1913.)

1. ELECTRICITY (§ 19*)—DANGEROUS PREMISES—INJURIES TO CHILDREN—LIABILITY.

Where an electric power company erected a transformer on the property of a manufacturing corporation, and the keys to the building were in possession of its employes, while the agents of the power company worked in the building a day, following which a window, with unprotected wires heavily charged within five or six inches, was left open, and children constantly played near the window, and one of the children was injured by coming in contact with the wires, there was sufficient evidence of the negligence of the company and the corpora-

tion to require submission of their liability for the injuries to the jury.

[Ed. Note.—For other cases, see *Electricity*, Cent. Dig. § 11; Dec. Dig. § 19.*]

2. NEGLIGENCE (§ 32*)—DANGEROUS PREMISES—LICENSEES.

Where an owner of premises gives permission to children to enter thereon to attend school, the permission must be limited before the children become trespassers.

[Ed. Note.—For other cases, see *Negligence*, Cent. Dig. §§ 42-44; Dec. Dig. § 32.*]

3. NEGLIGENCE (§ 25*)—DANGEROUS PREMISES—LIABILITY.

One who establishes a dangerous agency where people are likely to be found must guard it.

[Ed. Note.—For other cases, see *Negligence*, Cent. Dig. §§ 85-88; Dec. Dig. § 25.*]

4. NEGLIGENCE (§ 139*)—DANGEROUS PREMISES—ACTIONS—INSTRUCTIONS.

An instruction in an action to recover for injuries, based on the theory that defendant established a dangerous agency without guarding it, which refers to "social duty and the ordinary offices of humanity" instead of the law, is not prejudicial to defendant since the law requires the same thing.

[Ed. Note.—For other cases, see *Negligence*, Cent. Dig. §§ 371-377; Dec. Dig. § 139.*]

5. ELECTRICITY (§ 16*)—DANGEROUS PREMISES—PERSONAL INJURIES—PROXIMATE CAUSE.

Where one maintained live wires within five or six inches of an open window while children were constantly playing near the window, the negligent failure to guard the wires was the proximate cause of an injury to a child coming in contact with them.

[Ed. Note.—For other cases, see *Electricity*, Cent. Dig. § 9; Dec. Dig. § 16.*]

6. NEGLIGENCE (§ 136*)—DANGEROUS PREMISES—ATTRACTIVE TO CHILDREN—QUESTION FOR JURY.

Whether the maintenance of heavily charged electric wires within five or six inches of an open window, near which children constantly played, was the maintenance of a nuisance attractive to children, so as to create a liability for injuries to a child coming in contact with a wire, *held*, under the evidence, for the jury.

[Ed. Note.—For other cases, see *Negligence*, Cent. Dig. §§ 277-288; Dec. Dig. § 136.*]

7. NEGLIGENCE (§ 23*)—DANGEROUS PREMISES—ATTRACTIVE TO CHILDREN.

One who maintains on his premises enticements to children thereby impliedly invites them to inspect, and an infant enticed to come on the premises is not a trespasser, and the owner is not exempt from the duty of exercising ordinary care to avoid injuring him.

[Ed. Note.—For other cases, see *Negligence*, Cent. Dig. §§ 83, 84, 129; Dec. Dig. § 23.*]

Appeal from Common Pleas Circuit Court of York County; T. S. Sease, Judge.

Action by Walker Hayes, by his guardian ad litem, T. W. Huey, against the Southern Power Company and another. From a judgment for plaintiff, defendants appeal. Affirmed.

T. F. McDow, of Yorkville, H. C. Millar, of Charlotte, N. C., J. E. McDonald, of Winnsboro, and Osborne & Cocke, of Charlotte, N. C., for appellants. Dunlap & Dunlap, of Rock Hill, and S. E. McFadden, of Chester, for respondent.

FRASER, J. The appellants thus state their case:

"This was an action in the court of common pleas for York county, S. C., to recover the sum of \$30,000 damages for alleged injuries to plaintiff, a minor, by coming in contact with electric wires in a transformer house, located on the property of the defendant the Manchester Mills.

"It is alleged in the complaint that the defendant Southern Power Company is a corporation engaged in furnishing electricity to various industries and, among others, to the Manchester Cotton Mills. That the said Southern Power Company built, or had built, with the permission and consent of the Manchester Cotton Mills, the transformer house in question under an agreement to furnish electric power to said cotton mills. The specific and particular allegations of negligence alleged to have been the proximate cause of the plaintiff's injuries are found in the ninth paragraph of the complaint, and they charge the defendants with separate, joint, or concurrent negligence, carelessness, recklessness, and wantonness in the following particulars, to wit:

"(a) In erecting and allowing to be erected the said transformer house, and installing therein dangerous machinery, appliances, apparatus, and electric wires, heavily charged with electricity, and in not providing safe and proper means to protect the public and said infant from the dangers thereof; and the said defendant Southern Power Company, its agents and servants, knowing that in and around said house children of tender years and ignorant of the dangers of said machinery, apparatus, appliances, and electric wires, and being accustomed, did visit and play, being attracted to said house by the said appliances hereinbefore alleged; the said defendant Southern Power Company left the doors and windows of said house open and unprotected, thereby giving said children and this infant opportunity to be subjected to said dangerous machinery, apparatus, etc., heretofore alleged; and the Manchester Cotton Mills, its agents, servants, and officers, knew, or ought to have known, that said doors and windows were open and unprotected, and knew that the said house contained dangerous machinery, apparatus, etc., heretofore alleged, and that there were children of tender years, including said infant, attending said public school, and that said children, including the said infant, frequently visited and played around and near said house, with the knowledge and acquiescence of both of said defendants.

"(b) That the said house and the said danger, apparatus, appliances, etc., heretofore alleged, were under the control and management of the defendants, Southern Power Company and the Manchester Cotton Mills, the said transformer house and the said

schoolhouse on the property of the defendant the Manchester Cotton Mills, and the agents, servants, and officers, of the said the Manchester Cotton Mills, constantly used said house in getting the electricity to drive and operate its said machinery."

The answer of the defendant the Manchester Cotton Mills consists of: (a) A denial of the material allegations of the complaint; (b) that plaintiff's injuries were caused by his act and negligence; and (c) that he was a trespasser on the premises of the defendant.

"The answer of the defendant Southern Power Company contains similar defenses. The case was tried at the November, 1912, term of the court for York county, before Judge Thomas S. Sease and a jury. At the close of the testimony for the plaintiff, the defendants made a motion for a nonsuit. * * * This motion was overruled by the presiding judge. At the close of all of the testimony, defendants made a motion for the direction of a verdict in their favor, upon the grounds. * * * This motion was also refused by the presiding judge. After hearing the charge of the presiding judge, the jury found a separate verdict against each of the defendants for the sum of \$4,166.67. The defendants thereupon made a motion for a new trial which was also refused by the presiding judge. Thereafter judgment on the separate verdicts was entered against each of the defendants. Due notice of appeal was served. * * *

"Argument.

"The following facts appear to be undisputed in this case: That the plaintiff was severely burned and injured by coming in contact with the electric wires in the transformer house, located on the property of the defendant the Manchester Mills. At what time this transformer was built, it does not clearly appear from the testimony. It appears that the plaintiff, a little boy, nine years of age, lived on the property of the Manchester Mills and for several months had been attending school in a building near the transformer house. During the recess hours the children were accustomed to play in the neighborhood of the transformer house, sometimes at one place and sometimes at another. It appears that the Manchester Mills were principally in control of the transformer house, although the agents and servants of defendant Southern Power Company occasionally visited it for the purpose of making necessary repairs in the electrical apparatus. The transformer house itself is a brick building, having a door and three windows. Across the windows are slats about $2\frac{1}{2}$ inches wide nailed on at intervals of about 2 or 3 inches. The windows each had 2 sashes with 6 lights in each sash, of about 10 by 12 inches each. The electric power wires were located in this house, near one of the windows, about 5 or 6 feet from the ground. These windows were located

too high for the plaintiff to come in contact with the wires when standing on the ground.

"The plaintiff and other children had been warned not to go near the transformer house on account of the danger connected therewith.

"There were two panes of glass out of the lower sash of the window where the power wires were located, but this fact had no connection with the injury to plaintiff, as the windows were raised, and hence the broken panes of glass were not within reach.

"On the day plaintiff received his injuries, he, with two or three other small boys, at the noon recess, went to the transformer house, and when first seen after his injury had his knee in the window and was hanging out by his hand. His hand was through the window touching the wires. In his own account of how he received the injury, the plaintiff stated that the other little boys had told him if he touched the wire it would make him jump and dance.

"As shown by the testimony, therefore, it was necessary that the plaintiff should climb up in the window, place his hand between the slat and under the window, before he could touch the wires or come in contact with them. This seems to be the only manner in which his injury could have been received, according to the undisputed testimony.

"The exceptions raise five issues of law for the determination of this court, to wit:

"(1) That there was error on the part of his honor in refusing to grant a nonsuit as to both defendants, and especially as to the defendant Southern Power Company.

"(2) That there was error on the part of his honor in refusing to allow defendants to introduce certain testimony.

"(3) That there was error on the part of his honor in refusing to direct a verdict in favor of both defendants, and especially as to the defendant Southern Power Company."

"(4) The question as to an attractive nuisance.

"(5) The duty to protect trespassing children from injury from dangerous agencies."

[1] 1. The second issue is withdrawn in the argument. The first and third cover the same ground and present really only one issue, to wit: Was there evidence of negligence, and was there evidence of negligence as to both defendants? Appellants claim that there is certainly no evidence of negligence as to the appellant the Southern Power Company. The appellants have made common cause in this court, and both maintain that position, and yet the appellant the Manchester Cotton Mills in its answer "alleges that the transformer house mentioned in the complaint was erected by its codefendant, Southern Power Company, and was at the time of the plaintiff's injury under its exclusive control and management." However that may be, there was evidence to show that the transformer house was on the property of the Manchester Cotton Mills, and it there received its power, and that keys were in the possession of its employé; that the agents of the Southern

Power Company had access to the building and worked in there one whole day; and that the day after that the window was open and that its employes constantly entered it on corporate business.

The negligence, if any, was the open window with unprotected wires charged with electricity within five or six inches of the open window. The undisputed testimony was that the children constantly played near the window. Home base was quite near. There was a dispute as to whether the plaintiff had ever been warned or not. The teacher did not claim to have warned the plaintiff about the deadly wires but about the house. The house, or the nearby pole, was home base used daily by little children from 6 to 12 years of age. There was no fence or stake or line to mark the boundary line that must not be crossed. All the buildings were located on the property of the Manchester Cotton Mills.

[2] 2. There is no dispute that the plaintiff had the right to enter upon the property to attend school. If the permission was limited, then the limits must be defined before the licensee becomes a trespasser.

[3, 4] It is hardly necessary to cite authority to show that, if a man establishes a dangerous agency where people are likely to be found, it must be guarded. If his honor referred to "social duty and the ordinary offices of humanity" instead of the law of the state, the appellant cannot complain if the state law required the same thing, and it does.

[5] 3. The appellant claims that, even if there was negligence, still the negligence was not the proximate cause, because there was an intervening cause when the plaintiff took hold of the wire, and without that the injury would not have occurred. The authorities cited are not binding, nor are they good law. A live wire stretched across the schoolhouse door would do no harm unless the plaintiff had supplied the intervening cause of coming in contact with it. The jury in this case have vindicated their intelligence and freedom from passion when they found only actual damages for inadvertence. They seemed to have come to the conclusion that all parties who were charged with the high and responsible duty of protecting their little children from so dangerous a thing as an undiminished and unprotected current and its deadly and dreadful consequences were simply asleep at their posts and did not willfully sacrifice this plaintiff to sordid gain.

[6] 4. Whether this was an attractive nuisance or no was a question for the jury. There was evidence that the plaintiff had been told that, if he would take hold of the wires, he would see things that were interesting to see, and the jury might have inferred from that that the open window presented an attractive nuisance.

[7] 5. The twelfth and thirteenth exceptions are as follows:

"(12) Because his honor erred in charging the defendants' third request, which was as follows: 'The jury is charged that to maintain upon one's property enticements to the ignorant and unwary is tantamount to an invitation to visit and inspect and enjoy, and in such cases the obligation to endeavor to protect from the dangers of the seductive instrument or place follows as justly as though the invitation had been express.' The error being: (a) That such charge was not applicable to any of the testimony in the case; (b) that such charge was a charge on the facts in violation of the Constitution of this state, inasmuch as it instructed the jury as to the weight of the testimony and as to what inference should be drawn from the facts stated in such request to charge.

"(13) Because his honor erred in charging the jury as follows: 'It is true an infant may be a trespasser (that is, an infant of tender years) in a technical sense when it goes where it has no rightful permission or authority to be, but the same rule does not apply to infants as to adult trespassers. An infant non sui juris cannot be such a trespasser as would exempt any one from the duty of exercising ordinary care to avoid doing him an injury.' And in this connection I desire to read a few paragraphs from another case by the Supreme Court of the state, and that is as follows: Under the caption of 'Liability for Injuries to Children,' the author in 1 Thompson on Negligence, § 1026, thus speaks in strenuous language of the doctrine that liability extends only to wanton injuries: 'One doctrine under this head is that, if a child trespass upon the premises of the defendant and is injured in consequence of something that befalls him while so trespassing, he cannot recover damages unless the injury was wantonly inflicted or was due to the reckless, careless conduct of the defendant.' That is quoted from the eminent, distinguished author. The Supreme Court says: 'This cruel and wicked doctrine, unworthy of a civilized jurisprudence, puts property above humanity, leaves entirely out of view the tender years and infirmity of understanding of the child, indeed his liability to be a trespasser in sound legal theory, and visits upon him the consequences of his trespass just as though he were an adult and exonerates the person upon whose property he is a trespasser from any duty towards him which they would not owe under the same circumstances toward an adult.' Quoting from this same decision: 'Children, wherever they go, must be expected to act upon childish instincts and impulses, and others who are chargeable with a duty of care and caution towards them must calculate upon this and take precautions accordingly. If they leave exposed to the observation of children anything which would be tempting to them, and which, in their immature judgment, might naturally suppose that they were at liberty to handle or play with, they should expect that liberty to be taken'—

the error being: (a) That such charge was not a correct statement of the law as to infant trespassers, inasmuch as the defendants would be exempt from liability to an infant trespasser in the same manner and to the same extent as they would be to adult trespassers, if they were not guilty of negligence, and the injury to the infant trespasser was the result of his own act. (b) That it was error to read to the jury, in the circumstances, extracts from a decision of the Supreme Court wherein was quoted the opinion of the author of Thompson on Negligence, because such quotation from Thompson on Negligence was obiter dictum and at most was quoted by the Supreme Court in said case more by way of illustration than as a binding authority upon the issue raised in that case, which arose upon demurrer to the complaint therein. (c) That it was error to state to the jury that the Supreme Court in said case had characterized the law as laid down by many text-writers and announced by many of the courts of this country as a 'cruel and wicked doctrine unworthy of civilized jurisprudence' and 'puts property above humanity,' as this court had never delivered any such utterance, and the language used was that of a text-writer, and as used in the case in question was obiter dictum."

These exceptions cannot be sustained. The charges were taken from the case of *Franks v. Southern Cotton Oil Co.*, 78 S. C. 10, 58 S. E. 960, 12 L. R. A. (N. S.) 468, and this court cites these authorities with approval.

The fourteenth exception complains of error in refusing a new trial. What has already been said covers this exception, and it is overruled.

The judgment appealed from is affirmed.

GARY, O. J., and HYDRICK and WATTS, JJ., concur.

(96 S. C. 221)

HURST v. J. D. CRAIG FURNITURE CO.
et al.

(Supreme Court of South Carolina. July 14, 1913.)

1. WITNESSES (§ 159*)—TRANSACTION WITH DECEDENT.

In an action by the owner of a store building against a former tenant and a purchaser from such tenant of a half interest in the business carried on in such store, for damages for the removal of alleged fixtures, evidence as to whether, when the purchasing defendant bought the interest in the business, the tenant's manager, since deceased, represented the fixtures as being a part of the business was not admissible, under Code Civ. Proc. 1912, § 438, relating to testimony as to transactions with a person since deceased.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. §§ 629, 664, 666-669, 671-682; Dec. Dig. § 159.*]

2. TRIAL (§ 194*)—INSTRUCTIONS—WEIGHT OF EVIDENCE.

An instruction, charging that a certain word had a certain meaning in a particular

connection, when the evidence as to whether it did was conflicting, was properly refused as invading the province of the jury.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 413, 436, 439-441, 446-454, 456-460; Dec. Dig. § 194.*]

3. FIXTURES (§ 1*)—NATURE—"FIXTURE."

A "fixture" is an article which was originally a chattel, but which became a part of realty by physical annexation thereto, by one having an interest in the realty.

[Ed. Note.—For other cases, see Fixtures, Cent. Dig. §§ 1, 6; Dec. Dig. § 1.*]

For other definitions, see Words and Phrases, vol. 3, pp. 2831-2846; vol. 8, p. 7664.]

4. FIXTURES (§ 85*)—DETERMINATION OF NATURE.

The determination of whether property constitutes a fixture is a mixed question of law and fact.

[Ed. Note.—For other cases, see Fixtures, Cent. Dig. §§ 67-79; Dec. Dig. § 35.*]

5. FIXTURES (§ 4*)—TEST—INTENTION.

While the court should define a fixture in an action involving the question, whether an article is considered as a fixture depends largely upon the intention of the parties.

[Ed. Note.—For other cases, see Fixtures, Cent. Dig. §§ 3, 6; Dec. Dig. § 4.*]

6. APPEAL AND ERROR (§ 216*)—PRESENTATION BELOW.

Appellant defendant cannot complain of the submission of a certain item of damages alleged to the jury, on the ground that the allegations with reference thereto were not sustained by evidence, where there was no request to the jury to so instruct.

[Ed. Note.—For other cases, see Appeal and Error, Dec. Dig. § 216.*]

Appeal from Common Pleas Circuit Court of Sumter County; T. H. Spain, Judge.

Action by Fannie E. Hurst against the J. D. Craig Furniture Company and others. From a judgment for plaintiff, defendants appeal. Affirmed.

The following are the exceptions to the rulings of the trial court:

"(1) Because his honor erred, it is respectfully submitted, in excluding the testimony of R. F. Haynsworth, one of the defendants, as to a conversation had between him and J. D. Craig, from whom R. F. Haynsworth purchased a one-half interest in said business, as to the fixtures involved in this suit, on the ground that the said testimony was incompetent under section 438 of the Code, whereas, his honor should have allowed the defendant and witness, R. F. Haynsworth, to testify as to the conversation with J. D. Craig, as the same was competent under section 438 of the Code, and relevant to the issues in this case, and said testimony was material, and probably would have changed the result of the said case.

"(2) Because his honor erred, it is respectfully submitted, in refusing to allow the defendant and witness, R. F. Haynsworth, to answer the question, ruling that the same was incompetent under section 400 of the Code, as follows: 'Q. At the time you purchased it, did he represent these fixtures as being a part of the business?' the error

being that J. D. Craig, owning the business out of which this suit arose, sold a one-half interest to this witness, and his representations at such time were material to this cause, and the plaintiff having gone into said conversation, and, having been examined in regard to said transaction or communication, and evidence as to the same having been given on the trial in behalf of the plaintiff, that then the testimony was competent under section 438 of the Code, and the witness should have been allowed to answer the same, and if the answer had been allowed, the same would probably have changed the result of this trial.

"(3) That his honor erred, it is respectfully submitted, in refusing to allow R. F. Haynsworth, one of the defendants and witness, to testify as to any conversation with J. D. Craig concerning his purchase of one-half interest in the business from the said J. D. Craig, out of which this suit arose, and holding that all such conversation was incompetent under section 438 of the Code, whereas, his honor should have allowed the witness R. F. Haynsworth to testify as to the said conversation, transaction, and agreement with the said J. D. Craig; the plaintiff, having gone into the same, testified as to said conversation and transaction, and testimony having been offered on behalf of the plaintiff as to such conversation or transaction, and therefore the witness should have been allowed to testify as to the same.

"(4) Because his honor erred, it is respectfully submitted, in charging the jury as follows: 'Now, as to that awning, that is a question of fact for you to determine whether the word "awning" includes the frame and the covering, or just the covering;' the error being that his honor should have charged the jury that the word 'awning,' as used in stock taking, included the frame, and, the stock taking being in writing, it was the duty of the court to construe the same.

"(5) Because his honor erred, it is respectfully submitted, in not charging the jury that all of the chattel property referred to in the complaint were trade fixtures, and as such were removable by the tenant within the term of his lease.

"(6) Because his honor erred, it is respectfully submitted, in leaving to the jury the determination of the class of property referred to in the complaint, but should have held that the same were trade fixtures, which, under the evidence, were removable by the tenant at any time within the term of his lease, and therefore the tenant was not liable for removing the same.

"(7) Because his honor erred, it is respectfully submitted, in charging the jury as follows: 'Now, you must take into consideration what was the intention—what was the intention of the parties? Did they intend, when they—these fixtures—were fixed to the realty, to use them for the purpose of carrying

on their trade, or was it for the purpose of becoming a convenience to the land? * * * Now, that is a question of fact for you to determine, whether these are fixtures under the law as I charge you, or whether they are not fixtures;' the error being that his honor should have charged the jury that all of this property were trade fixtures, removable by the tenant during the term of his lease.

"(8) Because his honor erred, it is respectfully submitted, in not directing a verdict for the defendants, on the ground that all of the chattels were, from their nature, trade fixtures, removable by the tenant, who put them in within the term of the lease.

"(9) Because his honor erred, it is respectfully submitted, in not directing a verdict except as to the actual value of the awning frames, there being no testimony that any of the property was other than trade fixtures put into the building by the tenant for the purpose of its business, and therefore removable by it during the term, and therefore the defendants could not be held liable for the value of the fixtures, same being the property of the defendant J. D. Craig Furniture Company, and they having the right under the law of this state to remove the same.

"(10) Because his honor erred, it is respectfully submitted, in not directing a verdict as to punitive damages, there being no evidence sufficient to sustain an action for punitive damages, the defendants merely having removed certain trade fixtures belonging to it without in any way damaging or injuring the property of the plaintiff, and therefore there was no testimony on which to base punitive damages in this action.

"(11) Because his honor erred, it is respectfully submitted, in not granting a new trial on the ground that the chattels out of which this action arose were, from their nature, trade fixtures, and removable by the tenant who put them in during the term.

"(12) Because his honor erred, it is respectfully submitted, in not setting aside the verdict and granting a new trial on the ground that there was no testimony to sustain punitive damages, and no testimony to sustain any actual damages; the property being removed being the property of the defendant J. D. Craig Furniture Company.

"(13) Because his honor erred, it is respectfully submitted, in not directing a verdict as to the allegation as to painting out the sign of the defendant J. D. Craig Furniture Company from the outside of the store building of the plaintiff, as the same was a trade fixture, and removable by the tenant during the term, and the tenant had a right to obliterate its trade-name so painted on the store building.

"(14) Because his honor erred, it is respectfully submitted, in not granting a new trial on the ground that there was no testimony showing that the defendants were in

any way liable for the painting out of the sign on the outside of the store building, as the sign was a trade-name of the J. D. Craig Furniture Company, and the sign, after being placed upon the said building, became a trade fixture, and removable by the tenant during its term, and the mere attempt to remove the same was no ground upon which to base a cause of action.

"(15) Because his honor erred, it is respectfully submitted, in allowing the jury to consider the question of the stable door or gate, the error being that the evidence having shown that the gate or door of the stable had fallen from its support by reason of the natural wear and tear of its use, that then these defendants were not liable for the same having fallen off the hinges, and therefore there was nothing actionable in the gate having fallen off its hinges from ordinary use, wear, and tear."

Lee & Moise, of Sumter, for appellants.
L. D. Jennings, of Sumter, for respondent.

GARY, O. J. The following statement appears in the record: "This action was commenced by the service of the summons and complaint on the 12th day of February, 1912. The plaintiff was the owner of a store building in Sumter, S. C., and same had been rented to the J. D. Craig Furniture Company; the term expiring December 31, 1911. During the tenancy J. D. Craig Furniture Company had placed within said store building for its own use some electric light wiring upon the wall and ceiling, and had painted its firm name and sign on the upper southern corner of the outside of the southern wall of the store building. The plaintiff also claimed to own the awning frame in front of the store, horse trough in the yard, and two shop drawers. The plaintiff on the trial admitted that the defendant J. D. Craig Furniture Company had placed the electric wiring in the store, but claimed that same belonged to her, and also the other property mentioned. Before the end of the tenancy the defendant J. D. Craig Furniture Company removed the awning frame, electric wiring, and horse trough, and attempted to paint out the sign of this defendant on the outside of the store building. They were prevented from painting out the sign by the act of the plaintiff and her agent. The defendants denied having taken the shop drawers, and stated they knew nothing about them. The action was brought to recover \$10,000 actual and punitive damages for the removal of the awning frame, electric wiring, shop drawers, and horse trough, and tearing down of the stable door, and for painting out the sign on the outside of the building, and alleged misconduct of defendants in removing same. The defendant J. D. Craig Furniture Company claimed it had a right to remove this property, on the ground that the same belonged to it, except the shop drawers, which they knew nothing

about, and they also claimed that they had a right to paint out the sign on the outside of the building, as it was their corporate name and business sign, and it was put up merely for the purpose of advertising. The defendants claimed that the articles removed were merely trade fixtures, and that they had the right to remove the same during their tenancy; that the stable door fell down from ordinary wear and tear. The plaintiff contended that the property could not be removed, as they were not trade fixtures, but the property of the plaintiff. The jury returned a verdict for \$100 actual damages and \$945 punitive damages, which was reduced. On motion for a new trial Judge Spain granted a new trial nisi, unless the plaintiff remit all punitive damages over \$500, which was done, and judgment entered in due course for \$600." The defendants appealed upon exceptions, which will be reported.

[1] First, second, and third exceptions. These exceptions seem to have been taken under misapprehension, as it does not appear from the record that his honor the presiding judge excluded the testimony mentioned in the exceptions. Furthermore, the testimony was clearly inadmissible under section 438 of the Code of Procedure (1912).

[2] Fourth exception: The presiding judge could not have charged the jury, as contended by the appellants, without invading their province, for the reason that the testimony upon that question was conflicting.

[3] Fifth, sixth, seventh, eighth, and ninth exceptions. In the case of Padgett v. Cleveland, 33 S. C. 339, 11 S. E. 1069, this court recognized the following as a correct definition of a fixture: "A fixture is an article which was a chattel, but by being physically annexed to the realty by one having an interest in the soil becomes a part and parcel of it." In that case the court quotes with approval the following words of a distinguished judge: "It is difficult to define the term, and there is inextricable confusion, both in the text-books and the adjudged cases, as to what is such annexation of chattels to realty as to make them part and parcel, and pass by a conveyance of the realty. Any attempt to reconcile the authorities on the subject would be futile, and to review them would be an endless task." In Evans v. McLucas, 15 S. C. 70, the rule is thus stated: "As a general rule, all things * * * annexed to the land become a part of it, but to this there are exceptions; as, where there is a manifest intention to use the alleged fixtures in some employment distinct from that of the occupier of real estate, or where the chattel has been annexed for the purpose of carrying on trade, it is not, in general, considered as part of the realty." Mr. Justice McGowan, who delivered the opinion of the court in the case of Padgett v. Cleveland, 33 S. C. 339, 11 S. E. 1069, uses this language: "We think, however, the general statement may be safely made that in the later cases there has been a

decided relaxation as to the original rule of the common law, which subjected everything affixed to the freehold to the law governing the freehold, and that this modern relaxation has been effected chiefly in favor of trade. * * * Besides, this confusion, in the law, * * * and whether an article of personal property has been so annexed to the soil as to make it a permanent fixture and as such not movable, is always a mixed question of law and fact." In *Hughes v. Shingle Co.*, 51 S. C. 1, 28 S. E. 2, the court quotes with approval the following statement of the rule: "Where a structure is placed upon land, not to promote the convenient use of the land, but to be used for some temporary purpose, external to the land, and the land is used only as a foundation, because some foundation is necessary for the business, then the structure and its belongings are not fixtures."

[4, 5] The great confusion in regard to the law of fixture has arisen from the effort to construe that as a fixture in one case because it was so regarded in other cases. A fixture involves a mixed question of law and fact. It is incumbent on the court to define a fixture, but whether it is such in a particular instance depends upon the facts of that case, unless the facts are susceptible of but one inference. In modern times the question whether the article is to be regarded as a fixture depends generally upon the intention of the parties in the particular case. Tested by those principles, the exception must be overruled.

Tenth and twelfth exceptions. We do not deem it necessary to quote the testimony to show that these exceptions cannot be sustained.

Eleventh exception. What has already been said disposes of this exception.

Thirteenth and fourteenth exceptions. There was testimony tending to sustain the allegations of the complaint as to the manner in which the defendant attempted to erase the sign, by the reckless use of paint.

[6] Fifteenth exception. The record does not disclose the fact that the presiding judge was requested to instruct the jury that they could not consider this element of damages, on the ground that there was a failure of testimony to sustain the allegations of the complaint in this respect.

Judgment affirmed.

HYDRICK and WATTS, JJ., concur.
FRASER, J., disqualified.

(95 S. C. 68)

SOUTH CAROLINA & W. RY. v. ELLEN.

(Supreme Court of South Carolina. June 6, 1913.)

1. JURY (§ 35*)—TRIAL BY JURY—CONDEMNATION PROCEEDINGS—COURT OF RECORD.

Under Const. art. 9, §§ 20, 21, requiring compensation for property taken for public use

to be ascertained by a jury of 12 men in a court of record as shall be prescribed by court; Civ. Code 1912, § 3292 et seq., relating to condemnation proceedings and providing that the clerk shall call a jury, and further providing in section 3296 that either party may appeal from the verdict of the jury to the circuit court, and, if the court shall be satisfied of the reasonable sufficiency of the grounds, an issue shall be ordered, and the amount of compensation shall be submitted to a jury in open court, is violative of the constitutional right to a jury in a court of record, since condemnation proceedings, being a special statutory proceeding, the jury provided by the act, is not a jury in a court of record, and no absolute right to appeal from such jury is given.

[Ed. Note.—For other cases, see *Jury, Cent. Dig. §§ 238-241*; *Dec. Dig. § 35.**]

2. CONSTITUTIONAL LAW (§ 43*)—VALIDITY OF STATUTE—ESTOPPEL.

One who voluntarily proceeds under a statute and claims benefits thereby conferred is estopped to question its constitutionality to avoid its burdens.

[Ed. Note.—For other cases, see *Constitutional Law, Cent. Dig. §§ 79, 80, 84-99*; *Dec. Dig. § 43.**]

3. CONSTITUTIONAL LAW (§ 43*)—VALIDITY OF STATUTE—ESTOPPEL—CONDEMNATION PROCEEDINGS.

Where a railroad, wishing to condemn land, must proceed under Civ. Code 1912, § 3292 et seq., it does not by proceeding thereunder estop itself from attacking the act as unconstitutional as to that portion which fails to allow an appeal in all cases from the clerk's jury; the invalidity of that portion not destroying the scheme of the act.

[Ed. Note.—For other cases, see *Constitutional Law, Cent. Dig. §§ 79, 80, 84-99*; *Dec. Dig. § 43.**]

Fraser, J., dissenting.

Appeal from Common Pleas Circuit Court of Lee County; H. F. Rice, Judge.

Condemnation proceedings by the South Carolina & Western Railway against John H. Ellen. From a judgment in favor of plaintiff, defendant appeals. Affirmed.

M. L. Smith, of Camden, and J. B. McLauchlin, of Columbia, for appellant. Thos. H. Tatum, of Bishopville, for respondent.

HYDRICK, J. Sections 20 and 21 of article 9 of the Constitution are as follows:

"Sec. 20. No right of way shall be appropriated to the use of any corporation until full compensation therefor shall be first made to the owner or secured by a deposit of money, irrespective of any benefit from any improvement proposed by such corporation, which compensation shall be ascertained by a jury of twelve men, in a court of record, as shall be prescribed by law.

"Sec. 21. The General Assembly shall enforce the provisions of this article by appropriate legislation."

The Civil Code (section 3292 et seq.) authorizes the condemnation of rights of way for railroads, and prescribes, in detail, the manner in which it shall be done, and in which the compensation to the landowner therefor shall be ascertained. It is sufficient for the purpose of the present inquiry to

say that when the parties do not agree, and it becomes necessary to resort to condemnation, the corporation shall petition the judge of the circuit, who shall order the petition filed in the clerk's office, and the clerk shall thereupon impanel a jury to ascertain the amount of compensation. Section 3296 provides, in substance, that either party may appeal from the verdict of the jury to the circuit court, and, "*if the court shall be satisfied of the reasonable sufficiency of the grounds,*" an issue shall be ordered and the question of the amount of compensation shall be submitted to a jury in open court.

The railway company instituted this proceeding to condemn a right of way over defendant's land, and have the amount of compensation therefor ascertained. From the verdict of the jury impaneled by the clerk, the company appealed to the circuit court, and demanded that the amount of compensation should be ascertained by a jury in that court. The court was not satisfied of the sufficiency of the grounds of appeal, but held, nevertheless, that the company had the right, under the section of the Constitution above quoted, to have the compensation ascertained by a jury of 12 men in a court of record, and, holding that the jury impaneled by the clerk was not such a jury, ordered the issue set down for trial in the circuit court. The court held, also, that the company, having pursued the only method by which it could obtain the right of way, and have the compensation to be paid therefor assessed, was not estopped from attacking, as unconstitutional and void, the provision of section 3296, above quoted, which requires that the court shall be satisfied of the sufficiency of the grounds of appeal as a condition precedent to the right of trial by jury in open court. The appeal challenges these rulings.

The first question to be determined is whether the condemnation proceeding is *in* the circuit court, or is merely a special statutory proceeding, with right of appeal to the circuit court; for, if the proceeding is *in* the circuit court, the requirement of the Constitution that the compensation shall be ascertained by a jury of 12 men in a court of record has been satisfied; otherwise, if it is not.

[1] Condemnation of rights of way was unknown to the common law. Its origin is statutory. It is therefore generally regarded by English and American courts as a special statutory proceeding. Numerous expressions in the opinions of this court, and the result of its decisions, show conclusively that we have heretofore regarded it as a special statutory proceeding, not in the court, until brought there by appeal. Upon no other hypothesis can the decisions of this court be harmonized.

In *Railway Co. v. Riddlehuber*, 38 S. C. 308, 17 S. E. 24, the company denied the right of the landowner to compensation for a right of way over his land, and brought an action to

enjoin proceedings instituted by him, under the statute, to have his compensation ascertained. The circuit court dismissed the action, holding that the rights of the parties could be settled *in the proceedings themselves*. This court reversed the ruling, and held that the statute provides only the *manner* in which the right of way shall be taken and the *mode* by which the amount of compensation shall be ascertained, and that the issue as to the *right* to compensation must be determined in an action brought for that purpose. That ruling has been followed ever since.

In *Water Co. v. Nunamaker*, 73 S. C. 550, 53 S. E. 996, the action was for the same purpose. The court said: "When the right to institute condemnation proceedings is contested, the proper remedy is to bring an action in the court of common pleas in order that the court may, in the exercise of its chancery powers, determine such right. *Railway v. Riddlehuber*, 38 S. C. 308, 17 S. E. 24; *Cureton v. Railway*, 59 S. C. 371 [37 S. E. 914]; *Glover v. Remley*, 62 S. C. 52, 39 S. E. 780; *Railroad v. Burton*, 63 S. C. 348, 41 S. E. 451; *Riley v. Union Station Co.*, 67 S. C. 84 [45 S. E. 149]; *Railway v. Reynolds*, 69 S. C. 481, 48 S. E. 476. These cases show that such action must be regarded as independent, and not ancillary to the condemnation proceedings." On petition for rehearing in response to appellant's contention that the court had overlooked the distinction between ancillary and independent suits, the court said: "The appellant also quotes the language of Mr. Justice Bradley, in *Wood*, 112, in which, after stating he was unable to find any precedent for a bill for injunction to stay proceedings in the same court, says: 'I cannot see any necessity for it. If any circumstances exist which render it improper or inequitable to carry on proceedings in this court, they can always be brought to the attention of the court by motion or petition in the suit. I shall direct the bill as such to be dismissed, but allow it to stand as a petition in the several suits sought to be suspended. Supposing the matter to be properly brought before the court, on petition and motion thereon, the question arises whether the proceedings in this court ought to be stayed.' *Conceding that these principles would prevail if the action herein and the condemnation proceedings were in the same court, they are not applicable, for the reason that this action was commenced in the court of common pleas, while the condemnation proceedings were instituted in a special statutory tribunal from which an appeal may be taken to the court of common pleas.*" (Italics added.) This case is directly in point, and seems to be conclusive of the question.

If the statutory proceedings were *in* the court, the court would not entertain a separate action to enjoin them, for the court has control of any action or proceeding pending

therein. In such cases the remedy is by a motion *in the cause*. *Ins. Co. v. Mobley*, 90 S. C. 552, 73 S. E. 1032.

That the parties are given the right to appeal to the circuit court shows clearly that the Legislature did not regard the proceeding as one in the court. It would be somewhat anomalous to allow an appeal to a court from a proceeding in that court.

The authorities are practically agreed that when a constitution or statute speaks of a jury, without qualifying words, it means a common-law jury of 12 men, presided over by a court. But, as statutes in some states provide for "a jury of view," or "a jury of appraisers," etc., in condemnation proceedings, no doubt the framers of our Constitution, desiring to make plain their intention that in this state the parties to such proceedings should have the right to the final decision of a common-law jury, undertook to do so by qualifying the word "jury," by adding that it should consist of "twelve men," and sit "in a court of record," which, of course, carries with it the idea that it shall be presided over and instructed by a judge.

In *Archer v. Board of Levee Inspectors* (C. C.) 128 Fed. 125, the court held unconstitutional a statute of Arkansas which provided that on the complaint of any person aggrieved by the running of a levee through his land the sheriff of the county should summon a jury of six landowners who should assess the damages, and whose decision should be final. The provision of the Constitution of Arkansas on the subject was in substance the same as that of our Constitution, and almost in the same words. It read as follows: "No property, nor right of way, shall be appropriated to the use of any corporation until full compensation therefor shall be first made to the owner, in money, or first secured to him by a deposit of money, which compensation, irrespective of any benefit from any improvement proposed by such corporation, shall be ascertained by a jury of twelve men, in a court of competent jurisdiction, as shall be prescribed by law."

The reasoning of the court is so clear and strong that we quote from the opinion at length:

"But it is urged that this act provides for the assessment of damages by a jury. It is true the act does call the persons who are to assess the damages a jury; but it provides for only six jurors, when the constitutional provision requires a jury of twelve. It is unnecessary to determine whether, if that were the only defect in the act, the court could not disregard the provision limiting the jury to six, and have the issues tried by a jury of twelve. But is the sheriff's jury provided for by that act a jury within the meaning of the constitutional provision? A trial by jury, as defined by the Supreme Court of the

United States in its latest opinion, is as follows: "'Trial by jury,' in the primary and usual sense of the term at the common law and in the American Constitutions, is not merely a trial by a jury of twelve men before an officer vested with authority to cause them to be summoned and impaneled, to administer oaths to them and to the constable in charge, and to enter judgment and issue execution on their verdict; but it is a trial by a jury of twelve men in the presence and under the superintendence of a judge empowered to instruct them on the law and to advise them on the facts, and, except on acquittal of a criminal charge, to set aside their verdict if, in his opinion, it is against the law or the evidence. This proposition has been so generally admitted and so seldom contested that there has been little occasion for its distinct assertion.' *Capital Traction Co. v. Hof*, 174 U. S. 1, 13, 19 Sup. Ct. 580, 585, 43 L. Ed. 873. Merely calling it a jury does not make it so. The duties of the sheriff's jury, as defined by the act, are merely those of commissioners. There is no provision for a superintendence by a judge. No one is authorized to instruct them on the law, to advise them on the facts, or to set aside their verdict if it is against the law and evidence. How is the sheriff's jury to know what items are to be considered by them as elements of damage? No provision is made by the act for any one to instruct them as to the law, nor is any one authorized to set aside their verdict, even if it should appear conclusively that the verdict was the result of prejudice, passion, partiality, or misconstruction of the law. It may be conceded that a proceeding before such a body is not violative of a constitutional provision requiring a trial by a jury, if an appeal can be taken from the decision of that body to a court of record, where a trial *de novo* may be had by a constitutional jury of 12 men, under the superintendence of a judge. But the act not only fails to provide for an appeal, but expressly declares that the finding of the sheriff's jury 'shall be final in the premises.' This section of the act is therefore clearly in conflict with the Constitution of the State."

Appellant relies upon the remarks of the late Chief Justice McIver in *Railroad Co. v. Railroad Co.*, 57 S. C. 322, 35 S. E. 553, but concedes that they were obiter. Properly understood, however, the argument of the learned judge supports respondent's contention. In that case the circuit court was satisfied of the sufficiency of the grounds of appeal. There was therefore no room for the contention that the defendant who appealed from the verdict of the clerk's jury, had the right to a trial by jury in open court, without regard to whether he had satisfied the court of the sufficiency of his grounds of appeal or not. But the contention there was that the whole statute was unconstitutional

and void, because the jury trial therein provided for was not a jury trial "in a court of record," as required by the Constitution. In response to that contention, the learned Chief Justice proceeded to show that the statute prescribed certain preliminary steps, which, if complied with, will enable the parties to obtain a jury trial "in a court of record," which satisfies the Constitution, as we shall presently show. The Chief Justice said: "It will thus be seen that the statute makes such provisions as will secure to either party every right guaranteed to him by the Constitution, provided he complies with the provisions 'prescribed by law' for such purposes. * * * If a party, through his own neglect or omission, fails to obtain in a case like this, or, indeed, in any other case, a right of trial by jury in open court, or any other right guaranteed to him by the Constitution, by neglecting to pursue the mode prescribed by law for that purpose, it is not the fault of the law, but the fault is his own." In that case, it was the defendant's own fault that it failed to get a jury trial in open court, because it did not serve its grounds of appeal.

That Chief Justice McIver did not have in mind in his discussion of the question raised in that case the same point we are now considering is clearly shown by his remarks in the subsequent case of *Railroad Co. v. Johnson*, 58 S. C. 560, 36 S. E. 919, which was an appeal from an order submitting the issue of compensation to a jury in the circuit court. After showing why this court would not review the ruling of the circuit court that it was satisfied of the sufficiency of the grounds of appeal, he said: "Indeed, we may say, though the point has not been raised in this case, and therefore is not properly before us for decision, that it is at least doubtful whether, under the provisions of section 20 of article 9 of the present Constitution a person who has taken an appeal to the circuit court in the manner prescribed by the statute in a case like this can be denied the right to have the issue of the amount of compensation which should be allowed him tried 'by a jury of 12 men, in a court of record, as shall be prescribed by law.'"

If the Legislature had provided no right of appeal, would the proceedings have satisfied the constitutional requirement? Can it be supposed that the framers of the Constitution intended that a matter which was deemed so valuable and important as to be made the subject of a constitutional guaranty should be finally decided by a jury circumstanced as the clerk's jury ordinarily is? It is usually composed of men who are ignorant of law and the rules of evidence, and without experience in legal procedure. They have no power to punish for contempt of their proceedings, which may, therefore, be affected by irregularities which would utterly vitiate a trial by jury in any court.

There is no way by which the jury can be protected from improper influences. There may, and often do, arise nice questions of law as to the elements of just compensation and special damages, and as to the relevancy and competency of evidence. Left to themselves in the decision of such questions, grave injustice might result. These are mentioned merely as considerations tending to show that the framers of the Constitution did not intend that their verdict should be final. On the other hand, perhaps in a considerable majority of the cases, the matter of ascertaining the compensation is simple and a satisfactory conclusion may be reached merely by viewing the land, and their verdict is satisfactory to all concerned.

This leads to the consideration of the suggestion that, if the clerk's jury is not a jury in a court of record, then its work is a nullity. By no means. It is a convenient and often satisfactory step in the proceedings which, if pursued according to the statute, will ultimately result in a trial by jury in open court, if either party desires it. Moreover, the verdict is *prima facie* correct, and furnishes a basis upon which the compensation may be secured by a deposit of money, and thereby prevent needless delay in the progress of the work. "An act is not unconstitutional which provides for an assessment of damages in condemnation proceedings in the first instance by commissioners, viewers, or appraisers, where a right of appeal is secured to a court where a jury trial may be had; and this rule applies even where a jury trial in such proceedings is expressly guaranteed by the Constitution, but the appeal must be allowed to a court where the jury of 12 can be had." 24 Cyc. 195; 6 A. & E. Enc. L. (2d Ed.) 981; *Faust v. Bailey*, 5 Rich. 107; *Gregory v. Rhoden*, 24 S. C. 90.

The same authorities hold that if the guaranteed right is not allowed in the first instance, but only on appeal, neither the right of appeal nor the right of jury trial on appeal must be hampered or fettered by unreasonable restrictions. Reasonable restrictions, such as the requirement that notice and grounds of appeal shall be given within a specified time, are permissible, because they are usual and necessary to due and orderly procedure, and the parties can certainly comply with them, and if they fail to obtain the right guaranteed to them, as said by Chief Justice McIver in *R. Co. v. R. Co.*, *supra*, it will be their own fault, and not the fault of the law. But a provision which makes the enjoyment of the right depend upon the judgment or discretion of the judge is unreasonable, because it may result in depriving the parties of the right *without fault on their part*. Therefore it so burdens the right as to destroy the full force and effect of the guaranty. It follows that the condition im-

posed by the statute is violative of the Constitution.

[2, 3] We next consider whether the company is estopped, because it instituted the proceeding under the statute, from taking the position that the condition in question is void. The company does not contend that the statute is wholly void. Its contention is merely that a single and separable part of it is void, which is not inconsistent with the main purpose and scheme of the act. There is therefore nothing in that position which, according to any principle of the law of estoppel or of justice, should work an estoppel. The general principle that one who voluntarily proceeds under a statute and claims benefits thereby conferred will not be heard to question its constitutionality to avoid its burdens is conceded, and its soundness is not questioned. And as corporations have no right to exercise the power of eminent domain, except as it may be granted them by the state, in the absence of constitutional restrictions, the Legislature may impose upon the exercise of the right by them just such conditions as it may see fit. The corporation may accept the privilege with the conditions imposed, or not at all; but it will not be allowed to accept the privileges and reject the conditions. *Gano v. Minneapolis, etc., R. Co.*, 114 Iowa, 713, 87 N. W. 714, 55 L. R. A. 263, 89 Am. St. Rep. 393. But that principle is not applicable in this case, because the framers of the Constitution expressed the intention that the privilege of condemnation should be accompanied by the right to have the compensation ascertained by a jury in a court of record. The granting of the right to trial by jury in a court of record is imposed by the Constitution as a condition or restriction upon the power of the Legislature to grant the privilege of condemnation. In other words, the privilege cannot be granted, unless the right is secured. The one must accompany the other.

The makers of the Constitution knew that the privilege of exercising the power of eminent domain depended upon the legislative will and action. They knew, also, that that right had for many years been granted, and would, of necessity, be granted in future for the development of the state's resources. In the face of that knowledge, the language of section 20, above, carries both a prohibition and a command to the Legislature, to wit: You shall not grant to any corporation the right to appropriate any right of way, until full compensation therefor shall be first made to the owner, or secured by a deposit of money; and that compensation shall be ascertained by a jury of 12 men in a court of record, as shall be prescribed by law. The statute affords the only means whereby compensation for rights of way can be ascertained, if the parties cannot agree. This court has held that, where the right to condemn or the right to compensation is not disputed, the

mode of ascertaining the compensation prescribed by the statute is exclusive. *Glover v. Remeley*, 62 S. C. 52, 39 S. E. 780. This being so, it is clear that, if a party who proceeds under the statute is estopped to say that the condition in question is void, the right guaranteed to accompany the privilege, when granted, is denied without a remedy, contrary to the ancient boast of the law.

The suggestion that the provision for trial by jury was intended for the benefit of the landowner only is not supported by the language used in the Constitution, nor by any sound reason that has been advanced. But, even in that view of the case, suppose the landowner were to institute proceedings under the statute to ascertain his compensation, and he is limited to that method in those cases where it is exclusive, would he, too, be estopped? If not, upon what principle could a different rule be applied? Would not the application of a different rule in case of his attack upon the validity of the provision in question be a violation of that provision of the Constitution which guarantees to all citizens the equal protection of the laws?

The question of estoppel is not concluded by the decision in *Power Co. v. Williams*, 85 S. C. 179, 67 S. E. 136. In that case, the decision is rested upon two grounds: (1) That which is here invoked, to wit, that the company was estopped to attack the constitutionality of the provision in question, because it had instituted the proceeding under the statute; (2) because the point had not been presented to or decided by the circuit court. This court has held in numerous cases that questions not presented to or decided by the circuit court are not properly before this court on appeal. It follows, therefore, that when this court held that the record did not show that the circuit court had been requested to rule upon the question, any remarks by this court upon the question itself were obiter, because the question was not properly before the court. The same is true of the remarks in *Railroad Co. v. Railroad Co.*, 57 S. C. 317, 35 S. E. 553, cited in *Power Co. v. Williams*.

Affirmed.

GARY, C. J., and WOODS and WATTS, JJ., and ERNEST GARY, GAGE, DE VORE, SHIPP, SEASE, and SPAIN, Circuit Judges, concur. PRINCE and FRANK B. GARY, Circuit Judges, concur in the result.

FRASER, J. (dissenting). This is a proceeding by the appellant for condemnation of the land of the respondent. The company, requiring the right of way over the land of the respondent, procured the necessary order under the statute for a jury to assess the compensation. The jury assessed the value and fixed the compensation at \$3,500. From this assessment the railroad company appealed to the circuit court, and demanded

a trial in open court to reassess the compensation. The circuit judge held that he was not "satisfied of the reasonable sufficiency of the grounds," but granted an order for an issue to be tried in open court on the ground that the company was entitled to have the issue tried in open court, under the Constitution. From this judgment the owner appealed on several exceptions and states his questions as follows:

"(1) Does the statute regulating the condemnation of rights of way provide such a method of assessment of damages for the appropriation of a right of way by a corporation, as will fully meet the requirements of section 20, art. 9, of the Constitution, which provides that such 'compensation shall be ascertained by a jury of 12 men, in a court of record, as shall be prescribed by law'? In other words, in the language of Mr. Chief Justice McIver in *Railroad Co. v. Railroad Co.*, 57 S. C. 324 [35 S. E. 556], does the statute 'secure to either party every right guaranteed to him by the Constitution'?

"(2) Is section 3296, in so far as it makes the right of appeal from the verdict of a condemnation jury dependent upon the determination of 'the reasonable sufficiency of the grounds' of appeal by the presiding judge as a preliminary matter, contrary to the provisions of section 20, art. 9, of the Constitution?

"(3) Is the respondent estopped from asserting the right, if it exists, to submit the question of compensation to a jury in the court of common pleas, having invoked, at every stage of the proceedings, the condemnation statute?

"(4) If such right exists, independently of the statute of condemnation, should it be asserted by a proceeding under the statute, or in the court of common pleas *ab initio*?"

There are two provisions of the Constitution that must be considered.

Article 1, § 17, provides: " * * * Private property shall not be taken for private use without the consent of the owner. Nor for public use without just compensation being first made therefor." Article 9, § 20: "No right of way shall be appropriated to the use of any corporation until full compensation therefor shall be *first* made to the owner or secured by a deposit of money, irrespective of any benefit from any improvement proposed by such corporation, which compensation shall be ascertained by a jury of 12 men, in a court of record, as shall be prescribed by law." It will be seen that the first provision is in the "Declaration of Rights," where the most sacred and inalienable rights of the private citizen are secured to him. The second provision is made under the head "Corporations," and is in restraint of corporate power.

If the verdict of the jury "not in open court" does not ascertain the compensation, then the deposit of the amount of their ver-

dict can confer upon the railroad no right to proceed with the taking of the property of the "owner" until the compensation is *first* paid or deposited. These provisions are mandatory. If this method of ascertaining the compensation provided by statute does not comply with the constitutional provision, then it is unconstitutional and all the court can do is to so declare and dismiss the proceedings. This question this court need not decide in this case, because the appellant by taking these proceedings has waived its constitutional right to object. It has been held in this state that the constitutional right of the "owner" to prevent the appropriation of the right of way "until full compensation therefor shall be first made to him or secured by a deposit of money" may be waived by the owner. See *Verdler v. Railroad Co.*, 15 S. C. 483.

The attack is necessarily on the assessment "not in open court." Before the appellant can claim as a matter of right a reassessment, it must be held that the compensation has not been ascertained, paid, or deposited. If the compensation has not been ascertained in a court of record by a jury of 12 men, it is because the verdict is a nullity. There is nothing in the case from which consent to entry before compensation can be presumed.

Railroad Co. v. Railroad Co., 57 S. C. 322, 35 S. E. 555: "The respondent by participating in the proceedings prescribed by the statute, without protest or objection up to the time of the hearing before this court, which is only invested with jurisdiction to review the action of the circuit court, and by actually basing its application for the order appealed from upon the provisions of the statute, which it now claims is unconstitutional, is estopped from raising the question of the constitutionality of the statute, the benefits of which it has availed itself of. If the position now taken by respondent be tenable, then as it seems to us, its proper course would have been to entirely ignore the statute, which, if unconstitutional, was a nullity, and bring its action against the appellant for a trespass in intruding upon its property without lawful authority. But it certainly cannot be permitted to avail itself of the benefit of the statute and at the same time claim that it is unconstitutional, null and void." See, also, *Power Co. v. Williams*, 85 S. C. 179, 67 S. E. 136. Here the respondent took the proceedings under a statute that it now claims is unconstitutional. While it is not absolutely necessary to decide the constitutionality of this statute, yet it is very desirable to do so, and the question fairly arises from the record. In my judgment the statute is constitutional and for the very excellent reasons stated by Mr. Chief Justice McIver in *Railroad Co. v. Railroad Co.*, supra, 57 S. C. at pages 322-324, 35 S. E. at page 555: "But is the statute unconstitutional?"

In the first place, it will be observed that the provisions of the present Constitution is identical with that contained in the Constitution of 1868, § 2, art. 12, and it is very strange that in none of the numerous cases of this kind which arose while the Constitution of 1868 was in force was this question presented to this court for decision. True, this is not conclusive; but, in view of the intelligent, learned, vigilant, and able bar of which this state can boast, the fact that this question has never before been raised is entitled to some weight. Let us, therefore, examine for a moment whether the statute under which these proceedings were taken is in violation of the Constitution. The point made seems to be that the Constitution requires that the amount of the compensation 'shall be ascertained by a jury of 12 men in a court of record as shall be prescribed by law,' whereas, the contention is that the statute contemplated a proceeding by which the amount of compensation may be ascertained by a jury of 12 men, not in a court of record. Now, what are the provisions of the statute? By section 1744 of the Rev. Stat. the first step required to be taken is an application, 'by petition to the judge of the circuit wherein such lands are situated, for the impaneling of a jury to ascertain the amount which shall be paid as just compensation for the right of way required.' The next step is that the said judge shall order the said petition to be filed in the office of the clerk of the court of common pleas, and shall order the said clerk to impanel a jury of 12 to ascertain the compensation. The next step is that said clerk shall impanel a jury of 12 persons in the manner prescribed by the statute. Then, in section 1746, it is provided that the jury so impaneled, after being sworn faithfully and impartially to determine the question of compensation submitted to them, shall proceed to inspect the premises, and to take testimony and ascertain the amount to which the owner is entitled for the use of his land, and render their verdict in writing for the same. Then follows section 1747, copied above, securing a right of appeal from such verdict to the circuit court, and prescribing the manner in which such appeal shall be taken, by which the question of the amount of compensation may be submitted 'to a jury in open court.' Then by section 1753 it is provided that all proceedings in relation to the condemnation of lands for the right of way 'shall be filed in the office of the clerk of the court of common pleas for the county in which such proceedings were had, and shall be there of record.' It will thus be seen that the statute makes such provisions as will secure to either party every right guaranteed to him by the Constitution, provided he complies with the provisions 'prescribed by law' for such purposes. We can scarcely believe that the point made that the

word 'shall' in the constitutional provision, 'as shall be prescribed by law,' implies that there must be legislation after the adoption of the present Constitution prescribing the mode of proceeding to be adopted in order to secure a trial 'by a jury of 12 men in a court of record,' can be seriously insisted upon, especially in view of the provision in the first subdivision of section 11 of article 17, of the present Constitution, 'that all laws in force in this state at the time of the adoption of this Constitution, not inconsistent therewith, and constitutional when enacted, shall remain in full force until altered or repealed by the General Assembly or expire by their own limitation.' Even, therefore, if the constitutional question were properly before us, we would be obliged to say that there was at least grave doubt whether the statute was in violation of the Constitution, and the rule in such cases is well settled that the constitutionality of the statute should be sustained."

But it is stated that this may give the owner a right that is denied to the condemning corporation and violates the equal rights guaranteed to litigants. Is it unconstitutional to allow the defendant more challenges in the court of general sessions than is allowed to the state or to provide that a verdict of not guilty is final if in favor of the defendant and not final if in favor of the state? To say that in criminal cases it is different is no answer. In criminal cases there is a difference because the state is a party and the state may and does waive its right to equality.

Here it is said the respondent is a private corporation, and as such is entitled to equal rights. The corporation has a dual capacity. It is to some extent public and to some extent private. In condemnation proceedings it must stand on its public, and not its private rights. As a private corporation it can take not a foot of land without the "consent" of the owner. Condemnation proceedings are based on the want of consent.

The property is taken under the state's right of eminent domain, and is in theory, at least, a taking by the state. When, therefore, the corporation undertakes to take the property of the owner in the right of the state, it must accept the right with all the limitations the state has seen fit to impose upon itself. There would be no equality if the condemning corporation were allowed all the rights that is granted to it by the state, as the right of the state, and all the rights of a private citizen. In condemnation proceedings the respondent stands solely upon the rights of the state to condemn private property for public use after compensation has first been paid, or deposited.

The above answers all the questions properly before this court.

For these reasons I dissent.

(95 S. C. 352)

MATHESON v. MARION COUNTY LUMBER CO.

(Supreme Court of South Carolina. July 14, 1913. On Petition for Rehearing, Aug. 1, 1913.)

LOGS AND LOGGING (§ 3*)—TIMBER DEED—CONSTRUCTION—"TILL"—"PER ANNUM."

Under a timber deed providing that the grantee should have ten years to cut and remove the timber and ten years thereafter "by payment of 6 per cent. per annum upon the purchase price, within the next ten years or till said timber has been removed," the grantee had no right to the timber remaining on the land after the first ten-year period where it had paid no interest; the word "till" implying continued action, and the words "per annum" meaning by the year, and hence the only way to keep alive the second ten-year term being by the payment of the prescribed interest by the year and not merely at any time during such term.

[Ed. Note.—For other cases, see Logs and Logging, Cent. Dig. §§ 6-12; Dec. Dig. § 3.*]

For other definitions, see Words and Phrases, vol. 6, pp. 5284, 5285; vol. 8, pp. 6971, 6972.]

Appeal from Common Pleas Circuit Court of Marlboro County; J. A. McCullough, Special Judge.

Action by G. D. Matheson against the Marion County Lumber Company. From judgment for plaintiff, defendant appeals. Affirmed.

Townsend & Rogers, of Bennettsville, and M. C. Woods, of Marion, for appellant. Stevenson, Stevenson & Prince, of Bennettsville, for respondent.

FRASER, J. The appellant makes the following very clear statement of his case: "On December 12, 1898, A. J. Matheson conveyed to Cape Fear Lumber Company the timber on certain lands. The deed of conveyance contained the following provision: 'The Cape Fear Lumber Company shall have ten years from the 30th of September, A. D. 1898, to cut and remove said timber, and if at the end of that time they have not removed said timber, then by payment of 6 per cent. per annum upon the said purchase price, within the next ten years or till said timber has been removed, they can have any and may take ten years longer to remove said timber.'

"On August 24, 1911, the plaintiff, G. D. Matheson, successor in title of A. J. Matheson, brought this action against Marion County Lumber Company, the successor in title of Cape Fear Lumber Company, for the removal of a cloud upon his title, alleging: 'That neither the Cape Fear Lumber Company nor its successors and assigns nor the defendant exercised the rights under said deed to cut and remove said timber, or any of the other rights granted therein, upon the tracts owned by the plaintiff, or upon the other tracts mentioned in said deed during the time limited; nor did they procure an extension of said term during its currency or at

all, and all rights which are purported to have been conveyed in said deed have determined and the said timber and easements have reverted and are now the property of the plaintiff.'

"The defendant demurred to the complaint on the ground that it did not state facts sufficient to constitute a cause of action in that it appeared from the face of the complaint that the time limit of the grant had not expired. His honor, Jos. A. McCullough, special judge presiding at the fall term of the court of common pleas for Marlboro county, overruled the demurrer, and the case now comes before this court on the exceptions set forth in the record to the decree of his honor.

"Argument.

"In reaching a conclusion as to the proper construction of the grant before the court, we first desire to call the attention of the court to the fact that the principles announced by the court in *Flagler v. Lumber Corporation*, 89 S. C. 328, 71 S. E. 849, and the other cases construing grants with wording similar to the wording of the grant in the *Flagler Case*, have no application whatever to the case now under consideration, and the principle for which we now contend in no wise conflicts with the principles already announced by the court in such cases. The question the court is now called upon to answer is when the interest money should be paid under the words: 'The Cape Fear Lumber Company shall have ten years from the 30th of September, A. D. 1898, to cut and remove said timber, and if at the end of that time they have not removed said timber, then by the payment of 6 per cent. per annum upon said purchase price, within the next ten years, or till said timber has been removed,' etc."

Appellant is correct in his contention that the intention of the parties as expressed in the instrument governs and that the province of the court does not extend to the reformation of improvident contracts but to the enforcement of such contracts as the parties have made. It must be remembered that the whole instrument must be considered, and, except in rare instances, one clause must not dominate the whole. If the rule was different, the appellant has not and has never had any right to the timber itself. The grant is, "timber ways, rights of ways, and easements." There is no grant of the timber itself in the granting clause and only when the instrument is considered as a whole and its intention liberally construed is there a conveyance of the timber. The appellant claims that it has ten years after the expiration of the original term in which to pay the interest, or the court must disregard the words "within the next ten years." In other words, appellant claims that it can pay interest at the rate of 6 per cent. per annum at any time within ten years from the date of the expiration of its

original term, and that extends the term for an additional term of ten years. If the contract had said "at the rate of 6 per centum per annum," another question would be presented. The contract does not say that. It says: "Then by the payment of 6 per cent. per annum * * * within ten years or till said timber has been removed." It is not claimed that the right to revive the contract extended beyond the additional ten years, yet if the removal was within the ten years, then the payment of interest was "till" removal. "Till" carries with it the idea of continued action, so that, if the removal was within the ten years, there must have been continuous payments of interest or the right to revive was gone. If the payment of the interest was not made within ten years, the right was gone. So that the only way to keep the second term alive was by the payment of 6 per cent. per annum, according to the contract. The demurrer admits that it has not been done. "Per annum" means "by the year." *Rapalje & Lawrence, Law Dictionary*. Now substitute the meaning and we have: "The Cape Fear Lumber company shall have ten years from the 30th of September, A. D. 1896, to cut and remove said timber, and, if at the end of that time they have not removed said timber, then by the payment of 6 per cent. by the year upon said purchase price, within the next ten years or till said timber has been removed," etc. So we see that the contract that these people made for themselves is a contract that requires a payment of interest by the year in order to keep alive the extended time.

The judgment overruling the demurrer is sustained.

HYDRICK and WATTS, JJ., concur.
GARY, C. J., concurs in result.

On Petition for Rehearing.

PER CURIAM. After a careful consideration of the matters both of law and fact set forth in the written petition, this court is satisfied that it has not overlooked any material matter of law or fact. It is therefore ordered that the petition be and the same is hereby refused and that the stay of the remittitur heretofore ordered be revoked.

(72 W. Va. 353)

SPRINKLE, Sheriff, v. BIG SANDY COAL & COKE CO.

(Supreme Court of Appeals of West Virginia.
April 29, 1913. Rehearing Denied
June 30, 1913.)

(Syllabus by the Court.)

1. MASTER AND SERVANT (§ 153*)—DUTY TO INSTRUCT AND WARN—ACTIONABLE NEGLIGENCE.

It is actionable negligence to employ a minor and place him to work at a dangerous

employment, without instructing him as to the dangers and how to avoid them.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 814-817; Dec. Dig. § 153.*]

2. MASTER AND SERVANT (§ 265*)—MINORS—APPRECIATION OF DANGER—PRESUMPTION.

A minor, over 14 years of age, is presumed to have sufficient capacity to appreciate the ordinary dangers attending his employment. But the presumption may be rebutted by proof of want of capacity.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 877-908, 955; Dec. Dig. § 265.*]

3. EVIDENCE (§ 478*)—OPINION EVIDENCE—INJURY TO MINOR.

Opinions of nonexpert witnesses, based upon frequent observations of, and conversations with, a person extending over a period of several months, are admissible to prove want of capacity.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 2242-2244; Dec. Dig. § 478.*]

4. MASTER AND SERVANT (§ 95½*) — MINE BOSS—AGENT OF MASTER.

A mine boss, authorized by the mine operator to employ men and assign them to working places, is pro tanto the agent of such operator.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 358; Dec. Dig. § 95½.*]

5. MASTER AND SERVANT (§ 151*)—INJURY TO MINOR—ACTIONABLE NEGLIGENCE.

A coal mining company, by permitting its mining boss to employ men repeatedly and assign them to places of work, thereby makes him its agent for that purpose; and, if such agent employs an infant, who does not appreciate the dangers of his employment, and fails to instruct him concerning the dangers and how to avoid them, it is negligence for which the company is liable.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 298; Dec. Dig. § 151.*]

6. MASTER AND SERVANT (§ 151*) — MINOR EMPLOYÉ — DUTY OF MASTER — ACTIONABLE NEGLIGENCE.

To see that an infant servant has sufficient capacity to understand the dangers of his employment, and to properly instruct him in regard thereto, is the master's nonassignable duty, the failure to perform which constitutes negligence for which the master is liable.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 298; Dec. Dig. § 151.*]

(Additional Syllabus by Editorial Staff.)

7. NEGLIGENCE (§ 122*)—CONTRIBUTORY NEGLIGENCE—BURDEN OF PROOF.

Contributory negligence is a defense which the defendant must prove if it does not appear from facts and circumstances proven by plaintiff.

[Ed. Note.—For other cases, see Negligence, Cent. Dig. §§ 221-223, 229-234; Dec. Dig. § 122.*]

Error to Circuit Court, McDowell County. Action by E. T. Sprinkle, Sheriff, etc., against the Big Sandy Coal & Coke Company. Judgment for plaintiff, and defendant brings error. Affirmed.

Anderson, Strother & Hughes and Stokes & Sale, all of Welch, for plaintiff in error. Strother, Taylor & Taylor, of Welch, and Ritz & Ritz, of Bluefield, for defendant in error.

WILLIAMS, J. Action by the administrator of Alexander Turner, deceased, to recover damages for his unlawful death, alleged to have been caused by the negligence of defendant. Verdict and judgment for plaintiff for \$10,000, and defendant obtained this writ of error.

Deceased, a boy 15 years old, was employed, with his father's knowledge and consent, as trapper in defendant's coal mine in one of the side entries in which the cars were drawn by mules. His father also worked in the same mine. Shortly before the fatal accident the father made a trip to Virginia and left his boy in charge of Mr. Abe Short, the mine boss, who, the father testifies, promised to take as good care of him as he would of his own boy. While the father was away the boy quit work for three or four days. When he returned to resume work, Abe Short was away attending court, and A. C. Williams, assistant mine boss, was filling his place. Williams thought the boy had quit work, and had employed another boy to trap at the place where deceased had been trapping, but he needed a trapper in the main entrance and employed the boy, and put him to work there. He had been at work only about three hours until he was killed. The cars are operated in the main entry with electric motors. No one saw just how the boy was killed. Mr. Williams was on the motor, to which were attached 17 loaded cars, and testifies that he saw the boy holding the door open and standing in a stooping position.

It was not known that he was killed until the motorman discovered, by the action of his motor, that something had gone wrong with his train. He stopped, went back to make an examination, and found that two cars were off the track, and that deceased's body was under one of them. There is evidence tending to prove that his body had been dragged from near the door to a point about 180 or 200 feet from it. When the train was stopped, the hindmost car was 150 or 160 feet from the door, and the car off the track nearest to the door was about 180 feet from it. The first appearance, near the track, indicating that a car had left it, was about 150 feet from the door. It thus appears that the trip had gone some 20 or 30 feet after the first car had left the track. It also appears that the boy was not killed by an electric shock, because the wire was on the opposite side of the cars from him. His sweater and shirt were found pulled off his body and turned inside out. Whether he was killed at the door, and his body thereafter dragged until it got under the car, causing its derailment, or his clothing caught on some part of the car and he was dragged and killed by the derailment of the car, does not appear. The evidence, however, is sufficient to warrant the jury in concluding that he

met his death in one or the other of those ways.

That the work of trapping where the boy was killed was more dangerous than in the side entry where he had previously trapped is also proven. The space between the cars and the wall of coal in the main entry was much narrower. A witness who measured it testifies that it was only 22 inches from the rail to the wall, and that the body of the car, including the brake, extended beyond the rail 12 or 13 inches. It also appears that the brake, on the side of the cars where the boy had to be to perform his work, extended beyond the body of the car 3 or 4 inches. The trip of cars was of greater length, and therefore more danger of a car leaving the track than there was in the side entry. The boy's father testifies that he trapped, at the place where the fatal accident occurred, for half a day when the regular trapper was away, and found it to be a dangerous place. He says there was not room to stand with safety and hold the door open while the trip was passing, and that, on the approach of the motor, he would prop the door open and then take refuge in a recess in the wall, about 100 feet away. Mr. Williams testifies that most other trappers who had worked there would do the same thing. But he says that some of them "were pretty reckless; didn't care if they stayed at the door, and I suppose this boy had seen them in going to his work, and he just done as they did."

Defendant offered no evidence and submitted its case upon a demurrer to plaintiff's evidence.

Three acts are averred in the declaration as constituting actionable negligence: (1) That defendant failed to furnish plaintiff's intestate a reasonably safe place in which to work; (2) that it negligently took him from the place where his father had consented that he should work, and put him to work at a more dangerous place; (3) that he was only 15 years old, and possessed less capacity than boys of that age ordinarily possess, and was put to work at a dangerous employment, without being instructed as to how to avoid the dangers incident thereto.

As to the first, the statute (section 11, c. 15H, Code 1906) makes it the duty of the mine boss to "keep a careful watch over the ventilating apparatus and the airways, *travelling ways*," etc. It was his duty to see that the entry was made of proper width for the safety of the mines. Recent decisions of this court, construing that statute, settle the question that the operator is not liable for injuries resulting from the failure of the mine boss to perform duties required of him by the statute. *Williams v. Thacker Coal & Coke Co.*, 44 W. Va. 599, 30 S. E. 107, 40 L. R. A. 812; *Squillace v. Coal & Coke Co.*, 64 W. Va. 387, 62 S. E. 446; *Bralley, Adm'r, v. Tidewater Coal & Coke Co.*, 66 W. Va. 278,

66 S. E. 684, 40 L. R. A. (N. S.) 1101, 19 Ann. Cas. 510; *Davis v. Mabscot Coal & Coke Co.*, 69 W. Va. 741, 72 S. E. 1030; and *Hellie v. Piney Coal & Coke Co.*, 70 W. Va. 45, 73 S. E. 289.

[1] The second and third counts are sufficient, and may be considered together. The law makes it the duty of the master to warn his infant servant of the dangers attending his employment, and to instruct him how to avoid them, unless he already fully understands them; or, unless they are so simple and obvious that it can be fairly presumed that one of his age, possessing ordinary capacity, fully appreciated them. *Ewing v. Lanark Fuel Co.*, 65 W. Va. 726, 65 S. E. 200, 29 L. R. A. (N. S.) 487; *Shaw v. Hazel-Atlas Co.*, 70 W. Va. 676, 74 S. E. 910.

Deceased had never trapped in the main entry before, nor is there any evidence that he was told that it was narrower and more dangerous than the side entry in which he had trapped. It is not proven that the dangers of the place were explained to him in such a way as to enable him to comprehend them. He was simply told to keep out of the way of the trip. Mr. Williams says, "I cautioned him to keep in the clear as much as possible of the trip." Perhaps he thought the boy had had experience as a trapper, and knew how to keep out of danger. But he was confronted with new and greater dangers than he had been accustomed to. It does not follow that, because he had had experience in trapping at another place, he fully appreciated all the dangers of the new place.

Counsel for defendant insist, however, that it is proven, by the father's own testimony that the boy was fully informed of the dangers of trapping in the main entry. Instructions are for the purpose of information; and, if he was already fully advised and cautioned, further instructions were not necessary. He would then be regarded as having assumed the risk, for the doctrine of assumption of risk applies as well to an infant as to an adult. It is only necessary that he should appreciate the danger in order to apply the rule. 1 Labatt on Master and Servant, § 291. True, the father does testify that he told his boy that it was dangerous in the main entry, and told him not to work there. But he does not say that he explained to him why, or in what particular, it was dangerous, or that he showed him how to avoid the dangers. Simply telling him that it was dangerous is not enough. It required instruction, explanation. He does say that he showed him how to keep away from the wires, in going in and out, but the wires were not the proximate cause of his death. He also says that they wanted his boy to trap in the main entry, and he would not consent to it; that he trapped there for a half day himself, and learned that it was dangerous.

[2] Being over the age of 14 years, it is

presumed that deceased had sufficient capacity to comprehend, and did comprehend, all the ordinary risks attendant upon his employment. *Wilkinson v. Coal Co.*, 64 W. Va. 93, 61 S. E. 875, 20 L. R. A. (N. S.) 331, and *Ewing v. Lanark Fuel Co.*, supra.

[3] This presumption may be rebutted by proof that he did not, in fact, have the capacity ordinarily possessed by boys of his age, to understand and avoid dangers. Two or three witnesses who had known the boy intimately for eight or nine months, testify that, in their opinions, he had less capacity than was ordinarily possessed by boys of his age. One of them says: "He seemed to be awful slow in understanding anything you would tell him." Their opinions were based upon observations of and conversations with the boy extending over a period of several months. Some of them saw him nearly every day during that time. That furnished a sufficient basis on which to rest their opinions. His capacity was a matter of which ordinary witnesses could judge. It was not a matter calling for expert testimony. Opinions of ordinary witnesses, based upon acquaintance and observation, is admissible, and the jury were the judges of its value. *Freeman v. Freeman*, 76 S. E. 657; *Laplante v. Warren Cotton Mills*, 165 Mass. 487, 43 N. E. 294; *Keyser v. Chicago, etc., Ry. Co.*, 66 Mich. 890, 83 N. W. 868. The jury were justified in believing, from the testimony in the case, that deceased possessed less capacity than boys of his age generally have.

[4, 5] It is insisted by counsel for defendant that it is not liable because they say it is not proven that Williams had authority to employ the boy. That he was employed and put to work in the main entry by A. C. Williams, assistant mine boss, is fully proven. If Williams had authority to employ servants and assign them work in the mine, defendant is liable, if such act is negligence, for he did not act as statutory mine boss in so doing, but was performing a duty of the master. It is not proven by direct evidence that he did have such authority. But it may be inferred from facts proven. *Ewing v. Lanark Fuel Co.*, supra; *Union Pacific Ry. Co. v. Fort*, 17 Wall. 553, 21 L. Ed. 739. Being a corporation, defendant was obliged to carry on its operations through agents. It is not to be supposed that a directors' meeting was necessary to employ men and assign them work. Some individual must have been invested with that power. It is proven that Mr. Short, the mine boss, had employed both the boy and his father, and had promised the father to let the boy work at a particular place and not elsewhere; that Mr. Short was not about when the boy returned to the mine after being off three or four days, and that A. C. Williams, assistant mine boss, was then in charge of the mine; that he employed deceased and assigned him to trap in the main entry; and that he had, prior thereto,

employed another boy to trap where deceased had been trapping. In view of these uncontroverted facts, the jury could properly infer that Williams was the agent of defendant, and acted for it in employing deceased and assigning him a place to work.

[6] Like the duty to furnish reasonably safe appliances, it is the master's nonassignable duty, especially to his infant servants, to instruct them in regard to the dangers incident to their employment. If Williams failed to perform that duty, and the jury were satisfied by the evidence that such failure was the proximate cause of the boy's death, then defendant is liable.

[7] Contributory negligence is a defense, and must be proved by defendant, if it does not appear from facts and circumstances proven by plaintiff. Defendant offered no proof, and the jury certainly had a right to conclude that deceased was not guilty of negligence.

The instructions, given at the request of plaintiff, are consistent with the law as herein expressed; and it was not error to refuse defendant's instructions which the court did refuse. We think the instructions given fairly presented the law of the case to the jury, and deem it unnecessary to discuss them seriatim.

The judgment is affirmed.

(72 W. Va. 662)

CARTER v. STOWERS et al.

(Supreme Court of Appeals of West Virginia.
June 24, 1913.)

(Syllabus by the Court.)

1. MUNICIPAL CORPORATIONS (§ 48*) — COMMISSION FORM OF GOVERNMENT—EFFECT AS TO POLITICAL ORGANIZATIONS.

The charter of the city of Bluefield, providing for commission bipartisan government, does not guarantee the existence of established political organizations, nor preclude the formation of new ones.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 127, 128, 130-133; Dec. Dig. § 48.*]

2. ELECTIONS (§ 180*)—PARTY ORGANIZATION—AFFILIATIONS OF VOTERS.

Voters may belong to one political organization for national and state purposes and another for municipal purposes.

[Ed. Note.—For other cases, see Elections, Cent. Dig. §§ 151-155, 157; Dec. Dig. § 180.*]

3. ELECTIONS (§ 180*)—VOTERS—PARTY AFFILIATION.

In an election under said charter, a voter may vote for the regular candidate of the Republican party, nominated by convention, and for the candidate of the Independent Republican party, nominated by petition, they being on separate tickets on the same ballot sheet, notwithstanding the latter filed an affidavit saying he was a member of the Republican party, claimed allegiance thereto, and had been nominated by petition.

[Ed. Note.—For other cases, see Elections, Cent. Dig. §§ 151-155, 157; Dec. Dig. § 180.*]

4. ELECTIONS (§ 180*) — BALLOTS — MODE OF VOTING.

Under said charter, authorizing any political party to nominate twice as many candidates for offices as can be elected to represent it in offices of the class for which they are nominated, a voter may validly vote for all the candidates on his ticket, and is not bound to vote for only part of the candidates on his ticket for a given office and the balance on some other ticket.

[Ed. Note.—For other cases, see Elections, Cent. Dig. §§ 151-155, 157; Dec. Dig. § 180.*]

Petition by E. M. Carter against S. Frazier Stowers and others. Writ awarded.

Sanders & Crockett and John R. Dillard, all of Bluefield, for petitioner. Ross & Kahle, of Bluefield, Vinson & Thompson, of Huntington, and D. M. Easley, of Bluefield, for respondents.

POFFENBARGER, P. At an election held in the city of Bluefield on the 6th day of May, 1913, for the election of city officers, under its charter providing for said city a commission form of government, Carter was the nominee of the Republican party for member of the board of affairs, J. B. Shumate of the Democratic party, J. R. Johnson of the Progressive party, Henry A. Lilly of the Independent Republican party, and A. Lynch of the Independent Democratic party; the first three of whom were regularly nominated by conventions of their respective parties, and the last two by petitions filed in accordance with the statute. As a result of the canvass of the votes, made on the 13th day of May, 1913, Carter had 927 votes, Shumate 925, Lynch 816, Lilly 762, and Johnson 239. As Carter and Shumate were the two candidates having the highest number of votes, both were elected to membership in the board of affairs, but, in order to determine which of them should be mayor, it became necessary to ascertain finally which of them had the highest number of votes. Accordingly Shumate, believing himself to have received the greater number of valid votes, demanded a recount, which resulted in a finding of 913 votes for him and 909 for Carter. This result was accomplished, in part, by rejecting 25 votes cast for Carter on ballots marked for Carter and Lilly, the regular Republican nominee and the nominee for the Independent Republican party, and by rejecting 10 votes cast for Shumate on ballots marked for Shumate and Lynch, the regular Democratic nominee and the nominee of the Independent Democratic party. This action was based upon the view that Carter and Lilly were both Republicans and Shumate and Lynch both Democrats, and therefore not entitled to the vote of any person on the same ballot. In other words, the canvassers were of the opinion that no voter could vote for both Carter and Lilly because they were Republicans, nor for both Shumate and Lynch because they were Democrats. The charter was con-

strued as inhibiting the voter from voting for two candidates representing the same political party, and ballots prepared in violation of this supposed limitation were treated as void for all purposes.

[1] We have just decided, in the case of *Peyton v. Holley et al.*, 78 S. E. 666, not yet officially reported, that a charter adopting a commission form of government for a city was not intended to secure the existence or continue the maintenance of the political parties in existence at the time of its adoption, nor to prevent the formation of new political parties by dissatisfied members of old ones. We have also decided that a new party may be organized under the name of an old one, qualified by some distinguishing word, such as "Independent."

[2] The distinction between party affiliation for national and state political purposes and party affiliation for municipal purposes, has also been marked. A voter may belong to one party for national and state purposes and another for municipal purposes. All this, however, is subject to the limitation of honesty and sincerity of purpose in the organization of such new party. And our conclusions in that case have not been changed in any manner by the argument submitted upon the hearing of this one.

In the matter of party nominations and recognition of political parties, these charters adopt the general state law. The Bluefield charter provides in section 10 thereof as follows: "Candidates to be voted for at any municipal election for members of the board of affairs and members of the council, may be nominated by convention, primary or petition, in the manner and under the provisions now or hereafter prescribed by state laws relating thereto." These laws prescribe the mode and manner of obtaining and holding a status as a political party and securing representation upon ballots as such to be used in elections. Since they are adopted for the purposes of commission government and elections under charters providing for such government, the ascertainment of the existence of a political party or organization and its character is governed by the same rules as are applied in ascertaining the existence and character of political parties for all other purposes, and when it has been ascertained and the existence of the party established, its rights in respect to representation in municipal offices are governed by the provisions of the charter.

[3, 4] The petition by the filing of which Lilly was nominated, signed by numerous voters, declared him to be the representative of the Independent Republican party. By virtue of this petition he obtained a place on the official ballot as a candidate under the party name adopted in the petition. Complying with a requirement of the charter, he filed with the city auditor an affidavit, dated April 18, 1913, saying he was a member of

the Republican party and claimed allegiance thereto, and had been nominated for member of the board of affairs by petition duly filed. No petition nominating him other than the one mentioned was filed. None nominating him as a candidate of the Republican party could have been filed, for that party nominated by convention, and did not nominate him. In an affidavit filed at the hearing of this case, he says he has always affiliated with the Republican party, did not participate in the Republican Convention, was afterward induced to run Independent and as a Republican, was nominated as such by petition, filed an affidavit declaring himself a Republican, and would have represented the Republican party, if he had been elected. He assigns as his reason for nonparticipation in the convention his inability conscientiously to support the man he knew would be nominated. This state of facts is relied upon as proving he was a candidate of the regular Republican party, notwithstanding his candidacy as the representative of a rival organization having a different candidate. He was unquestionably the nominee of persons opposed to the election of the regular Republican nominee. These two organizations must have represented different measures or policies of city government. They organized under a separate and distinct party name and nominated a candidate. Obviously there was no collusion between them, for they were vigorous antagonists. Lilly's affidavits manifestly mean no more than that he affiliates with the Republican party in national and state politics. The petition by which he was nominated fixed his status as a candidate for the purposes of the election in question, no collusion or fraud having been shown, and voters could legally vote for both him and Carter, under the interpretation of the charter as to a limitation upon the right of voters assumed by the board of affairs to exist.

And there is another avenue by which the same conclusion can be reached. The question presented differs from the one involved in *Peyton v. Holley et al.* Here both candidates are elected, and the votes in question are considered only upon an inquiry as to which of them shall be mayor by virtue of his reciprocity of the larger number of votes. The board of affairs deducted from the total vote received by Carter 25 votes on the assumption that the voters in casting them had voted for two Republicans for the office of member of board of affairs, instead of one Republican and one Democrat, or one Republican and a candidate of some other party. These ballots were treated as void and not countable for any person, because the charter, it is argued, does not permit a person to vote for two candidates of the same political party. There is no such express inhibition in it. For all that appears in its terms, a voter may vote for two candidates of the same political party, and it

permits a political party to nominate two candidates for each office it is entitled to fill as a winning party in the election. The argument assumes obligation on the part of a voter to vote for a candidate for that particular office on each of two tickets, because two offices, and only two, were to be filled by the election of two men from different political parties. The statute contemplates party representation, and permits any political party to nominate twice as many candidates as there are offices which it can fill. This provision may be designed to set party against party as well as candidate against candidate. If a Republican is permitted to vote for two Republican candidates and his vote can be counted, that gives his party an advantage over any other rival party, without deciding as between the two candidates of his own party, and he may wish to vote for two candidates of his own party in order to obtain that advantage, to the end that his party may prevail over its rival in the election. In so doing he may leave the matter of choice between the candidates of his party to be settled by other voters who have preferences as between them. In other words, the Legislature may have intended to afford opportunity to the voter to vote for only one candidate, and the voters of each political organization to settle among themselves the election of an officer from among their number, while the voters of other political organizations express their preference as between men of their party. At any rate, the Legislature has not expressed any intention to require a voter to vote for only one candidate of his party. If such intention is to be found in the statute, it is matter of implication. There are two offices to be filled in this instance, and though only one Republican or one Democrat, as the case may be,

can be elected to one of these offices, the contest goes beyond the individuals who are candidates to rivalry between the political organizations, and, if the voter sees fit to vote for two men of his own party, his vote so cast sustains his party against other political organizations, without expression of preference between candidates of the party, and is therefore not wholly lost. It has an effect, notwithstanding the inability of his party to put two of its members into the office. If this be the true construction of the statute, the 25 votes deducted from Carter's total of ballots cast for him were valid and countable for him, though it be conceded that Lilly was a Republican.

Shall we insert this inhibition or limitation in the statute as having been necessarily implied? It is not necessary to the maintenance of bipartisan administration. That is controlled by the rule governing selection of the officers from the candidates, after the election and others providing for division of patronage or appointive offices between the prevailing parties. The right of members of a party to vote for two of its candidates at the same time may be a valuable one, and highly necessary to the maintenance of party representation in office, as has been shown. The Legislature omitted this inhibition. Why did it do so? Presumptively because that body deemed it unnecessary for the accomplishment of the purpose of the act. If we insert it as something implied, we must find it is essential to the achievement of the legislative purpose, for only necessary implications can be adopted. Is it necessary? Not at all, for the reason already indicated. Under certain conditions, its tendency would be to defeat the legislative purpose, rather than advance it.

MILLER, J., absent.

(95 S. C. 356)

ROBERTSON v. WESTERN UNION TELEGRAPH CO.

(Supreme Court of South Carolina. June 12, 1913. On Petition for Rehearing, Aug. 2, 1913.)

1. TELEGRAPHS AND TELEPHONES (§ 73*)—TELEGRAM—DELAY—WAIVER OF OFFICE HOURS—QUESTION FOR JURY.

In an action against a telegraph company for delay in delivering a telegram, where the defense was that the message was sent after office hours at the place of delivery, *held*, under the evidence, to be a question for the jury whether it had waived the right to insist upon these office hours by habitually disregarding them.

[Ed. Note.—For other cases, see Telegraphs and Telephones, Cent. Dig. § 76; Dec. Dig. § 73.*]

2. TELEGRAPHS AND TELEPHONES (§ 48*)—AGENT—SCOPE OF EMPLOYMENT.

Though a telegraph agent violates instructions in receiving and transmitting telegrams after office hours, yet, in so doing he is acting within the scope of his employment, and his acts bind the company.

[Ed. Note.—For other cases, see Telegraphs and Telephones, Cent. Dig. § 30; Dec. Dig. § 48.*]

3. APPEAL AND ERROR (§ 1050*)—HARMLESS ERROR—ADMISSION OF EVIDENCE.

In an action against a telegraph company for delay in delivering a telegram, and its defense was that it was received after office hours, though it was error to admit evidence as to the reasonableness of the hours, it was harmless, where the issue was not whether they were reasonable, but whether they had been waived by habitual disregard of them.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1068, 1069, 4153-4157, 4166; Dec. Dig. § 1050.*]

4. APPEAL AND ERROR (§ 1004*)—REVIEW—EXCESSIVE VERDICT.

A verdict will not be set aside by the appellate court because excessive, unless it is so excessive as to manifest capriciousness or fraud.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3944-3947; Dec. Dig. § 1004.*]

5. TELEGRAPHS AND TELEPHONES (§ 71*)—ACTION—MENTAL SUFFERING—DAMAGES NOT EXCESSIVE.

A verdict for \$375 against a telegraph company for delay in delivering a telegram to a wife, relating to the sickness of her husband, is not so excessive as to show capriciousness or fraud.

[Ed. Note.—For other cases, see Telegraphs and Telephones, Cent. Dig. § 74; Dec. Dig. § 71.*]

On Rehearing.

6. TELEGRAPHS AND TELEPHONES (§ 38*)—TELEGRAM—DELAY—OFFICE HOURS—WAIVER.

Where the office hours of a telegraph station were fixed by the rules of the company from 8 a. m. to 6 p. m., the company cannot escape liability for delay in delivering a message received after office hours, if it had habitually disregarded the office hours.

[Ed. Note.—For other cases, see Telegraphs and Telephones, Cent. Dig. § 33; Dec. Dig. § 38.*]

7. TELEGRAPHS AND TELEPHONES (§ 74*)—TELEGRAM—OFFICE HOURS—INSTRUCTION.

Where, in an action against a telegraph company for delay in delivering a message, the

court charged plaintiff's request that, though the telegraph company had a regulation that its office should close at a certain hour, yet it may bind itself to deliver after closing time, by agreement, as there was no evidence of an agreement it was error to refuse defendant's request to charge that there was no evidence of such an agreement.

[Ed. Note.—For other cases, see Telegraphs and Telephones, Cent. Dig. § 77; Dec. Dig. § 74.*]

8. APPEAL AND ERROR (§ 1066*)—TELEGRAM—DELAY—INSTRUCTION—HARMLESS ERROR.

In an action against a telegraph company for delay in delivering a message, though it was error to charge that, even though the company had a regulation that its office should close at a certain hour, yet, it could bind itself to deliver, after closing time, by agreement, it was harmless, as there was evidence tending to show a general waiver of the office hours, and as the court stated in connection with the charge that the burden was on plaintiff to show such an agreement.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 4220; Dec. Dig. § 1066.*]

Appeal from Common Pleas Circuit Court of Edgefield County; S. W. G. Shipp, Judge.

"To be officially reported."

Action by Mrs. Sallie Robertson against the Western Union Telegraph Company. From a judgment in favor of plaintiff, defendant appeals. Affirmed.

John Gary Evans, of Spartanburg, and N. G. Evans, of Edgefield, for appellant. Thurmond & Nicholson, of Edgefield, for respondent.

GARY, C. J. This is an action for damages, alleged to have been sustained by the plaintiff, through the negligence of the defendant, in failing to deliver a telegram within a reasonable time.

The plaintiff and her husband lived at Ninety-Six, S. C., and worked in the factory. The husband went to Edgefield, S. C., on a bicycle, to visit his sister Mrs. Kate Waits, and becoming suddenly ill, sent the following telegram to his wife on the 17th of July, 1910: "I am sick; we will be home tomorrow on train." He failed to arrive at home on the 18th of July, and his wife, on that day sent to him the following message: "When will you be home?" And in reply thereto, Mrs. Kate Waits (in whose care the telegram was addressed) on the 18th of July, 1910, at 6 o'clock p. m., delivered to the defendant, for transmission the following telegram: "Jerry is on way on bicycle; left at ten." The said telegram was not delivered to the plaintiff until the next day at 10 o'clock a. m., July 19, 1910, and as the result of the failure to deliver the last-mentioned telegram, the plaintiff alleges that she suffered mental anguish from 7 o'clock p. m. of 18th July, 1910, until 10 o'clock p. m. of that day when her husband, Jerry Robertson, returned home. The defendant interposed the defense that its office hours at Ninety-Six for receiving and transmitting messages were from 8 o'clock in the morning until

6 o'clock in the evening, that the message was not delivered for transmission until the office hours at Ninety-Six had closed, and that the same was not received at said office, until next morning when it was promptly delivered. The jury rendered a verdict in favor of the plaintiff for \$375, and the plaintiff appealed, upon exceptions which will be reported.

[1] The first question that will be considered is whether there was any testimony tending to show that the defendant waived the right to insist upon the office hours, mentioned in the defense.

G. M. Wilson, a witness for the defendant, and who was its agent at Ninety-Six at the time hereinbefore mentioned, thus testified: "Q. You say your office hours were from 8 to 6? A. Yes, sir. Q. But as a matter of fact, did you not make it a custom to receive and deliver messages after that time? A. If any one would come along, we would do it; we would not do it for any one else. Q. As a matter of fact, if you will examine one of those telegrams here, you will see that it was received at 7:15, and sent at 7:16, and you stated that you all were in the habit of receiving and delivering messages after that time?

"Mr. Evans: He never said that.

"Mr. Nicholson: I am asking him.

"Q. Now, frankly, were you all not in the habit of receiving and sending messages after 6 o'clock? A. Any time we were in the office we would do it; I would; I have sent them at 4 o'clock in the morning. Q. And you state that at that time you were in the habit of receiving and delivering telegrams for people after 6 o'clock? A. We would do it.

"Mr. Evans: Q. State whether or not the mere fact that you occasionally transmitted or received a telegram, state whether or not that was in your official capacity as affecting your office hours? A. No, sir. Q. It did not? A. No, sir.

"Mr. Nicholson: That is a matter for the jury.

"The Court: Let him state what his rules were.

"Mr. Evans: Q. What were the rules that you observed as to the opening and closing of your office for Western Union business? A. From 8 a. m. until 6 p. m. Q. Were those rules promulgated by the company and observed by you? A. It is the 16-hour law that fixes it. Q. They are not allowed to work longer than 10 hours? A. Ten hours and not over 16. Q. That is fixed by law? A. That is what they told us. Q. And everything that you did after that was simply out of your own good heart? A. Yes, sir. Q. And an act of humanity on your part? A. Yes, sir. Q. If you were in your office, after the office was closed for business, and your door was closed, and some one came to you with a death message, what would you do? A. I

would send it. Q. You would try your best to send it? A. Yes, sir. Q. Would you think you were doing wrong, or would you think you were acting as humanity would dictate, to any one?

"Mr. Nicholson: We object to that.

"Mr. Evans: What you would do would not be required of the company, but as an act of humanity?

"Mr. Thurmond: That is a matter of opinion.

"The Court: He can say whether or not the rules of the company required him to do it.

"The Court: He has already said that the rules of the company did not require him to do it, but that he would send them.

"Mr. Evans: Counsel comes in and tries to show habitual custom; they charge that it was habitual; I am asking the witness these questions so that counsel can see whether he is leading the witness.

"The Court: He knows whether he did it in obedience to the rules of the company, or whether he did it on his own responsibility.

"Mr. Evans: Q. Would you do it merely as an accommodation? A. Yes, sir. Q. And was not required by the company? A. They could not force me. Q. When you sent them after that, in what capacity were you acting? A. In my own capacity. Q. And out of your own good heart, as any proper man would do? A. I was trying to use common sense.

"Mr. Nicholson: We object to that, and my friend knows it is not competent."

It will thus be seen that there was sufficient testimony to require the submission of the case to the jury upon this question, unless it should be held that the defendant was not liable for the acts of its agent in receiving and delivering messages after the regular office hours.

[2] The agent was unquestionably acting within the scope of his employment. Therefore, even if his acts were in violation of the telegraph company's instructions, this would not absolve it from liability. *Reynolds v. Witte*, 13 S. C. 5, 36 Am. Rep. 678; *Rucker v. Smoke*, 37 S. C. 377, 16 S. E. 40, 34 Am. St. Rep. 758; *Hutchinson v. Real Estate Co.*, 65 S. C. 75, 43 S. E. 295; *Mitchell v. Leech*, 69 S. C. 413, 48 S. E. 290, 66 L. R. A. 723, 104 Am. St. Rep. 811; *Williams v. Tolbert*, 76 S. C. 211, 56 S. E. 908; *Brown v. Telephone & Telegraph Co.*, 82 S. C. 173, 63 S. E. 744.

[3] The next question to be determined is whether his honor the presiding judge erred in allowing the plaintiff to introduce testimony as to the reasonableness of the office hours at Edgefield. In the first place, the circuit judge ruled that the question of reasonableness must be determined, with reference to the office hours at Ninety-Six, and not at Edgefield; and in the second place, even if there was error, it was not prejudi-

dial, as the vital question was not whether the office hours were reasonable, but whether they were *waived*.

The next assignment of error relates to the refusal of the circuit judge to charge the defendant's request that there was no evidence that the suffering of the plaintiff was the direct and proximate result of the defendant's negligence. The exceptions raising this question must be overruled, as the record shows that there was testimony tending to prove such fact.

[4, 5] The last question for consideration is whether there was error on the part of the presiding judge, in refusing to set aside the verdict on the ground that it was excessive. That is not a question for this court, unless the verdict was so excessive as to manifest capriciousness or fraud, which does not appear in this case.

These conclusions practically dispose of all the questions raised by the exceptions. Judgment affirmed.

HYDRICK, WATTS, and FRASER, JJ., concur.

On Petition for Rehearing.

PER CURIAM. This is a petition for a rehearing upon two grounds, which will be considered in regular order.

[6] First ground. The defendant in its answer interposed the following as a defense: "That the office hours of the defendant company at Ninety-Six for the conduct of business are from 8 o'clock in the morning until 6 o'clock in the evening, and if any delay occurred in the delivery of the message complained of, it was by reason of the fact that said message was not offered for transmission until after the office at Ninety-Six had closed, and the same was not received at Ninety-Six until next morning, and was promptly delivered." The allegation as to the office hours at Ninety-Six was put in issue, without a formal denial. The plaintiff introduced testimony for the purpose of showing that the defendant's office hours had been changed by waiving its right to insist upon them, on numerous occasions prior to the time when the message herein was delivered for transmission. The operator at Ninety-Six thus testified: "Q. Now, frankly, were you all not in the habit of sending messages after 6 o'clock? A. Any time we were in the office we would do it; I would; I have sent them at 4 o'clock in the morning. Q. And you state that at that time, you were in the habit of receiving and delivering telegrams for people after 6 o'clock? A. We would do it." If the office hours at Ninety-Six were thus changed, then the defendant could not escape liability by showing "that the office at Ninety-Six was closed at the time the message was filed in Edgefield for transmission; that the telegram never reached Ninety-Six until 8 o'clock Tuesday morning; that the undi-

puted testimony shows that the agent at Edgefield stated to Mr. Ouzts, the sender of the message, that the office hours at Ninety-Six were from 8 o'clock a. m. until 6 o'clock p. m., and that the message would have to lie over in Augusta, Ga., the relay office." It seems to us, that appellant's counsel has misconceived the object for which the testimony was introduced. It was not for the purpose of showing waiver, *in this particular case*, but that the office hours had been *previously* changed, in so far as the *general public* were concerned, by habitually disregarding them. The verdict shows that this fact was established to the satisfaction of the jury. This ground cannot be sustained.

[7, 8] Second ground. This ground is based upon the assumption that the court failed to consider the fifth and eighth exceptions. It is true these exceptions were not considered specifically, but the court in concluding its opinion said: "These conclusions practically dispose of all the questions raised by the exceptions."

The fifth exception was as follows: "In that his honor erred in charging the fourth request of plaintiff, to wit: 'If a telegraph company have a regulation that one or more of its offices shall close at a certain hour, yet it may bind itself to deliver, after closing time, by agreement'—the error being that there was no obligation, and no evidence tending to show an agreement on the part of the defendant to deliver the message after office hours, and the charge was responsive to no issue of law or fact in the case, and was prejudicial to defendant." In charging the said request his honor the presiding judge said: "Of course, I do not mean to express any opinion as to whether there was any agreement; if there was an agreement, you will have to find it from the testimony; if there is no evidence of any agreement, then that would not apply."

The eighth exception was as follows: "In that his honor erred in refusing to charge the ninth request of the defendant, to wit: 'I charge you that there is no evidence of any agreement, on the part of the telegraph company, to deliver the telegram sued upon in this case'—the error being that said request contained a correct principle of law applicable to the case, and the failure to charge it was prejudicial to the rights of defendant."

In regard to the ninth request his honor the presiding judge said:

"Now, as to the ninth request, they ask me to tell the jury that there is no evidence on a certain point. I do not remember what the testimony was; I cannot keep it all in my mind.

"Mr. Evans: Is that the one as to the agreement? The Court: Yes, sir.

Mr. Evans: That is just in reply to their request, and there was no such agreement.

"Mr. Nicholson: We submit there was such an agreement.

"The Court: I will decline this ninth request, because that is a question for the jury. I will tell the jury, when it comes to the question of an agreement to deliver the message out of office hours, it is incumbent on the plaintiff to show that there has been such an agreement, and unless the plaintiff shows you by the preponderance of the testimony that there was such an agreement, then you will have to ignore it; if you do not find any evidence of a special agreement to deliver it out of the office hours, just disregard that; and if you find that the telegram was received outside of office hours, the company is not bound to deliver it, except in office hours, unless the company made a special agreement to deliver it after office hours, or unless the company had waived the requirements as to office hours."

While there was no evidence of a special agreement as to this telegram, and the circuit judge erred in not so charging, yet we are satisfied that the error was not prejudicial, for the reason that, as we have shown, there was testimony tending to show a general waiver of the office hours. In view of this fact, and the explicit instructions above quoted, to the effect that the burden was on the plaintiff to prove such agreement, and that if she had failed to do so, or there was no evidence of it, the jury must disregard that contention, we are satisfied that the error was harmless.

It is the judgment of this court that the petition be dismissed, and the order heretofore granted staying the remittitur be revoked. Petition dismissed.

(95 S. C. 288)

McDANIEL v. GREENVILLE-CAROLINA POWER CO.

(Supreme Court of South Carolina. July 22, 1913.)

WATERS AND WATER COURSES (§ 176*)—DAMS—FLOWAGE—LIABILITY.

Under the statute authorizing the construction by a power company of a dam across the Saluda river, a person whose land was not injured by the construction of the dam but which was subsequently overflowed, due to the dam collecting sand and mud in the channel, could recover the damages thereby sustained, whether or not the dam was negligently constructed.

[Ed. Note.—For other cases, see *Waters and Water Courses*, Cent. Dig. §§ 237-243; Dec. Dig. § 176.*]

Appeal from Common Pleas Circuit Court of Pickens County; S. W. G. Shipp, Judge.

Action by Luvicy D. McDaniel against the Greenville-Carolina Power Company. From a judgment sustaining a demurrer and dismissing the complaint, plaintiff appeals. Reversed and remanded for new trial.

Ansel & Harris, of Greenville, for appellant. Haynsworth & Haynsworth, of Greenville, Carey & Carey, of Pickens, and H. K. Osborne, of Spartanburg, for respondent.

WATTS, J. This action was brought to recover damages. The complaint alleges that in 1907 the defendant power company erected across Saluda river a dam, which obstructed the natural flow of sand and water in the channel, causing the channel to fill with sand and mud, and thus causing the plaintiff appellant's land lying above the dam to be overflowed with mud, and sand, and water. There is no allegation that the dam was wrongfully or negligently constructed. The respondent interposed a demurrer to the complaint on the ground that the same did not state facts sufficient to constitute a cause of action, "in that the defendant was authorized by the statutes of this state to construct the dam in question across Saluda river, which is navigable at said point, and inasmuch as the complaint does not charge that the said dam was negligently constructed." His honor, Judge Shipp, sustained the demurrer and dismissed the complaint, and from this order appellant appeals, and by 11 exceptions questions the correctness of this ruling.

The first three exceptions question the correctness in holding that the acts of the Legislature of this state make Saluda river a navigable stream. These exceptions are overruled, as the acts of the Legislature declare Saluda river to be a navigable stream as far up as McElhaney ford (Act Dec. 16, 1797, 5 St. at Large, p. 322), and it is conceded that McElhaney's ford is several miles above the land alleged to be damaged. The other exceptions raise the question that the building of the dam, even under authority of the Legislature, did not excuse or exempt it from liability for damages to riparian landowners above the dam for injuries done to their land by reason of the erection of the dam, and that the Legislature only had the power over the stream to allow dams and locks built for navigation purposes, and that the respondent is a private corporation, engaged in the business of generating electric power for sale, and liable for all damages done to lands above it which naturally flow from the erection of the dam, even though the act of the Legislature authorizing the building of the dam did not provide for such compensation.

We think these exceptions should be sustained. The Legislature had the authority to authorize and allow the respondent to build the dam in question across Saluda river, which had been declared to be a navigable stream; but it had no right to give them the power to build the dam and exempt from liability to any landowners on the stream, either above or below the dam, that might suffer any injury to their property by reason of the erection of the dam, even though by authority of the state. They could only be permitted to put the dam across the river, and, if by so doing they injured any land-

owners on the stream, they should be required to respond in damages for such injury. If in the erection of the dam they exercised the highest degree of care, and were in no manner negligent, and conducted it in the most skillful manner, yet, if by the building and maintenance of the dam they injuriously affect their neighbors, they are liable in damages. In other words, the Legislature had the right to grant permission to erect the dam, and respondent had the right to build and maintain the dam, yet, if by so doing they injure landowners on the stream, and the erection and maintenance of the dam is the direct and proximate cause of the injury to the landowners, they must pay damage; otherwise it would deprive property holders of their property and take it from them without compensation, and would be unlawful, unjust, and contrary, not only to all law, but all reason and justice. It may be that when a dam is first built that it will not injuriously affect land some distance from it, and for a long time there will be no cause for them to complain, but when the pond, made by the dam, fills with mud, sand, trash, and other things, causes overflows and injury to lands, then the parties injured have a cause of action, if the building and maintenance of the dam is the direct and proximate cause of their injury.

The complainant in this case alleges that the water from this dam backed up on her lands, and overflowed them with water, mud, sand, and other deleterious deposits. The complaint states a good cause of action. The fact that respondent's act in building the dam was sanctioned by the state, and it did it under authority of law, and committed no fault in the erection of its dam, does not relieve it, if by so doing it injures or destroys other people's property without compensating them. I know of no law that will permit a corporation or an officer thereof, even though he is authorized by the state, to take the property of an individual for any purpose whatsoever, however beneficial it may be to the public or an individual without compensation; such pretended authority would be void and could afford no protection to any one. If the appellant has been injured as a natural result by the erection and operation of this dam, and the operation of the same is the direct and proximate cause of injury to her land, then she is entitled to such damages as would compensate her for such injury. My views are that it does not make any difference whether Saluda river is navigable or not, as the same rule of damages follows, as laid down in *Ward v. Ford*, 58 S. C. 560, 36 S. E. 916; and *White v. Manf. Co.*, 60 S. C. 265, 38 S. E. 456. When the dam in question was erected, the waters from the pond in no manner affected appellant's land. She was at that time in no manner affected, and could not foresee that later she would suffer damage, and, for that reason,

could not demand compensation for she then suffered no injury, and any claim made would have been conjectural and speculative on her part; but when she suffered injury from the erection and operation of the dam in question, then, and not until then, did a cause of action accrue to her, and not until then was she in a position to maintain an action. Any action brought by her until her rights were injuriously affected, or her rights invaded, would have been premature, and she would have had no status in court.

"The Legislature has no power under the Constitution to make over to any individual or corporation any right save those of the public, without securing a just compensation." *Lee v. Pembroke Iron Co.*, 57 Me. 481, 2 Am. Rep. 64.

"The rights of a riparian proprietor on a navigable stream are substantially the same as those attaching to riparian ownership on a nonnavigable water course, except that in some respects they are enlarged by the greater size and capacity of the stream, and that there are some additional privileges connected with its navigable character. Such an owner has the right of access to the navigable part of the stream from the front of his lot, and provided he does not impede or obstruct navigation to build private wharves, landings, or piers, or use the water of the stream for any purposes." 40 Cyc. 565, *Yates v. Milwaukee*, 10 Wall. 497, 19 L. Ed. 984.

"While a dam in a navigable stream, if authorized by the act of the Legislature, cannot be indicted as a public nuisance for obstructing the stream, still the act is no protection against injuries to a private owner." 8 Amer. and Eng. E. Law, 704.

"In the case of a private stream, no one would doubt the right of an injured owner to maintain an action for the damages suffered by him by reason of a change in the current. But one has no more right to injure another with the water of a navigable stream than with that of a nonnavigable, private stream." *Fulmer v. Williams*, 122 Pa. 191, 15 Atl. 726, 1 L. R. A. 603, 9 Am. St. Rep. 88.

"The right of the state to improve the stream as a highway and for the purpose of aiding its navigation is superior to the rights of the riparian owners. It may take and direct absolutely and without compensation so much of the water of the stream as may be required to improve its navigation. But that is the limit of its right." *Green Bay Co. v. Kaukauna W. P. Co.*, 90 Wis. 370, 61 N. W. 1121, 63 N. W. 1019, 28 L. R. A. 448, 48 Am. St. Rep. 937.

It was held in *State v. Columbia*, 27 S. C. 146, 3 S. E. 55, that the riparian proprietor had title to the soil covered by the stream as far as the center of the stream, subject to the right of the public to use of the stream for transportation as a highway,

when such streams are navigable or may be made so by the removal of obstructions.

To allow the respondent to escape paying compensation to the appellant, if appellant has been injured as she alleges in her complaint, would nullify and wipe out article 1, § 17, of the Constitution of 1895. We have no doubt that the respondent should be liable for all damages, if any, caused by the building of said dam, even though they were authorized to build. We think that the order appealed from should be reversed. We are of the opinion that the complaint alleges a wrongful trespass upon the lands of the appellant and invasion of her rights. The court of common pleas has jurisdiction to try such cases, and even where condemnation is the proper procedure, it is tried in that court, and an order must be first obtained from the resident circuit judge, and from the first finding appeal may be had to court of common pleas. We see no reason why the issues as made in this case cannot be tried in the court of common pleas, as in other cases of trespass and damages. The appellant alleges she has been damaged for the wrongful invasion of her property rights by the respondent, and demands damages as compensation. The respondent denies that she is entitled to compensation. The issues as made are simple and should be disposed of in the court of common pleas, without having to resort to the statute provided for condemnation proceedings. Appellant's counsel at the hearing stated that they did not care whether they had to seek damages under the condemnation statute, or proceed in the case, as made out by the pleadings in the court of common pleas. This court is of the opinion that even if appellant could have pursued the course granted by the statute in condemnation proceedings that remedy was not exclusive in this case, and appellant not necessarily limited to that remedy.

The judgment is reversed, and case remanded for new trial.

GARY, C. J., and HYDRICK, J., concur.

FRASER, J. I concur in the result. The act of incorporation gives a right of action for injury, not for negligence. The defendant cannot escape liability by pleading its own wrong in failing to condemn.

HYDRICK, J. The sole question made by the demurrer, and, therefore, the only question properly before this court is, whether the complaint failed to state a cause of action in failing to allege that defendant's dam was negligently constructed. The complaint was not demurrable for that reason, because the act authorizing the construction of the dam imposes upon the corporation liability for damages caused thereby to riparian owners. True, such liability is not imposed in

express terms, but it is by a necessary implication; if not, why was the power of condemnation conferred upon the corporation? And why was the express provision inserted in the act that any landowners should have the right to sue for and recover, even after condemnation, such damages as might thereafter accrue which were not considered or contemplated by the appraisers in condemnation proceedings? No doubt the Legislature had in mind the possibility, under the well-known natural law of running waters, that damages might accrue many years after the building of the dam, by the deposit of sediment in the bed of the stream and the consequent raising thereof, which could not be foreseen with reasonable certainty at the time of condemnation. Therefore, notwithstanding the authority to build the dam conferred upon the defendant by the statute, the plaintiff is entitled to compensation for any damage to her land caused by the dam.

It is unnecessary, therefore, to decide in this case, the other questions discussed in the opinion, and, as they are questions of some gravity, and, as they have not heretofore been decided by this court, I prefer to reserve my opinion.

The defendant should not be allowed to shift ground and contend here—a point not raised or decided on circuit—that the complaint is demurrable because the remedy by condemnation, afforded by the statute, is exclusive.

For these reasons, I concur only in reversing the order sustaining the demurrer.

(95 S. C. 245)

D. W. ALDERMAN & SONS CO. v.
McKNIGHT.

(Supreme Court of South Carolina. July 15, 1913.)

1. VENDOR AND PURCHASER (§ 131*)—SUFFICIENCY OF VENDOR'S TITLE.

A grant 80 years old to H., which covered part of land contracted to be sold, and which the vendor could not satisfactorily connect with her chain of title, was not such a defect as justified the purchaser's refusal to accept the title, where the vendor and those under whom she claimed had been in possession for 40 or 50 years without any claim being set up adverse to her or to other owners of land covered in part by such grant, and there was no one claiming land in the neighborhood by the name of H. or claiming through or under persons of that name, and the vendor had paid taxes on part of the land for more than 20 years and on the rest for almost 20 years, and had a receipt from the tax collector acknowledging full redemption of the land for back taxes.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. § 247; Dec. Dig. § 131.*]

2. ADVERSE POSSESSION (§ 104*)—TAX SALE—REDEMPTION—EFFECT.

Where property in the possession of defendant was advertised for sale for taxes, as land not regularly on the tax books, and, upon payment of taxes by defendant, the sheriff, who was acting for the state, gave a receipt acknowledging full redemption of the land for back taxes and restoring it to the tax duplicate

for the taxes for the following fiscal year, this was a relinquishment by the state of any claim that it might have, and a grant from the state would be presumed.

[Ed. Note.—For other cases, see Adverse Possession, Cent. Dig. §§ 595-602; Dec. Dig. § 104.*]

3. ADVERSE POSSESSION (§ 104*)—PRESUMPTION OF GRANT.

Twenty years' open and notorious possession with the payment of taxes raises a presumption of a grant from the state.

[Ed. Note.—For other cases, see Adverse Possession, Cent. Dig. §§ 595-602; Dec. Dig. § 104.*]

4. ADVERSE POSSESSION (§ 40*)—ELEMENTS OF TITLE BY ADVERSE POSSESSION.

Ten years' open, notorious, adverse, and exclusive possession ripens into a title as against parties other than the state.

[Ed. Note.—For other cases, see Adverse Possession, Cent. Dig. §§ 148-183; Dec. Dig. 40.*]

5. ADVERSE POSSESSION (§ 16*)—CHARACTER OF POSSESSION.

The law is not as strict as to what constitutes adverse possession of open, wild, unfenced, and uncultivated lands or lands not capable of cultivation as with regard to land capable of cultivation and so situated as to be capable of having the highest acts of possession exercised with regard to them; acts of adverse possession or ownership with regard to wild, open, unfenced land not capable of cultivation being only required to be exercised in such way as is consistent with the use to which the land may be put, and as the situation of the property admits of without actual residence or occupancy.

[Ed. Note.—For other cases, see Adverse Possession, Cent. Dig. §§ 82-89; Dec. Dig. § 16.*]

6. ADVERSE POSSESSION (§ 16*)—CHARACTER OF POSSESSION.

Where swamp lands were incapable of cultivation and could not well be used except for pasturage, fishing, and timber purposes, their use for such purposes was sufficient as adverse possession.

[Ed. Note.—For other cases, see Adverse Possession, Cent. Dig. §§ 82-89; Dec. Dig. § 16.*]

7. JUDGMENT (§ 707*)—CONCLUSIVENESS—PARTIES CONCLUDED.

In a suit for specific performance involving the vendor's title and boundaries, no finding could be made that would bind the rights of adjoining owners not parties to the suit.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. § 1230; Dec. Dig. § 707.*]

8. SPECIFIC PERFORMANCE (§ 131*)—DISPUTED TITLE.

Where in a suit for specific performance of a contract for the sale of land for a specified price per acre, which provided that the purchaser should take and pay for all the land that the vendor had good title to, where it appeared that a small triangle was claimed by an adjoining owner not a party to the action, the acreage of such triangle would be excluded without prejudice to the rights of the vendor or the adjoining owner therein.

[Ed. Note.—For other cases, see Specific Performance, Cent. Dig. §§ 426-435; Dec. Dig. § 131.*]

9. COURTS (§ 244*)—REVIEW—QUESTIONS OF FACT.

Where in a suit for specific performance the real issue submitted to the referee involved the title to the land in controversy, his findings of facts were not reviewable by the Supreme Court.

[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 733, 734, 737-740; Dec. Dig. § 244.*]

Appeal from Common Pleas Circuit Court of Clarendon County; R. E. Copes, Judge.

Action by the D. W. Alderman & Sons Company against Sarah A. McKnight. Judgment for defendant, and plaintiff appeals. Affirmed.

See, also, 74 S. E. 1108.

The report of J. S. Lesesne, as special referee, was as follows:

"Pursuant to an order of court, referring to me as special referee, to take testimony and report my conclusion of both law and fact in this action, I beg leave to report to the court that I have held a reference, including hearings, on three different days, at which were present the attorneys for the plaintiff and the defendant, and have taken a great deal of testimony, both oral and documentary, which I respectfully herewith submit as part of my report.

"On the 5th of November, 1910, Mrs. S. A. McKnight, the defendant, executed and delivered to the Manning Realty & Insurance Company, a corporation, her certain contract of agreement, obligating to convey to the Manning Realty & Insurance Company, upon certain terms mentioned in the contract, her Black River Swamp lands adjoining, or as part of, her plantation about two miles from the town of Manning. That contract contained the following stipulations: 'That Manning Realty & Insurance Company has bought said land for the sum of \$12.50 per acre cash, of which \$250 has been paid this day, and the remainder is to be paid as soon as the titles can be abstracted, and the land surveyed, and acreage ascertained, and deeds made. The Manning Realty & Insurance Company or its assigns shall take and pay for all of the land that Mrs. S. A. McKnight has good title to, and same shall be conveyed to it or its assigns by good and sufficient deed, with covenants of warranty and free from all incumbrances—the number of acres to be ascertained by a survey by two surveyors, one appointed by the said Mrs. S. A. McKnight and paid for by her, and the other appointed and paid for by the said Manning Realty & Insurance Company.' Subsequently the Manning Realty & Insurance Company transferred and assigned its contract to D. W. Alderman & Sons Company, the plaintiffs herein.

"A contention arose between the plaintiff and the defendant as to the validity of the title to some of the swamp land involved, and the plaintiff brings this action, claiming that the titles to only a portion of Mrs. McKnight's swamp land, that is to say, the portion lying in the swamp nearest the hill and adjoining her uplands, being something less than 200 acres, is good and marketable, and that the title to a portion claimed by her and lying farthest in the swamp, going to the center of the same, is not good and marketable, the plaintiff alleging in substance that

he is ready to take over and pay for, and comply with the contract as to that portion of the land to which she has good titles. There were also some allegations in the complaint to the effect that the defendant was withholding from the plaintiff certain information affecting her source of title, the plaintiff asking that the defendant be required to disclose her source of title to all of her swamp land in order that the court might pass upon the same, and require both parties to carry out the terms of their contract. However, in the course of the reference, the defendant seems to have produced whatever land papers she had, and to have disclosed whatever information she was in possession of concerning the titles to her swamp land, and this point not being urged in the reference I apprehend there is no further controversy on this question, and that the entire case is fully before me.

"The defendant put in her answer denying all of the allegations of the complaint inconsistent with the allegations and admissions which are set forth in her answer, and alleged that she is the owner in fee of 3,098 $\frac{3}{10}$ acres of swamp land, lying, being, and situate in the county of Clarendon, bounded on the north by lands of De Lane, D. M. Hudnal, W. E. Brown, W. H. Cole, and D. M. Bradham, the center of Black River Swamp being the line; bounded on the east by lands of B. W. Alderman and Sons Company and A. P. Burgess; bounded on the south by lands of the defendant; bounded on the west by Levi and Alsbrook; the said swamp land being more fully delineated on a plat made by R. M. Cantey and E. J. Smith, surveyors, dated January 7, 1911. The defendant further alleged that she had been in open, exclusive, notorious, and adverse possession of the said swamp land for more than 20 years, paying the taxes thereon and claiming the same as her own against all the world. She admitted the execution of the contract on the 5th of November, 1910, as set out in the complaint, and alleges that she is ready and willing to execute to the plaintiff her warranty deed conveying unto it the above-described tract of land in fee, upon the plaintiff complying with the terms of the contract; but that she, the defendant, is not willing to convey only a portion of the land covered by her contract and not all of it. The defendant further asks that she be adjudged by the court to be the owner of the above-described tract of swamp land, and that upon her executing her warranty deed, conveying said tract of land unto the plaintiff, that it be required to pay over to her the amount due under the contract as set forth in the complaint.

"Under the contract above mentioned, the plaintiff and the defendant appointed Mr. E. J. Smith and Mr. R. M. Cantey, two very competent surveyors, to ascertain the number of acres of swamp land involved, and as a

result of this survey the surveyors have made up a large plat, signed by them, under date of January 7, 1911, offered in evidence as Exhibit A. This plat, which will hereafter be referred to and known as the Cantey-Smith plat, is elaborately made, and shows all the contentions of the plaintiff and the defendant, and will necessarily play an important part in the settling of this controversy. This plat purports to show in dotted lines various old grants and plats covering portions of the McKnight swamp lands, which have been introduced in evidence; some of these old plats and grants being so old that it is hard to link them with any accuracy in the chain of title to the lands which they purport to cover.

"Referring to the Cantey-Smith plat, the plaintiff contends that the defendant has a good and marketable title to only that portion of swamp land which lies on the southern edge of the swamp, and which lies south of the dotted line F, A, G, H, I, and that it is willing to take over and pay for the swamp lands lying south of this line, but that it is not willing to take over and pay for that portion of the swamp land lying north of the line just above indicated; the same going to the center of the swamp. On the other hand, the defendant contends that she is the absolute owner and in possession of all the swamp land lying between the hills, or her uplands, and running in the swamp to the practical center thereof, indicated by heavy black line on the Cantey-Smith plat as line from D to E, and that the plaintiff should be required to take over, under the terms of the contract, her entire swamp holdings, running into this heavy black line D, E, comprising an area containing 398.2 acres.

"This case, ordinarily, is one to be passed upon by a jury, and while it is proverbially a saying that it is uncertain what a petit jury will conclude in finding a verdict, yet I believe it is an easy presumption as to what the verdict of a petit jury would be in this particular case, with the same lights before the jury that are now before me. I am satisfied that a jury would come to the conclusion that if the defendant were required to make over and convey to the plaintiff only that portion of her swamp lands to which the plaintiff admits she has good title, that is to say, the strip of swamp land lying adjacent to the hill and south of the line F, A, G, H, I, that this would be tantamount to saying that the defendant has no title to that portion of the swamp lying between the line F, A, G, H, I, and the center of the swamp, and that, this portion of land in the middle of the swamp being fit for practically nothing except the purposes for which it is now being bought, that is to say, for timber purposes, and being thus isolated in the middle of the swamp, it would be practically valueless, and she could then scarcely induce other purchasers to entertain the idea of purchasing the said lands. Under that condition of af-

fairs, I believe a petit jury would find that the defendant does own, and has been in possession of, and has a marketable title to, the swamp lands which she contends that she owns, that is to say, into the swamp as far as the center of the same.

"But while these facts are true, and while I believe this is what a jury would find under the given state of circumstances, and while it is my purpose to find practically what I believe would be the verdict of a jury in this case, yet I cannot afford to rest my findings upon the reasons mentioned above, and thereby subject my findings to the criticism of being based upon policy or expediency. I am of the opinion from all of the evidence adduced at the hearings that the defendant is entitled to, not in the minutest detail, but substantially to what she contends for.

"The defendant is in possession of her swamp lands, along with the uplands adjacent thereto, under deeds which she obtained from her father, the late W. R. Carpenter, who has been dead for 23 years or more. Numerous deeds and conveyances have been introduced in evidence showing chain of title and how the land came into the late W. R. Carpenter and into the defendant herself; but I do not apprehend there is any special contention over these facts, as the main question seems to be, How far do the lands of the defendant extend into the swamp? The testimony of the defendant and of her husband, who have resided on the place for more than 20 years, is that the late W. R. Carpenter claimed the center of the swamp as his line; that he exercised acts of ownership and possession on these lands before his death, by cutting timber therefrom for plantation purposes, by selling timber from the lands, by fishing on the same, and otherwise using the said swamp lands as was the custom of persons who owned lands situated upon the swamps and extending into and comprising a portion of the swamp itself. The testimony also is that since the death of the late W. R. Carpenter the defendant continued in possession up to the present time, and has continued to exercise acts of ownership, and that during all of these many years she has never heard of any claim or contention on the part of landowners on the opposite side of the swamp disputing or controverting in any way her claim of ownership.

[1] "The plaintiff introduced in evidence a copy of a plat attached to a grant to 1,000 acres of land granted to James E. Harvin on February 23, 1818, and marked Exhibit L. On the Cantey-Smith plat the surveyors have attempted and possibly with some accuracy to lay down and indicate, shown by blue lines, what lands are covered by this Harvin grant in 1818. The plaintiff contends that this old grant to James E. Harvin operates a cloud or defect upon the swamp lands which Mrs. McKnight claims to own, since it is not satisfactorily explained in the chain of title

how this land ever passed out of James E. Harvin or his heirs. It is true that this old Harvin grant, as indicated by the surveyors on the Cantey-Smith plat and shown under the blue lines, does cover practically all of the swamp lands claimed by Mrs. McKnight, and does cover nearly all of the swamp at that particular place, even going over and including the lands claimed and in possession of parties on the opposite side of the swamp. But notwithstanding the fact that neither the plaintiff nor the defendant have been able to link up or dispose of this old Harvin grant absolutely and fully from the standpoint of a thoroughly connected and well linked up chain of title, yet I am not disposed to attach any serious importance to this old Harvin grant, and for the following reasons: This old Harvin grant dates back to 1818, now more than 90 years ago. Conceding that the surveyors on the Cantey-Smith plat have accurately indicated under the blue lines the area covered by the Harvin grant, this shows that some of the lands, which the plaintiff concedes that the defendant has good title to, are also covered by this old Harvin grant. The testimony of the defendant is that she has been in possession and paying taxes for more than 20 years, and that her father before her, and from whom she acquired ownership and possession, had for many years, in fact as far back as she can remember, been in possession of this swamp land, even the portion on the south side of the center of the swamp which purports to be covered by the Harvin grant, and that during all these years no one has made any claim against her under the Harvin grant or otherwise, nor has she ever heard of any parties claiming under the old Harvin grant, either against herself or other parties on the opposite side of the swamp who are in possession of swamp lands included under the Harvin grant, just like her own lands. The testimony further is by the defendant that she does not know of any parties claiming any land in that neighborhood by the name of Harvin, or any other parties claiming through or under them, and this fact, together with the fact that she and her grantor have been in possession for the past 40 or 50 years, without any claim being set up adverse to hers, and coupled still further with the fact of the proceeding which I shall hereinafter mention, commenced by the state for the sale for taxes of a portion of this swamp land, it seems to me creates a legal and well-founded presumption that there are no parties by the name of Harvin, or no parties claiming under the old Harvin grant, who have or could set up any claim to the swamp lands in question in such a way as to materially affect the title of the defendant to her swamp lands.

"The defendant introduced in evidence a plat made by Junius E. Scott, surveyor, on February 22, 1890, in which the surveyor stated that he had made a resurvey of the

several tracts of land of the defendant, guided by old surveys of the same, and found that the several parcels of her land contained 1,025 acres. On this plat the surveyor shows the northern boundary or back line in the swamp to be the practical center of the swamp, and the defendant contends that she has been claiming all of the lands covered under that plat, and has been paying taxes on the same.

[2] "Some time about the year 1891 the state of South Carolina, through the sinking fund commission, and under act of the Legislature was surveying up and advertising for sale all of the lands in the state which were not, or supposed not to be, regularly on the tax books, and advertised for sale 192 acres of land in Black River Swamp; the same being a portion of the lands claimed by the defendant and covered under the Scott plat above mentioned. As a result of this advertisement, the defendant went to the sheriff of Clarendon county, who seems to have been acting for and on behalf of the state through and under the sinking fund commission, and paid the taxes on the 192 acres, upon which it appears that the taxes were not then being paid, and received a receipt which I will set out in full, as follows:

"Manning, S. C., January 2nd, 1892.

"Received of Mrs. Sarah A. McKnight thirty-two 64-100 dollars being seventeen cts. per acre on one hundred and ninety-two acres of swamp land in Manning Town ship—advertised as unknown lands for taxes for year 1889-90. Mrs. McKnight having titles to said land, but not having it on tax books as required by law. This is acknowledged as full redemption of said land for back taxes and restores the same to the tax duplicate for taxes fiscal year 1890-91. \$32.64. Dan'l J. Bradham, Sheriff Clarendon County."

"This 192 acres which the defendant was allowed to redeem from the state and pay the taxes on, together with the number of acres that she had been paying taxes on previous to that time, coupled together, make up the 1,025 acres shown upon the Scott plat of 1890, and which the defendant says she has been paying taxes on ever since that time. In fact the testimony of the defendant is that she has been in possession of all the lands covered under the Scott plat ever since the death of her father, now more than 20 years, and does not concede that she was ever out of possession of it. The fact that she paid to the state \$32.64 as taxes in 1892 does not seem to me in any way to weaken her title, but that rather this fact, coupled with the fact that she and her grantor having been in possession for many years prior to that time, strengthens her title, and the receipt which the state gave her must be taken as a relinquishment by the state of any claim that it may have had upon the land whatever; and that the state thereafter had no claim whatever, except for the payment of

her taxes in the future, and under this statement of facts it seems to me that a grant from the state must be absolutely presumed.

[3, 4] "It is a well-settled and statutory provision of law that 20 years' open and notorious possession with the payment of taxes presumes a grant from the state; and that 10 years' open, notorious, adverse, and exclusive possession ripens into a title as against outside parties. Under the testimony and under the presumptive grant on the part of the state, it seems to me that the defendant comes fully under the requirements of the law and has a title to the land to the practical center of the swamp.

[5, 6] "On the question of adverse possession my conception of the law is that the law is not as strict or as jealous as to what constitutes acts of adverse possession with regard to open, wild, unfenced, and uncultivated lands, or lands that are not capable of cultivation, as it would be with regard to lands that are capable of cultivation, or which are situated in some time capable of having the highest acts of possession exercised with regard to them; but that acts of adverse possession, or acts of ownership, with regard to open, wild, unfenced lands, lands not capable of cultivation, are only required to be exercised in such way and in such manner as is consistent with the use to which the lands may be put and the situation of the property admits of without actual residence or occupancy. The lands in question are all located in the heart of Black River Swamp: they are incapable of cultivation, and cannot well be used for any purposes except for pasturage and fishing and for timber purposes, and the testimony is that they have been used by the defendant and her grantor for more than 20 years in this manner and for these purposes. It seems to me that the facts, as well as the law, affecting this controversy are fully covered in the case of *Lewis v. Pope*, 86 S. C. 285, 68 S. E. 680.

"The dotted line B to C on the Cantey-Smith plat was put down by the surveyors as indicating the black line or northern line on the Scott plat, and which is presumed to have been located by Surveyor Scott as the center of the swamp. The defendant contends that she has been in possession of and paying taxes on the land in the swamp as far as this dotted line B to C. There is some slight discrepancy between the surveyors, that is to say, Surveyor Scott on the one hand and Surveyors Cantey and Smith on the other hand, as to what is the line of the exact center of the swamp, Surveyors Cantey and Smith locating the center of the swamp as being represented on the heavy black line D to E. This slight discrepancy or difference between the surveyors is a reasonable one under the circumstances, that is to say, in locating the center of a large, wide, and boggy swamp, the Scott center line and the Cantey-Smith center line crossing each other,

but not varying in any wide or important particular. For the purpose of this action, and as set out in the answer of the defendant, the defendant, as I understood it, does not contend tenaciously for the Scott line as being the absolute center of the swamp; but is willing for the center of the swamp to be located and established on the line D, E, as fixed by Surveyors Cantey and Smith. Taking the western end of this Cantey-Smith center line D, E, that is to say, where the same affects the northwestern portion of the defendant's swamp land, the Cantey-Smith center line falls slightly south of the Scott center line, and therefore concedes to the landowner on the opposite side of the swamp (that landowner being to us unknown in this action) a narrow strip which the defendant has been claiming and paying taxes on, so that there can be no trouble arising with that unknown landowner on the other side of the swamp if we adopt the Cantey-Smith center line as the northwestern boundary of defendant's land, or as affecting that portion of her swamp, running from west to east until we reach the tract located on the Cantey-Smith plat indicated as lands of W. H. Cole.

[7] "Of course, in determining the rights of the parties in this action there can be no finding that would bind the rights of other parties or other landowners on the opposite side of the swamp, unless they were brought in and made parties to this action. It does not appear that W. H. Cole, or any party under him, or any one else as the owner of the tract of land indicated on the Cantey-Smith plat as W. H. Cole, had been brought into this action, and therefore we cannot do anything that would affect the rights of the owner of that tract of land. However, the testimony of Surveyor Smith, who was a witness for the plaintiff, is that when he or Mr. Cantey made the survey, and located the line D to E as being the center of the swamp, they had with them, in making this survey, a plat to the W. H. Cole tract of land, made in 1910, and that the southern boundary of the W. H. Cole tract, as represented on that plat, is the same and coincides with that portion of the line D, E, on the Cantey-Smith plat, which is put down as being at that point the center of the swamp, and the dividing line between the lands of the defendant and the lands of W. H. Cole. Mr. Smith is a competent surveyor of long experience, and testified that he was familiar with Black River lands and has done a considerable amount of surveying in the swamp, and was familiar with the lands of parties in that vicinity. So that by adopting the Cantey-Smith line D, E, the same being the center of the swamp, as the dividing line between the lands of the defendant and the owner of the W. H. Cole tract of land, it will not affect the W. H. Cole tract of land, and the Cantey-Smith center line D, E, can well and safely be

adopted from the western end thereof running east as far as the southeastern corner of the W. H. Cole tract, that is to say, to a point which I have marked on the plat for the purpose of accurate location by the letter X in red ink. The letters X, P, Q, M, placed upon the plat in red ink, were not made by the surveyors, but have been put on the plat by me for the purpose of intelligent discussion and more accurate location of lines and areas.

"I therefore find, as a matter of fact, that the northern boundary of the defendant, Mrs. S. A. McKnight, indicated on the Cantey-Smith plat, is a heavy black line, put down as the center of the swamp, beginning at the letter D at the northwestern corner of the tract, and running east (slightly south of east) down to and as far as the red letter P, which I have indicated on the Cantey-Smith plat.

[8] "But in finding the correct line on the eastern side of the tract some slight complication arises. It will be noted that as to the land covered by the triangle included in the red letters P, Q, M, there is an overlap, and that this triangle appears to be also claimed, or covered in a tract on the opposite side of the swamp and put down on the Cantey-Smith plat in the name of Bradham. It is not known who the owner is of this tract indicated as Bradham, nor has any one been brought in as a party to the action as the owner of that tract of land. Therefore I am not warranted in making any findings that will affect the rights of the owner of this tract marked Bradham, and the little triangle indicated by the red letters and the lines P, Q, M, is excluded from my findings for the defendant in this action, without prejudice as to the rights of either the defendant or the real owner of the Bradham tract. I do not know how many acres are included in this small triangle, but the acreage appears to be small, and I recommend that the same surveyors, Messrs. Cantey and Smith, be called upon to compute the area or acreage comprised in this triangle P, Q, M, and that the same be deducted from the $398\frac{1}{10}$ acres contended for by the defendant.

"I therefore conclude from all the testimony and facts before me, and from what I conceive to be the correct law governing the case, that Mrs. Sarah A. McKnight, the defendant, is the owner and in possession of, and has a good and marketable title to, all of the Black River Swamp land adjacent to her home place, lying north of the uplands, and extending in as far as the practical center of the swamp; the northern edge of the said swamp land being indicated by a line on the Cantey-Smith plat, beginning at the western end at the letter D, and running the heavy black line to the red letter X; thence continuing the said line to the red letter P; thence continuing southwest on the dotted line to the red letter M; thence con-

tinuing slightly south of east on the heavy black line to the corner indicated on the Cantey-Smith plat by a holly tree.

"With respect to the western and eastern lines of defendant's tract, I also find that the western line, as indicated on the Cantey-Smith plat, begins at a "big poplar" at the southwestern corner of the swamp land, running north the heavy black line to the letter D; and that the eastern line of the swamp land, as indicated on said plat, begins at the southeastern corner, joining the A. P. Burgess land, at the "State XIII N M," and running north along the heavy black line to the holly tree.

"And I recommend that the contract be carried out between the plaintiff and the defendant with regard to the area or acreage included within the lines and boundaries that I have found.

"All of which is respectfully submitted."

Charlton Du Rant, of Manning, for appellant. Davis & Weinberg, of Manning, for respondent.

GARY, C. J. The facts in this case are thus stated in the decree of his honor, the circuit judge:

"The defendant in this action entered into a contract with plaintiff, assignor, to sell to it all of her swamp land to which she had a good title at \$12.50 per acre, the number of acres to be ascertained by two surveyors, and was paid \$250 in cash. Upon the survey being made, the plaintiff contended the defendant had a good and marketable title to only about 236 acres of swamp land, whereas the plat made up by the surveyors showed an area of $398\frac{2}{10}$ acres, practically within the lines claimed by the defendants. The plaintiff then brought this action, alleging its willingness to comply with its contract, and asking that the defendant be required to convey, as required by its contract. The defendant answered, alleging that she was the owner of $398\frac{2}{10}$ acres of swamp land, which she was ready and willing to convey by her warranty deed to plaintiff; but that she was unwilling to convey a part and not all of the swamp land to which she had a good title.

"The real issue then submitted to the referee was whether the defendant had a good and marketable title to all the land claimed by her, as shown upon the plat of the two surveyors, and the referee held several references and made a full and exhaustive report, in which he found that the defendant was the owner of practically all the land claimed by her and shown upon the plat of the surveyors, and recommended that upon the surveyors ascertaining the number of acres within a small triangle, and deducting that from the $398\frac{2}{10}$ acres, that the parties perform the contract with respect to the balance.

"The matter came on before me upon excep-

tions by the plaintiff to this report, and after hearing argument thereon I took the matter under advisement, and upon a careful reading of the testimony and consideration of the whole case I find that the referee is right in all of his findings and conclusions; that the defendant is the owner of, and in possession of, and has a good and marketable title to, all the Black River Swamp land adjacent to her home place, lying north of the uplands, and extending in as far as the practical center of the swamp. * * *

[9] The plaintiff appealed upon exceptions, several of which are based upon alleged errors in findings of fact, which are not subject to review by this court, as the real issue submitted to the referee involved the title to the land in controversy. All the other exceptions are overruled, for the reasons stated by the special referee, whose report was confirmed in all respects by his honor, the circuit judge.

Judgment affirmed.

WATTS, HYDRICK, and FRASER, JJ., concur.

(95 S. C. 276)

BISCHOFF et al. v. ATLANTIC REALTY CORPORATION.

(Supreme Court of South Carolina. July 24, 1913.)

1. WILLS (§ 533*)—CONSTRUCTION—TAKING PER STIRPES OR PER CAPITA.

The testator gave all of his real and personal property to his wife for life and after her death to be divided equally between their children, share and share alike, and provided in the following clause that, if any of the children should die and not leave any issue living, his or her share should be equally divided between the children "then living" or their issue; the issue, if any, to receive their parents' share. Held, that the provision that the issue were to receive their parents' share referred solely to the manner of distribution, and was intended to indicate that the share of a child dying without issue should be divided between the children then living and the issue of those then dead, per stirpes and not per capita.

[Ed. Note.—For other cases, see Wills, Cent. Dig. § 1147; Dec. Dig. § 533.*]

2. WILLS (§ 545*)—CONSTRUCTION—LIMITATION OVER ON DEATH OF DEVISEE DYING WITHOUT ISSUE—"THEN."

Construing such will in connection with Code 1912, § 3551, providing that, when an estate shall be limited to take effect on the death of any person without issue, such words shall not be construed to mean an indefinite failure of issue, but a failure at the time of the death of such person, the children took a fee defeasible on their death at any time without issue living at the time of the death, since "then" means "at that time," referring to a time specified, either past or future, and has no power to itself fix a time, but simply refers to a time already fixed, and in such will referred to the time of the death of such child.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 1171-1176, 1310-1318; Dec. Dig. § 545.*]

For other definitions, see Words and Phrases, vol. 8, pp. 6941-6946, 7815.]

Fraser, J., dissenting.

Appeal from Common Pleas Circuit Court of Charleston County; J. W. De Vore, Judge.

Controversy submitted without action between Albert Bischoff and others and the Atlantic Realty Corporation. Judgment for plaintiffs, and defendant appeals. Reversed.

The will involved was as follows:

"The State of South Carolina

"In the name of God, Amen.

"I, Albert Bischoff, of the city of Charleston, S. C., and state aforesaid, being of sound mind and memory, and considering the uncertainty of this frail and transitory life, do therefore ordain, publish and declare this to be my last will and testament in the following manner.

"Item 1st. I will and direct that my funeral expenses, and all my other just debts be paid immediately after my death, or as soon thereafter as it can conveniently be done, without making any unnecessary sacrifices for that purpose.

"Item 2nd. All the rest and residue of my real estate and personal property whatsoever, I give and bequeath unto my beloved wife, Anna Martha Bischoff; that is to say, to enjoy the income thereof, after tax, insurance and repairing of buildings is paid, during her natural life, for her and her children support and for the education of our beloved children, and after her death the whole real estate and personal property, to be equally divided between our beloved children, share and share alike, viz.: Anna Matilde, Albertine, now married to John Godfried Steenken in Brooklyn, Julia Wilhelmine, Martha Caroline, Anna Matilda Sophia, Carl William, John Godfried, and also if we should have any more born after this my last will and testament is made, all shall share alike.

"Item 3rd. In case any of our children should die, and not leaving any issue living then his or her share or part, shall be equally divided, between our children then living, or their issue share and share alike, the issue if any are entitled and receive the parent part.

"Item 4th. It is my will that my executrix and executor hereinafter named keep together my real estate, and rent or lease the same to the best advantage, and use the same or the net proceeds as hereinabove stipulated.

"Item 5th. It is my will in case my dear wife, the said Anna Martha Bischoff, should be dissatisfied with the written stipulation of disposition of my estate, she shall have the full power and right to waive and relinquish her claim stipulated herein, and when that is done to have her full claim to her dower in or to said property according to the statute and regulation and law of the state of South Carolina, which the judge of the probate will then decide in Charleston, S. C.

"Item 6th. It is my will that my executrix and executor shall invest my personal property in real estate, bond or mortgage, or other good security, according to their own best

judgment, excepting household furniture, my dear wife has the full right and power to do with it as she may like best.

"Item 7th. I nominate, constitute and appoint my dear wife, Anna Martha Bischoff, my executrix, and John Godfried Steenken my executor, of this my last will and testament, in witness whereof I have hereunto set my hand and seal at Charleston, S. C., April (25th) twenty-fifth (1873) eighteen hundred and seventy-three.

"Albert Bischoff. [L. S.]

"Signed, sealed and delivered in our presence and at his particular request and in the presence of each other in the year and month above mentioned, have signed our names as witnesses thereto.

"O. Lillenthal.

"O. Tiedeman.

"John C. Tiedeman."

Nathans & Sinkler, of Charleston, for appellant. George F. Von Kolnitz and Ficken & Erckmann, all of Charleston, for respondents.

GARY, C. J. This is a controversy without action, under sections 413 and 414 of the Code of Procedure, for the purpose of determining whether the plaintiffs, who entered into an agreement with the defendant to sell the land described in the complaint, have such a marketable title as the defendant is bound to accept.

[1, 2] Albert Bischoff departed this life, leaving of force his last will and testament, the second and third items of which are as follows:

"Item 2nd. All the rest and residue of my real estate and personal property whatsoever, I give and bequeath unto my beloved wife, Anna Martha Bischoff, that is to say, * * * during her natural life, * * * and after her death the whole real and personal property, to be divided equally between my beloved children, share and share alike, viz.: [Naming them.]"

"Item 3rd. In case any of our children should die, and not leaving any issue living then his or her share or part, shall be equally divided, between our children then living, or their issue share and share alike, the issue if any are entitled and receive the parent part."

The question submitted to the court was: "Whether or not, under the terms of said will, the testator intended the first clause in item third to mean in case any of his children should die at or prior to the time of the death of the life tenant, or whether or not he intended the said clause in said item to provide in case any of his children should die at any time and not leaving issue, etc., and whether or not, under the terms of said will, the plaintiffs in this case (who survived the life tenant) have a fee-simple title."

His honor, the presiding judge, in concluding his decree, thus ruled: "Taking, there-

fore, the will as a whole, and endeavoring to make all portions of same consistently harmonize, I think it was the intention of the testator in item third to provide for the contingency of any of his children dying prior to the time of distribution, to wit, the death of the life tenant, and I so hold." The defendant appealed, and said conclusion is assigned as error.

Section 3551, Code of Laws (1912), and known as the act of 1853, is as follows: "Whenever * * * in any will of a testator, hereafter dying, an estate, either in real or personal property, shall be limited to take effect on the death of any person without heirs of the body, or issue, or issue of the body, or other equivalent words, such words shall not be construed to mean an indefinite failure of issue, but a failure at the time of the death of such person."

The words "the issue if any are entitled and receive the parent part," refer solely to the manner of distribution, and were intended to indicate that the share of a child dying without issue should be divided between the testator's children then living and the issue of testator's children then dead, per stirpes and not per capita.

The third section of the will must be read as if the provisions of section 3551, Code of Laws (1912), were incorporated in it, which would then read as follows: "In case any of our children should die, and not leaving any issue living at the time of the death of such person, then his or her share or part, shall be equally divided between our children then living, or their issue, share and share alike, the share of a child dying without issue living at the time of the death of such person, to be divided between the testator's children then living, and the issue of the testator's children then dead, per stirpes and not per capita." The court thus construed the word "then," in *Mangum v. Plester*, 16 S. C. 316: "The word, as an adverb, means 'at that time,' referring to a time specified, either past or future. It has no power in itself to fix a time. It simply refers to a time already fixed. The question here is, What time do the words 'dying without issue' unqualifiedly fix? Do they fix an indefinite period when there shall be no issue, or do they fix a definite period, to wit, the death of W. B. Griffin? They must have been used with reference to one or the other, and, having been thus used, the adverb *then* following them would refer to the one or the other as their proper construction might indicate as the time intended. To assume that the use of the word would, in itself, fix a certain time and then refer to it would be giving it a double significance, of which it is not susceptible." The only reasonable construction of the word "then" in the third clause of the will is that it had reference to the words "dying without issue living at the time of the death of such person,"

thus precluding the idea that it had reference to dying without issue in the lifetime of the life tenant.

The leading case upon which the respondents rely is *Vidal v. Verdier*, Speers, Eq. 402, in which the devise was as follows: "I give, devise and bequeath unto my beloved wife, Sarah Bennett, the use of all and singular my estate, both real and personal, whatsoever and wheresoever, during her natural life; and after the death of my beloved wife, Sarah Bennett, I leave to my nephew, James Felix Vidal, the whole of my estate, both real and personal; but in case of the death of my nephew, James Felix Vidal, without his leaving a lawfully begotten child, or children then and in that case, the whole, both real and personal, be divided among the rest of my nephews and nieces, share and share alike. And be it further understood, that in case of the death of my nephew, James Felix Vidal, leaving a lawfully begotten child, or children, then and in that case, the whole property, both real and personal, shall be divided between them, share and share alike." The last sentence thereof is what specially distinguishes that case from the one now under consideration.

The case of *Vidal v. Verdier*, Speers, Eq. 402, was thus explained by Chancellor Harper, who wrote the opinion in that case, in *Yates v. Mitchell*, 1 Rich. Eq. 265: "That case was decided on this principle: That, when a testator, giving in remainder after an estate for life, uses one set of expressions denoting that the remainderman is to take an absolute estate, and another set of expressions limiting him to an estate for life, with remainder to his issue, and a limitation over in the event of not having issue, this apparent repugnancy may be reconciled by restricting the dying without issue to the lifetime of the tenant for life, thus permitting every part of the will to have its proper effect. If he dies during the lifetime of the tenant for life, leaving issue, the issue will take as purchasers under the will, if without issue, the limitation over will have effect; but if he survives the tenant for life the estate is absolute. Such is in every case a reasonable and probable intention; and in that case there were circumstances to satisfy me very fully that such was the actual intention."

He then proceeds as follows to show the difference in the case then under consideration and that of *Vidal v. Verdier*, Speers, Eq. 402: "But this has nothing to do with the case before us, though in another and peculiar sense, different from that in which the words are used in *Vidal v. Verdier*; the devisee in one event is said to be restricted by the terms of the will to a life estate. It enters into the very definition of an executory devise; that a fee simple or absolute estate may be given, with a provision that it shall determine and go over on a

future contingency—most commonly, the contingency of dying without leaving issue; and this is what is very clear in the present instance. The testator devises to his children, 'their heirs, executors, administrators, and assigns forever.' He gives an absolute estate, and an absolute estate only; though, to be sure, it may be said that in one event it turns out to be no more than a life estate. In a sense still somewhat different, every man may be said to have only a life estate in any of his property. *In the present case, if the devisee had left issue, his estate would have been absolute so that he might dispose of it at his pleasure to his issue or any one else. In Vidal v. Verdier, on any other construction than that which was adopted, he could have had an absolute estate in no event whatever.*" (Italics added.)

In *Marshall v. Marshall*, 42 S. C. 436, 20 S. E. 298, the court had under consideration the will of John Marshall, which contained these clauses: "3rd. I leave to my beloved wife her lifetime the plantation whereon I now reside." * * * "6th. I give to my beloved sons Wm. K. and John W. Marshall at the death of my wife the residue of my land being the plantation whereon I now live commencing at the Hickory corner mentioned in Robert's track to extent of my land boundary west of the Potter road, the same to be equally divided between them, giving John the side next W. W. Bell's with these considerations, that each one pay to me or my executor the sum of sixteen dollars yearly commencing on the first of Jan. 1849, for the support of myself and wife during my lifetime and the lifetime of my wife should she outlive me they refusing to comply with said terms forfeit so much out of the said lands so given them and by their compliance I give said parcels of land to them and their heirs forever." * * * "11th. Should my son John W. Marshall die leaving no children to inherit the land left him by me at his death it is my desire and I leave it as my will that the parcel of land so left him by me be sold and the proceeds be equally divided between my son Samuel and my three daughters Mary, Susan and Sarah or their heirs."

Chief Justice McIver, who delivered the opinion of the court, thus states the question then under discussion: "The practical inquiry is whether the testator intended, by the words which he has used in the eleventh clause of his will, that the fee previously given to John W. Marshall by the sixth clause of the will should be defeated by his death without children during the lifetime of the widow, or by his death without children at any time when that event should occur; for both parties concede, and the circuit judge so holds, that John took a fee defeasible upon the happening of one or the other of said contingencies."

He then proceeds as follows to comment on the cases of *Vidal v. Verdier*, 1 Speers, Eq.

402, and *Yates v. Mitchell*, 1 Rich. Eq. 265: "In *Yates v. Mitchell*, 1 Rich. Eq. 265, the testator gave one moiety of the annual income of his estate to his wife for life, and the other moiety to his children during the life of his wife, and then provided that after the death of his wife his estate should go to his children in fee, 'and should any of my said children die without leaving lawfully begotten issue, living at the time of his, her, or their death, then the share or shares in my estate of such child or children, so dying as aforesaid, shall go to the survivor or survivors of my said children, and to the issue of such of my said children as may have previously died.' It was contended that upon the death of the widow the estate of a child who survived her became absolute, and the case of *Vidal v. Verdier*, supra, was relied upon to support that view; but the court held that that case did not apply, and upon the death of any of the children, at any time, without issue, the share of the child so dying would go over to the survivors. It seems to us that *Yates v. Mitchell* is much more like the present case than *Vidal v. Verdier*."

After quoting the language of Chancellor Harper in *Yates v. Mitchell*, 1 Rich. Eq. 265, explanatory of *Vidal v. Verdier*, Speers, Eq. 402, he then says: "It is very obvious that the case of *Vidal v. Verdier* thus explained cannot control the present case. For here there are not two sets of expressions, one denoting that John W. Marshall was to take an absolute estate, and the other limiting him to an estate for life, with remainder to his issue, and a limitation over upon failure of issue. On the contrary, it is clear that John W. Marshall by the sixth clause took an estate in fee simple, after which there could be no remainder to his issue; but by the operation of the eleventh clause such fee became defeasible upon his death without children, whenever that event might happen. *Carson v. Kennerly*, 8 Rich. Eq. 259; *Thomson v. Peake*, 38 S. C. 440 [17 S. E. 725]. The case of *Blum v. Evans*, 10 S. C. 58, resting mainly, if not entirely, upon *Vidal v. Verdier*, need not be considered."

In the case of *Mangum v. Piester*, 16 S. C. 316, Chief Justice Simpson, who delivered the opinion of the court, used the following words, after quoting the explanatory language of Chancellor Harper, in *Yates v. Mitchell*, 1 Rich. Eq. 265, in regard to the doctrine announced in *Vidal v. Verdier*, Speers, Eq. 402: "But he said, further, that this had nothing to do with the case he was then discussing, because in that case there was not a double set of expressions, indicating different estates conveyed, as in *Vidal v. Verdier*."

These authorities clearly establish the doctrine that unless there are two sets of expressions, one denoting that the remainderman is to take an absolute estate, and an

other set of expressions limiting him to an estate for life *with remainder to his issue*, and a limitation over in the event of his not having issue, the rule announced in *Vidal v. Verdier*, Speers, Eq. 402, cannot be successfully invoked, as it was only intended to be applied when there was a necessity to reconcile the apparent repugnancy by restricting the dying without issue to the lifetime of the tenant for life, and thereby permitting every part of the will to have its proper effect.

In the case of *Vidal v. Verdier*, Speers, Eq. 402, James Felix Vidal was given an absolute estate after the death of the life tenant. It was subsequently provided that, if he died without leaving a lawfully begotten child or children, then and in that case the whole property, both real and personal, be divided among the rest of his nephews and nieces, share and share alike. So far no valid objection could be urged to the provisions of the will, as it is not an *inconsistency*, but only an instance of that which commonly arises when an executory devise or a contingent or substitutional limitation is created. A different principle, however, prevails when there is a repugnancy between those provisions giving a fee in the first instance, and those subsequent provisions which destroy it, or cut it down to a life estate. The will subsequently provided that, in case of the death of James Felix Vidal, leaving a lawfully begotten child or children, then and in that case the whole property, both real and personal, was to be divided between them, share and share alike. It will thus be seen that if he died without issue the property was to go to others, and that if he died leaving a child or children the property was to go to them. Therefore it was certain that he could not, in either event, enjoy more than a life estate. It was with a view of reconciling this repugnancy that the court in that case restricted the dying without issue to the lifetime of the tenant for life.

In the case of *Marshall v. Marshall*, 42 S. C. 436, 20 S. E. 298, the will did not provide that the property should go to the issue of John W. Marshall, and this is the distinguishing feature between that case and *Vidal v. Verdier*. The case under consideration comes within the doctrine announced in *Marshall v. Marshall*, supra.

We proceed lastly to consider the case of *Blum v. Evans*, 10 S. C. 56, in which the provisions of the will were as follows: "I give to my beloved wife my entire estate, real and personal, during her lifetime, under the control and management of John Horlbeck and G. W. Dingle, as trustees, substitutions to be made by the court and approved of by the parties interested. I wish my wife to enjoy this estate during her life; at her death to go to my daughter, Emma Julia. Should my daughter die without issue, I wish my entire estate to be divided equally among the Horl-

becks (my wife's family) and the Blums (my family), one-half to the Horlbecks, one-half to the Blums." It will thus be seen that the facts were similar to those in *Marshall v. Marshall*, 42 S. C. 436, 20 S. E. 298, and not to those in *Vidal v. Verdier*, Speers, Eq. 402, in this important particular, to wit: That if the testator's daughter, Emma Julia, to whom he gave an absolute estate in the first instance, had issue living at the time of her death *the property was not to go to such issue*. There was no express words conferring such right upon the issue, nor was that a case in which they could take by implication. *Shaw v. Erwin*, 41 S. C. 209, 19 S. E. 499. The doctrine announced in *Vidal v. Verdier* was therefore incorrectly applied in *Blum v. Evans*.

While, as already stated, the facts in the last-mentioned case were similar to those in *Marshall v. Marshall*, and entitled the parties to similar relief, the conclusions were different. We must therefore regard the case of *Blum v. Evans* as practically overruled by *Marshall v. Marshall*, which was a later case.

Judgment reversed.

HYDRICK and WATTS, JJ., concur.

FRASER, J. (dissenting). I cannot concur in the opinion of the majority of the court in this case, and would not do so unless I felt impelled by indisputable authority. I think that the circuit decree ought to be affirmed upon the authorities and for the reasons therein stated.

It would not be profitable to compare the cases and review them all. While it is true that certain words have received judicial construction, yet it is a rule which is applicable to the construction of every will that the intention of the testator shall govern. I know that the word "intention" is a term of art, and signifies the meaning of the words there used, and does not refer to the purpose which the testator may have had in his mind. Applying this fundamental rule of construction, the question is, What estate is given to the children of Mr. Bischoff in his will? Without attempting to cite the will in full, which will appear in the case, and to which reference can easily be made, we find that he provided in the first clause of his will for the payment of his funeral expenses and just debts. In the second clause of his will he gives all of his property to his wife, not merely to his wife, but to the individual, Anna Martha. She is to hold the property during her natural life for her and "our" children's support, and for the education of our beloved children, and after her death the whole real estate and personal property to be equally divided between our beloved children, share and share alike. The children do not take as a class, but he names them, Anna Matilde, Albertine, Julie Wilhelmine, Martha Caroline,

Anna Matilda Sophia, Carl William, John Godfried, and then he provides in general terms for any other children who might thereafter be born. Up to that point the children unquestionably take a fee in remainder. Unfortunately he adds item 3, in which he says: "In case any of our children should die, and not leaving any issue living then his or her share or part, shall be equally divided, between our children then living, or their issue share and share alike, the issue if any are entitled and receive the parent part." Item 4 provided that the estate shall be kept together. Item 5 provides that if the wife, Anna Martha, should be dissatisfied with the provision he had made for her she could then, at her option, take her share under the statute. Item 6 provides that the executrix and executor "shall invest my personal property in real estate, bond or mortgage, or other good security, according to their own best judgment." If there is anything clear in this will, it is that Mr. Bischoff loved the persons named, and, with the highest sense of conjugal and parental love, attempted to provide for the specific objects of his bounty, and he calls them by name.

The opinion of the majority of this court, while not depriving the widow of her advantage, almost absolutely destroys the interests of the children. The children, it is held, take a fee defeasible upon their dying without issue. The issue of the children take a fee. Mr. Bischoff provided that the income from his estate shall be used for the education and support of his children. The unknown grandchildren take the property itself. The children whom he knew by name and loved will be entitled to their bare support after they have received their education. They are entitled to their support and nothing more until the day of their death. The estate can never vest in them, can never be subject to their control, and upon the judgment of the executor or executrix as to what is a reasonable amount for their support they must depend.

The circuit decree misquoted section 3. It does not say: "In case our children should die not leaving issue"; it says: "In case our children should die and *not* leaving issue." Our children will die, every one of them. There is no contingency about that. There *was* a contingency as to whether our children, all or any of them, would die before the life tenant.

It seems to me that as the time for distribution is fixed at the time of the death of the life tenant, and there are no restrictions upon their taking, those who take take a fee. It is conceded that the word "then" refers to the time fixed. The only time fixed in the whole will is the time of the death of the wife. Now substitute for the word "then" the fixed time we have: If any of our children be dead, at the time of the death of

my wife, the issue, if any, shall take; if there be no issue of a predeceased child, then those who survive my wife shall take, the issue of a deceased child to represent the present. What estate shall they take? The will is silent, and the statute says a fee. By this construction the issue of children take now in fee simple, while the children, the immediate objects of his bounty, take a fee defeasible.

So entirely free is this testator from a foolish pride in keeping up a family estate to descend from generation to generation that in item 4 he gives power to the executrix and executor to rent or lease the real estate and use the same or the net proceeds as hereinabove stipulated. That is to say, if it becomes necessary for the education and support of the persons named to use the corpus itself, it shall be used.

It will be further observed that Mr. Bischoff says *who* shall take, not *how* they shall take. He limits the estate of the wife to a life estate. There is nothing in this will which is inconsistent with a fee in those who shall take at the death of the life tenant, and under the statute that makes a fee.

It will be observed further that Mr. Bischoff refers to money, and can it be that he intended that his children should have anything but a fee in the money? And yet there is no distinction between money and land, and as they take the money they take the land. But they do not take the money or the land.

Item 4 provides (subsequent to item 3, and controlling it) that his executrix and executor "hereinafter named" shall keep together his real estate and rent or lease the same to the best advantage, and use the same or the net proceeds as hereinabove stipulated, that is, for the education and support of the children.

Item 6 provides that the executrix and executor shall invest his personal property in real estate bonds and mortgages, or other good securities, according to their own best judgment. Now if the children named are to take a fee defeasible, then the money must be kept together until the last child is dead; no, not until the last child is dead; the issue of deceased children take their shares as their parents die, and take it in fee.

There is no provision in the will for partial settlements as each child dies and the unknown issue comes into his own, and the whole will shows that no such thing is contemplated. The property is put in charge of the executrix and executor, not in the hands of trustees. The appointment of a trustee might have indicated that Mr. Bischoff contemplated an indefinite period of holding; but when he conferred the duty upon his executrix and executor he shows, and the will showed, that Mr. Bischoff apprehended that the time between his death and that of his wife would not be long, and therefore

the time of distribution and the time of vesting of the estate would be short, and appointed those to manage his estate, who in contemplation of law should hold for but a short time.

Even if item 3 must be construed to cut down a fee simple to a fee defeasible, items 4 and 6, subsequent items, which show that an early division is contemplated, ought to control the disastrous consequences of section 3.

It seems to me that, upon reading the will as a whole, it is very manifest that Mr. Bischoff intended that his wife should have the use of all of his property during her life, and that the mother love would prompt her to do just what he said could be done—use the property that had been his for the education and support of his wife and children, and then at her death those children named and such others as might be entitled should take the estate, and should take it so that it might be of some use to them, and treat his sons and daughters like men and women, and not keep them as perpetual wards of chancery and require them at all times during their lives to apply to the courts for permission to sell and reinvest every cent of their property.

For these reasons I dissent.

(95 S. C. 339)

BECK v. NORTHWESTERN R. CO. OF SOUTH CAROLINA.

(Supreme Court of South Carolina. July 30, 1913.)

AMENDMENT OF PLEADINGS—ANSWER.

In a proceeding to restrain defendant railroad company from excavating on plaintiff's land, defendant *held*, by an evenly divided court, entitled to amend its answer.

Hydrick and Fraser, JJ., dissenting.

Appeal from Common Pleas Circuit Court of Sumter County; J. S. Willson, Judge.

Action by Julia V. Beck against the Northwestern Railroad Company of South Carolina. From an order allowing defendant to amend its answer, plaintiff appeals. Affirmed.

L. D. Jennings and R. D. Epps, both of Sumter, for appellant. Lee & Moise and Purdy & Bland, all of Sumter, for respondent.

GARY, C. J. This is an appeal from an order allowing the defendant to amend its answer in certain particulars.

The exceptions raise two questions, the first of which is whether his honor, the circuit judge, had the power to allow the amendments. The case of *Taylor v. Railroad*, 81 S. C. 574, 62 S. E. 1113, which has been affirmed in numerous subsequent cases, is conclusive of this question, and shows that the exceptions raising this question cannot be sustained.

The next question is whether there was an abuse of discretion. The appellant has failed to satisfy this court that there was error in this respect, and the exceptions raising this question are also overruled.

Appeal dismissed.

WATTS, J. I concur only in the result in the opinion of the CHIEF JUSTICE, for the reason that I am loath to disturb the action of the circuit judge in the exercise of his discretion, unless there is abuse, and I cannot say there is. Now, as to what effect the amendment allowed will have, in view of the decision of this court in *Abbott v. Lumber Co.*, 93 S. C. 131, 76 S. E. 146, it is at this time unnecessary to consider.

FRASER, J. I cannot concur in the opinion of the CHIEF JUSTICE. The plaintiff claims to own a tract of land through which the defendant is operating a railroad, and that the railroad company is making excavations on the land along the railroad and carrying away the soil, that the land belongs to the plaintiff, and she is damaged thereby. She demands damages, and asks for an injunction. The suit commenced in July, 1910. Judge Memminger issued a restraining order. The case shows that the defendant made a motion before Judge Wilson on the 25th of July, 1910, to dissolve the restraining order, and it was granted.

The case shows that "during the argument on this motion one of the points made by one of the attorneys for the defendant was that the defendant company was well able to respond in damages, and therefore the restraining order should be dissolved." The answer of the defendant was sworn to on the 6th of August, 1910. The answer admitted the acts complained of and justified under claim of right. In October, 1912, the defendant applied to Judge Wilson for, and obtained, an order allowing it to amend its answer, setting up the defense of "independent contractors." From this order, this appeal is taken.

I think this appeal ought to be sustained, and the order appealed from be reversed, for the following reasons:

1. Amendments are ordinarily within the discretion of the circuit judge, but there are limits. The defendant claimed to own the land and justified under a claim of right. It admitted that it was making the excavations and that it was using the dirt for its own purposes, and asked the court to allow it to continue. If they were doing this through *Williams & Co.*, then under *Abbott v. Sumter Lumber Company*, 93 S. C. 131, 76 S. E. 146, *Williams & Co.* were not independent contractors, but servants, and defendant is responsible for their acts. The amendment was either necessary or unavailing.

2. The case shows that Judge Memminger issued a restraining order, and that this

order was vacated. "During the argument on this motion, one of the points made by one of the attorneys for the defendant was that the defendant company was well able to respond in damages, and therefore the restraining order should be dissolved." It seems to me that when a defendant comes into court, admits the acts, justifies by a claim of right, and induces the court to allow it to continue to do the things complained of, claiming that it is well able to respond in damages, an amendment setting up the defense of independent contractors ought not to be allowed. Certainly not, unless there is a clear showing that the independent contractors are also amply able to respond in damages and that they are within the jurisdiction of the court. The defendant is asking a favor, not demanding a right. The defendant knew in August, 1910, when it framed its answer, all the facts about the independent contractor that it knew in October, 1912, when it secured the order allowing the amendment. Of course, the high character of the parties in this case negatives a design to do what is wrong; but this case is a precedent, and it is easy to see what abuses may creep into the administration of justice in this state if this amendment is allowed. A person or corporation "well able to respond in damages" can look over the state and take whatever property it pleases. If stopped in the taking, it says: "Yes; I took it. It is mine, but I am well able to respond in damages." The court withholds its hand. It takes the balance. The litigation is continued for years, until it has gotten all it wants, and then shall it be allowed to amend and say: "I am not liable, and never was."

I do not think the amendment should be allowed.

HYDRICK, J., concurs.

(95 S. C. 441)

STATE v. MALLOY.

(Supreme Court of South Carolina. April 7, 1913.)

1. CONSTITUTIONAL LAW (§ 197*)—"EX POST FACTO LAW"—CRIMINAL LEGISLATION.

An "ex post facto law," as applied to criminal legislation, is one which in its operation, makes that criminal which was not so at the time the act was performed, or which increases the punishment, or which, in relation to the offense or its consequences, alters the situation of a party to his disadvantage. It includes every law which makes an act done before the passing of the law, and which was innocent when done, criminal, and punishes such act; every law which aggravates a crime or makes it greater than it was when committed; every law which changes the punishment and inflicts a greater punishment than the law annexed to the crime when committed; and every law that alters the legal rules of evidence, and receives less or different testimony than the law required at the time of the commission of the offense, in order to convict the offender. It does not in-

clude, however, laws that mollify the rigors of the criminal law to the prisoner's benefit.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. § 550; Dec. Dig. § 197.*]

For other definitions, see Words and Phrases, vol. 3, pp. 2527-2533; vol. 8, p. 7057.]

2. CONSTITUTIONAL LAW (§ 203*)—EX POST FACTO LAW—CRIMINAL LEGISLATION—CHANGE OF PUNISHMENT.

The punishment prescribed by law for an offense at the time it was committed cannot be changed by subsequent legislation, unless the change is advantageous to the prisoner.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. §§ 584-590; Dec. Dig. § 203.*]

3. CONSTITUTIONAL LAW (§ 203*)—EX POST FACTO LAW—CRIMINAL LEGISLATION—CHANGE OF PUNISHMENT—PLACE OF INFLECTION—DETAILS.

Act 1912 (27 St. at Large, p. 702), changing the punishment for murder in the first degree from hanging to electrocution, and changing the place where the execution should be conducted and the number of witnesses permitted or required, was not disadvantageous to one convicted of such offense for an act performed prior to the enactment of the law; and therefore, in so far as it applied to him, was not objectionable as an ex post facto law.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. §§ 584-590; Dec. Dig. § 203.*]

4. CRIMINAL LAW (§ 1192*)—APPEAL—DECISION ON FORMER APPEAL—LAW OF THE CASE.

Rulings of the Supreme Court on exceptions on a prior appeal, refusing to sustain accused's challenge to the array of the grand jury and to quash the indictment on the ground that it had been found by an illegal grand jury, and overruling accused's challenge to the array as drawn from lists illegally made up, etc., constitute the law of the case on retrial.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 3231-3240, 3243; Dec. Dig. § 1192.*]

5. CRIMINAL LAW (§ 1059*)—APPEAL—EXCEPTIONS—GROUNDS OF OBJECTION.

An exception to a ruling on the admission of evidence, failing to state the grounds of objection, will not be reviewed.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 2671; Dec. Dig. § 1059.*]

6. CRIMINAL LAW (§§ 763, 764*)—TRIAL—INSTRUCTIONS.

An instruction that the opinion of experts is like any other testimony in the case, and must be weighed by the jury as other facts are considered, is not objectionable as a charge on the facts and an invasion of the province of the jury, since it should be construed as meaning that if the jury believed the testimony of an expert, they should not disregard it merely because the witness was testifying as an expert.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1731-1748, 1752, 1768, 1770; Dec. Dig. §§ 763, 764.*]

7. CRIMINAL LAW (§ 761*)—TRIAL—INSTRUCTIONS.

An instruction that the free and voluntary confession of one accused of crime is competent evidence to be considered by the jury in determining the person's guilt or innocence is not objectionable as assuming that a confession has been made, since the charge is general, and should be understood as if it had been preceded by the word "if."

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1731, 1738, 1754-1764, 1771, 1853; Dec. Dig. § 761.*]

*For other cases see same topic and section NUMBER

8. CRIMINAL LAW (§ 824*)—INSTRUCTIONS—REQUESTS—NECESSITY.

Accused could not object to the court's failure to charge on manslaughter, where he failed to present a request for such charge.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1996-2004; Dec. Dig. § 824.*]

Woods, J., dissenting.

Appeal from General Sessions Circuit Court of Marlboro County; T. H. Spain, Judge.

"To be officially reported."

Joe Malloy was convicted of murder and sentenced to death by electrocution, and he appeals. Affirmed and remanded.

The following are the exceptions referred to in the opinion:

"(1) The court erred in overruling the challenge to the array of the grand jury and in holding that it was a legal grand jury, when it was drawn from a list not made up according to law, as shown by the admitted facts set out in the plea; and they deprived the defendant of his right to be tried on a bill duly found by a legal grand jury, in violation of the Constitution of the United States and of this state.

"(2) The court erred in refusing to quash the indictment on the ground that it was found by an illegal grand jury, and thereby deprived defendant of the right, given him by the Constitution of this state and of the United States, to be tried on a valid indictment found by a legal grand jury.

"(3) The court erred in overruling the challenge to the array of the jury as being illegally drawn from lists illegally made up, and thereby he deprived defendant of his right, guaranteed by the Constitution of this state and of the United States, to be tried by a jury of his peers, legally drawn and impaneled.

"(4) The court erred in overruling the plea in bar to the infliction of the death penalty by electrocution and the motion in arrest of judgment, for the reason that when the crime was charged to have been committed the penalty was death by hanging, whereas, the penalty of death by electrocution was substituted by the act of February 17, 1912 [27 St. at Large, p. 702], and was ex post facto as to him; and the imposition of the sentence was in violation of the Constitution of the United States and of this state, prohibiting the passage of ex post facto laws.

"(5) The court erred in allowing the witness Stephen Toma, over the objection of defendant's counsel, to state that he had told the same story to one Collins before he told the same in Mr. Evans' office; the same being an effort to corroborate the witness by the fact that he had made the same statement elsewhere, and being incompetent and prejudicial and self-serving.

"(6) The court erred in charging that 'the opinion of experts is like any other testimony in the case, and must be weighed by

the jury as other facts are considered,' it being a charge on the facts, and an invasion of the province of the jury, whose sole province is to weigh the evidence; and the court cannot direct it as to the method of weighing any kind of evidence.

"(7) The court erred in charging the jury that 'the free and voluntary confession of one accused of crime is competent evidence to be considered by the jury in the determination of his guilt or innocence,' the same being prejudicial, in that there had been proven alleged confession of the defendant, and the charge tended to impress the jury that such alleged confessions were made, whereas, they were disputed; and the competency of evidence is passed upon when it is admitted, and its use should not be commented upon in the charge, the same being a charge on the facts.

"(8) The court erred in not charging the law of manslaughter, as there were circumstances which might have indicated a case of manslaughter, and the same should have been defined to the jury.

"(9) The court erred in holding the jurors competent who had formed and expressed an opinion from the evidence given at the coroner's inquest, when it was likely that the evidence would be the same on the trial, and in not excluding them for that reason.

"(10) The court erred in standing aside the juror R. B. Crosland, when the only charge was that he had been by mistake bound as a witness for the defense."

Stevenson, Stevenson & Prince, of Bennettsville, for appellant. J. Monroe Spears, Sol., of Darlington, for the State.

GARY, C. J. The defendant was indicted and tried in July, 1912, for the murder of Prentiss Moore, on the 24th of November, 1910, and the jury rendered a verdict of guilty, whereupon the court sentenced him to be electrocuted on the 9th of August, 1912, in the manner provided by the act approved the 17th of February, 1912 (27 St. at Large, p. 702), which will be incorporated in the report of the case, together with section 946 of the Criminal Code of 1912; which prescribes the manner in which a person shall be hanged. The defendant appealed upon exceptions, which will be reported.

The first question that will be considered is whether the said act which changed the punishment for murder from death by hanging to death by electrocution was unconstitutional, on the ground that it was an ex post facto law as to him. Section 109, Criminal Code of 1902, is as follows: "Whoever is guilty of murder shall suffer the punishment of death: Provided, however, that in each case where the prisoner is found guilty of murder, the jury may find a special verdict recommending him or her to the mercy of the court, whereupon the punishment shall be reduced to imprisonment in the penitentiary with hard labor during the whole life-

time of the prisoner." Prior to the act of 1912 the mode of execution, when the prisoner was sentenced for murder, was by hanging.

[1] In Cooley's Constitutional Limitations, pages 319, 320, the author quotes with approval, the following language of Chase, J., in the leading case of *Calder v. Bull*, 3 Dall. (Pa.) 386, 1 L. Ed. 648, as to ex post facto laws: "I will state what laws I consider ex post facto, within the words and the intent of the prohibition: First, every law that makes an action done before the passing of the law, and which was innocent when done, criminal, and punishes such action; second, every law that aggravates a crime, or makes it greater than it was when committed; third, every law that changes the punishment, and inflicts a greater punishment than the law annexed to the crime, when committed; fourth, every law that alters the legal rules of evidence, and receives less, or different, testimony than the law required at the time of the commission of the offense, in order to convict the offender. All these and similar laws are manifestly unjust and oppressive. * * * But I do not consider any law ex post facto, within the prohibition, that mollifies the rigor of the criminal law; but only those that create, or aggravate, the crime, or increase the punishment, or change the rules of evidence, for the purpose of conviction." The last sentence is quoted with approval, in *State v. Richardson*, 47 S. C. 166, 25 S. E. 220, 35 L. R. A. 238.

In the case of *Kring v. Missouri*, 107 U. S. 221, 2 Sup. Ct. 443, 27 L. Ed. 506, it was held that any law is an ex post facto law, within the meaning of the Constitution, passed after the commission of a crime charged against a defendant, which in relation to that offense alters the situation of the party to his disadvantage; and no one can be criminally punished, except in accordance with the law of force when the offense was committed. In that case the court quoted with approval, the following language from the case of *Hartung v. People*, 22 N. Y. 95: "It is highly probable that it was the intention of the Legislature to extend favor rather than increased severity, towards the convict and others in her situation; and it is quite likely that, had they been consulted, they would have preferred the application of this law to their cases rather than that which existed when they committed the offenses of which they are convicted. But the case cannot be determined upon such considerations. No one can be criminally punished in this country, except according to a law prescribed for his government before the imputed offense was committed, and which existed as a law at that time. It would be useless to speculate upon the question whether this would be so upon the reason of the thing, and according to the spirit of our legal institutions, because the rule exists in the form of an express written precept, the binding force of

which no one disputes. No state shall pass any ex post facto law is the mandate of the Constitution of the United States." The court also quoted with approval the following language of Mr. Justice Washington, in *United States v. Hall*, 2 Wash. C. C. 366, Fed. Cas. No. 15,235: "An ex post facto law is one which in its operation makes that criminal or penal which was not so at the time the action was performed, or which increases the punishment, or, in short, which in relation to the offense, or its consequences alters the situation of a party, to his disadvantage."

In *Murphy v. Commonwealth*, 172 Mass. 264, 52 N. E. 505, 43 L. R. A. 154, 70 Am. St. Rep. 266, it is said: "The objection to ex post facto legislation consists in the uncertainty which would be introduced thereby into legislation of a criminal or penal character, and the injustice of punishing an act which was not punishable when done, or of punishing it in a different manner than that in which it was punishable when done. But not all retroactive legislation is unconstitutional as being ex post facto. The question in each case is whether it will increase the penalty, or operate to deprive a party of substantial rights or privileges to which he was entitled * * * when the offense was committed, or, 'in short, in relation to the offense and its consequences, will alter the situation of a party to his disadvantage.'" See, also, notes to the case of *Rooney v. North Dakota*, 196 U. S. 819, 25 Sup. Ct. 264, 49 L. Ed. 494, reported in 3 Ann. Cas. 76.

A statute which merely regulates the manner in which the execution shall be conducted, by prescribing the time and manner of the execution and the number and character of the witnesses, is not ex post facto, though it applies to offenses committed before its enactment. *Holden v. Minnesota*, 127 U. S. 483, 11 Sup. Ct. 143, 34 L. Ed. 734.

"The objection that the latter law required the execution of the sentence of death to take place within the limits of the penitentiary rather than in the county jail, as provided in the previous statute, is without merit. However material the place of confinement may be in case of some crimes not involving life, the place of execution, when the punishment is death, within the limits of the state is of no practical consequence to the criminal. On such a matter he is not entitled to be heard." *Rooney v. North Dakota*, 196 U. S. 819, 25 Sup. Ct. 264, 49 L. Ed. 494, 3 Ann. Cas. 76.

[2] The foregoing authorities sustain the proposition that the punishment prescribed by law for an offense at the time it was committed cannot be changed by subsequent legislation, unless the change is advantageous to the prisoner.

[3] The appellant's attorneys argued that the act of 1912 was unconstitutional, by reason of the fact that the place of execution, and the number of witnesses permitted or

required by the act of 1912 were changed to the disadvantage of the defendant. The foregoing authorities also show that these objections are untenable. In the language of Mr. Cooley in his excellent work entitled *Constitutional Limitations*, 322: "We have no doubt the privileges the respondent claims were designed and created solely as incidents of the severe punishment to which his offense formerly subjected him, and not as incidents of the offense." In this respect the statute is analogous to those which relate to penal administration or prison discipline, and is not unconstitutional, even though the effect may be to enhance the severity of the confinement. *Murphy v. Commonwealth*, 172 Mass. 264, 52 N. E. 505, 43 L. R. A. 154, 70 Am. St. Rep. 266.

We now come to the pivotal question, whether the act of 1912, changing the punishment for murder from death by hanging to death by electrocution, shows that its tendency is to ameliorate the punishment by hanging.

In the case of *In re Kemmler*, 136 U. S. 436, 10 Sup. Ct. 930, 34 L. Ed. 519, the court had under consideration the question whether the New York statute, providing that "punishment of death must, in every case, be inflicted by causing to pass through the body of the convict a current of electricity of sufficient intensity to cause death," was obnoxious to the provision of the Constitution prohibiting the infliction of cruel and unusual punishment. The first step which led to the enactment of the law in that state was the message of the Governor, in which he said: "The present mode of executing criminals by hanging has come down to us from the dark ages, and it may well be questioned whether the science of the present day cannot provide a means for taking the life of such as are condemned to die in a less barbarous manner. I commend this suggestion to the consideration of the Legislature." The Legislature accordingly appointed a commission to investigate and report "the most humane and practical method known to modern science of carrying into effect the sentence of death in capital cases." This commission reported in favor of execution by electricity. They also reported a proposed bill, which was enacted. Mr. Chief Justice Fuller, in delivering the opinion of the court, said: "Punishments are cruel when they involve torture or a lingering death; but the punishment of death is not cruel within the meaning of that word as used in the Constitution. It implies there something inhuman and barbarous—something more than the mere extinguishment of life. The courts of New York held that the mode adopted in this instance might be said to be unusual because it was new, but that it could not be assumed to be cruel, in the light of that common knowledge which has stamped certain punishments as such; that it was for the Legislature to say in

what manner sentence of death should be executed; that this act was passed in the effort to devise a more humane method of reaching the result; that the courts were bound to presume that the Legislature was possessed of the facts upon which it took action; and that by evidence allunde the statute that presumption could not be overthrown. They went further, and expressed the opinion that upon the evidence the Legislature had attained by the act the object had in view in its passage. * * * Treating it as involving an adjudication that the statute was not repugnant to the federal Constitution, that conclusion was so plainly right that we should not be justified in allowing the writ, upon the ground that error might have supervened therein. * * *

The enactment of this statute was, in itself, within the legitimate sphere of the legislative power of the state, and in the observance of those general rules prescribed by our systems of jurisprudence; and the Legislature of the state of New York determined that it did not inflict cruel and unusual punishment, and its courts have sustained that determination. We cannot perceive that the state has thereby abridged the privileges or immunities of the petitioner, or deprived him of due process of law. In order to reverse the judgment of the highest court of the state of New York, we should be compelled to hold that it had committed an error so gross as to amount, in law, to a denial by the state of due process of law to one accused of crime, or of some right secured to him by the Constitution of the United States. We have no hesitation in saying that this we cannot do, upon the record before us." The writ of error was accordingly denied.

It is true the provision of the United States Constitution now under consideration was not before the court in that case, but the decision clearly shows that the court regarded electrocution as a more humane method of punishment than that by hanging. It would have been surprising if the court had reached any other conclusion, after considering the manner in which an execution by hanging is conducted. The rope around the prisoner's neck must be of the proper length, and so adjusted that when he drops from the scaffold his neck will be broken, thus destroying the structural formation of the body. But suppose the rope is not of the proper length, or the noose is not properly adjusted, then there are instances on record where the head was completely severed from the body, when the convict dropped from the scaffold. There are also numerous instances where the neck was not broken, and the convict died of strangulation, after several minutes of consciousness. We merely mention the agony which must have been suffered during strangulation as indicated by the bulging eyes, and draw the curtain over such a picture. Suffice it to say that this

court is satisfied that electrocution is a more humane method of execution than by hanging. The exception raising this question is therefore overruled.

[4] The ruling of the court upon the former appeal in this case shows that the first, second, and third exceptions cannot be sustained.

The fourth exception has already been considered.

[5] There are two reasons why the fifth exception cannot be sustained. In the first place, the grounds of objection were not stated; and, in the second place, it has not been made to appear that the rights of the defendant were thereby prejudiced.

[6] The sixth exception is overruled, for the reason that his honor the presiding judge simply meant to tell them that if they believed the testimony of an expert, they were not to disregard it merely because the witness was testifying as an expert.

[7] The seventh exception cannot be sustained for the reason that the remark of the presiding judge was general, and was to be understood as if it had been preceded by the word "If."

[8] The eighth exception is overruled for the reason that the defendant failed to present a request to charge the proposition for which he now contends.

The ninth and tenth exceptions cannot be sustained for the reason that the record fails to show an abuse of discretion, on the part of the presiding judge, in ruling upon the competency of the jurors therein mentioned.

It is the judgment of this court that the judgment of the circuit court be affirmed, and that the case be remanded to the circuit court for the purpose of having another day assigned for carrying into execution the sentence of the court.

HYDRICK, WATTS, and FRASER, JJ., concur. WOODS, J., dissents.

WOODS, J. (dissenting). Early in the morning of November 24, 1910, Guy Rogers, a youth of about 17 years, and his friend, Prentiss Moore, several years younger, left the homes of their parents in Bennettville for a morning's hunt, with the expectation of returning in time for dinner. Upon their failure to return, the community united in a long and harrowing search, which resulted in finding the bodies of both the boys in a ditch about 1,100 yards from the house of the defendant. Prentiss Moore was killed by a gunshot wound in the back near the shoulder blade. The facts that the shot were somewhat scattered, and that there were no powder burns, indicated that the shot was fired at least a little distance off. While the wound was necessarily fatal, some minutes might have intervened before death. The gunshot which killed Guy Rogers seems to have entered, in almost a solid mass, in front near the left nipple, making powder marks

on the body, and leaving the gun wad sticking to the wound. Death must have been almost instantaneous. The body of Guy Rogers was lying in the ditch, and that of Prentiss Moore leaning against the side of the ditch. The one double-barrel shotgun which the boys had was lying on the side of the ditch, and near by was an empty shell. The defendant was indicted and tried for the murder of Prentiss Moore, and this appeal is from his conviction and sentence to death.

I concur in the reasoning and the conclusions of the CHIEF JUSTICE as to all the exceptions except the fifth.

The case of the state depended on some circumstances alleged to be unfavorable to the defendant, but mainly on the testimony of Charlotte Easterling and Stephen Toms, both negroes, as to confessions to them by the defendant that he had killed the boys. The witness Charlotte Easterling, as was agreed on all sides, was utterly discredited by her numerous contradictions of herself. These contradictions culminated in her testifying at the trial to a confession of the defendant, and then confessing in private to the solicitor, and on the stand, that no confession had been made to her. The witness Stephen Toms then testified to confessions made to him, and was allowed to bolster up his statement by stating that at a certain time and place he had told one Collins of the defendant's confession. This testimony was clearly incompetent (*State v. Thomas*, 3 Strob. 269; *State v. Scott*, 15 S. C. 434; *State v. Gilliam*, 66 S. C. 419, 45 S. E. 6; *State v. McDaniel*, 68 S. C. 304, 47 S. E. 384, 102 Am. St. Rep. 661), and I am convinced that it was also prejudicial, especially in view of the fact that the defendant introduced testimony tending strongly to show that Toms was a professional witness, having a bad reputation for veracity.

It seems to me that careful consideration of the evidence is convincing that the tragedy was one of deep mystery, requiring on the part of the jury most careful and anxious consideration of every particle of evidence before they could reach a verdict. They had to answer these serious questions: Were the boys murdered and thrown into the ditch, or was the tragedy due to an unusual and unexplainable accident? Was there any sufficient motive for the defendant to commit such a dreadful and monstrous crime? Were the circumstances proved by credible testimony affecting the defendant not consistent with his innocence? Were the confessions attributed to defendant really made by him, or were the witnesses who testified to them shown to be unworthy of belief? It cannot be doubted that the testimony as to the confessions was the strongest adduced against the defendant; and when the character of the witnesses from which this testimony came is considered, the conclusion seems irresistible that it was the right of the defendant to have excluded all incompetent testi-

mony as to the confessions imputed to him, and denied by him, which may have contributed to the verdict. This court has set its face against technical objections to testimony and appeals depending on errors which do not affect the merits. But I am forced to the conclusion that in a case so full of mystery, justice requires that no material testimony set down by the law as incompetent should be admitted to affect the conclusion of the jury.

For this reason, I think the judgment should be reversed, and the cause remanded for a new trial.

(94 S. C. 443)

STATE v. BETHUNE.

(Supreme Court of South Carolina. May 15, 1913.)

Appeal from General Sessions Circuit Court of Clarendon County; S. W. G. Shipp, Judge.

Willie Bethune was convicted of murder in the first degree, and sentenced to death by electrocution, and he appeals. Affirmed.

See, also, 93 S. C. 195, 75 S. E. 281.

John H. Clifton, of Sumter, for appellant. P. H. Stoll, Sol., of Kingstree, for the State.

WOODS, J. The defendant, Willie Bethune, was convicted of murder and sentenced to death by electrocution. He appeals on the ground that at the time of the commission of the crime, and at the time of his trial, the penalty for murder was death by hanging, and that the statute providing for the infliction of the death penalty by electrocution is *ex post facto* and unconstitutional as to him. The question was decided against the contention of appellant by the opinion and judgment of the Court in *State v. Joe Malloy*, 78 S. E. 905, recently filed.

It is therefore the judgment of the court that the judgment of the court of general sessions be affirmed, and the cause remanded to that court so that a new day may be set for the execution of the sentence.

Affirmed.

GARY, C. J., and HYDRICK and WATTS, JJ., concur. FRASER, J., disqualified.

(73 W. Va. 328)

BOWYER v. CONTINENTAL CASUALTY CO.

(Supreme Court of Appeals of West Virginia. April 22, 1913. Rehearing Denied June 30, 1913.)

(Syllabus by the Court.)

1. INSURANCE (§ 151*)—CONTRACT—APPLICATION.

To make the application for a policy of insurance in an accident and health insurance company organized under the laws of a state other than this and doing business here containing warranties part of the contract of insurance, it must be attached to the policy. Mere reference to it in the policy and adoption thereof in terms do not suffice.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 308-311; Dec. Dig. § 151.*]

2. INSURANCE (§ 151*)—CONTRACT—AGREEMENTS OUTSIDE POLICY.

In the absence of statutory prescription of the forms of contracts of insurance, such reference and adoption would make the application

part of the policy; but section 62 of chapter 34 of the Code 1906, as revised, amended and re-enacted by chapter 77 of the Acts of 1907 (serial section 1107a, Ann. Code Supp. 1909), and sections 15 and 69 of said chapter, requiring policies of insurance fully and plainly to set forth the contracts between the parties thereto, exclude therefrom all conditions, agreements, and warranties not expressed in the policies themselves or papers attached thereto.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 308-311; Dec. Dig. § 151.*]

3. INSURANCE (§ 655*)—ACTION ON POLICY—ADMISSIBILITY OF EVIDENCE—APPLICATION.

Though inadmissible, by reason of such statutory provisions, to prove a statement therein as a part of the contract, the application for the policy containing a false statement is admissible as part of the evidence of fraud in the procurement of the policy.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 1677-1681, 1682-1685; Dec. Dig. § 655.*]

4. INSURANCE (§ 640*)—ACTION ON POLICY—PLEADING AND PROOF.

Fraud in the procurement of the issuance of a policy of insurance not under seal need not be specially pleaded. Evidence thereof is admissible under the general issue.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 1554, 1600-1612, 1614-1624; Dec. Dig. § 640.*]

5. APPEAL AND ERROR (§ 1056*)—HARMLESS ERROR—EXCLUSION OF EVIDENCE.

It is not erroneous to reject relevant and material, but incomplete and insufficient, evidence of a defense, in the absence of disclosure of purpose and intent to supplement it with additional evidence tending to establish the elements of the defense the proffered evidence does not tend to prove.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4187-4193, 4207; Dec. Dig. § 1056.*]

Error to Circuit Court, Mercer County.

Action by Ella Bowyer against the Continental Casualty Company. Judgment for plaintiff, and defendant brings error. Affirmed.

Sanders & Crockett, of Bluefield, Manton Maverick and M. P. Cornelius, both of Chicago, Ill., and L. J. Holland, of Bluefield, for plaintiff in error. French & Easley, of Bluefield, for defendant in error.

POFFENBARGER, P. On this writ of error to a judgment against it for the sum of \$2,135, the Continental Casualty Company complains principally of the refusal of the court to permit it to rely in evidence upon a false statement made in the application for the policy of insurance as a breach of a warranty of the policy, and also of the refusal of the court to permit the introduction of the application as proof of the false statement therein as evidence of a fraudulent representation inducing the issuance of the policy; the trial court having refused to permit this evidence to go in upon the first theory of defense, here stated, because the statement was found neither on the face of the policy nor in any paper attached thereto, and also to permit it to go in upon the second

theory, because fraud in the procurement of the policy had not been specially pleaded and the facts offered in evidence were wholly insufficient to establish the fraud, if it had been pleaded.

[1, 2] The objection to the offered evidence as proof of a warranty in the policy and breach thereof rests upon the statute prescribing and regulating the business of life and accident insurance companies, and particularly section 62 of chapter 34 of the Code, as revised, amended, and re-enacted by chapter 77 of the Acts of 1907 (section 1107a, Ann. Code Supp. 1909), read and interpreted in the light of other provisions of the statute, regulating the business of insurance companies. This section relates to the business of foreign insurance companies other than fire or life, necessarily including in its terms accident insurance companies. It provides that "such companies or associations shall place on the face of its policy or certificate the agreements with the assured." Section 15 of the Acts of 1907, relating to the business of life insurance companies, contains this provision: "Nor shall any such company or agent thereof make any contract of insurance or agreement as to such contract other than as plainly expressed in the issued policy thereon." Section 62 provides that foreign insurance companies other than fire or life "shall be governed by the laws of this state regulating the admission of foreign fire insurance companies doing business in this state," except in certain enumerated particulars. Section 69, relating to fire insurance companies, says: "In all policies of insurance issued against loss by fire, made by companies chartered by or doing business in this state, no condition shall be valid unless stated in the body of the policy or attached thereto." The policy sued on was an accident policy, giving indemnity for loss of life by accident, and the insurer was a corporation organized under the laws of the state of Indiana.

The application for the policy containing the alleged false statement and warranty of its truth was not attached to the policy, but the latter paper declared the warranties and agreements contained in it and payment of the premium to be the consideration for the insurance and the application for the policy to be a part thereof. The words of this provision are: "The application herefor and any paymaster's order given to provide for the payment of premium are hereby made a part hereof." These provisions make the application a part of the policy by reference and adoption only. The policy does not on its face, or by any paper attached thereto, show the warranties and agreements. On the consummation of the insurance agreement the policy went into the hands of the insured, and the application therefor was retained by the insurer, and filed with its papers to which the insured had no access. The purpose of statutes of this kind, as declared by the courts

in other states, is to require the contract to be so formed as to enable the insured or assured at all times to have before him the covenants and agreements which he is required to observe or perform and relieve him from the burden of relying upon his recollection of the terms of his contract. *Life Ass'n v. Musser*, 120 Pa. 384, 14 Atl. 155; *Life Ins. Co. v. Kelly*, 114 Fed. 268, 52 C. C. A. 154; *Zimmerman v. Accident Ins. Co.*, 207 Pa. 472, 56 Atl. 1008. Objections to such statutes on the ground of alleged invalidity have been overruled by the courts and their constitutionality affirmed. *Life Ass'n v. Musser*, 120 Pa. 384, 14 Atl. 155; *Considine v. Life Ins. Co.*, 165 Mass. 462, 43 N. E. 201. Being remedial in nature, they are liberally construed by the courts for the effectuation of their obvious purpose. Though the statute of which the Massachusetts law is a part designated only certain kinds of life insurance by name, not all of them, it has been construed as requiring the attachment of the application to policies of all kinds of life insurance. *Considine v. Life Ins. Co.*, cited; *Nugent v. Life Ass'n*, 172 Mass. 278, 52 N. E. 440. The Kentucky statute relates in terms only to assessment companies, but, read in connection with another statute, applying to old line companies and requiring them to state the contract plainly in the policy, it has been interpreted as requiring attachment of the application to the policies of old line companies. *Life Ins. Co. v. Myers*, 109 Ky. 372, 59 S. W. 30; *Life Ins. Society v. Puryear*, 109 Ky. 381, 59 S. W. 15. The Iowa statute is held to apply to mutual companies, though not found in the chapter relating to them. *Corson v. Insurance Ass'n*, 115 Iowa, 485, 88 N. W. 1086. Read in the light of the spirit of these decisions, our statute undoubtedly requires the application to be attached to the policy, to enable the insured to resort to it at any time for information as to the terms of his contract. Under common-law principles, the words of reference and adoption found in the policy would make the application a part of it, but these statutory provisions, prescribing the form of contracts of insurance, clearly within the limits of legislative power, declare as a matter of public policy that all the essential elements relating to the contract must appear in one paper, the policy, or that paper and the others attached thereto, to the end that the insured, as well as the insurer, may at any time know the terms and provisions of the contract. Obviously mere reference in the policy to the application, containing portions of the contract and constructive adoption thereof, do not amount to a compliance with this requirement, and the court properly refused to permit the introduction of the application for the purpose of proving a warranty not stated on the face of the policy or in any paper attached thereto.

[3] Though inadmissible to prove state-

ments of the insured as a warranty or part of the policy, because not attached to it, the application was admissible, together with other evidence, to prove fraud in the procurement of the policy. A false statement made in the application for a policy is none the less false because made therein; and, if it is an element or fact in a scheme of fraud to procure the issuance of a policy, under circumstances under which it would not be issued if the insurer had been advised of the true situation, it stands upon the same footing as if made in any other paper or way. *Life Ins. Co. v. Logan*, 9 Ga. App. 503, 71 S. E. 742; *Johnson v. Ins. Co.*, 134 Ga. 802, 68 S. E. 731; *Life Ins. Co. v. Hill*, 8 Ga. App. 857, 70 S. E. 186.

[4] Nor was it necessary to plead fraudulent procurement specially. Fraud, if established, would be a full and complete, not merely a partial, defense; and, as the policy was not under seal, proof of fraud in the procurement thereof was admissible under the general issue on common-law principles. The decisions asserting the contrary are not in harmony with ours. It is undoubtedly a common-law defense. *Mylius v. Engine & Thresher Co.*, 70 W. Va. 576, 74 S. E. 728; and *Prewett v. Bank*, 66 W. Va. 184, 66 S. E. 231, 135 Am. St. Rep. 1019. See, also, *Fisher v. Burdett*, 21 W. Va. 626. At common law it was provable under the general issue in debt and assumpsit. 4 Min. Inst. 770, 792, 798; 1 Rob. Prac. (old) p. 210; 2 Saunders Pl. & Ev. top p. 28, mar. p. 526. The allowance of a special plea in the nature of a plea of set-off by chapter 126, Code, does not preclude proof under the general issue. *Sterling Organ Co. v. House*, 25 W. Va. 64; 4 Min. Inst. 792 to 798. The purpose of that statute is to make the fraud or other matter of the plea the basis of a cross-action and allow a recovery by the defendant from the plaintiff of an excess in favor of the former. It is an enabling statute, enlarging, not restricting, defendant's rights, and fraud may still be proved under the general issue as a mere matter of defense.

The false statement was that the assured had never claimed or received any accident or health insurance benefits. It was first made in the application for the original policy, dated August 14, 1909, and again in the application for renewal of the policy, dated August 14, 1910. Holding a health policy in the Travelers' Insurance Company, Bowyer, the insured, had made application for indemnity thereunder on the 12th day of April, 1905, on account of illness and incapacity to work by reason of la grippe and pleurisy, and on the 4th day of May, 1905, had received by way of such indemnity \$20. These facts only were offered as evidence to prove fraud in the procurement of the policy sued on, if, indeed, it was offered for such purpose; it having been tendered primarily to prove the statement as a part of the pol-

icy and warranty of the truth thereof, so as to make it material and binding as a part of the contract. It does not appear whether, if a truthful answer had been made to the question as to prior receipt of accident or health benefits, the company would have issued the policy. Nor does it appear that the assured at the date of the application was suffering from any chronic or incurable disease. Nor does it appear that in the procurement of benefits under the policy in the Travelers' Insurance Company he perpetrated any fraud. Nor is there anything to indicate his recollection at the date of the application of the receipt of benefits under a former policy. For all that appears, the false statement was an innocent mistake. It requires more than a mere false statement to prove fraud. It must have been made with intent to mislead and deceive, and the injured party must have relied upon it. This evidence was wholly insufficient to sustain the issue of fraud. *Medley v. Insurance Co.*, 55 W. Va. 342, 47 S. E. 101, 2 Ann. Cas. 99. There was no offer of additional evidence nor any representation to the court that the defendant, if permitted to put in evidence this false statement, would supplement it with additional evidence, sufficient to establish fraudulent procurement of the policy. The trial court may properly exclude evidence constituting no defense. *Walker v. Strosnider*, 67 W. Va. 39, 67 S. E. 1087, 21 Ann. Cas. 1; *Easy Payment Co. v. Parsons*, 62 W. Va. 26, 57 S. E. 253.

[5] Even though the action of the court in refusing to permit this evidence to be offered be regarded as technically erroneous, the error ought not to justify reversal, for fraud as a matter or ground of defense was not clearly and plainly brought to the attention of the trial court. The evidence was offered for an entirely different purpose, and the record shows no suggestion or intimation to the court of intent on the part of the defendant to rely upon it as proof of fraud in the procurement of the policy. Nor, as has been stated, was there an intimation to the court of the possession of additional evidence of fraud.

Ella Bowyer, wife of Jordan H. Bowyer, the assured, was the beneficiary named in the policy, and the real issue arising out of the evidence admitted was whether the death of the insured had been occasioned by external, violent, and purely accidental means and independently of all other causes, in conformity with a condition of the policy. The death of the insured was due to rupture of the bladder. At least such was the cause, in the opinion of physicians testifying as experts, disclosed by the result of an autopsy. They further expressed the opinion that the rupture had been caused by external violence. Both the wife and the mother-in-law of the insured testified to his injury by a fall in his room, coincident with the inception of the bladder trouble from which he died.

Testifying further, they say he was in good health before he fell. Both say there was on his abdomen after the fall a red rough place, indicative of percussion or violent contact with some object. Their theory is that he stumbled over a coal scuttle, and fell on or against a bed. To meet the case thus made, the defendant set up the theory of death from disease rather than violence. No evidence was adduced in support of this theory except a letter from Mrs. Bowyer, the beneficiary, to the defendant company, dated the day after the accident, saying: "This is to let you know that Jordan H. Bowyer has been (sick) & on bed for several days also his wife and not able to write you before. Please send blank." This is nothing more than a written statement, contradictory of the testimony of the writer and the other witness, her mother. Only a few days before the date thereof, the writer had been delivered of a child, and was on her sick bed at the time of the accident to her husband. This circumstance is relied upon in argument as one accounting for inaccuracy of statement in the letter. The letter does not prove a case of illness from disease, resulting in the death of the insured. As matter of impeachment of the testimony of the writer it was admissible, but its value was a question for the jury. Clearly the right of recovery depends upon the credibility of these two witnesses, and that is peculiarly a question for jury determination. We are unable to say the verdict is contrary to the evidence. Perceiving no error in the rulings of the trial court, we affirm the judgment.

(140 Ga. 245)

SROCHI v. VENTREES.

(Supreme Court of Georgia. July 19, 1913.)

*(Syllabus by the Court.)***1. APPEAL AND ERROR (§ 977*)—REVIEW.**

The first ground of the amendment to the motion for a new trial, complaining of the admission of certain testimony, is not approved by the trial judge, and consequently will not be considered by this court.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3860-3865; Dec. Dig. § 977.*]

2. NEW TRIAL (§ 99*)—NEWLY DISCOVERED EVIDENCE.

Considering the scope of the evidence on the trial and the character of the same, the court did not err in overruling the ground of the motion based upon newly discovered evidence. Under the showing made, the court might well have held that due diligence was not used to procure this evidence on the trial; and, besides, the evidence was not of such a character as to show that it would probably produce a different result upon another trial. *Young v. State*, 56 Ga. 403; *Berry v. State*, 10 Ga. 511.

[Ed. Note.—For other cases, see New Trial, Cent. Dig. §§ 201, 207; Dec. Dig. § 99.*]

3. SUFFICIENCY OF EVIDENCE.

The evidence authorized the verdict.

Error from Superior Court, Fulton County; J. T. Pendleton, Judge.

Action between Morris Srochi and C. P. Ventrees. From the judgment, Srochi brings error. Affirmed.

Lewis W. Thomas, of Atlanta, for plaintiff in error. Hewlett & Dennis, of Atlanta, for defendant in error.

BECK, J. Judgment affirmed. All the Justices concur.

(140 Ga. 342)

McLENDON BROS. & LOCKRIDGE v. MEADOR.

(Supreme Court of Georgia. July 19, 1913.)

*(Syllabus by the Court.)***DIRECTED VERDICT.**

The evidence introduced upon the trial demanded a verdict in favor of the defendant, and the court did not err in directing a verdict in his favor.

Error from Superior Court, Fulton County; J. T. Pendleton, Judge.

Action by McLendon Bros. & Lockridge against F. T. Meador. Judgment for defendant, and plaintiff brings error. Affirmed.

Jas. L. Key, of Atlanta, for plaintiff in error. J. H. Porter, of Atlanta, for defendant in error.

FISH, C. J. Judgment affirmed. All the Justices concur.

(140 Ga. 374)

LUMPKIN v. GREENLEA.

(Supreme Court of Georgia. July 18, 1913.)

*(Syllabus by the Court.)***VENDOR AND PURCHASER (§ 812*) — ACTION ON PURCHASE-MONEY NOTES—ACCELERATION OF MATURITY.**

A vendor of land received from the vendee a series of notes, maturing at successive monthly intervals, each note payable to the vendor or bearer, and containing a stipulation that time was of the essence of the contract, and "that if any two of said notes become due and remain unpaid at any one time, then all the remaining unpaid notes shall be considered as due and collectible, and the right of action thereon shall, at the option of the holder hereof, at once accrue"; the vendor executing his bond obligating him to make title to the land to the vendee upon the payment of the notes. The vendor transferred four of the notes without indorsement. The vendee defaulted in the payment of two notes, one of which was held by the vendor and the other by the transferee. Whereupon the vendor claimed that such default entitled him to exercise his option of declaring all the notes held by him to be due, and accordingly brought suit upon them. Held, that the suit was premature as to the unmatured notes.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. § 917; Dec. Dig. § 812.*]

Error from Superior Court, Fulton County; Geo. L. Bell, Judge.

Action by E. S. Lumpkin against George C. Greenlea. Judgment for defendant, and plaintiff brings error. Affirmed.

Green, Tilson & McKinney, of Atlanta, for plaintiff in error. Grover C. Middlebrooks and W. R. Tichenor, both of Atlanta, for defendant in error.

EVANS, P. J. E. S. Lumpkin sold to George C. Greenlea a lot of land, executing to him a bond to make title upon the payment of a series of 104 notes due in monthly installments, numbered from 1 to 104. The notes were payable to Lumpkin or bearer, and each contained the following stipulation: "It is hereby expressly agreed that time is of the essence of this contract, and that if any two of said notes become due and remain unpaid at any one time, then all of the remaining unpaid notes shall be considered as due and collectible, and the right of action thereon shall, at the option of the holder hereof, at once accrue." Lumpkin delivered four of these notes, Nos. 3 to 6, inclusive, to a real estate agent without indorsement, in payment of his services in negotiating the sale. When note No. 1 matured it was paid by Greenlea. When note No. 2 matured it was not paid. When note No. 3 (which was the first of the notes held by the real estate agent) it was not paid. Thereupon Lumpkin gave Greenlea written notice that he exercised the option contained in each of the notes and declared them all due, and instituted suit to recover on all the notes from 2 to 104, inclusive, except the notes which had been delivered to the real estate agent. The question made by the record is whether the plaintiff's suit was prematurely brought on all the notes sued on except No. 2.

It is competent for the maker of a series of promissory notes maturing monthly through several years to provide that, in case default is made in the payment of any one or more of them at maturity, time being of the essence of the contract, the entire series shall become due and collectible at once. *Stocking v. Moury*, 128 Ga. 414, 57 S. E. 704. The provision for the acceleration of the maturity of all of the purchase-money notes by the default of two of them is for the benefit of the vendor and is to be considered as a part of his security. Where land is sold, and the vendor takes from the vendee notes for the purchase money, payable to himself or bearer, and executes to the vendee a bond for title, a transfer of the notes without indorsement or guaranty and without any transfer of title to the land to the transferee operates as a payment of the purchase money, and the vendee's equity becomes complete, and the vendor ceases to hold any interest in the land. The debt evidenced by the notes transferred in such case loses its quality as a purchase-money debt, and the transferee becomes an ordinary creditor of the vendee.

Tompkins v. Williams, 19 Ga. 569; *McGregor v. Matthias*, 32 Ga. 417; *Neal v. Murphey*, 60 Ga. 389; *Carhart v. Revlere*, 78 Ga. 173, 1 S. E. 222; *Hunt v. Harbar*, 80 Ga. 746, 6 S. E. 596; *Adams v. Cauthen*, 113 Ga. 1166, 39 S. E. 479. If only a part of the purchase-money notes be transferred without indorsement or conveyance of the land, that part of the purchase money is taken from the operation of the contract of purchase. Relatively to the vendor, the transfer by him under such circumstances is to be treated as a payment of so much of the debt as is represented by the transferred notes. It is no longer the concern of the vendor whether the notes are paid by the vendee, and he cannot take advantage of the vendee's default in their payment in accelerating the maturity of his own notes, under a provision which was intended as a security for the collection of the purchase money.

The provision for the acceleration of the maturity of the principal is incorporated in each of the notes. That privilege is given to the holder of the notes. When Lumpkin transferred four of the notes to the real estate agent, he was no longer the holder of those notes. The agent may have granted an indulgence or extension of payment to the maker, or it may be that the maker had a pleadable set-off against the agent to the amount of the notes held by him. If the agent postponed the time of maturity of the notes held by him, there would be no default or failure to pay at maturity the note so held by him. In the case of *Scott v. Liddell*, 98 Ga. 25, 25 S. E. 935, the principal of a promissory note was made payable a number of years after its date, with a stipulation in the note for the annual payment of the interest; the contract to pay interest being severable from that to pay the principal. The payee of the note assigned in writing to another the principal, reserving to himself the interest, with the right to collect the same. The note contained a stipulation that the principal should become due instant on 30 days' default in the payment of any interest installment. The transfer of the principal of the note occurred before any default in the payment of interest. The payee of the note extended the time of the payment of the interest, and, after the date stipulated in the note for the payment of interest had passed, suit was brought by the assignee of the principal of the note in advance of the time fixed in the note itself for the payment of the principal in case there was no default in the payment of interest; and it was held that the maker's failure to pay the interest at the time stipulated in the note did not operate to accelerate the maturity of the principal of the note.

We think the principle of this case conclusive of the question in hand. The transfer by Lumpkin to the real estate agent will be treated as a payment of so much of the pur-

chase debt as is represented by the transferred notes; and it is immaterial, with reference to the acceleration of the maturity of all the notes, whether the maker defaulted in the payment of the transferred notes or not.

Judgment affirmed. All the Justices concur, except LUMPKIN, J., disqualified.

(140 Ga. 353)

AUGUSTA REAL ESTATE CO. v. NIXON.

(Supreme Court of Georgia. July 19, 1913.)

(Syllabus by the Court.)

1. TRIAL (§ 251*)—INSTRUCTIONS—ISSUES—PLEADINGS.

In a suit by a real estate broker to recover commissions, where it is alleged in the petition that at the time of the breach of alleged brokerage contract there had been no revocation of the brokerage agency, but that the same was in full force and operation, and this allegation is denied in the defendant's answer, it is not error to refuse a written request to charge that "there is no plea of revocation filed in this case, and that kind of defense is not before you for consideration." It was not necessary for the plaintiff to allege that the agency had not been revoked; but having alleged it, and the defendant having denied this allegation, and both sides having introduced evidence upon the issue thus made, it was proper to submit it to the jury.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 587-595; Dec. Dig. § 251.*]

2. SUFFICIENCY OF EVIDENCE—INSTRUCTIONS.

The excerpts from the charge to which exception is taken were not open to the criticism that they contained an expression of opinion on the facts of the case, or inaccurately presented the law. The preponderance of the evidence was with the verdict, which has the approval of the court, and no sufficient reason is made to appear that it should be vacated.

Error from Superior Court, Richmond County; H. C. Hammond, Judge.

Action by the Augusta Real Estate Company against G. H. Nixon. Judgment for defendant, and plaintiff brings error. Affirmed.

Wm. H. Fleming, of Augusta, for plaintiff in error. C. H. & R. S. Cohen, of Augusta, for defendant in error.

EVANS, P. J. Judgment affirmed. All the Justices concur.

(140 Ga. 289)

DEAL et al. v. FINCH et al.

(Supreme Court of Georgia. July 18, 1913.)

(Syllabus by the Court.)

DEEDS (§ 114*)—PROPERTY CONVEYED—DESCRIPTION.

Where one sold to another a parcel of land, and executed and delivered a deed describing it as "containing 100 acres more or less," and the vendee went into possession and discovered later that it contained less than 100 acres, and, contending that she bought by the acre, and not by the tract, employed a surveyor, who surveyed and marked out of the vendor's land adjoining the tract conveyed,

without the consent of or notice to the vendor, a sufficient number of acres to make up the difference, and no possession is shown in the vendee, or acquiescence by the vendor in the line thus run, and where subsequently the vendee sold the land and executed and delivered a deed to F., describing in the language of the first deed as "containing 100 acres more or less," and the original vendor cleared the land surveyed and marked out by his vendee, and cultivated it after that time for four years before the present suit was brought, the original vendee obtained no title to the additional land surveyed and marked out by her, nor did the vendee.

[Ed. Note.—For other cases, see Deeds, Cent. Dig. §§ 316-322, 326-329, 388; Dec. Dig. § 114.*]

Error from Superior Court, Bulloch County; B. T. Rawlings, Judge.

Action by J. C. Deal and Webb Donaldson against W. S. Finch and others. Judgment for defendants, and plaintiffs bring error. Reversed.

J. C. Deal and Webb Donaldson brought their petition against W. S. Finch, W. W. Parish, justice of the peace, and M. M. Pennington, constable, for injunction and other relief. The pleadings and evidence showed substantially the following: In 1892 Deal, one of the plaintiffs, sold and conveyed by deed to his sister, Mrs. Annie Strouse, a certain tract of land in Bulloch county, described in the deed as "containing one hundred (100) acres more or less." At the time of this sale Deal owned two adjacent tracts of land, known as the Hardee tract, containing about 987 acres, and the Bell place, containing about 80 acres. The sale to Mrs. Strouse embraced all of the Bell place and in addition a small portion was to be cut off of the Hardee tract. A survey was made by a surveyor employed by Deal, and Mrs. Strouse's husband was present when the line was run. No question seems to have been raised by Mrs. Strouse from the time of the execution of the deed to her in 1892 until 1896, after she had bargained to sell the land to Finch, and at which time she had a survey made, without notice to Deal, which showed a shortage in the number of acres. No offer to rescind the trade appears to have been made by Mrs. Strouse, nor any claim of an apportionment in the price of the land for the number of acres falling short. Neither Mrs. Strouse nor Finch, her grantee, so far as the record shows, at any time since the survey of the line by Mrs. Strouse, had actual possession of the land in controversy. In the meantime Deal had cleared the timber from a portion of the land, and his tenant was cultivating the same. In 1909 Finch, the grantee of Mrs. Strouse, demanded rent from Donaldson, the tenant of Deal, and, on the refusal of Donaldson to pay him rent, sued out a distress warrant against him. Donaldson filed a counter affidavit to the distress warrant, in which he denied owing any rent to Finch, and alleged that Finch

had no title to the land, but that Deal, his landlord, was the owner. Deal and Donaldson then filed the present petition, alleging that the sole question involved in the trial of the distress warrant was one involving the title to the land, and that the justice's court had no jurisdiction to determine that issue, or to award the plaintiffs full and adequate relief. Deal further alleged that the claim of title by Finch constituted a cloud upon his title to the land, and that, unless the question of title was settled, his tenants would from year to year continue to be annoyed and harassed by the foreclosure of distress warrants against them by Finch. The prayer of the petition was that the defendants be enjoined from further prosecuting the distress warrant, and that title to the land in controversy be adjudged to be in Deal, etc. The jury returned a verdict for the defendant, upon which the court entered a decree adjudging the title to the land in controversy to be in the defendant Finch. Deal made a motion for a new trial, which being overruled, he accepted.

Bfannen & Booth, of Statesboro, for plaintiffs in error. H. B. Strange, of Statesboro, for defendants in error.

HILL, J. (after stating the facts as above). This case involved the title to a parcel of land. It appears from the record that the plaintiff Deal owned two tracts of land, one known as the "Hardee tract" and the other as the "Bell place." He sold the Bell place, and a portion of the Hardee tract adjoining, to his sister, Mrs. Strouse, and executed and delivered to her a deed describing the land, in which it was stated that it "contained 100 acres more or less." Mrs. Strouse in turn conveyed a tract of land to the defendant Finch, describing it as "containing 100 acres more or less." The plaintiff's contention was that he sold and conveyed to Mrs. Strouse the Bell place and a certain portion of the Hardee place, all of which he and Mrs. Strouse estimated to contain about 100 acres, and that the land was sold by the tract, and not by the acre. The contention of the defendant Finch was that the plaintiff sold to Mrs. Strouse 100 acres of land, which consisted of the Bell place and enough of the Hardee tract to make the 100 acres, that the purpose of the deed he made to Mrs. Strouse was to convey 100 acres, and that the words "more or less" were inserted in the deed from the plaintiff to Mrs. Strouse by the clerk who prepared the deed; he saying at the time that it was customary to put such words in deeds. After the deed from the plaintiff to Mrs. Strouse was executed and delivered, Mrs. Strouse contended that the land described in the deed to her from the plaintiff did not contain 100 acres, and had a surveyor to run off a sufficiency of the Hardee tract of land to make 100 acres, and to mark a line

indicating the additional land she claimed to make up the deficiency. This survey was made, and the line run and marked, without the knowledge or consent of the plaintiff. Afterwards Deal had a portion of the land so surveyed and marked off cleared, and cultivated it for about four years before this suit was instituted. He never did anything towards ratifying the action of Mrs. Strouse in having the additional land surveyed and marked off, so far as the record discloses, but, on the contrary, cleared and cultivated the land for several years after this without interference. It is not clear whether Mrs. Strouse, in the deed made by her to the defendant Finch, included such additional part of the Hardee place; but, granting that she did, the defendant under such deed did not get a good title to it as against Deal, and therefore the evidence did not authorize a verdict in behalf of the defendant. Indeed, under the record as it now stands, it would not have been improper for the court to have directed a verdict in favor of the plaintiffs. The court erred in refusing to grant the motion for a new trial.

Judgment reversed. All the Justices concur.

(140 Ga. 270)

UNITED CIGAR STORES CO. v. MCKENZIE.
MCKENZIE v. UNITED CIGAR STORES CO.
(Supreme Court of Georgia. July 18, 1913.)

(Syllabus by the Court.)

1. LANDLORD AND TENANT (§ 233*)—LEASE—CONSTRUCTION—QUESTION FOR JURY.

A lease contract provided that the lessee should pay the lessor for a certain storeroom and basement the yearly rent of \$4,800 in equal monthly \$400 payments in advance, on the first day of each month during the term of five years. It was also provided that the lessor "allow a rebate of \$100.00 per month for the first year under this contract, same to cover such improvements or to be otherwise applied as lessee may desire, and same is to be deducted from the monthly rental." The lessee paid \$300 per month for the first 12 months, but refused to pay the \$100 per month, or \$1,200 for the year, or to make any "improvements" upon the leased premises amounting to \$100 per month, or \$1,200 per year. The lessor brought suit, at the expiration of the first 12 months, against the lessee for the \$1,200 not paid by the latter, and also asked for an accounting. A demurrer to the petition was filed on the ground, among others, that the plaintiff could not recover, because the lessee under the contract had the right to an unconditional reduction of the rental, during the first 12 months, of \$100 per month, without reference to any "improvements" made on the leased premises by the lessee. *Held*, that the court did not err in overruling the demurrer.

(a) The contract is ambiguous with reference to allowing a rebate of \$100 per month for the first year; and it is a question for the jury to say, under competent evidence, what the intention of the parties to the contract was.

[Ed. Note.—For other cases, see Landlord and Tenant, Cent. Dig. §§ 49, 940-944; Dec. Dig. § 233.*]

2. LANDLORD AND TENANT (§ 233*)—PLEADING (§ 18*)—LEASE—CONSTRUCTION—QUESTION FOR JURY—ANSWER.

The court did not err in other rulings made on demurrer, as set out in the second division of the opinion.

[Ed. Note.—For other cases, see *Landlord and Tenant*, Cent. Dig. §§ 940-944; Dec. Dig. § 233; * *Pleading*, Cent. Dig. §§ 39, 64; Dec. Dig. § 18.*]

Error from Superior Court, Fulton County; J. T. Pendleton, Judge.

Action by George M. McKenzie against the United Cigar Stores Company. Judgment for plaintiff, and defendant brings error and plaintiff files cross-bill. Affirmed on both bills of exceptions.

Moore & Pomeroy, of Atlanta, for plaintiff in error. Smith & Hastings, of Atlanta, for defendant in error.

HILL, J. McKenzie brought suit against the United Cigar Stores Company on a lease contract between McKenzie as landlord and the cigar company as tenant, to recover the sum of \$1,200 as part of the rent of a certain storehouse in the city of Atlanta, for the first 12 months. By the terms of the contract the defendant was to pay the plaintiff \$400 per month for a period of five years, "paying the yearly rent of \$4,800 payable in equal monthly \$400 payments in advance on the first day of each and every month during the term," with the privilege of canceling the lease at the expiration of the first 12 months. The contract contained the following clause: "Lessor allows a rebate of \$100.00 per month for the first year under this contract, same to cover such improvements or to be otherwise applied as lessee may desire, and same is to be deducted from the monthly rental." The defendant paid the plaintiff \$300 per month for the first 12 months, but refused to pay the additional \$100 per month, its contention being that the language in the lease contract quoted above gave it the right not to pay the \$100 to the plaintiff, but that it could "apply" the same as it saw proper, either to "improvements" on the leased property, or "otherwise" to its own use, at its option. The plaintiff, on the contrary, insists that the true meaning of the contract is that the defendant had the privilege of making improvements on the property to the amount of \$100 per month, and, if it should do so, this amount was to be deducted from the monthly rental of \$400 a month for the first 12 months, but in no event was the rental to be reduced unless "improvements" were made. The defendant filed general and special demurrers to the petition, and the plaintiff filed general and special demurrers to the answer. The court overruled both general demurrers, and sustained some, and overruled other grounds of the special demurrers, both to the petition and the answer.

The defendant filed the main bill of exceptions, and the plaintiff sued out a cross-bill of exceptions; each party complaining of the rulings which were adverse to him.

[1] 1. We think the whole case turns upon the proper construction to be given the portion of the lease contract quoted above. It was insisted on the part of the plaintiff that the contract meant that the \$100 rebate was to be used in "improvements" to the building, or otherwise to be applied to the property in substantially a similar manner as improvements. It was further insisted that the "rebate" was not a mere reduction in the rent, so as to become the property of the lessee, but was an allowance to the defendant for the purpose of improvements to be made by it on the leased premises, and was for no other purpose. The plaintiff asked for an accounting between the parties as to what improvements had been made by the defendant under the contract, and what sum was due the plaintiff after deducting the value of the improvements, if any. On the other hand, it was contended by the defendant that the contract of rental, as shown by the contract itself, was really to be but \$300 per month, and that the rebate was an unconditional reduction of the amount of the rent for the first 12 months of the life of the contract, and that no "improvements" were in contemplation of the parties, and, also, if it be held that the contract is ambiguous, that the "trade fixtures," which were placed in the store for the purpose of conducting the business in connection with the use of the premises, should be taken into consideration in connection with the rebate, and the defendant should be allowed a reduction for whatever sum was expended for trade fixtures, which is alleged to be about \$1,200 or over. Great stress is laid by the defendant upon the word "otherwise," as used in the contract. It is argued that if the word has any meaning at all in connection with this particular contract, it cannot mean anything of the same nature and character as "improvements"; that it must mean that the money must be applied in some other way, "to be otherwise applied as lessee may desire," and that this language gives the defendant the option to apply the money as it may desire, and that it has "desired" to apply this money to a reduction of the rental, and consequently to its own use. Thus it will be seen that the real question is as to the meaning of the contract and the intention of the parties thereto, and whether its meaning is so doubtful and vague as to make it ambiguous, and to call for parol evidence in order to arrive at its true meaning and the intention of the parties at the time of its execution. From an inspection of the contract, it is clear that the clause under consideration is ambiguous, and that parol evidence is admissible to explain the real intention of

the parties, so that the jury, on the trial, may determine the facts from the evidence. In this view, the court did not err in overruling the demurrer to the petition.

[2] 2. In its answer to the petition the defendant averred, among other things, that, should there be any ambiguity with reference to the contract (which the defendant denied), "a reasonable and legal construction thereof is to the effect that trade fixtures should be taken into accounting in consideration of the \$100 rebate; this defendant says that trade fixtures and other improvements on said property amounted to more than the sum of \$1,200." The plaintiff demurred specially to this paragraph of the answer, "in so far as the same alleges that trade fixtures should be taken into accounting, for the reason that the same states a conclusion of the pleader. * * * And for the further reason that same is vague and indefinite, in that it does not allege what trade fixtures are referred to, and the itemized value thereof, nor does it allege whether said trade fixtures were removed or allowed to remain in the plaintiff's building. Plaintiff also demurs specially to the following words in paragraph 14 of defendant's answer, namely, 'trade fixtures and other improvements,' because the same is vague and indefinite, and fails to allege what improvements, and the separate and itemized cost thereof." The court sustained these demurrers in so far as they refer to the defendant's allegations as vague and indefinite, but overruled the demurrer to the allegation that its trade fixtures should properly be taken into the accounting. To so much of the court's judgment as sustained the plaintiff's demurrer to the answer as being vague and indefinite, the defendant excepted; and to so much of the order as overruled the plaintiff's demurrer to the defendant's allegation that the trade fixtures should be properly taken into the accounting, the plaintiff excepted. Properly understood, we think the court correctly disposed of this demurrer. The effect of the court's order was to hold that the defendant could aver that the trade fixtures placed in the leased premises by the lessee were a proper subject of accounting between the parties to the contract, but that the items had not been properly set out and pleaded in the instant case. Having held that the contract is ambiguous, it is for the jury to say, under sufficiently definite pleadings and under the evidence, whether trade fixtures are embraced within the meaning of the words "such improvements," "or to be otherwise applied," etc., as contemplated by the parties to the contract.

It is unnecessary to consider each of the numerous special demurrers separately, some of which were overruled and some sustained by the court. The rulings of the court on the other questions raised by the demurrers

were generally in accord with the rulings here made.

Judgment affirmed on both bills of exceptions. All the Justices concur.

(140 Ga. 326)

PRATER v. PRATER.

(Supreme Court of Georgia. July 18, 1913.)

(Syllabus by the Court.)

EXCEPTIONS, BILL OF (§ 56*)—VERIFICATION.

The Supreme Court is without jurisdiction to pass upon the merits of any bill of exceptions, the recitals of fact in which are not duly certified to be true. *Binyard v. State*, 128 Ga. 635, 55 S. E. 498; *Cade v. Du Bose*, 125 Ga. 832, 54 S. E. 697; *Grant v. Derrick*, 130 Ga. 43, 60 S. E. 157.

[Ed. Note.—For other cases, see Exceptions, Bill of, Cent. Dig. §§ 94-96; Dec. Dig. § 56.*]

Error from Superior Court, Fulton County; Geo. L. Bell, Judge.

Action between E. L. Prater and Jessie Prater. From the judgment, E. L. Prater brings error. Dismissed.

Thos. B. Brown and C. G. Battle, both of Atlanta, for plaintiff in error. Thos. H. Scott, of Atlanta, for defendant in error.

ATKINSON, J. Writ of error dismissed. All the Justices concur.

(140 Ga. 345)

CLOUD et al. v. FORD.

(Supreme Court of Georgia. July 19, 1913.)

(Syllabus by the Court.)

REVIEW ON APPEAL.

No errors of law are alleged to have been committed upon the trial of the case, and there was sufficient evidence to support the verdict.

Error from Superior Court, Fulton County; W. D. Ellis, Judge.

Action between Narcissus Cloud and others and M. A. Ford, administratrix. From the judgment, the parties first mentioned bring error. Affirmed.

Lowndes Calhoun, of Atlanta, for plaintiffs in error. C. W. Smith and M. A. Hale, both of Atlanta, for defendant in error.

BECK, J. Judgment affirmed. All the Justices concur.

(140 Ga. 345)

GEORGIA GRANITE CO. v. AUSTIN.

(Supreme Court of Georgia. July 19, 1913.)

REVIEW ON APPEAL.

There was no merit in the objections to the rulings of the court upon the admissibility of evidence. And though it may have been doubtful, under the allegations of the petition, whether the charge in regard to future pain and suffering was proper, in view of the evidence and the amount found by the jury, this will not require the grant of a new trial.

Error from Superior Court, Fulton County; Geo. L. Bell, Judge.

Action by Osborne Austin against the Georgia Granite Company. Judgment for plaintiff, and defendant brings error. Affirmed.

Candler, Thomson & Hirsch, of Atlanta, for plaintiff in error. Frank L. Haralson and R. J. Jordan, both of Atlanta, for defendant in error.

PER CURIAM. Judgment affirmed. All the Justices concur.

(140 Ga. 283)

R. O. CAMPBELL COAL CO. v. WHITE et al.

(Supreme Court of Georgia. July 18, 1918.)

(Syllabus by the Court.)

1. MUNICIPAL CORPORATIONS (§ 809*) — OBSTRUCTION OF STREET — INJURY TO PEDESTRIAN — LIABILITY.

In an action to recover damages, brought against a municipal corporation and two private corporations, the petition alleged: A certain company was undertaking to construct and had constructed a house at a certain place on one of the public streets of the city, and in so doing had placed in the street a lime box, a mortar box, and a pile of sand and brick. The other defendant company furnished the material, the lime box, and the mortar box, and the sand and brick, and placed them in the street. An ordinance of the municipality authorized any person or persons actually building, or about to build or repair any building, to collect and lay the necessary material therefor in the street adjoining the place of construction, and to have the privilege of using one-half of the sidewalk and one-half the width of the street adjoining, under certain conditions. One of these was that "the owner or proprietor of such material" shall cause lights to be placed upon the obstruction at night. This was not done, and all of the defendants knew such fact, and all of them neglected and failed to provide the necessary lights. "All of said defendants were the owners or proprietors of said material in said street." They knew, or ought to have known, that the material was dangerous in the street without having a light or lamp placed upon it. By reason of the failure to perform the duty imposed by the ordinance, the person passing along the street in the plaintiff's automobile, without fault on his part, ran against the obstruction, causing damages to the machine. Held, that as against a general demurrer this made a case against the corporation alleged to have furnished and placed the material in the street and to have been one of the owners thereof, and there was no error in refusing to dismiss the petition against such corporation on general demurrer. *Wilson v. White*, 71 Ga. 506, 51 Am. Rep. 269.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. §§ 1688-1694; Dec. Dig. § 809.*]

2. DEMURRER PROPERLY OVERRULED.

The special grounds of demurrer were properly overruled.

Error from Superior Court, Fulton County; Geo. L. Bell, Judge.

Action by M. H. White and others against the R. O. Campbell Coal Company. Judgment for plaintiffs, and defendant brings error. Affirmed.

Robt. C. & Philip H. Alston, of Atlanta, for plaintiff in error. Lawton Nalley, J. L. Mayson, W. D. Ellis, Jr., and Mayson & Johnson, all of Atlanta, for defendants in error.

HILL, J. Judgment affirmed. All the Justices concur.

(13 Ga. App. 120)

WOODWARD v. STATE. (No. 4,849.)

(Court of Appeals of Georgia. July 22, 1913.)

(Syllabus by the Court.)

CRIMINAL LAW (§§ 179, 274*) — PLEA OF GUILTY — RIGHT TO WITHDRAW — FORMER JEOPARDY.

Where a plea of guilty has been entered and judgment has not been pronounced, the accused has the right to withdraw the plea of guilty and enter a plea of not guilty. The facts in the instant case presented no exception to the rule, and did not authorize the refusal by the trial judge to permit the accused to exercise this statutory right.

[Ed. Note.—For other cases, see *Criminal Law*, Cent. Dig. §§ 325, 632, 633; Dec. Dig. §§ 179, 274.*]

Pottle, J., dissenting.

Error from Superior Court, Fulton County; W. E. Thomas, Judge.

P. Woodward entered a plea of guilty of gaming, and from the trial judge's refusal to allow him to withdraw such plea, he brings error. Reversed.

Plaintiff in error was indicted for gaming. On arraignment he filed a plea of not guilty. After the evidence for the state had been introduced, his attorney asked permission from the court to withdraw the plea of not guilty and to enter a plea of guilty. He was allowed to do this; and after having entered the plea of guilty, the attorney for the accused asked the court to postpone sentence until a subsequent day named. The request was granted. On the day upon which sentence was to be imposed, which was the last day of court, the accused, when called up for sentence, moved to the court to be permitted to withdraw his plea of guilty and to enter a plea of not guilty. It appears that all the witnesses for the prosecution had been discharged, and that the witnesses upon whose testimony the state relied to make out the case resided beyond the jurisdiction of the state. Under this state of facts the trial judge refused to allow the accused to withdraw his plea of guilty. The writ of error challenges the correctness of this judgment.

John S. McClelland and J. E. McClelland, both of Atlanta, for plaintiff in error. Hugh M. Dorsey, Sol. Gen., of Atlanta, for the State.

HILL, C. J. (after stating the facts as above). The Penal Code of 1910, § 971, declares that any time before judgment is pronounced the prisoner may withdraw a plea

of guilty and plead not guilty. In *Griffin v. State*, 12 Ga. App. —, 77 S. E. 1080, in construing this section, it is held that before sentence is pronounced upon the prisoner, he has a right to withdraw his plea of guilty, but that after sentence is pronounced, it ceases to be a right of the prisoner and then may be allowed in the discretion of the presiding judge. The majority of this court are of the opinion that the facts of this case do not constitute any exception to the rule as announced in the *Griffin Case*, supra. The right which the statute gives to the prisoner to withdraw his plea of guilty before judgment is pronounced is without qualification. If, however, the trial judge should be satisfied that the prisoner is endeavoring to perpetrate a fraud upon the court by first pleading not guilty and then withdrawing that plea and then pleading guilty, and then again withdrawing the latter plea and again pleading not guilty, for the purpose of delaying his trial, or of taking advantage of the fact that the juries for the term had been discharged and the witnesses for the state had been excused, the judge would be justified in not allowing the prisoner to exercise this right, but this would require very clear and strong proof of misconduct on the part of the prisoner or his counsel. The mere fact that if the prisoner is allowed to withdraw his plea of guilty, his case could not be tried at the then term, or that the state's witnesses had been discharged, and that the case would have to be continued, would not be sufficient to deprive the prisoner of this statutory right. It should further appear that this situation had been brought about designedly by the prisoner for the purpose of misleading or deceiving the court in the manner indicated. The record does not show that this was the purpose of the prisoner or his counsel, and it will not be assumed that such was the purpose. The prisoner had only entered a plea of guilty one time, and counsel had asked that sentence be postponed, presumably for the purpose of allowing him to procure exculpatory statements or affidavits in behalf of his client. While the record does not show the fact, yet it is fair to presume that between the entering of the plea of guilty and the day for imposition of sentence, the attorney for the prisoner, or the prisoner himself, may have discovered evidence in his favor. It is not the purpose of the law to invite pleas of guilty by persons charged with crime, but rather is it the purpose of the law to guarantee to all persons charged with crime a trial by a jury. Before depriving a man of his liberty or his property trial judges would prefer to hear all the evidence, and to have the support of a verdict of a jury upon that evidence, rather than to impose sentence based upon pleas of guilty.

It has been suggested by learned counsel for defendant in error that if the accused, under the facts in the present case, were allowed to withdraw his plea of guilty and en-

ter a plea of not guilty, he might on a subsequent trial set up the first trial, when his case was partly investigated by the jury, as former jeopardy. We do not concur in this opinion. On the first trial the accused voluntarily withdrew his plea of not guilty. In other words, his case was withdrawn from the consideration of the jury by his request, and not by any action of the court. There is no principle of the law of former jeopardy which would permit an accused to set up his own voluntary act in withdrawing his case from the consideration of the jury and pleading guilty, and subsequently withdrawing the latter plea and again pleading not guilty, as a bar to a second trial. The withdrawal of the case from the jury in compliance with the request of the accused was equivalent to the declaration of a mistrial by consent, and a second trial resulting from this voluntary conduct of the accused would be equivalent, in legal effect, to a new trial granted at his own request. Under the construction which this court placed upon section 971 of the Penal Code in the *Griffin Case*, supra, the majority of this court is clearly of the opinion that the accused had the right, since the sentence of the court had not been pronounced against him, to withdraw his plea of guilty and enter a plea of not guilty.

Judgment reversed.

POTTLE, J. (dissenting). In the absence of a statute to the contrary, a prisoner has no absolute right to withdraw his plea, either before or after sentence. Section 971 of the Penal Code is declaratory of the common law in so far as it allows the judge, in the exercise of sound discretion, to permit the plea to be withdrawn after sentence, and in derogation of the common law in so far as it gives the prisoner the absolute right to withdraw the plea before sentence is pronounced. No such state of facts as the present record discloses was presented in *Griffin v. State*, 12 Ga. App. —, 77 S. E. 1080. There the prisoner pleaded guilty on arraignment, and was permitted, under the showing made, to withdraw his plea even after sentence. The section of the Code above cited provides: "Upon the arraignment of a prisoner, the indictment shall be read to him, and he shall be required to answer whether he is guilty or not guilty of the offense charged in the indictment, which answer or plea shall be made orally by the prisoner, or his counsel. And if he shall plead 'Guilty,' such plea shall be immediately recorded on the minutes of the court by the clerk, together with the arraignment; and the court shall pronounce upon such prisoner the judgment of the law, in the same manner as if he had been convicted of the offense by the verdict of a jury; but, at any time before judgment is pronounced, the prisoner may withdraw the plea of 'Guilty,' and plead 'Not guilty,' and such former plea shall not be given in evidence

against him on his trial." No matter how often tried, nor how often the plea be withdrawn, the prisoner is entitled to be arraigned but once. *Atkins v. State*, 69 Ga. 595, 598. If, upon arraignment, the prisoner elect to join issue with the state, and the trial commences, he cannot as a matter of right withdraw his plea of not guilty and have the case withdrawn from the jury. His right to do so rests in the sound legal discretion of the court, because the statute gives him no such right and the common-law rule is applicable. If upon arraignment, instead of joining issue with the state, the prisoner admits the facts set forth in the indictment and enters a plea of guilty, he may, at any time before sentence is pronounced, as a matter of right, without assigning any reason for so doing, withdraw his plea of guilty and go to trial. *Griffin v. State*, supra. When called upon to plead he answers guilty or not guilty, or stands mute, in which last event the court pleads not guilty for him. If he pleads guilty, he can withdraw that plea, as matter of right before sentence; if he pleads not guilty and the trial begins, he cannot without the court's consent withdraw that plea. A plea of not guilty is a denial of guilt, and an election to have the question of guilt or innocence determined by the tribunal designated by the law to find the facts. So far as his absolute rights are concerned, an election to join issue when once made is final, and the record is closed so far as the pleading is concerned. The court may, in the exercise of a sound discretion, permit the record to be opened, and the plea withdrawn and a plea of guilty entered, and this may be done at any time before verdict. After a plea of not guilty is once entered, the whole matter from that time afterward rests in the discretion of the court. In the present case the plaintiff in error moved the court to permit him to withdraw the plea of not guilty, upon the ground that he desired to enter a plea of guilty and have sentence pronounced upon him. The court granted his motion. The plea of not guilty was withdrawn, and the jury was discharged. As a further matter of grace, upon the prisoner's own motion, the court postponed the pronouncement of sentence until the last day of the court, for the purpose of allowing the prisoner to present facts which might go in mitigation of the punishment to be imposed. After having taken advantage of this indulgence, and after the witnesses for the state had dispersed and gone beyond the jurisdiction of the court, he proposed to withdraw his plea of guilty and have the case postponed for another term. Of course, if he had a right to do this, the right ought to have been accorded, let the consequences be what they may. But, in my opinion, he had no such right. The law required him to plead on arraignment. He did plead. The present situation has arisen, not because of any right

which the law gave him, but because of the exercise of the court's discretion in his favor. That part of section 971 which gives the prisoner the absolute right to withdraw his plea of guilty before sentence must be construed to mean the plea of guilty to which the statute has reference; that is to say, the plea of guilty entered upon arraignment. It was never contemplated that the prisoner could exercise the right of withdrawal ad infinitum, merely because sentence had not been pronounced. There is nothing in the statute which expressly limits the prisoner's right to one withdrawal. If the view of the majority be correct, the only limitation upon this right is that sentence should not have been pronounced, and the prisoner may play battledore and shuttlecock with the court until judgment is actually pronounced upon him. In my opinion, after the prisoner has been accorded the right to withdraw the plea which he has entered on arraignment, whether it be a plea of guilty or a plea of not guilty, his right to withdraw a second plea is a matter addressed to the sound legal discretion of the court. If this view of the law is correct, it must be conceded that the court did not abuse its discretion in the present case in refusing to permit the prisoner to withdraw his plea of guilty. No reason whatever was assigned by him for the exercise of the court's discretion in his favor, and the situation which has been brought about, upon his own motion and by his own request, rendered it proper to refuse to extend to him any further favor. I cannot bring my mind to believe that the law will permit a prisoner thus to trifle with the court and the orderly and regular administration of justice. If he cannot plead former jeopardy, it is only because he has waived his right so to do by consenting for the case to be withdrawn from the jury. *Nolan v. State*, 55 Ga. 521, 21 Am. Rep. 281; 1 Bishop, New Crim. Proc. § 821. His proposition was, in effect, that if the court would allow him to withdraw his plea of not guilty, he would consent for the jury to be discharged; and if the court would grant him indulgence for two or three days, he would then appear and receive sentence under his plea of guilty. The court accepted his proposition, and he ought to be required to abide by his part of the agreement. The majority concedes that if the prisoner brought about the situation designedly for the purpose of deceiving the court and procuring a postponement of the trial, the court might refuse to allow the plea to be withdrawn. This concession is to my mind wholly inconsistent with the principle of law announced by the court, namely, that the prisoner had an absolute right to withdraw his plea of guilty at any time before sentence. If he had this right, the reason for its exercise is not a matter with which the court has any concern. If this limitation upon his right is sound, then in my

opinion, even under the court's view of the law, the judgment ought to be affirmed. The facts are such as justly to give rise to the inference that the prisoner was merely trifling with the court, and had adopted this method of securing postponement. He said not a word, and offered not the slightest evidence, to rebut this inference by showing that since the withdrawal of his plea of not guilty he had discovered new facts which would entitle him to an acquittal. To allow him to take advantage of a situation which he himself had brought about, embarrass the state, which may not be able again to procure the attendance of the witnesses residing in another state, and thus probably bring about a miscarriage of justice, is wholly at variance with my conception of the law. Upon the clearest principles, the prisoner has by his own consent, waived his right to be again put on trial, and was properly sentenced under his plea of guilty.

For these reasons, I am compelled to dissent from the judgment rendered by the majority.

(13 Ga. App. 153)

WARD v. THOMPSON. (No. 4,495.)

(Court of Appeals of Georgia. Aug. 11, 1913.)

(*Syllabus by the Court.*)

1. EVIDENCE (§ 420*)—PAROL—BILLS AND NOTES.

While the consideration of a promissory note may generally be inquired into, yet where it appears that the terms of a mutual contract are explicitly stated, parol evidence is inadmissible to ingraft upon the contract additional conditions inconsistent with those therein explicitly stated.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 1728, 1795, 1800, 1804, 1815, 1821, 1929-1944; Dec. Dig. § 420.*]

2. EVIDENCE (§ 445*)—MODIFICATION—PAROL AGREEMENT.

A note which stipulates that it is given for a domestic pump, which is to be delivered within 30 days from the date thereof, and further provides that the note is to be void only upon condition that the pump company refuses to deliver the pump as above specified, and for no other cause whatsoever, cannot be affected by a subsequent agreement of an agent of the pump company (who, so far as appears from the record, was not authorized to make this subsequent agreement) to the effect that, if the purchaser struck quicksand he would not be required to take the pump or pay the note. Especially is this true where it appears that the pump was delivered according to the contract, upon the land of the defendant, within the specified time, and no effort was made to install the pump. Nor could the note be affected by a parol agreement that the pump was to be installed free of charge and water pipes run into the purchaser's kitchen.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 2052-2065; Dec. Dig. § 445.*]

3. ACTION ON NOTE.

The judgment for the plaintiff was authorized by the evidence, and there was no error in refusing a new trial.

Error from Superior Court, Greene County; Jas. B. Park, Judge.

Action by W. G. Thompson against Iverson Ward. Judgment for plaintiff, and defendant brings error. Affirmed.

M. C. Few, of Madison, for plaintiff in error. Middlebrooks & Burrus and Williford & Lambert, all of Madison, for defendant in error.

RUSSELL, J. Judgment affirmed.

(13 Ga. App. 179)

WILLIAMS v. STATE. (No. 4,917.)

(Court of Appeals of Georgia. Aug. 12, 1913.)

(*Syllabus by the Court.*)

1. CRIMINAL LAW (§ 1077*)—APPEAL—AFFIDAVIT IN FORMA PAUPERIS.

As it appears from the record that the plaintiff in error filed a proper affidavit in forma pauperis, the motion to dismiss the writ of error is denied.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2718, 2719; Dec. Dig. § 1077.*]

2. CRIMINAL LAW (§ 598*)—CONTINUANCE—GROUNDS.

The court did not err in overruling the motion for continuance, since it does not appear that any effort had been made to procure the attendance of the absent witness, either by subpoena or otherwise.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1335-1341; Dec. Dig. § 598.*]

3. INTOXICATING LIQUORS (§ 236*)—PROSECUTION—EVIDENCE OF SALE.

The evidence was sufficient to authorize the verdict of guilty. The witness saw the defendant accept from another person a quarter and a half dollar in money, and saw the defendant get a pint of whisky out of a carton in a corner of the warehouse and hand it to the person who had paid him the money. This, with the additional circumstance that the witness (who was the town marshal) immediately examined the carton and found therein four or five pints of whisky, and the fact that the carton was addressed in the name of the defendant, was sufficient to authorize the jury to infer that, in accepting the money and handing the whisky in return, the defendant was consummating a sale.

[Ed. Note.—For other cases, see Intoxicating Liquors, Cent. Dig. §§ 300-322; Dec. Dig. § 236.*]

4. CRIMINAL LAW (§ 1129*)—APPEAL—ASSIGNMENT OF ERROR—SUFFICIENCY.

The assignment of error addressed to the charge of the court as a whole, upon the ground that "the charge was too meager for the jury to understand their duty in the light of the law, and that the charge did not cover the issue made by the evidence," is too vague and indefinite to present anything for the consideration of this court.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2954-2964; Dec. Dig. § 1129.*]

5. CRIMINAL LAW (§ 789*)—INSTRUCTIONS—REASONABLE DOUBT.

The instruction of the court, that "the degree of proof necessary is that the facts and circumstances submitted to your consideration must be sufficient to satisfy your minds and consciences beyond a reasonable doubt that the defendant is guilty," sufficiently presented to the jury the doctrine of reasonable doubt as

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep't Indexes

applied to the evidence submitted in the case. There is no assignment of error based upon the ground that the court failed to instruct the jury that, where circumstantial evidence alone is relied upon, the evidence must be sufficient to exclude every other reasonable hypothesis than that of the defendant's guilt.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1846-1849, 1851, 1880, 1904-1922, 1960, 1967; Dec. Dig. § 789.*]

6. VERDICT AND DENIAL OF NEW TRIAL SUSTAINED.

The evidence authorized the verdict, and there was no error in refusing a new trial.

Error from Superior Court, Worth County; Frank Park, Judge.

Carey Williams was convicted of violating the prohibitory law, and brings error. Affirmed.

Payton & Nottingham, of Sylvester, for plaintiff in error. R. C. Bell, Sol. Gen., of Cairo, for the State.

RUSSELL, J. Judgment affirmed.

(13 Ga. App. 170)

HILL v. STATE (No. 4,990.)

(Court of Appeals of Georgia. Aug. 11, 1913.)

(Syllabus by the Court.)

1. CRIMINAL LAW (§ 762*)—INSTRUCTIONS—EXPRESSION OF OPINION.

The objection made to an excerpt from the charge of the court, on the ground that it was an expression of opinion as to what had been proved by the state, is not well founded. The trial judge fully and fairly stated the contentions of both the state and the accused, without the slightest intimation or expression of any opinion as to which contentions had been established by the evidence.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1731, 1750, 1754, 1758, 1759, 1769; Dec. Dig. § 762.*]

2. VERDICT SUSTAINED.

No other error of law was complained of, and the verdict is supported by the evidence.

Error from Superior Court, Early County; W. C. Worrell, Judge.

Donas Hill was convicted of crime, and brings error. Affirmed.

H. M. Calhoun, of Arlington, for plaintiff in error. B. T. Castellow, Sol. Gen., of Cuthbert, and R. R. Arnold, of Atlanta, for the State.

HILL, C. J. Judgment affirmed.

(13 Ga. App. 174)

HUDSON v. DRIVER. (No. 4,579.)

(Court of Appeals of Georgia. Aug. 12, 1913.)

(Syllabus by the Court.)

APPEAL AND ERROR (§ 979*)—DISCRETIONARY RULING—GRANTING NEW TRIAL.

In this case error is assigned upon the judgment of the trial court in granting a new trial. It is the first grant of a new trial; and

since a verdict in favor of the plaintiff was not demanded by the evidence, the discretion of the trial judge will not be controlled. "The first grant of a new trial will not be disturbed unless both law and facts require the verdict." Civil Code 1910, § 6204; Wright v. Garland, 137 Ga. 80, 72 S. E. 399; Zorn v. Upson Banking & Trust Co., 137 Ga. 464, 73 S. E. 652.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3871-3873, 3877; Dec. Dig. § 979.*]

Error from City Court of Carrollton; James Beall, Judge.

Action by Mrs. Jim Hudson against Berry Driver. A new trial was granted after judgment for plaintiff, and plaintiff brings error. Affirmed.

Newell & Fielder, of Carrollton, for plaintiff in error. Leon Hood, of Carrollton, for defendant in error.

RUSSELL, J. Judgment affirmed.

(13 Ga. App. 180)

SURRENCY v. GLENNVILLE SUPPLY CO. (No. 4,973.)

(Court of Appeals of Georgia. Aug. 12, 1913.)

(Syllabus by the Court.)

1. ELECTION OF REMEDIES (§ 3*)—EFFECT.

The defendant in the lower court, in his plea, alleged that he had previously filed and that there was then pending an action in trover for the recovery of the cotton for the conversion of which he sought to recoup damages as against the suit brought by the plaintiff upon his note. The defendant was concluded by his election, and the court did not err in striking the plea, even if it was not an attempt to set off damage arising from a tort committed by the plaintiff as against a suit upon the contract. "Where one has an option either to affirm or to disaffirm a sale, * * * and exercises this option, he is bound by his election." Kennedy v. Manry, 6 Ga. App. 816, 66 S. E. 29. The defendant's election to proceed in trover was conclusive, and constituted an absolute bar to the maintenance of the defense he sought to set up. Rowe v. Sam Wechselbaum Co., 3 Ga. App. 504, 60 S. E. 275.

[Ed. Note.—For other cases, see Election of Remedies, Cent. Dig. §§ 3, 4; Dec. Dig. § 3.*]

2. APPEAL AND ERROR (§ 854*)—JUDGMENT—INCORRECT REASON.

A correct judgment will not be reversed, even if the reason stated for its rendition is incorrect or insufficient.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3403, 3404, 3408-3424, 3427-3430; Dec. Dig. § 854.*]

Error from City Court of Reidsville; R. O. Collins, Judge.

Action by the Glennville Supply Company against H. S. Surrency. Judgment for plaintiff, and defendant brings error. Affirmed.

Way & Burkhalter, of Reidsville, for plaintiff in error. C. L. Cowart, of Glennville, for defendant in error.

RUSSELL, J. Judgment affirmed.

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

(13 Ga. App. 181)

WATSON v. STATE. (No. 5,035.)

(Court of Appeals of Georgia. Aug. 12, 1913.)

*(Syllabus by the Court.)***1. CRIMINAL LAW (§ 1159*)—APPEAL—EVIDENCE.**

The credibility of witnesses is a matter exclusively for the jury, and, on the trial of a criminal case (in which there is no complaint of errors of law), when a witness testifies positively to all of the facts essential to constitute the offense charged, this court cannot interfere with the verdict, no matter how many witnesses may have testified to the contrary, or how many circumstances may have been adduced tending to disprove the testimony of the single witness. *Chatman v. State*, 8 Ga. App. 842, 70 S. E. 188; *Jolly v. State*, 5 Ga. App. 454, 63 S. E. 520; *Barber v. State*, 3 Ga. App. 598, 60 S. E. 285.

[Ed. Note.—For other cases, see *Criminal Law*, Cent. Dig. §§ 3074-3083; Dec. Dig. § 1159.*]

2. CRIMINAL LAW (§ 742*)—CREDIBILITY OF WITNESSES—PROVINCE OF JURY.

There is no limitation to the power of the jury to credit a witness, unless the facts testified to by him be inherently at variance with the common knowledge and experience of mankind. A witness impeached for general bad character, or for contradictory statements out of court, may be restored to credit. *Civ. Code* 1910, § 5884.

[Ed. Note.—For other cases, see *Criminal Law*, Cent. Dig. §§ 1098, 1138, 1719-1721; Dec. Dig. § 742.*]

Error from City Court of Griffin; J. J. Flynt, Judge.

Lizzie Watson was convicted of crime, and brings error. Affirmed.

W. H. Connor, of Griffin, for plaintiff in error. Wm. H. Beck, Sol., of Griffin, for the State.

RUSSELL, J. Judgment affirmed.

(13 Ga. App. 182)

BANKS v. STATE. (No. 5,046.)

(Court of Appeals of Georgia. Aug. 12, 1913.)

*(Syllabus by the Court.)***1. SANCTION OF CERTIORARI.**

The judge of the superior court did not err in refusing to sanction the certiorari.

2. CRIMINAL LAW (§ 1159*)—APPEAL—EVIDENCE.

The evidence as to the identity of the accused was sufficient to authorize the jury to find that he was the person who sold the intoxicating liquors, although a large number of witnesses testified that another, and not he, was the seller. *Watson v. State*, supra, this day decided.

[Ed. Note.—For other cases, see *Criminal Law*, Cent. Dig. §§ 3074-3083; Dec. Dig. § 1159.*]

3. CRIMINAL LAW (§ 814*)—INSTRUCTIONS—CIRCUMSTANTIAL EVIDENCE.

The testimony as to the identity of the accused was positive and direct, and hence the trial judge did not err in omitting to charge the jury on the law applicable to their consideration of circumstantial evidence.

[Ed. Note.—For other cases, see *Criminal Law*, Cent. Dig. §§ 1821, 1833, 1836, 1860, 1865, 1883, 1890, 1924, 1979-1986, 1987; Dec. Dig. § 814.*]

Error from Superior Court, Fulton County; J. T. Pendleton, Judge.

Walter Banks was convicted of violating the prohibitory law, and from a refusal of the superior court to sanction a certiorari he brings error. Affirmed.

Thos. B. Brown and Thos. J. Lewis, both of Atlanta, for plaintiff in error. Hugh M. Dorsey, Sol. Gen., Lowry Arnold, and Edward C. Hill, all of Atlanta, for the State.

RUSSELL, J. Judgment affirmed.

(13 Ga. App. 170)

WEATHERBY v. STATE. (No. 5,026.)

(Court of Appeals of Georgia. Aug. 11, 1913.)

*(Syllabus by the Court.)***1. CRIMINAL LAW (§ 828*)—INSTRUCTION—CIRCUMSTANTIAL EVIDENCE.**

The verdict does not depend solely upon circumstantial evidence, a confession having been shown; and, in the absence of a timely written request, the trial judge did not err in failing to give in charge the law of circumstantial evidence, as contained in *Penal Code* 1910, § 1010. *Benton v. State*, 9 Ga. App. 422, 71 S. E. 498; *Holt v. State*, 7 Ga. App. 77, 66 S. E. 279.

[Ed. Note.—For other cases, see *Criminal Law*, Cent. Dig. § 2007; Dec. Dig. § 828.*]

2. DENIAL OF NEW TRIAL APPROVED.

No error of law being assigned, except as indicated above, and the verdict being supported by the evidence, the judgment refusing a new trial is affirmed.

Error from Superior Court, Floyd County; Price Edwards, Judge.

John Weatherby was convicted of crime, and brings error. Affirmed.

Eubanks & Mebane, of Rome, for plaintiff in error. W. H. Ennis, Sol. Gen., of Rome, for the State.

HILL, C. J. Affirmed.

(13 Ga. App. 86)

CRANOR v. SOUTHERN RY. CO.

(No. 4,818.)

(Court of Appeals of Georgia. June 25, 1913.
On Rehearing, July 15, 1913.)

*(Syllabus by the Court.)***1. APPEAL AND ERROR (§ 1042*) — HARMLESS ERROR—STRIKING MATTERS FROM PETITION.**

Where, in a suit for damages, the jury returns a verdict finding in effect that the defendant was not guilty of negligence, and a motion for a new trial, filed by the plaintiff, is overruled, if the latter judgment is affirmed, the striking of certain items of damage from the petition, even if erroneous, is immaterial.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 4110-4114; Dec. Dig. § 1042.*]

2. CARRIERS (§ 218*) — CARRIAGE OF LIVE STOCK—LIMITATION OF LIABILITY.

A common carrier of live stock cannot contract against liability caused by its own negligence; but it may make reasonable stipula-

tions in reference to matters which are merely incidental to the transportation of the animals, such as loading and unloading and caring for the stock. If such a contract is made, the shipper cannot recover for any damage which results from his own failure to comply with his engagement. In view of the allegations of the petition in the present case, it was competent for the defendant to plead a contract of the nature above indicated.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 674-696, 927, 928, 933-949; Dec. Dig. § 218.*]

3. CARRIERS (§ 180*)—CONNECTING CARRIERS—LIMITATION OF LIABILITY—INTERSTATE SHIPMENT.

Where goods are transported over the lines of several carriers under a contract with the initial carrier for delivery at destination, each succeeding carrier is the agent of the first carrier, and as such, if sued for the loss of or damage to the goods, is entitled to the benefit of any contractual exemption which the initial carrier would have been allowed to plead had he been sued for the failure to transport safely. This rule is applicable to carriers in interstate as well as intrastate commerce.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 815-823; Dec. Dig. § 180.*]

4. CARRIERS (§ 218*)—CARRIAGE OF LIVE STOCK—LIMITATION OF LIABILITY—HEPBURN ACT.

There is nothing in the act of Congress known as the Hepburn act (Act June 29, 1906, c. 3591, 34 Stat. 584 [U. S. Comp. St. Supp. 1911, p. 1288]) or in the Carmack amendment to that act which prohibits a carrier of live stock from stipulating against liability resulting from the failure of the shipper to accompany and care for the stock, or from entering into any other reasonable stipulation which does not amount to a contractual exemption from liability on account of the carrier's negligence.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 674-696, 927, 928, 933-949; Dec. Dig. § 218.*]

5. APPEAL AND ERROR (§ 1050*)—HARMLESS ERROR—ADMISSION OF EVIDENCE.

Under the evidence the real issue was whether the defendant had improperly fed and watered the live stock; and therefore the contract of affreightment which required the shipper to accompany and feed and water the stock was not material, but its admission in evidence did not result in injury to the plaintiff.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1063, 1069, 4153-4157; Dec. Dig. § 1050.*]

6. CARRIERS (§ 218*)—CARRIAGE OF LIVE STOCK—LIMITATION OF LIABILITY—DUTY OF SHIPPER TO ACCOMPANY STOCK.

If the provision in the contract of affreightment requiring the carrier to furnish the shipper free passage for himself or agent, in order to enable him to accompany the stock, was valid and binding upon the parties, it was the duty of the shipper to apply for transportation. Having failed to request that a pass be issued to him in accordance with the terms of the contract, he cannot urge, as an excuse for failing to accompany the stock, the failure of the carrier to issue the transportation.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 674-696, 927, 928, 933-949; Dec. Dig. § 218.*]

7. EVIDENCE (§ 48*)—TRIAL (§ 105*)—JUDICIAL NOTICE—BEST EVIDENCE—OBJECTIONS.

The evidence demanded a finding that the contract of affreightment was issued to the

plaintiff in consideration of a reduced rate of freight.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 70; Dec. Dig. § 48; Trial, Cent. Dig. §§ 260-266; Dec. Dig. § 105.*]

8. SUFFICIENCY OF EVIDENCE.

The evidence authorized the verdict, and there was no error in overruling the motion for a new trial.

(Additional Syllabus by Editorial Staff.)

9. CARRIERS (§ 229*)—INJURIES TO LIVE STOCK—ELEMENTS OF DAMAGE.

In an action for injuries to live stock in which defendant pleaded a stipulation of the contract of shipment requiring the plaintiff to accompany the stock, which he failed to do, plaintiff could not recover, as an element of his damages, traveling expenses incurred in coming to a distant city to ascertain the condition of the stock while they were in the hands of the carrier.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 930, 963, 964; Dec. Dig. § 229.*]

10. CARRIERS (§ 227*)—CARRIAGE OF LIVE STOCK—NEGLIGENCE OF CARRIER—PLEADING.

Though petition in an action by a shipper of live stock alleged that defendant carrier failed to take proper care of the stock and failed to water the same properly, allegations of the answer setting up a contract of affreightment, requiring plaintiff to accompany and feed and water the stock, was not irrelevant to the issue.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 232, 953-956; Dec. Dig. § 227.*]

11. COMMERCE (§ 8*)—INTERSTATE COMMERCE—WHAT LAW GOVERNS.

In determining the rights and liabilities of the parties to a contract stipulating for the carriage of goods in interstate commerce, the acts of Congress and the decisions of the federal courts construing them are controlling.

[Ed. Note.—For other cases, see Commerce, Cent. Dig. § 5; Dec. Dig. § 8.*]

12. CARRIERS (§ 211*)—CARRIAGE OF LIVE STOCK—DUTY TO FEED AND WATER STOCK.

In the absence of a contract, the carrier is required to feed and water live stock.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 926-928; Dec. Dig. § 211.*]

13. CARRIERS (§ 211*)—CARRIAGE OF LIVE STOCK—DUTY TO FEED AND WATER STOCK.

Though the contract for the shipment of stock requires the shipper to accompany and feed the same, if the carrier undertakes to perform this duty it is bound to exercise care in doing so.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 926-928; Dec. Dig. § 211.*]

14. CUSTOMS AND USAGES (§ 17*)—VARYING TERMS OF EXPRESS CONTRACTS.

If a stipulation in a contract of shipment requiring the carrier to furnish a pass was valid and binding, no previous practice or custom could relieve it from the obligation.

[Ed. Note.—For other cases, see Customs and Usages, Cent. Dig. § 34; Dec. Dig. § 17.*]

Error from City Court of Atlanta; H. M. Reid, Judge.

Action by John Cranor against the Southern Railway Company. From a judgment for defendant, plaintiff brings error. Affirmed.

A. H. Davis, of Atlanta, for plaintiff in error. McDaniel & Black and E. A. Neely, all of Atlanta, for defendant in error.

POTTLE, J. The plaintiff sued the railway company for damages on account of injuries to certain live stock in a car which was delivered to the Atlantic Coast Line Railroad Company in Deland, Fla., consigned to Howell Station, Ga., for transportation by the Atlantic Coast Line and connecting railroads to Atlanta, Ga. The car of stock was delivered by the initial carrier to the Southern Railway Company at Jacksonville, Fla., for transportation to Atlanta. The consignee at Howell Station was plaintiff's agent in and about the reception and caring for the stock after arrival. The contract made with the initial carrier bound it to carry the stock to Jacksonville and deliver it to a connecting carrier; and the defendant company received the stock at Jacksonville and undertook to transport the same with due diligence to the place of destination. Delivery was made by the defendant to the consignee on April 28, 1910, but the stock were in very bad condition, being run down, jaded, and sick. One horse and one mule died on April 30th, and another horse continued sick and died a week or ten days after arrival. The defendant was immediately notified of the condition of the stock and had them examined by a veterinarian. While in transportation from Jacksonville to Atlanta, the stock were entirely under the control and care of the defendant; the plaintiff having no agent with the stock and having no arrangement or agreement with the defendant that he or his agent should accompany the same. The plaintiff alleges that the stock were sound and in good condition when delivered to the defendant; that the defendant failed to take proper care of the same and furnished them with insufficient food, did not water the stock properly and sufficiently, and gave them impure water to drink which poisoned them; that by reason of the defendant's negligence it became necessary for the plaintiff to come to Atlanta and look after the care and treatment of the stock; that, in order to cure them and put them in a salable condition, he incurred certain necessary items of expense, such as railroad fare, board, and feed for the stock and treatment by a veterinarian. In addition to these items of damages, the plaintiff lost the value of three head of stock which died and certain sums on account of deterioration in value of others. Upon demurrer the court struck from the petition the claim for damages on account of the plaintiff's railroad fare and expenses.

The defendant answered, denying all allegations of negligence. By amendment the defendant pleaded that the shipment of live stock was made under a through contract of affreightment between the plaintiff and the Atlantic Coast Line Railroad Company in

consideration of a reduced rate. This contract provided that, in consideration of the reduced rate and of a free pass issued to the owner or his agent, the owner released all the carriers from risk of injury to the animals in consequence of their inherent nature or resulting from any material used by the owner for feed of the stock and certain other causes. The contract further stipulated that the owner should feed, water, and attend to the stock at his own expense and risk while in the railroad stock yards awaiting shipment, or at a transfer point, or while unloaded for any purpose; also that the owner should ride upon the freight train upon which the stock was transported; that the value of each horse or head of stock did not exceed \$75; that notice in writing of any claim for damages should be given to the carrier before the stock were moved from the place of destination; and that, if it was necessary for the stock to be transported over the line of any other carrier or carriers to the point of destination, delivery might be made to such other carrier for transportation upon such terms and conditions as it might be willing to accept, provided that the terms and conditions of the contract made with the initial carrier should inure to the benefit of such other carrier, but that no carrier should be liable for the negligence of any other carrier. This amendment was objected to by the plaintiff upon the following grounds: (1) That it did not sufficiently appear that the defendant railway company accepted the shipment upon the terms and conditions of the contract made with the initial carrier; (2) that no facts were alleged which would bring the defendant under any of the exceptions or exemptions from liability stipulated in the contract; (3) that it did not appear from the amendment how or why the terms of the contract inured to the benefit of the defendant; (4) there was no allegation that the plaintiff had been furnished with a free passage, and the terms of the contract in reference to this matter and the requirement that the owner accompany the stock were irrelevant, there being no claim of liability except from improper feeding and watering; (5) there was no allegation that the failure of the owner to accompany the stock and feed and water them was the proximate cause of the damage; (6) no sufficient reason is shown why the terms or conditions of the contract made with the initial carrier inured to the benefit of the defendant, and the burden of proving that the stock were transported by the defendant under the terms of such a contract was upon the defendant. The court allowed the amendment, and the defendant excepted pendente lite. The trial resulted in a verdict in favor of the defendant. Plaintiff's motion for a new trial was overruled, and he excepted, assigning error upon the judgment striking certain items of damage from his petition, upon the allowance of the

amendment offered by the defendant, and upon the overruling of the motion for a new trial.

[1] 1. Since the jury found for the defendant and we have reached the conclusion that the evidence authorized the finding that the defendant was not negligent, and that the judgment overruling the motion for a new trial should be affirmed, the ruling of the court in striking from the plaintiff's petition certain items of damage which he claims the right to recover becomes immaterial.

[9] The court was clearly right, under the facts alleged, in ruling that the plaintiff was not entitled to recover traveling expenses incurred in coming to Atlanta to ascertain the condition of the live stock. This was not a legitimate item of damage recoverable from the defendant on account of its breach of duty in failing to deliver the live stock safely at the point of destination.

[2] 2. A carrier of live stock is a common carrier, but, on account of the nature of the goods to be transported, the carrier is permitted to make a special contract imposing certain obligations upon the shipper and exempting the carrier from liability for damages for loss or injuries not resulting from the negligence of the carrier. Public policy forbids a carrier to contract against liability caused by its own negligence, but it does not prevent the carrier from contracting with the shipper for the performance of certain acts which may facilitate the safe transportation of the goods. The duty of the carrier is to transport safely. Its failure to perform this duty is negligence from which liability arises. But in carrying live stock there are certain things necessary to be done apart from the transportation of the animals, such as loading and unloading, feeding, and watering. They must be secure from escape; they must be protected from heat and suffocation and overcrowding. In the absence of such a contract, it would be the duty of the carrier to do everything essential for the protection and safe delivery of the animals. But reasonable stipulations in a contract of affreightment are binding on the shipper if they do not amount to a stipulation against liability for negligence of the carrier. See *Hutchinson on Carriers*, § 419; *Louisville & Nashville Railroad Co. v. Tharpe*, 11 Ga. App. 465, 75 S. E. 677; *Weaver v. Southern Ry. Co.*, 9 Ga. App. 34, 70 S. E. 222; *s. c.* 11 Ga. App. 355, 75 S. E. 447; *New England Steamship Co. v. Paige*, 108 Ga. 296, 33 S. E. 969; *Southern Ry. Co. v. Adams*, 115 Ga. 705, 42 S. E. 35.

[10] The petition having alleged that the defendant failed to take proper care of the stock and failed to water the stock properly, it was competent for the defendant to plead a contract of affreightment which required the owner to accompany and feed and water them himself. The contract was not ir-

relevant as pleading, even if it could be said to be inapplicable to the facts as shown by the proof.

[3] 3. It is contended that the burden was on the defendant to show that the special contract inured to its benefit and that no facts sufficient to carry this burden are pleaded in the amended answer. Where goods are to be transported by more than one carrier and the initial carrier makes a contract to deliver at destination, the connecting carriers are agents of the initial carrier and entitled to the benefit of any contractual exemption which the initial carrier would have been allowed to plead had it been sued for its failure to transport safely. The rule is otherwise where the initial carrier contracts to convey only to the end of its own line and there to deliver to a succeeding carrier en route. In such a case the initial carrier has no interest in the further transportation of the goods after they are delivered to the succeeding carrier, unless there is something in the contract, or a statute, which stipulates to the contrary. 1 *Hutchinson on Carriers*, § 472. It has been expressly held by the Supreme Court of the United States that, in the case of an interstate shipment, any limitation of liability in a contract made with the initial carrier, which is valid as to such carrier, inures to the benefit of the succeeding carriers. *Kansas City Southern Ry. Co. v. Carl*, 227 U. S. 639, 33 Sup. Ct. 391, 57 L. Ed. —. In the present case it appears that the Atlantic Coast Line Railroad Company contracted to deliver the goods at destination; and, under the decision just cited, every valid stipulation in the contract of affreightment bound not only the parties to the contract but was binding upon and inured to the benefit of the succeeding carriers. In addition to this, the contract itself expressly provided that the terms and conditions of the contract should inure to the benefit of all connecting carriers unless otherwise stipulated in the contract.

[4] 4. It is argued, however, that under the Hepburn act and the Carmack amendment a carrier of goods in interstate commerce is not permitted to exempt itself from liability by stipulations requiring the shipper to accompany the stock and feed and water them, and requiring notice of any claim for damages to be given before the stock are removed from the place of destination, and fixing an agreed value to be recovered in case of loss, and similar stipulations. Counsel correctly contend that the act of Congress supersedes all regulations and laws of the states upon the subject-matter dealt with in the act. *Adams Express Co. v. Croninger*, 226 U. S. 491, 33 Sup. Ct. 148, 57 L. Ed. —; *Kansas City Southern Ry. Co. v. Carl*, *supra*; *Southern Pacific Co. v. Crenshaw*, 5 Ga. App. 675, 63 S. E. 865.

[11] In determining the rights and liabilities of the parties to the contract stipulat-

ing for the carriage of goods in interstate commerce, the acts of Congress and the decisions of the United States construing them are controlling. Under those acts a carrier cannot stipulate against liability resulting in whole or in part from its own negligence. *Adams Express Co. v. Croninger*, supra. In that case it was held that, in consideration of the reduced rate, an interstate carrier might limit the amount recoverable by the shipper to an agreed value. The Carmack amendment to the Hepburn act provided that any common carrier receiving property for transportation from a point in one state to a point in another state shall issue a bill of lading therefor and shall be liable to the lawful holder thereof for any loss or damage caused by it or any of the succeeding carriers over whose line the property might pass, and that "no contract, receipt, rule, or regulation shall exempt such common carrier, railroad, or transportation company from the liability hereby imposed." Recent decisions of the Supreme Court of the United States make it plain that, while under the act of Congress a carrier cannot stipulate against its own negligence, it may enforce reasonable stipulations in a contract of affreightment which are not designed to exempt it from the consequence of its own neglect. There is nothing in the act of Congress, as construed by the Supreme Court of the United States, which would prohibit a carrier of live stock from entering into a fair and reasonable agreement with a shipper with reference to the care of the stock while being transported and as to things incidental to the transportation of the animals, but necessary to be done on account of the nature and the character of the goods being transported.

[12] In the absence of contract, the carrier would be bound to feed and water the stock. He may by contract bind the shipper to perform this service, and for any injury or damage resulting from the failure of the shipper to comply with his part of the contract the carrier would not be liable. *Weaver v. Southern Ry. Co.*, supra. As to this matter there is no difference between interstate and intrastate shipments.

[6] 5. Under the evidence the real issue was as to whether the stock had been improperly fed and watered by the defendant's employés.

[13] Under its contract the carrier was not bound to feed and water the stock at all, but, if it undertook to do so, it was, of course, bound to exercise due care to see that the stock were not given poisoned water or impure food. *Louisville & Nashville Railroad Co. v. Tharpe*, 11 Ga. App. 465, 75 S. E. 677. It appeared, from the evidence, that the carrier did feed and water the stock. The jury found that it was not guilty of any negligence in reference to the character of food and water furnished the stock, and

there was ample evidence to justify this finding. In view of the fact that the carrier undertook to water and feed the stock and did not rely upon the stipulation in the contract requiring the shipper to accompany and care for the stock, this provision in the contract became irrelevant; but its admission in evidence resulted in no harm to the plaintiff.

[6] 6. In view of the issue upon which the case turned, it was really not material whether the plaintiff accompanied the stock or not. The plaintiff proposed to prove that he did not demand of the carrier a free pass to accompany the stock because it had been the practice of the railroads in this section of the country to refuse to give a pass to shippers of live stock and it was not their custom to do it.

[14] If the stipulation in the contract requiring the carrier to furnish a pass was valid and binding, no previous practice or custom could relieve it from this obligation. It was the duty of the plaintiff to apply for transportation as stipulated in the contract, and, if the carrier failed to furnish it, the shipper's failure to accompany and care for the stock might be excused. The evidence fails to show that the carrier refused to furnish the transportation or that any application was made to it by the plaintiff for a free pass as stipulated in the contract. *Georgia Railroad Co. v. Reid*, 91 Ga. 377, 17 S. E. 934.

[7] 7. "Courts will not take judicial cognizance of the schedule of rates filed by a carrier with the Interstate Commerce Commission and published as required by the acts of Congress." *Hartwell Ry. Co. v. Kidd*, 10 Ga. App. 771, 74 S. E. 310. The contract recites that the rate therein fixed was less than the maximum rate which the carrier was allowed to charge, and that the reduction in the rate constituted the consideration for the contract. There was affirmative testimony by one of the defendant's agents that the rate charged the plaintiff was less than the maximum which the carrier was allowed to charge under its schedule filed with and approved by the Interstate Commerce Commission. There was no objection to this testimony on the ground that there was higher and better evidence; and the finding that the rate charged the plaintiff was in fact less than the maximum allowed was demanded.

8. The foregoing deals with all of the material questions raised by the record. The evidence fully authorized the verdict and there was no error in overruling the motion for a new trial.

Judgment affirmed.

On Rehearing.

The plaintiff in error challenges the correctness of the court's construction of the

contract of affreightment and of the ruling announced in the third division of the opinion. It is contended that the contract of carriage under which the live stock was transported was one merely to transport to the end of the line of the receiving carrier and there to deliver to the defendant company. This construction of the contract is based upon the recital in the record that a contract of shipment was introduced in evidence acknowledging the receipt of the car of live stock from the Atlantic Coast Line Railroad Company, consigned to Howell, Ga., "to be delivered to such carrier, whose line may be considered a part of the route to destination; it being understood that the responsibility of the Atlantic Coast Line Railroad shall cease at said station when delivered." The Atlantic Coast Line Railroad Company received the car of live stock for shipment to Howell, Ga., over its own line and the lines of such other carriers as were necessary to complete the shipment. By the express terms of the Hepburn act as amended, when the Atlantic Coast Line Railroad Company delivered its receipt for the live stock, it became liable for any loss or damage caused by it or by any other carrier to which the live stock was delivered, or over whose line the property might pass. It could not by contract exempt itself from liability thus imposed. Consequently the Atlantic Coast Line Railroad Company became bound, when it received the goods, to see that they were safely delivered at destination. The recital in the contract, to the effect that its responsibility should cease on delivery of the goods to the Southern Railway Company at Jacksonville, was absolutely null and void. The contract into which the initial carrier entered became, under the terms of the act of Congress, a through contract. Moreover, the contract itself recited that, in consideration of the transportation of the stock at the reduced rate of \$69.75 per car, the shipper agreed to release the carrier from liability for certain acts not amounting to negligence. The rate thus fixed was a through rate to destination, which the initial carrier could collect. It is apparent, therefore, from the very language of the contract itself that the company undertook to transport to destination and was entitled to be paid therefor. Of course, in so doing it was compelled to use the agency of certain connecting carriers, but it was bound to the same extent as if the goods had been transported over its own line from the point where it was received to destination. We are satisfied that the contract of affreightment was properly construed in the original opinion, and nothing has been presented in the motion for a rehearing to require any change in or modification of the judgment rendered.

Rehearing denied.

(13 Ga. App. 102)

ATLANTIC COAST LINE R. CO. v. THOMASVILLE LIVE STOCK CO.

(No. 4,866.)

(Court of Appeals of Georgia. July 15, 1913.)

(Syllabus by the Court.)

1. CARRIERS (§ 177*)—ACTION AGAINST CONNECTING CARRIER—HEPBURN ACT.

There is nothing in the act of Congress known as the Hepburn act (Act June 29, 1906, c. 3591, 34 Stat. 584 [U. S. Comp. St. Supp. 1911, p. 1288]), as amended by the Carmack amendment, which will prohibit a shipper of goods in interstate commerce over the lines of several carriers from bringing suit, under the provisions of section 2752 of the Civil Code of 1910, against the last carrier who received the goods as "in good order" for damages sustained on account of loss of or damage to the goods.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 775-789, 791-803; Dec. Dig. § 177.*]

2. CARRIERS (§ 186*)—COMMERCE (§ 8*)—EXCLUSIVE REGULATIONS—HEPBURN ACT.

The purpose of the act of Congress referred to in the preceding headnote was to fix the liability of interstate carriers and in so doing to put an end to the diversity of regulation under state laws on the subject. The act of Congress is paramount upon the subject with which it purports to deal and supersedes all state laws upon the same subject. It follows that, where suit is brought for loss of or damage to goods transported in interstate commerce, the rule of liability as prescribed by the federal act is applicable whether the suit be brought against the initial carrier or against one of the succeeding carriers.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. § 790; Dec. Dig. § 186;* Commerce, Cent. Dig. § 5; Dec. Dig. § 8.*]

3. CARRIERS (§ 185*) — DAMAGES TO INTERSTATE SHIPMENT—PRESUMPTION AND PROOF.

Where suit is brought against a connecting carrier in interstate commerce for damage to goods delivered to it by the preceding carrier, a prima facie case is made for the plaintiff by proof of the reception of the goods by the defendant and of their delivery in a damaged condition. Upon such proof the presumption arises that the goods were damaged in consequence of the negligence of the carrier sued. There is nothing in the act of Congress fixing the liability of interstate carriers for loss of or damage to goods which would relieve them from this common-law presumption. Whether in such a suit, upon proof that the defendant received for the goods as "in good order," the shipper would, under the provisions of the act of Congress, be entitled to the benefit of the conclusive presumption arising under the provisions of section 2752 of the Civil Code of 1910 is not decided, since there was no proof in the present case that the defendant actually received the goods as "in good order."

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 835-850; Dec. Dig. § 185.*]

4. CARRIERS (§ 185*)—DAMAGE TO INTERSTATE SHIPMENT—PRESUMPTION AND PROOF—REBUTTAL.

The common-law presumption against the carrier is rebuttable, and, where a connecting carrier is sued for damage to goods upon the theory that the goods were injured by reason of improper and negligent handling of the train, the presumption arising from proof of the reception of the goods by the defendant and of their delivery in a damaged condition is completely rebutted by affirmative proof by the de-

defendant that it was not guilty of negligence in the manner in which the train was handled, and that the injury must have resulted from some cause for which the initial carrier and its agents were exempted from liability under the contract of affreightment. In the present case the evidence demanded a finding in favor of the defendant, and it was error to award a judgment in favor of the plaintiff.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 835-850; Dec. Dig. § 185.*]

Error from City Court of Thomasville; W. H. Hammond, Judge.

Action by the Thomasville Live Stock Company against the Atlantic Coast Line Railroad Company. Judgment for plaintiff, and defendant brings error. Reversed.

J. H. Merrill, of Thomasville, and Bennet & Branch and Russell Snow, all of Quitman, for plaintiff in error. Fondren Mitchell, of Thomasville, for defendant in error.

POTTLE, J. The plaintiff made a through contract of affreightment with the Louisville & Nashville Railroad Company to transport a car of live stock from a station in the state of Illinois to Thomasville, Ga., over the line of the contracting company and its connecting carriers. The last carrier was the Atlantic Coast Line Railroad Company, which delivered the stock at destination. One of the horses in the shipment was bruised and injured, as a result of which it died, and the plaintiff brought suit against the Atlantic Coast Line Railroad Company, as the last connecting carrier which received the live stock as "in good order." The petition alleged that the injury and subsequent death of the horse was due to the careless and negligent handling of the car by the defendant company; that, when the car left the initial point of shipment, the stock were in perfect condition and were so accepted by the initial carrier. The contract of affreightment was in the usual form and exempted the carriers from liability resulting from various causes other than negligence in transportation. Amongst other things the carrier was exempted from liability on account of injuries received by the animals in consequence of being vicious or of unruly propensities, and provided that the shipper would furnish at his own expense such bedding and other suitable appliances in the car as would enable the animals to stand securely on their feet. The case was submitted to the judge without the intervention of a jury. There was no proof that the defendant had received the freight as "in good order." The plaintiff rested his case upon proof of delivery to the initial carrier in good order and the injury to the horse while being transported from the initial point of shipment in Illinois to destination at Thomasville, Ga. The evidence for the defendant showed that the contract of affreightment was made in consideration of a reduced rate of freight. It also offered the testimony of the conduc-

tor and other persons who had handled the shipment after delivery to the defendant that the defendant was not guilty of any negligence in reference to the manner in which the train was handled, and that the stock were transported in the usual manner and without negligence on the part of the defendant. The trial judge entered judgment for the plaintiff, and the defendant excepted.

[1] 1. In the bill of exceptions it is recited that counsel for the plaintiff stated in his place that the suit was brought under the provisions of section 2752 of the Civil Code against the last connecting carrier which received the shipment "in good order." The point is made that, as the shipment was made in interstate commerce, suit could not be maintained under the above-mentioned section of the Code against the last carrier, but should have been brought against the initial carrier, under the provisions of the act of Congress known as the Hepburn act and the Carmack amendment to that act. The act of Congress was under consideration by this court in the case of the Southern Pacific Co. v. Crenshaw, 5 Ga. App. 675, 63 S. E. 865. It was there held that: "While the federal statute fixing the liability of the initial carrier to the holder of the bill of lading expressly preserves in favor of the shipper or owner of the goods all remedies and rights of action otherwise existing, yet, where the terms of the statute are directly applicable, they become the paramount law on the subject, and all state laws to the contrary are pro tanto superseded." In discussing the question Judge Powell, speaking for the court, said: "In fine, the enactment, so far as it is applicable to the present case, is merely a declaration by Congress, the lawmaking power having paramount jurisdiction of that subject, that as to interstate shipments all contracts tending to vary the carrier's common-law liability of responsibility to destination on a through bill of lading shall be void. Its effect is not to give the shipper directly and immediately any new right but to cut off from the carrier a defense it otherwise would have, to take away from it a means of avoiding what otherwise would be only a prima facie liability." It was further noted in the opinion in that case that the Hepburn act was declaratory of the common law, in so far as it imposed liability upon the initial carrier resulting from his acceptance of the shipment for through carriage, and derogatory of the common law, in so far as it enacted that the carrier could not exempt himself from the liability imposed by the act by any contract, receipt, rule, or regulation. In fine, it was held in that decision that as to all transactions covered by the act it was the law paramount binding upon the states and superseding all state statutes dealing with the same subject-matter.

Subsequently to the decision of this court

in *Southern Pacific Co. v. Crenshaw*, supra, the case of *Adams Express Co. v. Croninger*, 226 U. S. 491, 33 Sup. Ct. 148, 57 L. Ed.—, was decided by the Supreme Court of the United States. In that decision the court took occasion to approve the following language of this court in the *Crenshaw* Case, in which this court undertook to set forth some of the reasons which brought about the passage of the national law and made it paramount: "Some states allowed carriers to exempt themselves from all or a part of the common-law liability by rule, regulation, or contract; others did not; the federal courts sitting in the various states were following the local rule, a carrier being held liable in one court when under the same state of facts he would be exempt from liability in another; hence this branch of interstate commerce was being subjected to such a diversity of legislative and judicial holding that it was practically impossible for a shipper engaged in a business that extended beyond the confines of his own state, or for a carrier whose lines were extensive, to know without considerable investigation and trouble, and even then oftentimes with but little certainty, what would be the carrier's actual responsibility as to goods delivered to it for transportation from one state to another. The congressional action has made an end to this diversity, for the national law is paramount and supersedes all state laws as to the rights and liabilities and exemptions created by such transaction. This was doubtless the purpose of the law; and this purpose will be effectuated, and not impaired or destroyed, by the state court's obeying and enforcing the provisions of the federal statute where applicable to the fact in such cases as shall come before them."

The precise ruling made in the *Croninger* Case was that while, under the provisions of the act of Congress, the carrier could not exempt himself from negligence, yet he might, by a fair and reasonable exemption, limit the amount recoverable by the shipper to an agreed value made for the purpose of obtaining a reduced rate of freight. In discussing generally the subject of the effect of the act of Congress, Mr. Justice Lurton, who delivered the opinion of the court, used the following language: "That the legislation supersedes all the regulations and policies of a particular state upon the same subject results from its general character. It embraces the subject of the liability of the carrier under a bill of lading which he must issue and limits his power to exempt himself by rule, regulation, or contract. Almost every detail of the subject is covered so completely that there can be no rational doubt but that Congress intended to take possession of the subject and supersede all state regulation with reference to it. Only the silence of Congress authorized the exercise of the police power of the state upon the subject of such

contracts. But, when Congress acted in such a way as to manifest a purpose to exercise its conceded authority, the regulating power of the state ceased to exist. *Northern Pacific Ry. v. State of Washington*, 222 U. S. 370 [32 Sup. Ct. 160, 56 L. Ed. 237]; *Southern Railway v. Reid*, 222 U. S. 424 [32 Sup. Ct. 140, 56 L. Ed. 257]; *Mondou v. Railroad*, 228 U. S. 1 [32 Sup. Ct. 169, 56 L. Ed. 327, 38 L. R. A. (N. S.) 44]. To hold that the liability therein declared may be increased or diminished by local regulation or local views of public policy will either make the provision less than supreme or indicate that Congress has not shown a purpose to take possession of the subject. The first would be unthinkable and the latter would be to revert to the uncertainties and diversities of rulings which led to the amendment. The duty to issue a bill of lading and the liability thereby assumed are covered in full, and, though there is no reference to the effect upon state regulation, it is evident that Congress intended to adopt a uniform rule and relieve such contracts from the diverse regulation to which they had been theretofore subject."

The question is whether the act of Congress, as interpreted by the Supreme Court of the United States, so far supersedes all state legislation as to prohibit a shipper who has been injured by loss of or damage to goods carried in interstate commerce, from proceeding directly against one of the connecting carriers which either actually or presumptively received the goods "as in good order." Indeed, the act itself contains a provision that nothing in it "shall deprive any holder of such receipt or bill of lading of any remedy or right of action which he has under existing law." Here is an express declaration by Congress, preserving to the shipper all remedies existing under state laws; and this, of course, must mean all remedies which are not in conflict with that prescribed by the national act. The act purports to regulate the carriage of goods in interstate commerce and to fix the liability of the carrier in case of the loss of or damage to the goods, but it does not interfere with or abrogate any remedy which the shipper has under state law. Section 2752 of our Civil Code authorizing suit against the last carrier receiving goods "as in good order" is not, as applied to shipments from beyond the state, a regulation of interstate commerce so as to be repugnant to the commerce clause of the Constitution of the United States. *Kavanaugh & Co. v. Southern Ry. Co.*, 120 Ga. 62, 47 S. E. 528, 1 Ann. Cas. 705. The statute is designed merely to make it more certain that railroad companies will perform the duty, resting upon them as public carriers, to use the utmost care and diligence in the transportation of goods. There is no provision in the act of Congress that suit against the initial carrier shall be the exclusive remedy for the offended shipper; nor

is there anything in that act that either expressly or by necessary implication would prohibit the shipper from proceeding against one of the initial carrier's agents who had damaged the goods while being transported over its line. Under the law of this state, the initial carrier who makes a through contract of affreightment may be sued for failure to deliver at destination; or the initial carrier's agent, a connecting carrier, may be sued for any injury or damage which occurs to the goods while being transported over the latter's line. The act of Congress provides merely for suit against the initial carrier and does not take away the right of the shipper to proceed in a proper case against a connecting carrier.

2. A through contract of affreightment made by one carrier to transport to destination over the lines of several carriers is binding upon all of the succeeding carriers to the same extent as it is upon the initial carrier. In such a case the connecting carriers are merely the agents of the initial carrier, and, when sued, are entitled to the benefit of any contractual exemption which the initial carrier would have been allowed to plead had he been sued for the failure to transport safely. *Cranor v. Southern Ry. Co.*, 78 S. E. 1014.

[2] The act of Congress was designed to put an end to diversity of regulations and ruling by the state authorities upon the question of liability of an interstate carrier for its failure to transport goods in accordance with its contract. The provisions of the act, where applicable, should be applied as well where the suit is against the initial carrier's agent as where brought directly against the initial carrier. So that a suit under our statute against the last connecting carrier in no wise destroys the harmony which was intended to be brought about by the act of Congress. If the goods are shipped in interstate commerce, then the act of Congress applies without reference to which carrier the shipper elects to proceed against to recover any damages which he has sustained. If he elects to proceed against the last connecting carrier, the latter can plead any contractual exemption which the initial carrier might be entitled to rely on. And as to this matter the federal act and the decisions of the Supreme Court of the United States construing it are binding upon the state courts, without reference to the carrier who may be proceeded against for any damage which may have been sustained. The act of Congress created no new remedy. The shipper could always sue the initial carrier, but the federal act was designed simply to fix the liability of the carrier of goods in interstate commerce and make the rule of liability uniform throughout the several states. As to this matter the act of Congress is paramount and the decisions of the federal Supreme Court are controlling. For example, the courts of this state have always held that

a mere statement of value of goods delivered to a carrier for transportation, although the shipper received a reduced rate of freight, is a mere arbitrary preadjustment of damages and not binding upon the shipper, and that he could recover the full value of the goods lost by the carrier, in the absence of a bona fide agreement in reference to value. In the act of Congress, as construed by the Supreme Court of the United States in the *Adams Express Company Case*, supra, and in several later decisions, such a stipulation in a contract of affreightment is binding upon the shipper. As to this and similar matters affecting the question of liability of an interstate carrier, the decisions of the Supreme Court of the United States must be regarded as controlling.

[3] 3. There is neither allegation nor proof that the defendant company actually received the live stock as "in good order." Upon proof of the reception of the goods by it for transportation and delivery at destination in a damaged condition, a presumption arose that the injury to the stock was the result of the defendant's negligence. If the suit is predicated upon the carrier's common-law obligation to transport safely, the defendant is presumed to have received the goods in good order; but this presumption is not conclusive and may be rebutted, and the carrier may be relieved of its effect by proof that it was not in fact negligent. If the carrier actually receipted for the goods as "in good order," this presumption of negligence becomes conclusive on proof of injury to the stock. *Hartwell Ry. Co. v. Kidd*, 10 Ga. App. 771, 74 S. E. 310. It is argued that, if the provisions of the act of Congress are applicable, there is no presumption against the carrier. There was no proof in the present case that the defendant actually receipted for the goods as "in good order"; and hence it is unnecessary to inquire whether, if this had been done, the shipper would, under the act of Congress, be entitled to the benefit of the conclusive presumption arising under the state statute. There is certainly nothing in the act of Congress which was designed to relieve the carrier of the presumption of the common law. Under that act, as well as under the state law, the shipper makes out a prima facie case by proof of delivery in good order and the subsequent loss of or damage to the goods, and the burden of proving that it was guilty of no negligence, and that damages resulted from some act for which it was not liable under the law, or under some contractual exemption lawfully made by the shipper, is upon the defendant.

[4] 4. The plaintiff elected to sue the last carrier. It relied upon proof that the goods were received by the carrier, and that one of the horses was delivered by it in a damaged condition. This raised a presumption against the defendant, and, if nothing more had appeared, would have authorized a recovery

in behalf of the plaintiff. But the defendant completely rebutted the presumption which arose against it upon the prima facie case made by the plaintiff. The negligence relied on in the petition was the improper handling of the car upon which the injured horse was being transported. Proof of the reception of the horse by the defendant and of its delivery in a damaged condition raised a presumption that the defendant was negligent as alleged in the petition. But this presumption was rebutted by the testimony for the defendant, which completely exculpated the defendant from any charge of negligence in handling the train and demanded a finding that the injury to the horse was due to some cause for which, under the contract of affreightment made with the initial carrier, it and its agents were exempted from liability.

Upon the merits the case is controlled by the decision of this court in Georgia Southern Ry. Co. v. Greer, 2 Ga. App. 516, 58 S. E. 782, where it was held that: "Where it appears that the cars in which the stock was carried were suitable, that the track was in good condition, that the equipments and appliances of the train were adequate, and that there was no fault or negligence in any respect on the part of the carrier in handling the stock, or in the running and management of the train, or in the exercise by the servants of the carrier of that degree of care demanded by the terms of its contract and required by the nature of the stock, any presumption of negligence would be fully rebutted, and the carrier would not be liable for loss or damage to the stock while in transportation."

The defendant was liable only for the consequences of its own negligence, and, as the evidence demanded a finding that it was not negligent as alleged in the petition, no recovery could be had against it. If the suit had been brought against the initial carrier, it would have been liable not only for its own negligence but for the negligence of its agents, the succeeding carriers. Having elected to sue the last connecting carrier upon the theory that its negligence caused the damage, the plaintiff must take the consequences of proof by the defendant that it exercised due care and diligence in handling the stock after they were delivered to it. The evidence demanded a finding in favor of the defendant, and the court erred in awarding judgment in favor of the plaintiff.

Judgment reversed.

(12 Ga. App. 170)

READ v. STATE. (No. 5,045.)

(Court of Appeals of Georgia. Aug. 11, 1913.)

(Syllabus by the Court.)

DENIAL OF NEW TRIAL.

The evidence, although weak, was sufficient to satisfy the jury, and, as no error of law is

complained of, the judgment refusing a new trial must be affirmed.

Error from Superior Court, Fulton County; L. S. Roan, Judge.

Herbert Read was convicted of crime, and brings error. Affirmed.

S. C. Crane, of Atlanta, for plaintiff in error. Hugh M. Dorsey, Sol. Gen., and E. A. Stephens, both of Atlanta, for the State.

HILL, C. J. Affirmed.

(13 Ga. App. 154)

ALPINE SAFE & LOCK CO. v. W. E. PARSONS & BRO. (No. 4,741.)

(Court of Appeals of Georgia. Aug. 11, 1913.)

(Syllabus by the Court.)

1. SALES (§ 288*)—ACTION BY SELLER—DEFENSE—Breach of WARRANTY.

In case of an express warranty that the property sold is of a particular kind and quality, the purchaser has the right to rely on the warranty, and may plead total or partial failure of consideration on account of defects discovered after acceptance, even though they would have been discovered by an examination before delivery. Cook v. Finch, 117 Ga. 541, 44 S. E. 95.

[Ed. Note.—For other cases, see Sales, Cent. Dig. §§ 817-823; Dec. Dig. § 288.*]

2. SALES (§ 288*)—ACTION BY SELLER—DEFENSE.

The giving of a note for the purchase price will not estop the buyer from pleading failure of consideration, although the note was given after the discovery of the defects, where the seller promised to repair the defects and failed to do so. Moultrie Repair Co. v. Hill, 120 Ga. 731, 48 S. E. 143; Robson v. Weatherly Lbr. Co., 12 Ga. App. —, 78 S. E. 610; Burr v. Atlanta Paper Co., 2 Ga. App. 52, 58 S. E. 373.

[Ed. Note.—For other cases, see Sales, Cent. Dig. §§ 817-823; Dec. Dig. § 288.*]

3. VERDICT SUSTAINED.

The verdict for the defendant was supported by the evidence, and no error of law is complained of.

Error from City Court of Statesboro; H. B. Strange, Judge.

Action by the Alpine Safe & Lock Company against W. E. Parsons & Bro. Judgment for defendants, and plaintiff brings error. Affirmed.

Remer Proctor and Homer C. Parker, both of Statesboro, for plaintiff in error.

HILL, C. J. Judgment affirmed.

(13 Ga. App. 157)

SNIDER & WRIGHT v. SALTER. (No. 4,792.)

(Court of Appeals of Georgia. Aug. 11, 1913.)

(Syllabus by the Court.)

APPEAL AND ERROR (§ 956*)—DISCRETIONARY RULING—GRANTING NEW TRIAL.

A case went to the trial calendar under the local rule, and while on that calendar the attorney for the defendant obtained from the

presiding judge a leave of absence, which, under the rule, had the effect of checking or suspending the trial of the case until the expiration of the leave of absence, and until after the giving of due notice to have the case resume its place on the trial calendar. During the absence of the attorney for the defendant, under his leave, the attorney for the plaintiff, without notice to the absent attorney or his client, had the case called for trial and obtained a verdict for the plaintiff. On the return of the attorney for the defendant after the expiration of his leave of absence, he for the first time discovered these facts. It was then too late to file a regular motion for a new trial. During the term of the court at which the verdict was rendered and judgment entered, but beyond the time limit for the filing of a regular motion for a new trial, the defendant filed a motion in the nature of an extraordinary motion for a new trial, setting out the foregoing facts, and asking that the verdict and judgment be set aside and a new trial granted. *Held*, that the discretion of the trial court in entertaining the motion for a new trial on extraordinary grounds and in granting a new trial will not be disturbed.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3810, 3891; Dec. Dig. § 956.*]

Error from Superior Court, Fulton County; W. D. Ellis, Judge.

Action by Snider & Wright against Annie Salter. A judgment for plaintiffs was set aside, and a new trial granted, and plaintiffs bring error. Affirmed.

Etheridge & Etheridge, R. H. Harris, and Alvin L. Richards, all of Atlanta, for plaintiffs in error. Mayson & Johnson, of Atlanta, for defendant in error.

HILL, C. J. Judgment affirmed.

(13 Ga. App. 153)

BROUGHTON v. JOS. LAZARUS CO.

(No. 4,563.)

(Court of Appeals of Georgia. Aug. 11, 1913.)

(Syllabus by the Court.)

1. PRINCIPAL AND SURETY (§ 35*) — BILLS AND NOTES (§ 493*)—CONSIDERATION—BURDEN OF PROOF.

The decision in this case is controlled by the ruling of this court in *Lacey v. Hutchinson*, 5 Ga. App. 886, 64 S. E. 105, and *Smith v. Hightower*, 3 Ga. App. 197, 59 S. E. 593. The

notes were unconditional contracts under seal. They recited a consideration, and this put upon the defendant the burden of proving that they were without consideration, which she failed to carry. It appeared from the undisputed evidence that the defendant became a surety, and that indulgence was extended to her principal. This was sufficient consideration for the contract of suretyship.

[Ed. Note.—For other cases, see Principal and Surety, Cent. Dig. § 68; Dec. Dig. § 35.* Bills and Notes, Cent. Dig. §§ 1652-1662; Dec. Dig. § 493.*]

2. PRINCIPAL AND SURETY (§ 41*)—LIABILITY OF SURETY—RIGHTS OF CREDITOR.

A creditor is not affected by the acts of the principal or of any other person than the creditor himself, by which one is induced to become a surety, even though the acts of such third parties be fraudulent. Nor are the rights of the creditor affected by the conditions or agreements which may influence one to become a surety for the principal debtor.

[Ed. Note.—For other cases, see Principal and Surety, Cent. Dig. §§ 78-81; Dec. Dig. § 41.*]

3. PRINCIPAL AND SURETY (§ 41*)—LIABILITY OF SURETY—RIGHTS OF CREDITOR.

The evidence failed to show that the plaintiffs had any knowledge of the agreements or conditions by virtue of which the defendant was induced to become a surety until after they had accepted the notes. The communication with an agent of the plaintiffs, to which the defendant testified, appears, without contradiction, to have taken place in August, while the plaintiffs accepted the notes on the previous July 24th.

[Ed. Note.—For other cases, see Principal and Surety, Cent. Dig. §§ 78-81; Dec. Dig. § 41.*]

Error from City Court of McRae; Echol Graham, Judge.

Action by the Jos. Lazarus Company against Mrs. M. P. Broughton. Judgment for plaintiff, and defendant brings error. Affirmed.

W. B. Smith, of McRae, and Wooten & Griffin, of Eastman, for plaintiff in error. John R. L. Smith, of Macon, and Max L. McRae, of McRae, for defendant in error.

RUSSELL, J. The evidence demanded the verdict, and there was no error in refusing a new trial.

Judgment affirmed.

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

(95 S. C. 343)

GIBSON v. BETHEA et al.

(Supreme Court of South Carolina. July 30, 1913.)

1. JUDGMENT (§ 139*)—OPENING DEFAULT—DISCRETION OF COURT.

A mortgagee, who was made a defendant in a foreclosure suit, asked to have its mortgages foreclosed; but its answer was not served on the mortgagor. Judgment foreclosing the mortgages was rendered on default. On motion the court vacated the judgment in part, and ordered that the answer be served on the mortgagor. *Held*, that it was for the trial court to determine whether there was any real controversy, and whether the mortgagor had "her day in court," without going into the merits, and, if it decided both questions in the affirmative, it could open the default, and its discretion would not be disturbed.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 265-268; Dec. Dig. § 139.*]

2. PLEADING (§ 332*)—ANSWER OR CROSS-COMPLAINT—SERVICE ON CODEFENDANT.

A defendant is not required to serve its answer on its codefendant, where the relief asked arises out of the facts alleged in the complaint; but, when the answer asks affirmative relief against a codefendant, it must be served, or the judgment rendered thereon may be set aside.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 1003-1010; Dec. Dig. § 332.*]

3. MORTGAGES (§ 581*)—FORECLOSURE—OPENING DEFAULT—OPERATION AND EFFECT—ATTORNEY'S FEES.

Where a judgment foreclosing a mortgage was vacated, the court rightly held that the attorney's fee of the mortgagee's attorney was not due at the time of the order of vacation; attorney's fees being at most in the discretion of the court.

[Ed. Note.—For other cases, see Mortgages, Cent. Dig. §§ 211½, 1669-1679; Dec. Dig. § 581.*]

Appeal from Common Pleas Circuit Court of Marion County; S. W. G. Shipp, Judge.

Action by Rebecca A. Gibson, as guardian of George H. Hyman, and others against Florence A. Bethea and the Bank of Marion. From an order setting aside a judgment in favor of the defendant, Bank of Marion, against its codefendant, Florence A. Bethea, defendant Bank of Marion appeals. Affirmed.

L. D. Lide, of Marion, for appellant. George E. Dargan and James R. Coggsall, both of Darlington, for respondent.

FRASER, J. [1] The following statement of facts appear in the "case": "This action was brought by the plaintiff to foreclose a mortgage given to her by the defendant, Florence A. Bethea. Bank of Marion was made a party defendant, because it held two mortgages on the premises given by its codefendant, Florence A. Bethea. One of these mortgages had been given to Atlantic National Bank, and subsequently was assigned to Bank of Marion, and there is no controversy as to this mortgage. On April 10, 1911, a decree for foreclosure was granted. On December 27, 1911, notice was given by Flor-

ence A. Bethea, through her attorneys, that she would move on the first day of the next term of the court of common pleas for Marion county to vacate and set aside the said decree, and that she would move on January 4, 1912, for an order staying the proceedings until the motion to vacate the judgment could be heard. Judge Shipp granted an order staying the proceedings, and the motion to vacate the judgment was to have been heard at the next term of court; but, by agreement of counsel, it was taken up at chambers on June 27, 1912. On September 27, 1912, Judge Shipp passed an order adjudging that the decree herein, in so far as it relates to the note and mortgage made by Florence A. Bethea and her husband, P. Y. Bethea, to Bank of Marion, be vacated and set aside, and that Bank of Marion be required to serve upon the said Florence A. Bethea its answer in this case. Bank of Marion gave due notice of appeal from this order, and the case comes before this court upon the exceptions set forth in the record."

The defendant Bank of Marion did not serve its answer on its codefendant, Mrs. Bethea, although its answer asked for the foreclosure of its two mortgages. Mrs. Bethea admits the plaintiff's mortgage and one of the defendant's mortgages, but denies the other. Judge Shipp opened the default as to the disputed mortgage. From this order, Bank of Marion appealed.

It will not be necessary to consider the exceptions separately. They all question the right of the judge to open the default and modify the judgment, and are all overruled. It was a matter of discretion. It appeared from the showing made before him that there was a real issue between Mrs. Bethea and Bank of Marion. It was not his province to determine the facts upon the showing, but to determine whether there was a real controversy or not, and whether she had had "her day in court." He found that there was a controversy. This is indisputable. He found that she has not had her day in court. She has not.

[2] It is said that defendants are not required to serve their answer on their codefendants when the relief granted arises out of the facts alleged in the complaint. That is true; but when they have an answer in which affirmative relief is asked against the codefendant, and do not serve the answer on the defendant, they are liable to have the judgment set aside.

[3] Having held that the order was within the discretion of the circuit judge, and that there was no abuse of discretion, no other question remains, except to say that he was also right in holding that the attorney's fee was not due at the time of the order. The recent case of *Coley v. Coley*, 94 S. C. page 383, 77 S. E. 49, shows that an attorney's fee of 10 per cent. is not a matter of course,

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes 78 S.E.—65

even though provided for in the note and mortgage.

The order appealed from is affirmed.

GARY, C. J., concura.

HYDRICK, J. The rule in equity is, that the court can adjust equities between defendants, when they arise out of allegations in the complaint, supported by proof. But when one defendant seeks affirmative relief against another, which does not so arise, he must serve a cross-answer, stating the facts out of which the relief which he prays for arises. The complaint alleges that Bank of Marion "claims a lien upon said premises prior to plaintiff's lien, by virtue of certain mortgages on said premises, one of which said mortgages * * * was assigned and transferred to Bank of Marion by the Atlantic National Bank." This sufficiently alleges that said bank held at least two mortgages over the premises to warrant the court in giving judgment thereon, in the absence of any defense. Parties should not be allowed to trifle with the court by failing to answer and defend under such an allegation, and, when judgment is given against them, seek to set it aside.

I concur in affirming the order appealed from, because this motion was based upon other grounds which warranted the court in granting it.

WATTS, J., concurs.

(65 S. C. 347)

SMYLY et al. v. COLLETON CYPRESS CO.
(Supreme Court of South Carolina. July 30, 1913.)

1. TRESPASS (§ 67*)—NONSUIT—CIRCUMSTANTIAL EVIDENCE.

In an action for trespass, where all the circumstances, considered as a whole, showed that the plaintiff was in possession, a nonsuit was properly refused, even though no one of the circumstances was sufficient.

[Ed. Note.—For other cases, see *Trespass*, Cent. Dig. § 150; Dec. Dig. § 67.*]

2. TRESPASS (§ 67*)—QUESTION FOR JURY—POSSESSION OF PLAINTIFF.

In an action for trespass, it was a question for the jury whether the plaintiff's possession was continuous, or in the nature of repeated trespasses.

[Ed. Note.—For other cases, see *Trespass*, Cent. Dig. § 150; Dec. Dig. § 67.*]

3. VENDOR AND PURCHASER (§ 245*)—BONA FIDE PURCHASERS—RECORDS—NATURE OF DEFENSE.

In trespass, the defense of innocent purchaser for value, under the recording acts, presents a legal, and not an equitable, issue.

[Ed. Note.—For other cases, see *Vendor and Purchaser*, Cent. Dig. § 612; Dec. Dig. § 245.*]

4. VENDOR AND PURCHASER (§ 231*)—BONA FIDE PURCHASERS—RECORDS—PERSONS AFFECTED.

The defense of innocent purchaser for value, under the recording acts, does not apply in an

action for trespass, where the parties do not claim from a common source of title.

[Ed. Note.—For other cases, see *Vendor and Purchaser*, Cent. Dig. §§ 43, 55, 487, 513-539; Dec. Dig. § 231.*]

Appeal from Common Pleas Circuit Court of Colleton County; George E. Prince, Judge.

Action by C. M. Smyly and others against the Colleton Cypress Company. Judgment for plaintiffs, and defendant appeals. Affirmed.

Howell & Gruber, of Walterboro, for appellant. H. R. Padgett and Padgett, Lemacks & Moorer, all of Walterboro, for respondents.

GARY, C. J. This is an action of *quare clausum fregit*, to recover actual and punitive damages for trespasses, alleged to have been committed on 448 acres of swamp lands, of which the plaintiffs alleged that they were in possession, and were the owners in fee. The defendant denied, generally, the allegations of the complaint, and set up as a defense that it was a purchaser for valuable consideration without notice, actual or constructive. At the close of the plaintiffs' testimony, the defendant made a motion for a nonsuit, on the ground that the plaintiffs totally failed to prove actual possession of the property in dispute, and on the further ground that they failed to prove legal title to the said property. His honor the presiding judge refused the motion, on the ground that, although the plaintiffs had failed to show title in themselves, nevertheless there was testimony tending to prove that they were in possession of the property at the time of the alleged trespasses. The jury rendered a verdict in favor of the plaintiffs, for \$4,000, whereupon the defendant made a motion for a new trial, which was also refused. The defendant then appealed.

[1] The first question that will be considered is whether there was any testimony tending to show that the plaintiffs were in possession of the lands at the time of the alleged trespasses. The plaintiffs relied upon a number of facts and circumstances, and, while no particular one is sufficient to show that they were in possession of the lands at the time mentioned, nevertheless, when the facts are considered as a whole, they satisfy us that the nonsuit was properly refused. The rule is thus stated in *Railroad v. Partlow*, 14 Rich. 237: "It may be that no one of the facts would, of itself, warrant the inference, and yet, when taken together, they may produce belief, which is the object of all evidence." In *Greenl. Ev.* § 51a, it is said: "It is not necessary that the evidence should bear directly upon the issue. It is admissible if it tends to prove the issue, or constitutes a link in the chain of proof, although alone it might not justify a verdict in accordance with it."

[2] It was peculiarly a question to be determined by the jury whether the possession

of the plaintiffs was continuous, or in the nature of repeated trespasses.

We have not discussed the testimony in detail, as it would unnecessarily prolong the opinion, and subserve no useful purpose.

The next question that will be considered is whether there was error on the part of his honor the presiding judge, in ruling that the doctrine of innocent purchaser for value without notice has no application, where people claim from different sources.

[3] The defense of purchaser for value without notice, when it arises out of the recording acts, presents a legal issue to be determined by the jury. *Gregory v. Ducker*, 31 S. O. 141, 9 S. E. 780; *Hodges v. Kohn*, 67 S. C. 69, 45 S. E. 102; 2 Pom. Eq. Jur. § 736.

[4] But whether considered in its legal or equitable aspect, it is not applicable to this case, for the reason that, as stated by his honor the presiding judge, the plaintiffs and defendant do not claim from a common source of title. The rule is thus stated in 2 Pom. Eq. Jur. § 658: "It is not every subsequent purchaser who comes within the purview of the statute. The mere fact that subsequently to the registering of a deed of certain premises a third person purchases the same premises from any source of title, from any grantor whatsoever claiming to own them, does not render the purchaser necessarily chargeable with notice of the prior recorded conveyance. The only subsequent purchaser, who is charged with notice of the record of a conveyance is one who claims under the same grantor from the same source of titles. If two titles to the same land are distinct and conflicting, the superiority between them depends, not upon their being recorded, but upon their intrinsic merits. It is a settled doctrine, therefore, that a record is only a constructive notice to subsequent purchasers deriving title from the same grantor." In section 735 of the same volume, it is also said: "This section will deal with the equitable doctrine of bona fide purchase, for a valuable consideration and without notice. The doctrine in its original form was purely equitable. Questions of priority cannot, as has already been stated, arise between successive adverse estates, which are purely legal, and therefore cannot, independently of statutory permission, come before courts of law for settlement; such estates must stand or fall upon their own intrinsic merits and validity. A contest concerning priority or precedence, properly so called, can only exist where one of two claimants holds a legal, and the other an equitable, title or when both hold equitable titles, and must therefore belong to the original jurisdiction of equity. Courts of equity do not have jurisdiction of suits brought merely to establish one purely legal title against another and conflicting legal title." The principle was announced in *Martin v. Quattlebaum*, 3 McCord, 205,

that a deed to land is not affected in any way by not being recorded, except as to subsequent purchasers from the same grantor, the court concluding its opinion as follows: "The law never meant anything so absurd as to say that if a man sold his land and made a title for it, which should not be recorded, that such title should be destroyed by another making a title to the same land and having it duly recorded." This doctrine was affirmed in *Youngblood v. Keadle*, 1 Strob. 121. In that case Mr. Justice Wardlaw dissented, on the ground that the act of 1698 (2 St. at Large, p. 137), which was then under consideration, did not limit its application to those cases in which the parties claimed from a common source of title. He, however, thus succinctly stated the general object of the recording acts: "A registry is designed for public information, and it can be searched only by indexes referring to names. No search would usually disclose conveyances, made by unknown third persons, of the same property which has been mortgaged or sold by an instrument whose validity is under investigation; and often the conveyance of a third person, if found, although containing the same property, might not afford the means of identification." See, also, *Richardson v. Atlantic Coast Lumber Corporation*, 93 S. C. 254, 75 S. E. 371.

The cases are in accord with the general doctrine elsewhere. In 39 Cyc. 1721, we find the following: "It is sometimes said that the record of a conveyance which is entitled to be recorded is constructive notice to all the world. But this is too broad and unqualified an enunciation of the doctrine. It is constructive notice only to those who are bound to search for it, subsequent purchasers claiming under the same grantor, or through one who is the common source of title." At page 1728 the same author says: "The record of an instrument not in the chain of title through which the purchaser claims is not constructive notice to the purchaser; the record being notice only to those who claim under or through the same grantor."

Judgment affirmed.

HYDRICK, WATTS, and FRASER, JJ.
concur.

(35 S. C. 326)

MERCK et al. v. MERCK et al.

(Supreme Court of South Carolina. July 29, 1913.)

1. DEEDS (§§ 53, 66*)—ACTION—DELIVERY—QUESTION FOR JURY.

In an action by the heirs of M. to recover, as his heirs, land, evidence held sufficient to warrant submitting to the jury the issue whether there was a complete execution and delivery of a deed to the land by M. before his death.

[Ed. Note.—For other cases, see *Deeds*, Cent. Dig. §§ 127, 633; Dec. Dig. §§ 53, 66.*]

2. APPEAL AND ERROR (§ 213*)—OBJECTION BELOW—NECESSITY.

Although it was error to submit to the jury the issue whether plaintiffs were estopped to deny the delivery of a deed to defendant's grantor because of a waiver of this defense by defendant, this was waived as a ground of appeal by plaintiffs' failing to call the court's attention to such error.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1149, 1165, 1304-1308; Dec. Dig. § 213.*]

3. ESTOPPEL (§ 110*)—ESTOPPEL IN PAIS—PLEADING.

In an action by the heirs of M. to recover, as his heirs, land, the defense that the heirs were estopped to deny the delivery of a deed by M. because M. made a deed complete on its face, and left it where the grantee named therein could easily take it, thereby inducing defendant to accept him as the real owner of the land, is estoppel in pais, and need not be specially pleaded.

[Ed. Note.—For other cases, see Estoppel, Cent. Dig. § 300; Dec. Dig. § 110.*]

4. VENDOR AND PURCHASER (§ 240*)—BONA FIDE PURCHASER—PLEADING.

A defense of bona fide purchaser without notice is an equitable defense, and must be specially pleaded.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. §§ 601, 602; Dec. Dig. § 240.*]

Appeal from Common Pleas Circuit Court of Pickens County; R. W. Memminger, Judge.

Action by Daniel M. Merck and others against Lawrence C. Merck and others. From a judgment on a verdict for defendant W. B. Mann, plaintiffs appeal. Affirmed.

Cothran, Dean & Cothran, of Greenville, and J. E. Breazeale and Julius E. Boggs, both of Anderson, for appellants. James P. Carey, of Pickens, for respondent.

GARY, C. J. This is the third appeal herein; the first is reported in 83 S. C. 329, 65 S. E. 347, 137 Am. St. Rep. 815, and the second in 89 S. C. 347, 71 S. E. 969, Ann. Cas. 1913A, 937.

The following statement appears in the record: "This is an action instituted in the court of common pleas for Pickens county on December 22, 1906, by the plaintiffs as heirs at law, children of one Blumer Merck, for the partition of a certain tract of land in Pickens county, described in the complaint, which formerly belonged to Blumer Merck, now deceased. The defendants Lawrence C. Merck, son of Blumer Merck, and Ella Burton, B. Stewart and K. Stewart, children of Parthena Stewart, a predeceased daughter of Blumer Merck, were made parties defendant as tenants in common with the plaintiff. None of them answered the complaint. The defendant W. B. Mann answered the complaint, denying title in the plaintiffs, and setting up a claim of title in fee in himself. The case was tried before Hon. R. W. Memminger, presiding judge, at Pickens, March term, 1912. The legal issues of title were submitted to a jury, the jury found a verdict in favor of the

defendant W. B. Mann that he was entitled to the possession of the land in dispute, and thereupon the presiding judge signed an order, confirming the verdict of the jury and dismissing the complaint. Upon this decree and verdict judgment was duly entered up by the said defendant W. B. Mann against the plaintiffs, from which the plaintiffs above named have appealed to this court."

The opinions on the former appeals, especially the first, state the facts in detail.

[1] There are four exceptions, but it will not be necessary to consider them seriatim, as the appellants' attorneys have discussed them under two heads, the first of which is as follows: "Is the testimony offered by the defendant Mann, upon the subject of the execution and delivery of the deed from Blumer Merck to L. C. Merck, of such character as to constitute some evidence of the complete execution and delivery of the deed, and so entitled the defendant Mann to have the issue of complete execution and delivery submitted to the jury?"

During the trial which resulted in the second appeal (89 S. C. 347, 71 S. E. 969, Ann. Cas. 1913A, 937), this court, after sustaining the ruling of his honor the circuit judge that M. F. Hester was not a competent witness, to prove the execution of the deed from Blumer Merck to L. C. Merck, on the ground that he was disqualified under section 400 (now 438) of the Code, proceeded as follows: "The defendant Mann was in this plight: Mrs. L. C. Merck, one of the persons whose names were subscribed as witnesses to the alleged deed from Blumer Merck to L. C. Merck, was hostile, and upon being put on the stand, testified in effect that the deed was not delivered. The other witness Hester was excluded because disqualified by interest. Under these conditions the defendant Mann had a right to introduce other testimony tending to prove the execution of the deed; the evidence of the handwriting of the witnesses, of the grantor's acknowledgment of the validity of the deed after its execution, and of any facts tending to show that the deed had been executed was clearly admissible. Land titles would be very insecure if they should fall whenever the subscribing witnesses might deny that they witnessed the execution of a deed, or might become for any cause incompetent to testify to its execution. It is true in proving a deed the subscribing witnesses must be produced, or their absence accounted for, but manifestly the title cannot be made to depend entirely on their testimony. Whenever the witnesses are dead or inaccessible, or have become incapacitated, or deny the execution in their presence, or for any cause are unable or unwilling to prove the execution, then other evidence may be introduced. This is a principle of general recognition (citing authorities). On this principle the court erred also in holding that the ad-

mission of Blumer Merck that he had conveyed the lands to his son L. C. Merck was not admissible as evidence of the execution of the deed, but only to show the character of the possession. Such admission, together with testimony as to the handwriting of the grantor, and of the witnesses, as to the independent possession and control of the lands by the grantee, and as to the recording of the deed, were all admissible, either to support the testimony of the subscribing witnesses that the deed had been executed, or in substitution of the testimony of the subscribing witnesses if that testimony, without fault of the party in interest, was not available, or was adverse. * * * As the case is to go back for a new trial, we refrain from any discussion or expression of opinion as to the facts, further than to say that we think there was a scintilla of evidence for the consideration of the jury on the issue of estoppel."

The appellants' attorneys, thus summarize the testimony introduced by the defendant, for the purpose of proving the execution and delivery of the deed from Blumer Merck to L. C. Merck: "The handwriting of M. F. Hester and that of Lizzie Merck, whose signatures appear as subscribing witnesses, we will assume has been proved. The handwriting of M. F. Hester in the signature of Blumer Merck, by his mark, we will assume has been proved. Four witnesses testified that at different times they had heard Blumer Merck say, after the date of the deed, that he had deeded the land to L. C. Merck. The fact that the deed was recorded in the R. M. O. office of Pickens county on December 10, 1904, nearly three years after its date. That after the death of Blumer Merck, L. C. Merck was in possession of the land, claiming title thereto under said deed, and conveyed same to M. F. Hester, besides having exercised other acts of ownership, such as cultivating the land, mortgaging it, and returning it for taxation, all within the brief period of from May to September, 1905." The testimony tending to establish said facts was admissible under the ruling of the court, which we have just quoted; and if his honor the presiding judge had undertaken to determine its force and effect he would have invaded the province of the jury.

The second question discussed by the appellants' attorneys, is as follows: "Did the presiding judge err in submitting to the jury the issue of estoppel, based upon the alleged negligence of Blumer Merck, in making a deed complete on its face, lacking only delivery to make it a good conveyance, and then leaving it where the grantee named in the paper could easily take it, thus inducing others to accept him as the real owner of the land, and instructing the jury that upon the solution of said issue his title would be good, even if the deed of Blumer Merck had never been delivered?"

The appellants' attorneys contend that the

defendant was not entitled to the benefit of this doctrine, for the following reasons, which constitute their specifications of error, in this particular: "This defense is based upon the doctrine of estoppel, which in turn is based upon the plea of purchaser for value without notice, both of which defenses and pleas were expressly in open court repudiated and waived by counsel for the defendant Mann. Under the pleadings, testimony, and admission of counsel, the question of Blumer Merck's negligence, as affecting the issue of the delivery of the deed, was not an issue in the case."

On the first appeal (83 S. C. 329, 65 S. E. 347, 137 Am. St. Rep. 815), the court used this language: "On the question of delivery, the plaintiffs submitted the following request: 'Even if properly executed, the deed does not have effect as a deed unless it be shown that it was duly delivered by Blumer Merck to L. C. Merck, or to some one for him. If Blumer Merck never parted with or intended to part with the possession of the deed; if he retained possession of it, placed it away with his papers and never delivered it to L. C. Merck or to any one for him; if while it was in Blumer Merck's possession it was surreptitiously taken away from his place of safe-keeping without his knowledge or consent and placed on record—I charge you that under these circumstances the law declares that the deed has not been delivered and is therefore invalid.' This is correct as a general statement of the law (citing authorities). Counsel for defendant now insists, however, the request was properly refused, because it left out of view the question of estoppel from negligence. His argument is that Blumer Merck and his heirs might have been estopped from disputing Mann's title by negligence on his part in making a deed complete on its face, and lacking only delivery to make it a good conveyance, and then leaving it where the grantee, named in the paper, could easily take it, and thus induce others to accept him as the real owner of the land, and that therefore Mann's title might be good even if the deed of Blumer Merck had never been delivered. Neither the requests nor the charge of the circuit judge indicate that the issue of negligence was made on the trial, and it may be unfair to appellants to say it should have been incorporated in this request. But it was earnestly pressed in the argument that the issue of negligence was made on the trial as arising out of the evidence. That being so, the request above quoted was not sound with the request of negligence left out of view."

It will thus be seen that the exceptions raising this question cannot be sustained, unless there was waiver of the right to insist upon estoppel in this respect. We, therefore, proceed to the consideration of the question whether the defendant waived such right.

After stating the principles announced in the former decision in this case, his honor

the presiding judge thus charged the jury as to the undecided issues then before the court: "Now it appears to this court that, after all these appeals, and with the record as we have it before us now, there are no great legal complications about this matter, and, after the statement of counsel for the defendant Mann here, in open court, that they are not contending for nor relying on these abstruse doctrines of equitable estoppel as such, or purchaser for value without notice, that the issues are very clearly narrowed down. First. Was the alleged deed from Blumer Merck to Lawrence Merck executed and delivered in compliance with law? If not, Mann loses. Second. If it was so executed and delivered, was it obtained by fraud? If so, Mann loses; otherwise he wins. And third. If executed, has its delivery been shown by such evidence of carelessness, on the part of Blumer Merck, as would prevent the parties claiming that nondelivery has not been shown? Now as to this last point, on the question of carelessness, I charge you, and dispose of that question, by citing and charging you the law upon the point as laid down in the first appeal, as follows (reading same). I simply add the element of carelessness to the charge, as refused there by Judge Klugh, which makes it according to the decision a correct declaration of the law on that point. I simply add to the refused request. So you see I charge you that as the law, adding to it that you have the right to take into consideration, upon the question of delivery, that matter of negligence as laid down there, and say whether or not there was a delivery."

The plaintiffs' ninth request was as follows: "The defendant W. B. Mann is not entitled upon this issue to assume the position, of a bona fide purchaser for value without notice, for the reasons: (a) Such defense must be pleaded, and it has not been done in this case. (b) It is essential to the plea of bona fide purchaser for value without notice that the defendant shall have paid in full the purchase price. The defendant admits that he purchased the land for \$6,000, paid \$1,200 cash, and gave his note, secured by mortgage, for \$4,800, no part of which has been paid, except a small portion of interest. (c) At most, the defendant would only be entitled to that plea pro tanto, and that on the equity side of this case." The following indorsement thereon shows why it was not charged: "Cary don't claim it." See 83 S. C. 339, 85 S. E. 347, 137 Am. St. Rep. 815. The circuit judge made similar indorsements, on other requests, relative to the plea of purchaser for valuable consideration without notice.

The plaintiffs' fifth request was as follows: "If the jury believe from the evidence, that after signing the alleged deed Blumer Merck never parted or intended to part with the possession of the deed, and never intended that it should take effect as a deed until

after his death; that he retained possession of the deed, placed it away with his papers, and never delivered it to L. C. Merck, nor to any one for him; that while the deed was in possession of Blumer Merck, it was surreptitiously taken away from his place of safe-keeping, without his knowledge or consent, and placed on record—I say, if you believe these facts to have been established by the evidence, then I charge you that under these circumstances the law declares that the deed was never delivered, and is invalid." After reading it to the jury, his honor said: "That, of course, I charge you, as a more detailed explanation, but take that in connection with that matter I explained to you of negligence. These requests don't go quite far enough. You have to add that element to them, to make them a complete statement of the law."

The presiding judge also charged the jury as follows: "If, however, you decide these issues in his favor—that is, decide in favor of the execution and delivery of the deed—you will proceed to the inquiry, as to whether or not it was obtained by fraud. You have heard the reply read, as to what fraud the heirs claim against the deed, that there was a combination between these people to obtain this deed from the old man, and that that was carried out, and that therefore the deed is void on that account, and they charge Mann with being cognizant of this fraud; but his counsel, as I stated, declared that on this point they rely upon what they claim is the absolute failure to show fraud in the original transaction, and are not resting upon a claim, that if you found fraud, Mann would still have a good title, as being a purchaser without knowledge or notice of the alleged fraud, and this simplifies the issue very much for you, and is something of which the plaintiffs cannot complain."

From the foregoing it appears that the defendant did not intend to waive his right to insist upon the doctrine of estoppel, arising out of the negligence of Blumer Merck, nor did the circuit judge so understand him.

[2] Furthermore, when the presiding judge stated "that the issues are very clearly narrowed down" to the three which he mentioned, one of which was, "If executed, has its delivery been shown by such evidence of carelessness, on the part of Blumer Merck, as would prevent the parties claiming that nondelivery has not been shown?" It was the duty of plaintiffs' counsel to call such supposed error in stating the issues to the attention of the court, in case it was intended to rely upon it as a ground of appeal; otherwise such objection was waived.

[3,4] The circuit judge drew a distinction between the plea of purchaser for valuable consideration without notice and estoppel by negligence; and, while he held that the issue as to estoppel by negligence was then before the court, he also held that the defendant

did not insist upon the plea of purchaser for valuable consideration without notice. The authorities show that there is a well-recognized distinction between such issues.

The right of the defendant to rely upon the negligence of Blumer Merck, whereby other were induced to become purchasers of the land, falls under the head of estoppel in pais, which need not be pleaded.

The rule is thus stated in *Scarborough v. Woodley*, 81 S. C. 329, 62 S. E. 405: "It is not necessary in this state to plead estoppel (*Lites v. Addison*, 27 S. C. 235, 3 S. E. 214); and therefore the defendant had the right, under his general denial, to introduce evidence of estoppel, and on such evidence have the issue of estoppel submitted to the jury." While on the other hand, "The defense of bona fide purchase without notice is an equitable defense, must be set out in the answer, and must be sustained by party who erects it as a shield." *Lupo v. True*, 16 S. C. 587.

In the recent case of *Sullivan v. Moore*, 84 S. C. 426, 65 S. E. 108, 66 S. E. 561, which was also an action to recover the possession of land, the court thus stated the rule: "The appellant's first contention is that the issue of estoppel is equitable in its nature, and therefore should have been tried by the court, and not submitted to the jury on the issue of legal title. The position is not tenable. The rule is thus stated in *Drexel v. Berney*, 122 U. S. 241 [7 Sup. Ct. 1200, 30 L. Ed. 1219]: 'Estoppels of this character, as distinguished from estoppels by record or by deed, are called equitable estoppels. It is not meant thereby that they are recognizable only in courts of equity, for they are commonly enforced in actions at law, as was fully shown in *Dickerson v. Colgrove*, 100 U. S. 578 [25 L. Ed. 618]. But it does not follow because equitable estoppels may originate legal, as distinguished from equitable, rights that it may not be necessary in particular cases to resort to a court of equity, in order to make them available. All that can properly be said is that, in order to justify a resort to a court of equity, it is necessary to show some ground of equity other than the estoppel itself, whereby the party entitled to the benefit of it is prevented from making it available in a court of law. In other words, the case must be one where the forms of law are used to defeat that which in equity constitutes the right. Such a case is one for 'equitable interposition.' The right to prove against the plaintiff estoppel by conduct as a defense to an action to recover possession of land was recognized in *Marines v. Goblet*, 81 S. C. 153 [9 S. E. 808, 17 Am. St. Rep. 22], on the authority of *Lessee of Tarrant v. Terry*, 1 Bay, 241."

Judgment affirmed.

HYDRICK, WATTS, and FRASER, JJ., concur.

(95 S. C. 370)

MIMS v. ATLANTIC COAST LINE R. CO.
et al.

(Supreme Court of South Carolina. July 4, 1918. Rehearing Denied Aug. 9, 1918.)

MASTER AND SERVANT (§§ 286, 289*)—INJURY TO SERVANT—NEGLIGENCE—CONTRIBUTORY NEGLIGENCE—QUESTIONS FOR JURY.

In an action for the death of a car inspector, killed at a public crossing by an engine and tender running backwards, evidence held sufficient to warrant submitting to the jury the question whether the accident was caused by the negligence of the deceased, or by the negligence of the railroad company.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. §§ 1001, 1006, 1008, 1010-1015, 1017-1033, 1036-1042, 1044, 1048-1050, 1089, 1090, 1092-1132; Dec. Dig. §§ 286, 289.*]

Appeal from Common Pleas Circuit Court of Richland County; T. H. Spain, Judge.

Action by Lizzie M. Mims, administratrix, against the Atlantic Coast Line Railroad Company and another. From a judgment granting a nonsuit, plaintiff appeals. Reversed and remanded.

Nelson, Nelson & Gettys, of Columbia, and John H. Clifton, of Sumter, for appellant. Barron, Moore, Barron & McKay, of Columbia, P. A. Willcox, of Florence, and Lucian W. McLemore, of Sumter, for respondents.

GARY, C. J. This is an action by the plaintiff, as administratrix of John J. Mims' estate, to recover damages against the defendants, for the benefit of herself and children, on account of the death of her husband, alleged to have been caused by the joint and concurrent negligence and recklessness of the defendants.

The allegations of the complaint, material to the questions under consideration, are set forth in the fourth, fifth, and sixth paragraphs thereof, which are as follows:

"Fourth. That the defendant S. B. Divine is a citizen of the state of South Carolina, who was at the times hereinafter mentioned a servant and employé of the defendant Atlantic Coast Line Railroad Company, being engineer, engaged in running an engine of the defendant, used for switching and other purposes on defendant's yard at said Sumter.

"Fifth. On information and belief, that on or about the 19th day of December, 1910, while plaintiff's intestate was crossing Harvin street, a public street of the said city of Sumter, defendant Atlantic Coast Line Railroad Company carelessly, negligently, recklessly, willfully, and wantonly ran backwards one of its engines and tender, on one of its tracks across said Harvin street, at an excessive and reckless rate of speed, and in violation of its own rules and regulations as to speed, and without having any one on the rear of said engine or tender to keep a lookout in the direction in which said engine and tender were being run, and in violation of its

own rules, and without blowing the whistle or ringing the bell of said engine, and without giving any signal or warning whatsoever of its approach, as required by law, although, where the tracks of said defendant cross said Harvin street, is a public crossing in said city of Sumter, and carelessly, negligently, recklessly, willfully, and wantonly ran into and over plaintiff's intestate, crushing him beneath the wheels of said tender and causing his death.

"Sixth. On information and belief, that the defendant Atlantic Coast Line Railroad Company knew, or should have known, that its codefendant, C. B. Divine, was a careless and reckless engineer, nevertheless it carelessly, negligently, recklessly, willfully, and wantonly retained the said S. B. Divine, in its employ, as switch engineer, in and about its yards at said Sumter, S. C."

The defendants denied the allegations of negligence and recklessness, and set up contributory negligence on the part of John J. Mims, as a defense. At the close of all the testimony his honor the presiding judge granted an order of nonsuit, on the ground "that the only inference to be drawn from the evidence is that the plaintiff's intestate, John J. Mims, was guilty of gross negligence, which contributed to his injury, as a proximate cause thereof." The appellant's exceptions assign error in said ruling.

There was testimony tending to show that the deceased was a car inspector at the time of his death, and was in the employment of the defendant company, in its yard at Sumter, S. C.; that one of his duties was to inspect all trains upon their arrival in the yard; that at the time of his death he was going across the yard and tracks, diagonally from a train which was already in the yard to one which had just arrived, for the purpose of inspecting it; that in going from one to the other it was necessary for him to cross Harvin street, a much traveled place, and one of the main thoroughfares of the city; that while he was thus discharging his duty he was killed by collision with a switch engine, within a few feet of Harvin street; that the engine was running backwards without a full shifting crew and without any one on the back of the tender to keep a lookout, at a rate of speed from 15 to 20 miles an hour, which was reckless, and exceeded the rate of 10 miles an hour prescribed by the rules of the company; that no signal was given except the blow of the whistle, after Mims was struck by the engine; and when considered in its entirety, there was reasonable grounds for the jury to draw from the testimony the inference that Mims did not know the engine was approaching until it was within a few feet of him, as his back was turned in that direction. In fine, there was testimony tending to prove every material allegation of the complaint that was put in issue. After the introduc-

tion of testimony by the plaintiff, for the purpose of establishing the facts just mentioned, the defendants offered evidence contradictory thereof, for the purpose of showing that they were not guilty of negligence or recklessness, and to sustain their defense that the plaintiff's intestate was guilty of contributory negligence. If the jury believed the testimony offered by the plaintiff, and it was unquestionably susceptible of the inference that the injury was the direct and proximate result of negligence or recklessness on the part of the defendants, and not of gross negligence on the part of the plaintiff, while, on the other hand, if they believed the testimony introduced in behalf of the defendants, including that which contradicted the evidence offered in behalf of the plaintiff, then it was susceptible of the inference that the injury resulted directly and proximately from the gross negligence of John J. Mims. It was, however, for the jury, not only to determine whether they believed the whole or any part of the testimony introduced by either party, but also to draw the inference therefrom.

The defendants seem to attach much importance to the testimony of L. I. Parrott, then clerk of the court, who testified that he heard some one ask John J. Mims, immediately after the injury: "My God, John, how did this thing happen?" and that Mims replied: "I thought I could make it," or, "I thought I could cross," or some expression of that kind. We do not, however, attach the same importance to it, on account of the subsequent testimony of this witness.

The record shows that the following took place subsequently: Mr. Parrott, recalled: Mr. Clifton: "Q. In the statement you made as coming from Mr. Mims, you say that there is no absolute degree of certainty whether he referred to his physical condition, or ability to get across the track; you can say which he referred to? Whether he was in such physical condition that he was unable to get across the track, or had time to get across? A. What I heard on the grounds, what the person said with reference to his physical condition, impressed my mind with the fact that it was on account of his physical condition."

It appears from the testimony, that Mims was not then in good health physically, and the statement of the witness is that the remarks made by Mims had reference to his physical condition, and not to the question whether he had time to get across on account of the proximity of the train. His honor the presiding judge based his ruling on the case of *Drawdy v. Railway*, 78 S. C. 375, 58 S. E. 980, which he held to be conclusive of the present case. Upon comparison of the facts in the two cases, it will be found that they are materially different.

It is the judgment of this court that the

order of the circuit court be set aside, and the case remanded to that court for a new trial.

HYDRICK, WATTS, and FRASER, JJ.,
concur.

(95 S. C. 306)

MAGILL v. SOUTHERN RY. CO. et al.
(Supreme Court of South Carolina. July 25, 1913.)

1. EVIDENCE (§ 123*)—RES GESTÆ—STATEMENTS OF INJURED PERSON.

A declaration by a boy, who had been injured by a train, made to a witness immediately upon his arrival at the scene of the accident, which was half a minute after he heard a brakeman call that they had run over a man, was admissible as part of the res gestæ.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 351-368; Dec. Dig. § 123.*]

2. EVIDENCE (§ 123*)—RES GESTÆ—STATEMENTS OF INJURED PERSON.

The declaration was not inadmissible because the boy was then dazed and shocked, since that would affect the credence to be given it, not its admissibility.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 351-368; Dec. Dig. § 123.*]

3. EVIDENCE (§ 539¼*)—SUBJECTS OF EXPERT TESTIMONY—OPERATION OF RAILROADS.

A witness, who testified that he had run as a trainman on a switch engine, and had made experiments on the morning the injuries were received, can testify, as an expert, that freight cars, other than those which caused the injury, projected out over the ends of the cross-ties.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 2350-2352; Dec. Dig. § 539¼.*]

4. RAILROADS (§ 400*)—INJURIES TO PERSON NEAR TRACK—PROVINCE OF JURY.

In an action for injuries to a boy nine years old, struck by cars while playing on a pile of cross-ties near a side track, and on a pathway commonly used by the public, where there was evidence tending to support the allegations of the complaint, it was for the jury to determine whether the company was negligent, and whether they owed any duty to the boy.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 1365-1381; Dec. Dig. § 400.*]

5. TRIAL (§ 241*)—INSTRUCTIONS—READING AUTHORITIES TO JURY.

In an action for injuries to a nine year old boy, who was playing on a pile of cross-ties placed along the railroad track, on a pathway ordinarily used by the public, it was not error for the court to modify a charge requested by the railroad company as to its duty toward a trespasser, by reading to the jury from a previous case a quotation from a text-book, in which the doctrine that a railroad company is not liable for injuries to a child who trespasses upon its track, except for willful injury, was characterized as a "cruel and wicked doctrine, unworthy of a civilized jurisprudence, and one which put property above humanity."

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 562, 563; Dec. Dig. § 241.*]

6. TRIAL (§ 241*)—INSTRUCTIONS—RIGHT TO EXPLAIN.

In giving a sound charge upon the law, the court has a right to explain it fully in his own language, or by decisions of the court, in order to convey the correct idea of the law of the case.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 562, 563; Dec. Dig. § 241.*]

Appeal from Common Pleas Circuit Court of York County; T. S. Sease, Judge.

Action by Samuel T. Magill against the Southern Railway Company and another. Judgment for the plaintiff, and defendants appeal. Affirmed.

The requested charges given by the court as modified, to which the eighth, ninth, and tenth exceptions refer, were as follows:

"(2) The law does not impose upon railroad companies the duty of keeping a lookout for trespassers upon its cars or tracks, and it is the law that a railroad company is not bound to assume, or even expect that trespassers will intrude themselves into dangerous places on their trains or tracks, and is therefore under no legal obligation to provide for their safety by warning them of the danger of their willful and reckless acts. Any other doctrine would impose an unnatural care and responsibility upon railroads. They are organized for wise purposes, and should respond to the duty they owe the public; but to impose upon them the burden of a quasi guardianship of all trespassers, infant or otherwise, who go upon their tracks, or intrude upon their cars, not intended for passengers to occupy, would be extending the rule too far.

"I charge you that, gentlemen, in connection with what I have already charged you, read you out of the book in the case of Tucker against the railroad. That is, that an infant non sui juris cannot be such a trespasser as would exempt any one from the duty of exercising ordinary care to avoid doing it an injury. And in this connection I desire to read to you a few requests to charge in another case, and worded better than I can word it at this time. I charge you that where the owner or occupier of grounds brings or artificially creates something thereon, which from its nature is especially attractive to children and which at the same time is dangerous to them, he is bound, in the exercise of social duty and the ordinary offices of humanity, to take reasonable pains to see that such dangerous things are so guarded that children will not be injured by coming in contact with them. Going back to the defendant's requests to charge:

"(3) An infant under the age of 7 years is not capable of contributory negligence, and an infant under the age of 14 years is presumed to be incapable of contributory negligence. No matter what may be the age of a child or infant, it may be a trespasser upon the tracks or cars of a railroad company in the same manner that an adult person would become a trespasser. A child incapable, by reason of tender age, of exercising discretion or of being guilty of contributory negligence may become a trespasser upon a railroad track or railroad cars upon the same state of facts that would impress that character upon a person of legal discretion. In the case of

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

an injury to a trespasser on the cars or tracks of a railroad, his age is immaterial on the question of the defendant's negligence. Infancy does not affect the relation as trespasser.

"I charge you that, but also wish to read to you a decision of the Supreme Court of this state: 'Under the caption, "Liability for Injuries to Children," the author in Thompson on Negligence, section 1026, thus speaks in strenuous language of the doctrine that liability extends only to wanton injuries'—and I am reading this in connection with the third request by the defendant, because this is from our own Supreme Court. This is what Thompson says: 'One doctrine under this head is that if a child trespass upon the premises of the defendant, and is injured in consequence of something that befalls him while trespassing, he cannot recover unless the injury was wantonly inflicted, or was due to the reckless, careless conduct of the defendant.' That author also goes on and says, and it is quoted with approval in *Franks v. Cotton Oil Company*, 78 S. C., page 19: 'This cruel and wicked doctrine, unworthy of a civilized jurisprudence puts property above humanity, leaves entirely out of view the tender years and infirmity of understanding of the child, indeed his inability to be a trespasser in sound legal theory, and visits upon him the consequences of his trespass just as though he were an adult, and exonerates the person upon whose property he is a trespasser from any duty towards him which they would not owe under the same circumstances towards an adult.'"

B. L. Abney, of Columbia, and McDonald & McDonald, of Winnsboro, for appellants. Thos. F. McDow, of Yorkville, for respondent.

WATTS, J. This was an action in the court of common pleas for York county for \$20,000 damages for alleged personal injuries to the plaintiff, received while on or near the track of the defendant Southern Railway Company. The case was heard by Judge Sease and a jury at the November term of the court, for said county, in 1912, and resulted in favor of the plaintiff for \$8,000. At the close of plaintiff's testimony a motion was made and granted by the court to direct a verdict for the defendant as to the cause of action for punitive damages set out in the complaint. At the close of all testimony, the defendants asked the court to direct a verdict in their favor on two grounds: (1) That there was no evidence tending to show a breach of any duty that the defendants owed to the plaintiff, and that there was therefore no evidence of negligence on their part which was the proximate cause of his injuries; (2) upon the ground that the plaintiff was a trespasser upon one of the cars of the defendant, and that there was no evidence of a breach of

any duty on the part of the defendants, owed to the plaintiff. This motion was refused. After verdict was rendered a motion for a new trial was made and refused. Defendants, after entry of judgment, appeal and allege error by 12 exceptions. At the hearing in this court appellants' counsel announced that they abandoned exceptions 2 and 3.

[1, 2] Exceptions 1, 4, and 5 allege that his honor was in error in admitting, over defendant's objection, in permitting plaintiff's witnesses to testify as to certain matters; exception 1, in permitting witness McNinch to testify as to statements made by plaintiff as to how he received the injuries, as such statements were not part of the *res gestæ*, and the plaintiff was not at that time in a condition to make an intelligent statement, being dazed and shocked. As to exception 1, in allowing McNinch, the uncle of the plaintiff, to detail the statement, made by the plaintiff, immediately after he received the injury, we see no error in this, as we think it was admissible as part of the *res gestæ*. As was said in the case (*State v. Arnold*, 47 S. C. 9, 24 S. E. 926, 58 Am. St. Rep. 867), the court held admissible as *res gestæ* the statement: "'Charlie shot me to death,' made by a man shot in a doorway of a house, from which he staggered some 30 yards and fell; the utterances being made a few minutes after the shooting, to the first person who reached him in response to his cries for help. The declarations here in question were made probably * * * within 200 or 300 feet of the place of the shooting. These circumstances of time and place do not alone necessarily prevent a declaration from being part of the *res gestæ*, but they are factors, with other circumstances, in determining whether the declarations were the spontaneous utterances of the mind under the immediate influences of the transaction." The court, in the same case, further says: "Questions of this kind must be very largely left to the sound judicial discretion of the trial judge, who is compelled to view all of the circumstances in reaching his conclusion, and this court will not reverse his ruling, unless it clearly appears, from undisputed circumstances in evidence, that the testimony ought to have been admitted or rejected, as the case may be." "In the nature of the case, there can be no hard and fast rule as to the precise time near an occurrence within which declarations explanatory thereof must be made, in order to be admissible. The general rule is that the declarations must be substantially contemporaneous with the litigated transaction, and be the instinctive, spontaneous utterances of the mind under the active influences of the transaction, the circumstances precluding the idea that the utterances are the result of reflection, or designed to make false or self-serving declarations." *State v. McDaniel*, 68 S. C. 310, 311, 47 S. E. 386, 102 Am. St. Rep. 661.

"This court has several times held that the declaration need not be made coincident with the injury, but near about it, so nearly that it is not likely that the declaration could be manufactured." *Williams v. Southern Railway Co.*, 68 S. C. 373, 47 S. E. 707. See, also, *Shelton v. Southern Railway Co.*, 86 S. C. 102, 103, 67 S. E. 890, 901, wherein the court says: "The testimony on the part of the plaintiff was that the second car from the engine was the first to jump the track, and that the engine ran on about three-quarters of a mile before it stopped; the engineer said he stopped within 150 or 200 yards, and when the engineer ran his engine back to the wreck, he said to the conductor: 'Cap, we have played hell.' Error is imputed to the judge in admitting the declaration of the engineer, on the ground that it was too long after the accident to be admitted as part of the *res gestæ*." The court quotes from the case of *State v. McDaniel*, and says: "While the length of the time between the wreck and the making of the declaration in this case was such as to raise some doubt as to its admissibility, it was not such a clear case as would warrant the holding that the testimony was not within the rule."

When this evidence was admitted McNinch, the witness, testified that he had been in his office looking after some business, had changed his clothes, put on overalls, and was standing in the porch of the store, and was hailed, turned and saw a brakeman, of the railroad of this train, running, and the brakeman hollered: "'Captain, for God's sake get a doctor here quick! We have killed a man, or cut a man's leg off.' I followed in a moment after sending to Ft. Mill for a doctor." In answer to the question, "You got up there as quickly as you could?" he said, "Yes, sir; I was there inside a half a minute. I couldn't have been longer; as soon as I could run there, as hard as I could go." "Did he make a statement as soon as you got there? Yes, sir; just as soon as I got down on my knees by him. Oh, I guess it was a few seconds." As to that part, which complains that when statement was made by plaintiff he was dazed and shocked, the evidence was admissible, and what force and effect and credence the jury gave to it was for the jury alone, but in answer to a question by his honor, as to whether the statement made by plaintiff was sensible and coherent, or rambling, the witness's answer was: "It was as intelligent as could be. There is no question about it." This exception is overruled.

Exceptions 2 and 3 were abandoned at the hearing of the case. Exception 4 alleges error in allowing plaintiff's witness Berry Hill to testify as to the existence of a rule of the company, forbidding employes to place obstructions near the track. This exception is overruled for the reason that later in the trial the rule was brought out in examination of one of the defendant's witnesses, E. L. Hughes, and for this reason the exception

cannot be sustained. *Hyland v. Telephone Co.*, 70 S. C. 315, 49 S. E. 879; *Young v. McNeill*, 78 S. C. 143, 59 S. E. 986.

[3] Exception 5 is as follows: "Because his honor erred in permitting the plaintiff, over the objection of defendants, to prove by their witness W. H. Howard that freight cars, other than those that are alleged to have injured the plaintiff, projected out over the ends of the cross-ties; the error being that it was incompetent to prove what the size or length of other cars might have been, or how far their ends would project over the ends of cross-ties, as it was not shown that they were of the same width or size as the one that injured the plaintiff, as alleged in the complaint." By reference to the testimony of Howard it will be seen that he had run as a train hand, and on switch engine, and witness had made experiments on the morning that the injuries occurred; that he was called as an expert witness, and testified sufficiently to show that he was an expert, and was entitled to give an opinion, and his testimony was not contradicted by any of the train crew, who were on the train at the time of plaintiff's injury, and who were present at the trial of this case. This exception is overruled.

[4] Exceptions 6 and 7 allege error on the part of his honor in not directing a verdict for the defendants on the grounds stated, and depend entirely upon the question whether or not there was any evidence tending to show negligence on the part of the defendants, which was the proximate cause of the plaintiff's injury. The specifications of negligence are that the defendant railway company negligently, and in violation of its own rule, placed in the pathway commonly used by the residents of the village in going to and from the village, including making trips to the defendants' passenger station, and that the defendants knew, or should have known, that this pathway was in constant use—placed in the pathway, and in close proximity to the ends of the cross-ties of said track, a large number of cross-ties, piled up irregularly, and negligently failed to require them to be removed; that notwithstanding defendants' knowledge that children of very tender years were frequently upon said pile of cross-ties, and notwithstanding defendants knew of the perilous situation of the plaintiff, or by the exercise of due care could have known it, they failed to warn the plaintiff, and took no means or precaution to save said plaintiff from the injuries suffered by him; that defendants failed to keep watch and look out on front of moving train of cars so as to prevent injury to any person along the pathway, and particularly to prevent any injury to children of tender years, who, with knowledge and consent of defendants, were accustomed to travel along the pathway, and to be upon the cross-ties; that while the plaintiff, a child of tender years, was on the pile of cross-ties the defendants recklessly and negli-

gently ran said cars on the side track at an excessive and dangerous rate of speed.

We do not think his honor was in error in submitting the case to the jury for their determination as more than one inference could be drawn from the evidence in the case. There was some evidence in the case that the pathway was commonly used, and that the cross-ties were put where they were in violation of the defendant company's rule, and that children were accustomed to play there, and that the employes of the company failed to keep a proper lookout, and that the train came in at a high rate of speed, and that the shifting was done in too short a time, as they were in a hurry to go two miles to get on a side track, and make way for the passenger train. There was some evidence of a loose door, in one of the cars, swinging. There was some evidence that the plaintiff might have been injured by the loose swinging door projecting out, as cars came around the curve at the rate of speed testified to, or by a rod projecting under the car, the car step on the end of the car, which projected out, or the car itself projecting over. It was for the jury to determine, under all of the facts and circumstances of this case, as testified to, whether the defendant owed the plaintiff any duty, or whether they were guilty of any actionable negligence. The owner of the land over which the railroad runs has the right to use it in any way not inconsistent with the right of the railroad company. *Harman v. Railroad Co.*, 72 S. C. 228, 51 S. E. 689.

The evidence in this case shows that the railroad was a side track going to an industrial plant, and that the path was constantly used by the residents of the vicinity. The evidence further shows that McNinch, the uncle of the plaintiff, owned the industrial plant in question, and that Charles Magill, the father of the plaintiff, has charge of the brick mill there; that plaintiff lived with his father, and he and other children, as well as the employes of the industrial plant, used the pathway in question in going to school, to the station, and village, and the path had been so used since the erection of brick mill, over 10 years. It was held in *Goodwin v. Railroad*, 82 S. C. 321, 64 S. E. 242, that the rights of the owner of an industrial plant and of its employes over the ground along which a side track to the industrial plant ran were much greater than over the right of way of a railroad company along the main line. Where the public has constantly used a pathway along a railroad track, the railroad company owes the duty to be on the lookout for them and not injure them. If such persons are not trespassers, but licensees, in such cases it is the duty of the rail-

road company to expect persons near the track, and keep a lookout for them. *Jones v. Railway*, 61 S. C. 556, 39 S. E. 758; *McKeown v. Railway*, 68 S. C. 483, 47 S. E. 713; *Matthews v. Railroad Co.*, 67 S. C. 510, 46 S. E. 335, 65 L. R. A. 286; *Sanders v. Railway Co.*, 90 S. C. 331, 73 S. E. 356. "The duty of a locomotive engineer and fireman to keep a vigilant lookout ahead for the sake of passengers, as well as those who may be helpless on the track, is urgent, and the failure to keep a lookout may be evidence of recklessness or wantonness." *Wilson v. Southern Ry.*, 93 S. C. 17, 75 S. E. 1014. These exceptions are overruled.

[5] The eighth, ninth, tenth, and eleventh impute error to the circuit judge in his charge to the jury. As to the eighth exception, an examination of the charge as a whole will show that his honor did charge the request, as asked for by appellant, but he read from the case of *Franks v. Southern Cotton Oil Co.*, 78 S. C. 15, 58 S. E. 960, 12 L. R. A. (N. S.) 468, the language quoted and approved by the court in that case in connection with this request; and, while we are not prepared to say that a pile of cross-ties is per se attractive to children as a place to play, the evidence as to this particular place, and how it was used by them, was competent to go to the jury, and his honor committed no prejudicial error in quoting from the *Franks Case*, supra, in connection with appellant's request to charge; and this exception is overruled.

Exceptions 9 and 10 complain of error in modifying defendant's third and fourth requests. What is said in overruling the eighth exception disposes of these exceptions also, and they are overruled.

[6] The eleventh exception is overruled, as his honor charged that lawfully and correctly, not only as to what duty the defendant owed to a trespasser, but likewise charged what it owed as a duty to a licensee. He charged the requests, and carefully explained what the law was in connection with the decisions of this court. It is the duty of the judge to give the law to the jury, and in charging a sound proposition of law he has a right to explain fully, and make clear in his own language, or the decisions of the court, what the law of the case really is, and what idea the request intends to convey of the law of the case.

The twelfth exception is overruled, for the reasons set out in overruling exceptions 6 and 7, as this exception practically raises the same question as these exceptions.

Judgment affirmed.

GARY, C. J., and HYDRICK and FRASER, JJ., concur.

(95 S. C. 28)

DILLARD et al. v. DILLARD et al.

(Supreme Court of South Carolina. June 10, 1913.)

WILLS (§ 542*) — LIMITATION OVER — CONDITION.

The expression, "if not living," in the provision of the will of one having children by two wives, the three youngest by his second wife, giving property to her for life, it at her death to be sold and equally divided between "my three youngest children, if living, if not living, then to go back to my estate," has reference to the youngest children collectively, so that the limitation over does not become operative if any of them are living.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 1165-1168, 1177, 1302-1309; Dec. Dig. § 542.*]

Appeal from Common Pleas Circuit Court of Greenville County; J. W. De Vore, Judge.

Action by G. M. Dillard and others against M. F. Dillard, individually and as executor of M. G. Dillard, deceased, and others. From an adverse decree, plaintiffs appeal. Affirmed.

The circuit decree is:

"M. G. Dillard, of Greenville county, died in February, 1876. He had been married twice. By the first marriage he had nine children, and by the second marriage he had three children, to wit: H. L. Dillard, Susie Dillard (now Elmore), and J. D. Dillard. The last mentioned died several years ago, leaving a widow and several children, to wit: Manning Dillard, Bessie Dillard (now Smith), Troy Dillard, Wm. Dillard, and Herbert Dillard. The testator's widow, Susan Dillard, died several months before the commencement of this action. M. G. Dillard left a will by which he gave to his wife, Susan Dillard, the home tract of land, containing 300 acres, more or less, and certain household furniture, and other personal property 'during her natural life and widowhood in lieu of all claims of dower and all other claims in my estate; and at her death, or marriage, all of the above-mentioned property should be sold and equally divided between my three youngest children, if living, if not living, then to go back to my estate.' The controversy between the plaintiffs and the defendants relates to that share in the home place to which J. D. Dillard would have been entitled, had he lived. The plaintiffs contend that by the terms of the will this share reverted to the estate and passed under the seventh clause.

"The testator's purpose, as disclosed by the will, must prevail, even though it involve the rejection or addition of words, or their restraint from their usual meaning. *Clark v. Clark*, 19 S. C. 352. It is clear that the first objects of the testator's bounty, so far as concerns the property involved in the first clause of the will, were his wife, Susan Dillard, and her three minor children. The limitation over in favor of the children by the first marriage was to take effect only in case the three youngest children were not living. The executor was directed to sell the land for

the purpose of division among the youngest children; but the limitation over was of the land itself, and not of the proceeds of the land or a share in such proceeds. Clearly, these provisions were alternative in their character. On the falling in of the life estate, one or the other was to take effect. If the three youngest children were living, the land was to be sold and divided among them; if they were not living, the land was to go back to the estate and be divided among the children of the first marriage. The contingency upon which the first limitation was to fail and the limitation over was to arise was the death of the youngest set of children at the falling in of the life estate. The expression 'if not living' clearly has reference to the youngest children collectively, and not individually. The limitation over is upon their death. The testator dealt with the two sets of children as constituting two classes, or with the younger set collectively. The estate given to the younger set of children was to be defeated only in case they were not living; that is, only in case none of them were living. *Stewart v. Sheffield*, 13 East, 526; *Kersh v. Yongue*, 7 Rich. Eq. 100; *Schaffer v. Kettell*, 14 Allen (Mass.) 528. The limitation over was to take effect on the death of the three youngest children. It was not intended to become operative while any of these younger children were living. *Shanks v. Mills*, 25 S. C. 358; *Seabrook v. Mikell*, Cheves, Eq. 80.

"It follows, from what has been stated, that the limitation over has not taken effect, and that the plaintiffs can claim nothing under his will. H. L. Dillard and Susie Elmore, the survivors of the three youngest children, have by their answer consented that any interest which they may have in the share which would have gone to J. D. Dillard, had he lived, be vested in his widow and children. It is accordingly so decreed, and it is declared by the judgment of this court that such interest which they, the said H. L. Dillard and Susie Elmore, may have in the share which would have gone to J. D. Dillard, be, and the same is hereby, vested in the widow and children of the said J. D. Dillard. In view of what has just been said, it would be idle to discuss the question as to whether under the limitations of the will the share of J. D. Dillard passed to his representatives or to the survivors of the class designated as the three youngest children.

"It is therefore ordered and decreed that the widow and children of J. D. Dillard take among them the one-third interest in the proceeds of the sale of said lands; that is, unto the widow, Minnie Dillard, an interest equal to one-third, and the remaining two-thirds to be equally divided among the children, to wit, Manning Dillard, Bessie Smith, Troy Dillard, Wm. Dillard, and Herbert. It is further ordered that the plaintiffs pay the cost of this proceeding."

McCullough, Martin & Blythe, of Greenville, for appellants. Haynsworth & Haynsworth, of Greenville, for appellees.

HYDRICK, J. The decree of the circuit court is affirmed, for the reasons therein stated.

(% S. C. 191.)

STATE v. MATTISON.

(Supreme Court of South Carolina. June 11, 1913.)

1. HOMICIDE (§ 244*)—SELF-DEFENSE—INSTRUCTIONS.

In a prosecution for murder, it was error to charge that the burden was on the defendant to establish his plea of self-defense by a preponderance of the proof.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. §§ 507-509; Dec. Dig. § 244.*]

2. CRIMINAL LAW (§ 1038*)—APPEAL—OBJECTIONS IN LOWER COURT.

The error in so charging was so patent that defendant waived his right to rely upon it on appeal by not calling the lower court's attention to it.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 2646; Dec. Dig. § 1038.*]

Appeal from General Sessions Circuit Court of Anderson County.

Jim Mattison was convicted of manslaughter, and he appeals. Affirmed.

Martin, Greene & Earle, of Anderson, for appellant. P. A. Bonham, of Greenville, for the State.

GARY, C. J. The defendant was indicted for murder, and upon his trial the jury rendered the following verdict: "Guilty of manslaughter, with recommendation to mercy."

From the sentence imposed upon him, he appealed upon the following exception: "It is respectfully submitted that his honor, the presiding judge, erred in charging the jury as follows: 'Mr. Foreman, on the issue of self-defense, if you entertain a reasonable doubt as to where lies the greater weight of the testimony, the plea as an affirmative plea fails, and it is not established, because it must be established by the greater weight of the evidence; and if you are in doubt as to where lies the greater weight of the evidence, then it has not been established. But if, after considering the whole case, after considering all the evidence adduced on the main issues, the main facts put in issue by the allegations of the indictment and the general plea of not guilty, and after considering all the evidence adduced in support of the issues thus raised, and the issue of self-defense, after considering all the testimony in the whole case, you entertain a reasonable doubt that the party is guilty, give him the benefit of that doubt, and write a verdict of not guilty.' The error consists in imposing upon defendant a greater burden of

proof, and in requiring of him a greater quantum of evidence, than the law requires, with respect to his plea of self-defense."

His honor, the presiding judge, charged the jury as follows, in regard to the plea of self-defense: "Where one kills another in the exercise of self-defense, that is an excusable homicide, and is not unlawful. When may one plead self-defense, and what is the nature of that plea? It is an affirmative defense, and the burden of establishing it by the greater weight of the evidence is on him who sets it up. Whenever one attempts the taking of the life of his fellow man, or whenever it is proven to the satisfaction of the jury beyond a reasonable doubt that one has taken the life of his fellow man, and he seeks in either case to be excused on the ground of self-defense, he must be prepared to prove, and he must prove by the greater weight of the evidence ordinarily, these four propositions: * * * The question is: Has the defendant by his special plea, his affirmative defense in this case, satisfied you by the greater weight of the evidence that it was necessary, or apparently necessary, to take the life of the deceased? * * * I said something about the greater weight of the evidence awhile ago. Sometimes that expression is misunderstood by jurors. I do not mean by that, Mr. Foreman, the greater number of witnesses testifying to any given fact, because one man may by his superior observation and his accuracy of observation, by his higher character, put more into one statement than a dozen others with less accuracy of observation, with less character, would make in a dozen statements. When I say greater weight of evidence, Mr. Foreman, I mean the greater amount of truth, when it comes to one or a dozen witnesses, or whether gathered from this witness or that, and it is the honest conclusion of the jury as to what the truth is after considering all the testimony adduced. * * * If you are not satisfied beyond a reasonable doubt that he is either guilty of murder or manslaughter, find him not guilty. Or if you are satisfied by the greater weight of the evidence that he has made good his plea of self-defense, find him not guilty," thus giving him the benefit of all reasonable doubts on the entire case.

[1] 1. When the charge is considered in its entirety, the only reasonable construction of it is that his honor, the presiding judge, simply meant to instruct the jurors that, if as reasonable men they reached the conclusion that the plea of self-defense was sustained by the preponderance of the evidence, they should acquit the defendant, but that, if there was not a preponderance of the evidence in its favor, then the defendant was not entitled to an acquittal on such ground.

[2] 2. Furthermore, the error was so patent that it might be successfully contended

that the defendant waived the right to rely upon it as a ground of appeal by failing to call attention to it.

Judgment affirmed.

(95 S. C. 368)

STILL v. CREECH.

SAME v. EDGEILLE.

(Supreme Court of South Carolina. Aug. 7, 1913.)

WILLS (§ 614*)—CONSTRUCTION—LIFE ESTATE.

Testator devised and bequeathed all his property to his wife during her life, and, at her death, whatever remained to his adopted daughter, and, at her death, to the lawful heirs of her body. *Held*, that the adopted daughter took only a life estate and not a fee conditional, and that the heirs of her body living at her death took as purchasers.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 1893-1416; Dec. Dig. § 614.*]

Fraser, J., dissenting.

Appeal from Common Pleas Circuit Court of Barnwell County; H. F. Rice, Judge.

Two actions by Florence Still against Harlan Creech and against Isabelle O. Edgelle, which, by consent, were heard together. From judgment in favor of plaintiff, defendants appeal. *Affirmed*.

J. A. Willis and J. O. Patterson, both of Barnwell, for appellants. R. C. Holman and B. M. Darlington, both of Barnwell, for respondent.

GARY, C. J. These two actions were brought to recover possession of the tracts of land described in the respective complaints, and, by consent, were heard together. The appeal is from the decree of his honor the circuit judge construing the will of Andrew Lee.

From the agreed statement of facts it appears: That Andrew Lee died in 1878, leaving of force his last will and testament, which was as follows: "I give and bequeath unto my beloved wife, Anna Lee (after payment of my just debts), all my estate both real and personal of whatever kind or nature, during her natural life, and at her death whatever may remain at that time, I give and bequeath unto Laura Sanders (my adopted daughter) daughter of William S. Sanders, during her natural life, and at her death to the lawful heirs of her body, share and share alike, but should she die leaving no such issue alive at her death, then to go to her brothers and sisters and the survivors of them. And the property so bequeathed, is not to be subject to the debts or contract of any husband, she may have or intermarry with. But to be and remain for her sole and separate use and behoof." That Laura Sanders intermarried with one Stinson, and died in December, 1903, leaving a son, who died intestate and unmarried, and a daughter, Florence, the plaintiff herein, who intermarried with one Still, and she and her children were at the time these actions were com-

menced, and are now, the only surviving issue of the said Laura Sanders. That Anna Lee, widow of the testator, died prior to the death of Laura Sanders. That Laura Sanders and some of her brothers and sisters were living at the time of the execution of the said will, and several of her brothers and sisters were living at the time of her death. That the lands described in the complaint were alienated by Laura Sanders after the birth, and during the lifetime of issue born to her.

His honor the circuit judge in construing the will held that Laura Sanders took only a life estate, and that the heirs of her body living at the time of her death took as purchasers, and not in fee conditional. The exceptions assign error in said ruling. The ruling of the circuit judge is sustained by the case of *McCorkle v. Black*, 7 Rich. Eq. 407, which is cited with approval in *Williams v. Kibler*, 10 S. C. 414. *Mendenhall v. Mower*, 16 S. C. 303; *Powers v. Bullwinkle*, 33 S. C. 293, 11 S. E. 971; *Gadsden v. Desportes*, 39 S. C. 131, 17 S. E. 706; *Selman v. Robertson*, 46 S. C. 262, 24 S. E. 187; *Davenport v. Eskew*, 69 S. C. 292, 48 S. E. 223, 104 Am. St. Rep. 798; *Guy v. Osborne*, 91 S. C. 291, 74 S. E. 617.

Judgment affirmed.

HYDRICK and WATTS, JJ., concur.

FRASER, J. I dissent. I think Laura Sanders took a fee conditional, and, the condition being fulfilled, her deed conveyed the fee.

(162 N. C. 456)

MOODY & MORGAN v. CULLOWHEE MINING & REDUCTION CO.

(Supreme Court of North Carolina. May 28, 1913.)

Appeal from Superior Court, Jackson County; Ferguson, Judge.

Action by Moody & Morgan against the Cullowhee Mining & Reduction Company. Judgment for plaintiffs, and defendant appeals. *Affirmed*.

See, also, 76 S. E. 717.

O. C. Cowan, of Webster, for appellant. Walter E. Moore and Alley & Buchanan, all of Webster, and S. Brown Shepherd, of Raleigh, for appellees.

CLARK, C. J. The plaintiffs claim damages by reason of defendant's failure to give them the hauling contracted for; the plaintiffs having gone to considerable expense to equip themselves with teams for the work. There are numerous exceptions, but the controverted matters are substantially as to the facts, and these were properly submitted to the jury.

The defendant earnestly contended that there was not sufficient evidence or data from which the jury could find, with any certainty, the amount of damages sustained by the plaintiffs in consequence of the breach of contract, if the jury should find, as they did, that the contract was broken by the defendant, and that the plaintiffs were ready and willing to perform their part of the contract. But upon examina-

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

tion of the evidence we find sufficient to go to the jury upon all the issues submitted. After full consideration of the record and the exceptions, and the very full brief filed by counsel for the defendant, we think the case has been fairly tried, and that the defendant has no cause to complain of error in any of the particulars assigned.

No error.

(162 N. C. 526)

LINNEY v. MINTZ et al.

(Supreme Court of North Carolina. May 7, 1913.)

Appeal from Superior Court, Alexander County; Lyon, Judge.

Special proceeding by W. C. Linney against W. D. Mintz and another to establish a boundary line. From a judgment establishing the line, defendants appeal. Affirmed.

J. L. Gwaltney, of Taylorsville, and W. A. Self, of Hickory, for appellants. F. A. Linney, of Boone, J. H. Burke, of Taylorsville, and L. C. Caldwell, of Statesville, for appellee.

PER CURIAM. This was a special proceeding, started before the clerk of Alexander superior court, to establish the boundary lines between the plaintiff and the defendants, and heard on appeal by Lyon, Judge, and a jury at the fall term, 1912, of said court, upon the following issue: "Is the line from black 4 to black 5 the true dividing line between the plaintiff and the defendant?"

We are of opinion that the question at issue is one of fact, and that it has been determined by the finding of the jury.

Upon a review of the record, we find no error.

(162 N. C. 528)

HOPKINS et al. v. CRISP et al.

(Supreme Court of North Carolina. May 28, 1913.)

Appeal from Superior Court, Cherokee County; Lane, Judge.

Action by W. R. Hopkins and others against J. M. Crisp and others. Judgment for plaintiffs, and defendants appeal. Affirmed.

Civil action tried upon this issue: (1) "Is the land claimed by plaintiffs, tract No. 1,949, located as shown on the plat, and as contended by plaintiffs?" Answer: "Yes."

A. D. Raby, J. N. Moody, and R. L. Phillips, all of Robbinsville, for appellants. M. W. Bell and J. H. Dillard, both of Murphy, and Zebulon Weaver, of Asheville, for appellees.

PER CURIAM. We have examined the record in this case, and considered the several assignments of error, and we find no reversible error. The controversy appears to be almost exclusively one of fact, and we think the court properly presented it to the jury.

No error.

(72 W. Va. 648)

BROWN v. BROWN et al.

(Supreme Court of Appeals of West Virginia. June 24, 1913.)

(Syllabus by the Court.)

1. APPEAL AND ERROR (§ 47*)—APPELLATE JURISDICTION—AMOUNT IN CONTROVERSY.

Upon an inquiry as to whether the amount involved in a pecuniary controversy is sufficient to confer appellate jurisdiction, the amount of

the claim asserted on the one side and denied on the other, not the validity thereof, is the criterion, unless the claim is obviously pretentious and made merely to confer jurisdiction.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 202-225; Dec. Dig. § 47.*]

2. EXECUTORS AND ADMINISTRATORS (§ 120*)—COEXECUTORS—POWERS OF ADMINISTRATOR DE BONIS NON.

One of two or more coexecutors, who has given a new bond and retained his position after the resignation of the others, has the status of an administrator de bonis non administratis, and can sue his former associate only for legally unadministered assets remaining in his hands, or in respect to transactions between themselves. He cannot maintain a bill to surcharge and falsify ex parte settlements made by the retired executor, nor charge him as for a devastavit.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. §§ 485-492; Dec. Dig. § 120.*]

3. EXECUTORS AND ADMINISTRATORS (§ 120*)—ADMINISTRATORS DE BONIS NON—UNADMINISTERED ASSETS.

Property converted or altered by an executor or administrator from the state or condition in which the testate or intestate left it is regarded in law and equity as having been administered, even though such conversion or alteration be an appropriation of the property by the personal representative to his own use or amount to a devastavit.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. §§ 485-492; Dec. Dig. § 120.*]

4. EXECUTORS AND ADMINISTRATORS (§ 120*)—ADMINISTRATORS DE BONIS NON—UNADMINISTERED ASSETS.

The limitation upon the rights and powers of administrators de bonis non here mentioned has not been abrogated nor changed by the provisions of section 1 of chapter 118 or sections 25 to 32 of chapter 87 of Code 1906.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. §§ 485-492; Dec. Dig. § 120.*]

Appeal from Circuit Court, Pleasants County.

Suit by E. W. Brown, executor, against C. L. Brown and others. From a decree for defendants, plaintiff appeals. Affirmed.

Wm. Beard, of Parkersburg, for appellant. Charles L. Brown, of Ravenswood, and Charles E. Hogg, of Morgantown, for appellees.

POFFENBARGER, P. The decree complained of on this appeal, dismissing the original and first amended bills on pleas in abatement for nonjoinder and misjoinder, and sustaining a demurrer to a second amended bill, disposes of litigation commenced in Jackson county January, 1904, and ending in Pleasants county in 1911.

Charging failure on the part of Charles L. Brown, the active one of three coexecutors of the will of Anna H. Brown, deceased, to account for and pay over to the plaintiff, Ephraim W. Brown, a succeeding or surviving executor, all of the estate which had come into his hands and had not been disbursed or distributed to the parties entitled thereto in the course of administration, the

bill specified certain assets of the estate with which the executors had not been charged in any of the three ex parte settlements made by them, and denied the validity of certain disbursements for which credit had been taken, and sought correction of the alleged errors in the settlements, and a decree for considerable sums of money alleged to be due and owing from the defendant as late executor of the will.

The testatrix had designated as the executors of her will A. B. Wells, Joseph H. Brown, E. W. Brown, and Charles L. Brown, the last three of whom qualified and took upon themselves the execution of the will. According to the allegations of the bill, Charles L. Brown really had charge of the estate. For some reason not disclosed, he filed his petition in the county court of Jackson county on the 9th day of February, 1899, under the provisions of section 1 of chapter 118 of the Code, praying to be permitted to resign. On this petition a summons or rule was issued, requiring all interested parties to appear at the April term of the court and show cause, if any they could, why he should not be permitted to resign. At that term, it appeared that he had submitted his accounts to one of the commissioners of the court, and the hearing of the matter was continued until the completion of the report. On the 24th day of May, 1899, an order was entered reciting completion and filing of the report and certain exceptions thereto by E. W. Brown, one of the executors, for failure to show from what source two items charged in the account, one for \$1,228.48 and the other for \$3,000.48, had been derived. In response to this, C. L. Brown tendered and filed his affidavit, showing on what accounts the money had been collected, whereupon the court overruled the exception and approved and confirmed the report. The order then recites that C. L. Brown had fully settled his account according to law and accounted for all funds and assets in his hands administered as well as unadministered, and accepted his resignation, to become effective on the appointment and qualification of his successor. This having been done and a new and additional bond required of the remaining executors in the penalty of \$40,000, Joseph H. Brown tendered and filed a paper, stating his desire not to serve longer as one of the executors. Thereupon a rule was awarded against him and E. W. Brown to show cause, at the next term of the court, why they should not be required to execute a new and additional bond as executors. On the 15th day of August, 1899, E. W. Brown tendered the required bond, which the court approved. The order approving it also accepted the previously tendered resignation of Joseph H. Brown and he and Charles L. Brown were ordered to "turn over and deliver to the said Ephraim W. Brown, sole executor of Anna H. Brown, deceased, all the property and assets

belonging to the estate of Anna H. Brown, deceased."

The three settlements, as made up by the commissioner and confirmed by the court, show a partial administration of the estate amounting to something more than \$24,000, and E. W. Brown, as sole executor of the will, receipted to Charles L. Brown and Joseph H. Brown, as late executors thereof, for certain notes and other securities, unadministered assets, amounting to several thousand dollars. This receipt bears date November 8, 1899, and recites the existence of real estate, constituting part of the assets, appraised at \$6,000. These assets were delivered over in obedience to the decree of the circuit court of Jackson county, made some time in the year 1899, in a suit brought by Ephraim W. Brown, as sole executor of the will, against C. L. Brown and J. H. Brown, as late executors thereof. In that suit the proceedings in the county court relating to the resignation of Charles L. Brown and J. H. Brown, and the giving of a new bond by Ephraim W. Brown, were exhibited, and, upon consideration thereof, the court was of opinion that the defendants and each of them had been discharged as such executors, and E. W. Brown was the sole executor of the will and entitled to the assets of the estate, and the order so recited. Accordingly, it was adjudged, ordered, and decreed that the defendants turn over to the said plaintiff, E. W. Brown, as sole executor of the estate of Anna H. Brown, deceased, all assets of the estate remaining in their hands to be administered, without any specification of such assets, and that the suit be dismissed without prejudice to any party as to any proceedings they might thereafter desire to take in relation to any of the matters concerning said estate or the administration thereof.

Deeming the order of the county court ineffectual to terminate the powers of Joseph H. Brown as executor, because of noncompliance with the requirements of section 1 of chapter 118 of the Code, he not having filed his petition and given notice and made the settlements thereby required, and the decree just referred to as inconclusive as to the status of Joseph H. Brown, because of the reservation or saving clause embodied therein, pleas in abatement to the original and first amended bill setting up the nonjoinder of Joseph H. Brown as plaintiff, and, Ephraim W. Brown having been made a party defendant as late executor, misjoinder as to him was also set up in abatement. Other matters of abatement pleaded relate to process and service thereof. Some of these pleas, particularly the latter, were sustained by orders entered in the circuit court of Jackson county. The others were sustained by the circuit court of Pleasants county to which the cause was removed on account of the disqualification of the judge of the circuit court of Jackson county as to the particular case.

The second amended bill was filed in the circuit court of Pleasants county making Joseph H. Brown a party defendant as executor, he having refused to join in the bill as plaintiff. To this bill, pleas in abatement set up the failure to join Joseph H. Brown as plaintiff, and also irregularities as to process, all of which pleas as to the second amended bill, were rejected. C. L. Brown and Joseph H. Brown then interposed their several demurrers to the second amended bill, both of which were sustained and the bill dismissed.

[1] In support of a motion to dismiss the appeal, the brief contains a calculation and argument, based upon the facts set forth in the bill and exhibits, the purpose of which is to show the amount involved is below the appellate jurisdiction of this court, not more than \$100. The bill alleges the appraised value of the estate to have been \$31,523.07 in 1896, and makes the three ex parte settlements exhibits, showing disbursements which, together with the assets turned over by C. L. Brown to E. W. Brown, exceed the amount of the appraisement by something over \$4,000, after deducting from the disbursements all items described in the bill as improper credits. In this way, the appellee endeavored to show, upon the facts set forth in the bill itself, that he has accounted for considerably more money than is alleged to have gone into his hands, and that there is in fact nothing due from him. This position is untenable for the following reasons: The bill charges misappropriation of the proceeds of railroad bonds amounting to several thousand dollars as well as some other items. These sums, if assets at all, may be administered assets, within the meaning of the law and the plaintiff may not be entitled to recover them, but the bill nevertheless claims them. Conceding them to be administered assets or wasted assets for which there was at common law liability only to the beneficiaries of the will, right in the succeeding executor to demand them from his predecessor is predicated upon the statute, which, it is argued, has changed the rule at common law in this respect. Among the assets turned over to the plaintiff, there is a note executed by C. L. Brown payable to the executors of the will of Anna H. Brown for the sum of \$3,000. Although the bill contains no specific prayer for a decree for the amount of this note, it is argued that such relief may be had under the prayer for general relief. These contentions and claims on behalf of the plaintiff in error may not be well founded as regards the merits of the bill, but they are sufficient to create a controversy which involves much more than the jurisdictional amount.

[2, 3] Fairly construed, the bill charges the defendant as for a devastavit in the capacity of executor. In so far as the assets sought by it have been disposed of, they are administered assets. Such of them as are alleged

to have been converted by the defendant to his own use are regarded in law as administered. They do not remain in his hands actually or constructively in the state in which he found them as executor. In other words, their character has been changed, and he does not admit that they belong to the estate. If there is a liability, or, if the acts complained of amount to a devastavit, the liability is not one for unadministered assets. *Coleman v. M'Murdo*, 5 Rand. (Va.) 51; *McCreery v. Bank*, 55 W. Va. 663, 47 S. E. 890; *Gottberg v. Bank*, 26 Abb. N. C. 50, 13 N. Y. Supp. 841; *Jones v. Clark*, 25 Grat. (Va.) 642; *Hartson v. Elden*, 58 N. J. Eq. 478, 44 Atl. 156. Such assets are not recoverable by an administrator de bonis non. They do not in any sense belong to his administration, but to the former or preceding one. He is not in any sense liable for them, unless they actually come into his hands, nor has he any right to recover them. *McCreery v. Bank*, cited; *Coleman v. M'Murdo*, cited; *Veach v. Rice*, 131 U. S. 293, 9 Sup. Ct. 730, 33 L. Ed. 163. This proposition is so well settled as to require neither discussion nor citation of authority. Right of action as to them is in the legatees or other beneficiaries of the will.

But it is said E. W. Brown is not an administrator de bonis non, and that he holds his title under the original appointment, no change having been made therein except to require a new bond of him. Technically he may not be an administrator de bonis non, but on principle he must be treated and regarded as standing in the same situation. So far as the estate has been disposed of by C. L. Brown as executor, it has been administered, and the residue remains unadministered. This works as complete a severance as if C. L. Brown had been sole executor and had resigned, or, being a coexecutor had died. If one of two or more coexecutors, acting singly and alone, disposes of any portion of the estate, his act is as complete, full, and effectual as if his companions had joined in it. *Williams, Ex'rs*, §§ 818, 819. The conclusion stated in *Veach v. Rice*, 131 U. S. 293, 9 Sup. Ct. 730, 33 L. Ed. 163, and the Georgia statute construed in that case, simply declares the logical results of common-law principles, and the statute may be regarded as merely declaratory of the common law.

[4] This rule is not changed by the provisions of section 1 of chapter 118 of the Code. That statute deals merely with the matter of resignation and conditions requisite thereto. The account is not taken as the basis of a decree or judgment, for the court is not authorized to enter any decree or pronounce any judgment, or enter any order as the basis for a decree or judgment. The statute merely prescribes what the administrator must do as a condition to the acceptance of his resignation. It does not authorize an acceptance of the resignation until the order

has been complied with. If the fiduciary fails after having made the settlement and disclosed what remains due to the estate to turn it over to such person as the court may order, the resignation cannot be accepted, he remains liable on his bond and in respect to his administration. This conclusion involves nothing more than the reading of the statute in the light of its purpose.

Sections 25 and 32 and others of chapter 87 have no relation to the subject. They deal with the settlements of fiduciaries without any reference to resignation, removal, or succession. When an existing fiduciary has made his settlement and it appears that anything is due from him, the court may order it paid to the persons entitled thereto, and any person interested may bring a suit in chancery in the circuit court of the county to compel compliance with the order. This creates no new interest or rights. An administrator de bonis non has no interest in, or title to assets administered, in the legal sense, of the preceding administrator or executor. He is not a person interested within the meaning of the statute.

The observation of Judge Snyder in *Gilmer v. Baker*, 24 W. Va. 72, to the effect that the common-law rule as to the rights of an administrator de bonis non is subject to certain modifications and exceptions in courts of equity, is not to be taken as going to the extent of abolishing the rule. What is meant by the observation is very clearly shown by the opinion in the following terms: "The right and duty of an administrator de bonis non to administer the fund now in question was determined by the appellate court on the appeal of Hopkins. The court in its mandate directed a part of this fund to be paid over to said administrator to be administered by him." The statute adverted to by him in a later portion of the opinion is substantially embodied in section 24 of chapter 87 of the Code. Its purpose is to enable a personal representative who has resigned or been removed, or the personal representative of a deceased executor or administrator, to discharge himself by the payment to the administrator de bonis non, if he sees fit to do so, or if any person interested desires it to be done; but the provisions of this statute extend only to securities for money, loaned or invested, standing in the name of a deceased fiduciary, or one whose powers have been revoked, and not yet transferred to his successor. It confers upon the successor no right to surcharge and falsify the accounts of his predecessor or demand administered assets.

If the plaintiff has any right to recover the amount due on the \$3,000 note, hereinbefore referred to, the remedy at law is both available and fully adequate. Although executed at a time when C. L. Brown, E. W. Brown, and Joseph H. Brown were coexec-

utors, it is not payable to them by name, but to the executors of the estate of Anna H. Brown generally. Being admitted assets of the estate, since it was turned over as part thereof by C. L. Brown to E. W. Brown, and C. L. Brown being no longer an executor of the will, it would not be necessary for him to join as plaintiff in an action thereon. This is the clear result of the assumption that the note was part of the assets of the estate. If it is not, and is merely the evidence of a misappropriation, or devastation on the part of C. L. Brown, as is intimated in the bill, then there is no right of recovery at all in the plaintiff. These observations are not to be taken as expressing any decision as to the status of the fund represented by said note, but only as saying the allegations respecting it are not sufficient to sustain the bill.

These conclusions, respecting the demurrers to the second amended bill, render it unnecessary to enter upon any inquiry as to the correctness of the rulings upon the pleas in abatement.

For the reasons stated, the decree complained of will be affirmed.

(72 W. Va. 418)

HUDKINS et al. v. CRIM et al.

(Supreme Court of Appeals of West Virginia.
Feb. 4, 1913. Rehearing Denied June 30, 1913.)

(Syllabus by the Court.)

1. MORTGAGES (§ 32*)—NATURE AND REQUISITES—ABSOLUTE DEED AS MORTGAGE.

Whether a deed, absolute or conditional on its face, is, in fact, a mortgage, or a mere security for the payment of money, is a question of intent, largely determinable by the situation of the parties and the surrounding facts and circumstances.

[Ed. Note.—For other cases, see *Mortgages*, Cent. Dig. §§ 60-66, 84-94; Dec. Dig. § 32.*]

2. MORTGAGES (§ 38*)—ABSOLUTE DEED AS MORTGAGE—EVIDENCE.

As the proof of equitable title must be clear, mere conflicting oral testimony is generally insufficient to establish it. In addition, there should be facts and circumstances making out an equity in the grantor outside of, and beyond, the oral testimony and independent of the deed.

[Ed. Note.—For other cases, see *Mortgages*, Cent. Dig. §§ 108-111; Dec. Dig. § 38.*]

3. MORTGAGES (§ 32*)—NATURE AND REQUISITES—ABSOLUTE DEED AS MORTGAGE—RELINQUISHMENT OF EQUITY OF REDEMPTION.

If the transaction was originally a security for the payment of money, it will be regarded and treated in equity as a mortgage, and the maxim, "Once a mortgage always a mortgage," applies, and it will remain such unless changed by a new contract upon an adequate consideration, so reasonable and fair as to relieve it of any suspicion of unconscientious advantage. Ordinarily subsequent writings, not shown to rest upon a valuable consideration, admitting a different relation or conveying the equity of redemption, do not change it.

[Ed. Note.—For other cases, see *Mortgages*, Cent. Dig. §§ 60-66, 84-94; Dec. Dig. § 32.*]

4. FRAUDULENT CONVEYANCES (§ 17*)—TRANSACTIONS INVALID—TIME OF FRAUDULENT ACTS.

A purchase of property by a married woman bona fide in its inception does not lose its character as such by the subsequent conduct of the husband intended to defraud his creditors.

[Ed. Note.—For other cases, see *Fraudulent Conveyances*, Cent. Dig. § 23; Dec. Dig. § 17.*]

5. JUDGMENT (§ 678*)—CONCLUSIVENESS—PERSONS CONCLUDED—PRIVIES.

A privy in estate is not bound by a judgment or decree recovered against him from whom he derived his estate, after he derived it, merely because of such privy.

[Ed. Note.—For other cases, see *Judgment*, Cent. Dig. §§ 1195-1199, 1221; Dec. Dig. § 678.*]

6. BOUNDARIES (§ 43*)—JUDGMENT—LOCATION OF BOUNDARY.

A decree dismissing a bill to redeem a mortgage in a cause in which the pleadings make no definite issue as to the location of the boundary lines, but in which evidence was adduced to identify them upon the ground, is not an adjudication as to the location thereof.

[Ed. Note.—For other cases, see *Boundaries*, Cent. Dig. § 208; Dec. Dig. § 43.*]

7. MORTGAGES (§ 616*)—REDEMPTION—ACTION TO REDEEM—OFFER TO DO EQUITY.

The plaintiff in a bill to redeem from a mortgage must manifest willingness to do equity by a tender of the amount due to the mortgagee or by an averment of willingness to have the same paid out of the proceeds of the land.

[Ed. Note.—For other cases, see *Mortgages*, Cent. Dig. §§ 1833-1844; Dec. Dig. § 616.*]

Appeal from Circuit Court, Barbour County.

Bill in equity by Mary J. Hudkins and another against E. H. Crim and others for an injunction and to compel the conveyance of a tract of land. From a decree rejecting plaintiffs' claim of equitable title, adjudicating the title in defendants, dissolving the injunction, and awarding a writ of possession, plaintiffs appeal. Decree reversed, injunction reinstated, and cause remanded.

Wm. T. George, of Philippi, and John B. Dilworth, of La Porte, Ind., for appellants. J. Blackburn Ware and Warren B. Kittle, both of Philippi, for appellees.

POFFENBARGER, P. The bill in this cause, having for its purpose an injunction against the prosecution of an action for unlawful entry and detainer, settlement of an account, and a compulsory conveyance of a tract of 40 acres of land, proceeds upon the assertion and claim of a trust, the purposes of which have been accomplished. The appeal is from a decree, rejecting the claim of equitable title, adjudicating title in the defendant, dissolving the injunction, and awarding a writ of possession.

The question presented is very similar to that involved in the case of *A. A. Hudkins v. Crim and Peck*, decided by this court and reported in 64 W. Va. 225, 61 S. E. 166. This controversy relates to 40 acres of the 192.5-acre tract involved in that suit and there adjudged, as against A. A. Hudkins, to be the property of Crim's heirs. This 40-acre tract

is claimed by the wife of E. B. Hudkins under a conveyance from A. A. Hudkins, antedating the adjudication against him.

She purchased it, while the creditor's suit of Crim, instituted in November, 1885, to subject A. A. Hudkins' land to sale for the satisfaction of Mens, was pending. Though a pendente lite purchaser and not protected in her purchase for that reason, she claims Crim, the moving plaintiff in that suit who purchased the entire tract of the Hudkins land, made himself a party to the transaction with her. The deed from A. A. Hudkins to her is in Crim's writing, and he took the purchase-money notes, six in number, amounting to \$1,360, by assignment from A. A. Hudkins, which notes were never returned to her and are now in the hands of Crim's executors. As to whether any money was directly paid on them the evidence is conflicting. After the Crim purchase of the entire tract, A. A. Hudkins and E. B. Hudkins, both hopelessly insolvent, continued to reside upon the land, and continued to do business largely in the names of their wives. Some time after the purchase by M. J. Hudkins of the 40-acre tract of land, a residence and outbuildings were erected on the Hudkins farm by her and her husband, and there they have since resided and reared a family.

About the year 1902 or 1903 the Hudkinses gave to the Bijou Coal Company options upon the coal under the land, which Crim refused to recognize, but he later optioned and finally sold the coal under the entire tract to that company at the price specified in the Hudkins options. He died in January, 1905, and, when his executors took charge of his business and attempted to collect the balance due on the purchase money of the coal, the purchaser objected to payment without a release of the claim of M. J. Hudkins. M. Peck, one of the executors, thereupon prepared a quitclaim deed for execution by her and her husband, conveying all their right, title, and interest in the 40 acres to E. H. Crim and C. H. Peck, heirs at law of J. N. B. Crim, and sent it by mail to E. B. Hudkins. It bears date March 21, 1905, and was acknowledged on the 28th day of March, 1905, and returned to Peck.

It is under and in connection with this conveyance that the alleged trust is set up and claimed. Following the established course of conduct, clearly shown by the testimony, M. J. Hudkins acted upon the advice and by the direction of her husband in the execution of the deed. She had no representations from Peck or the Crim heirs as to the purpose, other than those given by her husband, unless the letter transmitting the deed conveyed it, for she had no other direct communication from them or any of them. The letter is not produced nor is its contents shown. As to the purpose of the conveyance, the testimony of E. B. Hudkins, the husband, conflicts with that of Peck and E. H. Crim. He says he

called upon them after the receipt of the unexecuted deed, and was assured that the purpose was merely to remove the obstacle to the collection of the money due from the coal company. He says he related to them a prior understanding and agreement between his wife and J. N. B. Crim, to the effect that the balance of the purchase money due from her on her notes given to A. A. Hudkins for purchase money of the land and assigned to Crim was to be paid out of the purchase money of the coal under that land, about 35 acres at \$80 an acre, and the surplus paid over to her, and expressed his willingness to execute the deed in order to enable the executors to collect the money from the coal company, provided the surface of the land should be reconveyed to his wife, and that Peck assented, saying "Yes, yes," as the statements were made. He says he then went to E. H. Crim's store with the deed in his possession, and obtained from Crim an envelope in which to mail the deed back after execution and made the same statement to him, and he said "All right," from which statement the witness says he inferred he would do what J. N. B. Crim had agreed to do; and he says E. H. Crim further said he had helped his father make the calculation on the amount due from E. B. Hudkins and his wife, and in that connection said, "Interest counts up fast." All of this is flatly, positively, and totally denied by both Peck and Crim. Nothing was paid for the conveyance, however. The consideration recited in the deed was \$1 in hand paid.

The alleged contract between Crim and Mrs. Hudkins antedated his purchase of the Hudkins farm. Under the application of strict legal principles, her purchase under the pendency of that suit was futile and abortive. Legally and logically J. N. B. Crim took by his purchase at the judicial sale such title as a stranger would have acquired thereunder. His preparation of the deed from A. A. Hudkins to M. J. Hudkins and acceptance of the notes of the latter as assignee while the suit was pending constituted no legal impediment to the purchase of the land at the judicial sale.

[1] All of this the theory of the bill necessarily admits. Legal title in J. N. B. Crim is not denied. Though his title is absolute on its face, the bill charges the deed to be in fact a mortgage. Deeds absolute on their faces, whether made under purchases at judicial sales or not, have often been declared to be mortgages in point of fact. In *Lawrence v. Du Bois*, 16 W. Va. 443, the court held the following circumstances to be indicative of the relation of mortgagor and mortgagee: "First. Where the parties admit that the grantor owes, after the execution of the deed, the consideration of the land to the grantee as a debt. Second. If this alleged consideration is grossly inadequate. Third. If the vendor remains in possession

of the land for many years without the payment of any rent." *Vanglider v. Hoffman*, 22 W. Va. 1, adds the following circumstances as indicating that relation: "First, that the grantor was hard pressed for money, and that the grantee was a known money lender; second, that the actual execution of the deed was preceded by a negotiation for a loan of money by the grantee to the grantor; third, that the parties did not apparently consider or contemplate the quantity or value of the land." In the inception of the transactions between Crim and the Hudkinses, M. J. Hudkins was not his debtor. She became so only by the execution of her notes to A. A. Hudkins and the assignment thereof to Crim. She was not then a debtor needing money, applying to a money lender for a loan. She was a purchaser of land. By that purchase, however, she became the debtor of Crim, and by her deed took an equitable title from A. A. Hudkins. Though the relation of borrower and lender between her and Crim did not exist, the relation of debtor and creditor was established, and the relation of mortgagor and mortgagee may have sprung out of Crim's purchase at the judicial sale. If, in point of fact, he purchased for her benefit, intending to permit her to pay her notes and redeem the land, and thereafter to make her a deed for it, the situation would be the same as if she had been his debtor originally and he had taken a deed from her, absolute on its face, but intended to be a mortgage. *Liskey v. Snyder*, 56 W. Va. 610, 49 S. E. 515. The following authorities are to the same effect: *Jones, Mort.* § 332; *Ryan v. Dox*, 34 N. Y. 307, 90 Am. Dec. 696; *Brown v. Lynch*, 1 Paige (N. Y.) 147; *Sahler v. Signer*, 37 Barb. (N. Y.) 329; *Guinn v. Locke*, 1 Head. (Tenn.) 110; *Hlester v. Maderia*, 3 Watts & S. (Pa.) 384; *Roberts v. McMahan*, 4 G. Greene (Iowa) 34; *Sandfoss v. Jones*, 35 Cal. 481; *Smith v. Doyle*, 46 Ill. 451; *Beatty v. Brummett*, 94 Ind. 76; *Reece v. Roush*, 2 Mont. 586.

[2] Whether such a relation was established is a question of intent to be determined by the facts and circumstances, both contemporaneous and subsequent. *Sadler v. Taylor*, 49 W. Va. 104, 38 S. E. 583; *Liskey v. Snyder*, 56 W. Va. 610, 49 S. E. 515; *Hursey v. Hursey*, 56 W. Va. 148, 49 S. E. 367. To establish such an equitable title, the evidence ought to be clear and convincing. *Sadler v. Taylor*, cited; *Hudkins v. Crim*, 64 W. Va. 225, 61 S. E. 166. Mere direct conflicting oral testimony is generally insufficient for the purpose. There should be something decisive in the facts and circumstances, uncontradicted or clearly established, and resolving the conflict in the oral testimony. Hence the presence or absence of the indicia mentioned is highly important. Such facts and circumstances make out a case of equity in the grantor outside of, and beyond, the oral testimony and independent of the deed.

"In all such cases the circumstances which surround the case very frequently have a powerful, nay almost controlling, influence in determining the question, and the direct parol evidence may be quite weak, and yet the court may hold the absolute deed as a conditional sale or a mortgage, because these surrounding circumstances are strong to show that such was the real character of the transaction." *Lawrence v. Du Bois*, cited.

The oral testimony of the plaintiff and her husband is relied upon, but it is clearly incompetent. *Freeman v. Freeman*, 76 S. E. 657; *Kilgore v. Hanley*, 27 W. Va. 451. However, testimony of competent witnesses to admissions by J. N. B. Crim was adduced. L. N. B. Paugh says he had a conversation with him in the year 1904 in which he had said "that after he received the money for the coal that he would make them a title for the surface of the land." Al Cleavenger says he had a conversation with him also, the substance of which he states as follows: "I asked him if there would be any of that that would go to Ed and Abe Hudkins, and he told me there would be none of the coal money go to them. That the coal money would come to him. I made the remark to him when he told me there would be no money coming to them. I said, 'Will that leave the land pretty well out of debt?' and he says, 'We have not made a settlement, but pretty much I think.'" Edward Thompson, the agent of the company that bought the coal, says Crim objected to the option made by the Hudkinses on account of the price; but said everything was all right except he would require a little more purchase money. As a reason for this, the witness says he stated there were certain interests down there he would have to pay for, but he did not state what those interests were.

[3] In contradiction of this testimony, certain papers signed by the Hudkinses, and certain transactions between them and Crim in his lifetime, are relied upon. The documents thus invoked are substantially set forth in the opinion in *Hudkins v. Crim*, 64 W. Va. 225, 61 S. E. 166. All but two of them are signed only by E. B. Hudkins and A. A. Hudkins. One of the two bearing the name of M. J. Hudkins relates to personal property, giving a list thereof and declaring it to be the property of J. N. B. Crim. Those signed only by the husband, or by him in company with A. A. Hudkins, do not, of course, affect the rights of the plaintiff. The one in which she acknowledged the title of J. N. B. Crim to the personal property bears date in the year 1899, some 13 years after Crim had bought the property. It is important only as bearing upon the relation between the parties. Obviously that relation was established many years before this paper was executed. If it was that of mortgagor and mortgagee, the execution of this paper did not change its character. In so far as it acknowledges the relation of land-

lord and tenant, it, of course, has an important bearing, but it is not conclusive, as will be hereinafter shown. The other paper signed by M. J. Hudkins is the letter in which she offered to release her right and title to the coal in consideration of \$100, dated May 1, 1902, after the date of the option of the coal, and relating to the negotiation of the sale thereof. It is not necessarily inconsistent with the position now taken by her. According to the theory of their bill, the purchase money for the coal was to go to Crim and out of it her indebtedness was to be paid, after which the surface was to be conveyed to her and the surplus of coal money, if any, paid over to her. This letter relates only to the coal, and may be construed as asserting a claim to a surplus of coal money over and above the amount of her indebtedness. These papers are not conclusive, for the relation of the parties had been fixed long before the date thereof.

In all cases of this class, the maxim, "Once a mortgage, always a mortgage," applies, and the relation is not extinguished or changed by subsequent writings in the absence of payment of an adequate consideration. *Sadler v. Taylor*, cited; *Liskey v. Snyder*, cited; *Hursey v. Hursey*, cited. In *Liskey v. Snyder* were many papers similar in character to those relied upon here in contradiction of parol testimony, particularly admissions of Crim, but they were unavailing. These papers may have been executed and delivered for the accomplishment of purposes and objects entirely consistent with the claims of the plaintiff, such as the better security of Crim as a creditor. Similar papers were so interpreted in the case of *Liskey v. Snyder*. Notwithstanding these papers, the following facts remain in corroboration and support of the admissions: He took no deed for the land until 1902; Mary J. Hudkins remained in possession, and the land was taxed in her name; she was apparently the owner; Crim retained her notes; and this state of affairs obtained until 1899, a period of 13 years, during which nothing occurred to indicate any relationship between the parties other than that of mortgagor and mortgagee. After the conveyance of this land to plaintiff and down to the year 1908, Crim recognized Mrs. Hudkins as having some financial credit or standing, for he repeatedly loaned money on her notes executed by her husband for and on her behalf. This land is the only property she had or claimed at any time in that long period, and her husband neither owned nor claimed any property. This conduct on his part is a strong circumstance in support of the theory of the bill. One of the executors of Crim's will says plaintiff's husband, after the death of the testator, notified him of the danger of a levy of an execution upon the stock on the farm for a debt of himself and his brother, and thus admitted the relation of landlord and ten-

ant. But this was not an admission as to title, nor made by the plaintiff. The answer seems to admit that this personal property never was delivered to the executors. It asserts a right to an accounting as to it.

The deed of March 21, 1905, executed by Mary J. Hudkins to the heirs of J. N. B. Crim, is a paper of the character of the others. Assuming the testimony of E. B. Hudkins as to what took place between him and Peck and E. H. Crim to have been false, it nevertheless remains that Mary J. Hudkins received nothing as a consideration for that conveyance. Under principles already announced, her voluntary and gratuitous execution thereof did not change the character of the relation of the parties. Relinquishment by a mortgagor of his equity of redemption without consideration does not alter the relation of the parties, in the absence of clear proof of intent to do so. The burden is upon the mortgagee to prove he obtained it fairly and for an adequate consideration. *Hursey v. Hursey*, cited; *Villa v. Rodriguez*, 12 Wall. 323, 20 L. Ed. 406; *Wright v. Bates*, 13 Vt. 341; *Henry v. Davis*, 7 Johns. Ch. (N. Y.) 40; *Mills v. Mills*, 26 Conn. 213.

[5] As Mary J. Hudkins is an assignee of the equity of redemption of A. A. Hudkins, and therefore stands in privity with him, the adjudication in the case of *Hudkins v. Crim* is relied upon here as one against her, though she was not a party to the suit. This theory is not tenable. Though she stood in privity with A. A. Hudkins, she is not bound by an adjudication against her grantor or assignor, subsequent to the acquisition of her right. "A privity in estate is not bound by a judgment or decree against him from whom he derived his estate, after he derived it, merely because of such privity." *Bensimer v. Fell*, 35 W. Va. 15, 12 S. E. 1078, 29 Am. St. Rep. 774; *Maxwell v. Leeson*, 50 W. Va. 361, 367, 40 S. E. 420, 88 Am. St. Rep. 875; *Steel v. Long et al.*, 104 Iowa, 39, 73 N. W. 470; *Black, Judgments*, § 549.

[4] The charge of fraud against the plaintiff Mary J. Hudkins is predicated upon the financial manipulations of A. A. Hudkins and E. B. Hudkins in their wives' names. If her purchase was bona fide and without fraud in its inception, the subsequent conduct of her husband could not make it fraudulent. At that time Crim held valid liens upon all the property, good against most of the other creditors of A. A. Hudkins, possibly all of them. All the purchase money paid and the purchase-money notes were delivered to him on account of his claims. Assuming indebtedness and insolvency on the part of her husband, E. B. Hudkins, the conveyance was not made in fraud of his creditors, for he did not own the land and nothing in the evidence indicates that he had any interest therein. As to the general creditors of A. A.

Hudkins, Crim's debts were liens and prior, and, as the other lien creditors are not complaining, they were presumptively satisfied in some way. In her purchase of this 40 acres and application of the purchase money thereof to the lien indebtedness in favor of Crim, the plaintiff may well be supposed to have thought she was acting in good faith. The test of fraud is the intent with which the act is done, except in the few instances in which there is a conclusive legal presumption of fraud. As this is not a conveyance from husband to wife, we have not here the usual case of inability on the part of the wife to overcome the presumption of the payment of the purchase money by the husband or out of funds furnished by him. But, if there were such presumption, it has been overcome by proof that the purchase-money notes of the wife alone were accepted for practically all the purchase money. Nor is there any evidence of actual fraudulent intent on the part of the wife in making the purchase. Nothing appears upon which to base the charge except that the husband had creditors whom he was unable to pay. In purchasing this land, not from her husband, but from a third person, she did nothing to their prejudice or injury.

[6] Evidence was taken by the defendant tending to prove the buildings of the plaintiff are not on the land claimed by her. As neither the bill nor the answer contains any specific allegation or averment as to the locations of the boundary lines, it cannot be said any issue was made respecting them. The bill avers the buildings are on the premises in question, and the answer seems to make no denial of that allegation. As it states a conclusion rather than a fact, since the bill does not undertake to locate upon the ground the lines, or rather to identify them, it follows there was no issue as to the location thereof. Moreover, as the circuit court dismissed the bill, denying the plaintiff's right as to any of the land, the issue attempted to be made by the introduction of this evidence regarding the location of the boundary lines was evidently not decided by the court.

[7] Our conclusion is that Mary J. Hudkins and J. N. B. Crim sustained toward one another the relation of mortgagor and mortgagee, and that the former was entitled to have the proceeds of the purchase money of the coal underlying her 40 acres of land credited on the purchase-money notes and the interest thereon and the surplus of such proceeds, if any, paid to her. Claiming the proceeds of the coal to have been amply sufficient to pay off the balance due on her notes, she has failed to aver willingness to pay any balance that may be found against her. This, though a formal one, is a necessary allegation of a bill to redeem, and it should be amended accordingly.

For the reasons stated, the decree com-

plained of will be reversed, the injunction reinstated, and the cause remanded for further proceedings.

(72 W. Va. 545)

CHILTON v. WHITE et al.

(Supreme Court of Appeals of West Virginia.

May 27, 1913.)

(Syllabus by the Court.)

1. FORCIBLE ENTRY AND DETAINER (§ 6*)—ISSUE—TITLE.

In an action of unlawful entry and detainer, wherein the relation of landlord and tenant does not exist, and the entry of defendant has been peaceable and under a claim of right, the right to possession depends upon the true ownership of the land.

[Ed. Note.—For other cases, see Forcible Entry and Detainer, Cent. Dig. §§ 29-32; Dec. Dig. § 6*]

2. ADVERSE POSSESSION (§ 14*)—CONSTRUCTIVE POSSESSION—EFFECT.

Constructive possession of land does not apply in favor of a claimant thereof against the true owner, unless such claimant has had actual adverse possession of some part of the controverted land.

[Ed. Note.—For other cases, see Adverse Possession, Cent. Dig. §§ 77-81; Dec. Dig. § 14*]

3. ADVERSE POSSESSION (§ 96*)—"CONSTRUCTIVE POSSESSION"—WHAT CONSTITUTES.

Actual possession of one or more tracts of land, contiguous to another tract in controversy, under a deed for a larger boundary which includes them all, does not give constructive possession of the controverted tract against the true owner thereof. There must be actual possession of some part of the land in controversy before the rule of constructive possession can apply.

[Ed. Note.—For other cases, see Adverse Possession, Cent. Dig. §§ 533-536; Dec. Dig. § 96*]

For other definitions, see Words and Phrases, vol 2, pp. 1474, 1475.]

4. JUDGMENT (§ 707*)—RES JUDICATA—ESTOPPEL.

One is not estopped by proceedings in a suit to which he was not a party, when not claiming a right in privity with a party thereto.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. § 1230; Dec. Dig. § 707*]

5. TAXATION (§ 517*)—PAYMENT—FORFEITURE—ADVERSE POSSESSION.

Payment of taxes upon land by either of two adverse claimants thereof, claiming title from the same person as a common source, prevents a forfeiture thereof in the name of the person under whom they so claim.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. § 963½; Dec. Dig. § 517*]

6. ADVERSE POSSESSION (§ 80*)—DEEDS—PROBATIVE EFFECT.

A deed which does not identify the land in controversy, and is not shown to include it, is not evidence of colorable title thereto.

[Ed. Note.—For other cases, see Adverse Possession, Cent. Dig. §§ 463-467; Dec. Dig. § 80*]

7. ADVERSE POSSESSION (§ 16*)—WHAT CONSTITUTES—WILD LANDS.

Occasional cutting of timber on, and ranging cattle over, wild and uninclosed land is not such occupation of it as will amount to adverse possession.

[Ed. Note.—For other cases, see Adverse Possession, Cent. Dig. §§ 82-89; Dec. Dig. § 16*]

Error from Circuit Court, Logan County.

Action by J. E. Chilton against Anderson White and others. Judgment for defendants, and plaintiff brings error. Affirmed.

Ellison & England, of Logan, and Price, Smith, Spilman & Clay, of Charleston, for plaintiff in error. E. H. Greene and Chafin & Bland, all of Logan, and Campbell, Brown & Davis, of Huntington, for defendants in error.

WILLIAMS, J. This action of unlawful entry and detainer was brought by J. E. Chilton against Anderson White and others in the circuit court of Logan county to recover possession of 23,647½ acres of land. It was tried by the court in lieu of a jury and resulted in a finding and judgment in favor of defendants, and plaintiff obtained this writ of error.

The land is composed of contiguous tracts, and the description in the writ is by exterior boundary lines of the whole. Defendants disclaimed possession and the right to possession of all of the land, except a tract of 842½ acres which lies wholly within the larger boundary. The right to the possession of this smaller tract is the real contention. The relation of landlord and tenant does not exist between the parties. If defendants entered unlawfully and by force ousted plaintiff, he would be entitled to recover irrespective of his right to the possession or ownership of the land. The law does not permit even the true owner of land to assert his rights in such unlawful manner. *Moore v. Douglas*, 14 W. Va. 708; *Duff v. Good*, 24 W. Va. 682; *Fisher v. Harman*, 67 W. Va. 619, 68 S. E. 885; *Olinger v. Shepherd*, 12 Grat. (Va.) 462. But there is no proof that defendants entered unlawfully. Their entry was peaceable and under a claim of right. The tract in dispute is wild, timbered land, and defendants entered upon it about two years, or a little more, before suit and built small houses on it, and are now occupying them with their families, claiming title by conveyance from Harriet Jarrell and her husband, made in 1907, to her nine children. Defendants are her sons and sons-in-law.

[1] While unlawful entry and detainer is purely a possessory action and may be maintained without regard to title, still title is sometimes involved in the action, as an incident to the right of possession, for, in the absence of actual possession, constructive possession belongs to him who has the title. "Title draws after it possession of property not in the adverse possession of another." *Moore v. Douglas*, supra, *Olinger v. Shepherd*, supra, and *Duff v. Good*, supra. And constructive possession by the true owner is sufficient to enable him to maintain the action against a wrongdoer or mere trespasser. Plaintiff claims under color of title, derived mediately from Harriet Jarrell in 1888, and

adverse possession thereunder for ten years or more before defendants entered. Defendants claim by deed direct from said Harriet Jarrell and her husband, made in 1907, and lawful entry thereunder. The issue depends upon the true ownership of the land.

[7] The case was tried upon an agreed statement of facts, upon record evidence and testimony of witnesses; the testimony relating chiefly to the matter of actual possession by plaintiff and those under whom he claims of the tract in dispute. A careful examination of that evidence satisfies us that it is not sufficient to prove actual, adverse possession by plaintiff of the 842½ acres. McClintock cut the poplar timber off the tract, beginning in 1890 and completing it in 1892 or 1893. He located his sawmill on the tract and also built shanties on it for the accommodation of his men, but as soon as the work was done his actual occupancy ceased. The work occupied less than three years. No other person is shown to have lived on the land. Plaintiff and his predecessors in title employed agents to look after it and keep off trespassers. These agents lived in the neighborhood of the tract and were authorized to lease it, and did lease it, to others who ranged their cattle on it during the summers for a number of years. But the boundary was not inclosed. There was a fence extending for 100 or 150 yards across Seng Camp branch, from hill to hill, but there is no evidence that cattle did not have free access to the land from all other quarters. S. S. Chambers, who was the first man employed by McClintock to look after the land, testifies that the fence was on the land of Mr. White who owned land adjoining the controverted tract. There was also about an acre of cleared land in the bottom adjoining this fence which had been cleared for a good many years, but when and by whom does not appear. Chambers says this cleared ground was inclosed and cultivated in corn a year or two by Mr. B. W. White, to whom he had leased the land, or by a sublessee of Mr. White, but says that it lay out uninclosed a portion of the time. The proof does not show that this acre was kept inclosed and cultivated for any number of consecutive years. The character of possession which the evidence tends to prove plaintiff and his predecessors in title had of the Harriet Jarrell tract does not constitute adverse possession. It lacks the important elements of notoriety, continuity, and exclusiveness. *Core v. Faupel*, 24 W. Va. 238. "There can be no adverse possession of wild lands as against the superior title unless such possession is actual, exclusive, visible, and notorious." *Wilson v. Braden*, 56 W. Va. 372, 49 S. E. 409, 107 Am. St. Rep. 927. Occasional cutting of timber or ranging cattle over uninclosed wild lands is not sufficient. *Yokum v. Fickey*, 37 W. Va. 762, 17 S. E. 318; *Oney v. Clendenin*, 28 W. Va. 34.

[2, 3] But counsel for plaintiff insist that he and his predecessors have had constructive adverse possession of the Harriet Jarrell tract, and that such constructive possession is all that the law requires to invest him with indefeasible title. It is agreed that on October 1, 1891, Alexander McClintock conveyed the 23,647 acres to P. B. Dobbins, trustee, as one entire tract, describing it by exterior boundary lines; that the disputed tract is situate wholly within those boundary lines; and that the land has come down to plaintiff from said Dobbins, trustee, through several mesne conveyances, as a single tract described in the same manner. It is also agreed that plaintiff and his predecessors in title have had actual, adverse possession continuously since 1891 by their tenants of all the land outside of the 842½ acre, or Harriet Jarrell, tract. In view of these admitted facts, counsel for plaintiff insist that he has had adverse possession of the Harriet Jarrell tract for the same period on the principle that, if a person has color of title to two contiguous tracts of land and is in actual possession of one of them, his possession will extend so as to include both tracts. This is a rule generally recognized as law. *State v. Harman*, 57 W. Va. 447, 50 S. E. 828. But the application of it is limited by another well-defined principle, which is that constructive possession never runs against the true owner, unless there has been actual adverse possession of some part of the land in controversy. Here the Harriet Jarrell tract is the only land claimed by defendants. If plaintiff had had actual adverse possession of some part of it, such actual possession would extend, by construction, to the whole tract, because the whole is included in his deed. But not having actual adverse possession of any part of the disputed land, the rule contended for cannot apply. Possession on the 23,647 acres, outside of the 842½ acres, would not be notice to defendants that plaintiff claimed the 842½ acres. Possession must be such as amounts to constructive notice of the adverse claim and such as would give the true owner a right to sue for trespass. Such can never be the case unless the trespass is committed upon some part of the disputed boundary. The present case is not distinguishable from that of an ordinary interlock of boundaries between junior and senior patentees. The junior patentee's possession, outside of the interlock, avails nothing. It is never construed to embrace the land within the interlock, as against the senior patentee. The senior patentee's title draws after it the constructive possession of the whole of his grant, what is within as well as what is without the interlock, so long as there is no actual adverse possession within the interlock. But, if the junior grantee has had actual adverse possession of some part of the interlock, the disputed boundary, then

such possession, be it of ever so limited a portion of it, is construed to extend and embrace the whole of the interlock, provided the senior grantee has not also had actual possession of some part of it. *Garrett v. Ramsey*, 26 W. Va. 345; *Taylor's Devises v. Burnside*, 1 Grat. (Va.) 165; *Overton's Heirs v. Davisson*, 1 Grat. (Va.) 211, 42 Am. Dec. 544; *Sulphur Mines Co. v. Thompson's Heirs*, 93 Va. 293, 25 S. E. 232.

The principle which we must apply to the present case was declared in *McNeeley v. Oil Co.*, 52 W. Va. 616, 44 S. E. 508, 62 L. R. A. 562, as follows: "Where an occupant's boundary covers adjoining lands of separate owners, his possession on land of one of them will not be adverse possession of land of the other, without actual possession of such other's land, on the theory that possession of part is possession of the whole." And in *Camden v. West Branch Lumber Co.*, 59 W. Va. 148, 53 S. E. 409, it was stated in the following language: "The actual possession of the owner of a tract of land, lying adjacent to another tract of uncleared land, the title to which is vested in another person by a grant from the state, is not extended over a portion of such other tract by the acquisition of a junior patent, covering such portion and purporting to vest title thereto in the owner of such first-mentioned tract, however long such possession may continue. To work an ouster of the elder patentee and hold adversely to him, the junior patentee must take actual possession of some part of the land included in the junior patent and within the boundaries of the senior patent." Such is also the statute law of this state. Section 19, c. 90, Code. And such is also the rule adopted by the courts of other states. See the following cases: *Kimball v. Stornier*, 65 Cal. 116, 3 Pac. 408; *Jones v. Gaddis*, 67 Miss. 761, 7 South. 489; *Byrd v. Phillips*, 120 Tenn. 14, 111 S. W. 1109; *Turner v. Stephenson*, 72 Mich. 409, 40 N. W. 735, 2 L. R. A. 277. In the foregoing discussion it is assumed that defendants are claiming, under the older and superior title, a matter depending on other questions presented by the record and to be determined by this opinion.

Both parties claim title to the 842½ acres from Harriet Jarrell, a daughter of Boyd W. Mullins, deceased, as a common source; plaintiff claiming, remotely, under a special commissioner's deed directed to be made to M. B. Mullins by the circuit court of Logan county in a suit brought by Hinchman, administrator de bonis non of Boyd W. Mullins, deceased, against his heirs, which deed bears date the 19th of July, 1888, and defendants claiming by deed directly from said Harriet Jarrell and her husband to her nine children, made in 1907. Defendants are her sons and sons-in-law.

[4] Counsel for plaintiff claim that defendants are estopped by the proceedings in that

suit. On the other hand, counsel for defendants insist that the doctrine of estoppel has no application, because, they say, Harriet Jarrell was not made a party to that suit. A copy of the proceedings in that cause is made a part of the record in this, and it thereby appears that Boyd W. Mullins died intestate about the year 1869, seised of several tracts of land which had been granted to him by the commonwealth of Virginia between the years 1838 and 1855, and that the 842½ acres is a part of those lands; that he left six children as his only heirs at law, among whom was a daughter, Harriet, who married Paris Jarrell; that in 1875 the aforesaid suit was instituted by the administrator of B. W. Mullins, deceased, against his heirs at law, for the purpose of selling his lands, or a portion thereof, in order to pay his debts, the bill alleging that the personal property was not sufficient to pay them. Harriet Jarrell appears not to have been named as a defendant either in the bill or the summons. There was an ascertainment of the debts and a decree of sale entered the 13th of April, 1876, but no sale was made. Pending the decree of sale, the six children of Boyd W. Mullins, deceased, entered into a written agreement, the husbands of the married daughters joining therein, partitioning the land among themselves and agreeing to pay their ratable portion of the debts due by the estate. The various lots of land were described by metes and bounds; lot No. 3, which is the 842½ acres in controversy, falling to Harriet Jarrell. They also bound themselves by that agreement to make an interchange of deeds as soon as all the debts were paid, and further agreed that if they did not do so "to direct P. K. McComas, the commissioner appointed to sell the land aforesaid, in the suit of Hinchman v. Mullins' Heirs, or whoever may hereafter be appointed or substituted to make said deeds, to convey the said lands as partitioned as aforesaid." This agreement bears date the 12th of February, 1880. The cause was thereafter, on the 9th of April, 1886, again referred to a commissioner to ascertain who were then the heirs of said B. W. Mullins, deceased, what division had been made of the lands amongst them, and how much of the debts were unpaid, and from whom due. Pursuant to that reference there was a report filed by the commissioner, from which it appears that two of the children of B. W. Mullins, deceased, viz., Charles Mullins and Henry Mullins, had died, each leaving a number of infant children. The commissioner also reported the amount of the debts which had been paid, by which ones of the children paid, and how much was yet due from each. The agreement among the heirs to partition the land is exhibited with his report. On the 4th of July, 1887, the cause was again heard upon this second report of a commissioner, and a decree was made reciting that the lands had

been partitioned among the heirs, and that M. B. Mullins had become the owner of the interest assigned to Harriet Jarrell, and H. C. Ragland was appointed a special commissioner to make conveyance of the same, when the debts due by the estate should be paid. Pursuant to that decree, said special commissioner, on the 19th of July, 1890, conveyed the Harriet Jarrell interest to M. B. Mullins. Alexander McClintock acquired the M. B. Mullins title to the Harriet Jarrell interest, and, through various mesne conveyances, it has passed to plaintiff.

It nowhere appears that Harriet Jarrell appeared either in court or before the commissioner. We have already said she was not a party to the bill. If it could be said that she submitted herself to the jurisdiction of the court by the partition agreement, it would only be for the purpose of carrying out the agreement by having the special commissioner to execute proper deeds to the several parties thereto, in the event they failed or refused to do so themselves. But the decree of July 4, 1887, finds that M. B. Mullins, a stranger to the agreement, had acquired Harriet Jarrell's interest. How did the court so find, and on what evidence? The commissioner did not so report, and there is no evidence shown in the record whereby the court could have found that fact. She is not bound by the recital in the decree, not being a party to the suit, and we know of no rule of law which could be applied to estop her from asserting her title. Judgments and decrees bind only parties and privies. She was not a party, nor is she privy in estate to any one who was a party. The deed executed by Ragland, commissioner, while it may have served as color of title, if plaintiff and his grantors had held adverse possession of the land under it, did not operate to divest Harriet Jarrell of title.

[8] But plaintiff claims that Harriet Jarrell's title is forfeited and that the forfeiture inures to his benefit. It is agreed that no taxes have been assessed to, or paid by, Harriet Jarrell or her grantees on the 842½ acres since the year 1888. Plaintiff contends that this proves a forfeiture of her title. But the taxes on the whole 23,647½ acres have been regularly paid by McClintock and those claiming under him since that year. McClintock claimed the land in dispute under deed from M. B. Mullins, who thought he was getting the title of Harriet Jarrell by the deed from Ragland, special commissioner. Both parties to the suit are claiming to own the Harriet Jarrell title, and the payment of taxes thereon by either of them would prevent a forfeiture of the land in her name. The payment of taxes by plaintiff and his predecessors in title on the 23,647½ acres, which includes the Harriet Jarrell tract, has prevented a forfeiture. "The state is not entitled to double tax on same land under the same title." *State v. Alien*, 65 W. Va. 335, 64 S. E. 140.

"Where there is privity of title, one payment of taxes is sufficient and full satisfaction, whether the land is charged as a whole in the name of one, or the various interests separated and charged to the respective owners, dividing the valuation equitably between or among them as provided in section 25, c. 29, Code." *State v. Low*, 46 W. Va. 451, 33 S. E. 271.

Finding that her title did not become forfeited to the state for nonentry and nonpayment of taxes, and that the deed by Ragland, special commissioner, did not operate to divest her of title, it follows that Harriet Jarrell, her husband joining in the deed, could pass title to her children.

[9] But plaintiff claims the land by another and distinct source of title also. He claims under a deed from Bur Wakeman's executors to Benjamin C. Bowman dated 28th of February, 1891, and a deed from said Bowman and wife to Alexander McClintock. These deeds do not purport to convey the Harriet Jarrell land, nor do they identify it as a part of the land conveyed. The first deed mentioned describes the land as "all and every their right, title, and interest at law and in equity in and to any lands owned or claimed by the said Bur Wakeman at the time of his death or acquired by his said executors and trustees, or either of them, since his death and situate in the counties of Logan and Wyoming in the state of West Virginia, and within a certain patent for 142,000 acres of land more or less, granted February 19, 1796, by the commonwealth of Virginia to De Witt Clinton, which patent to De Witt Clinton is bounded as follows." Then follows the metes and bounds. To prove that the disputed land was embraced in that deed, plaintiff examined, as a witness, Alfred Buskirk, a surveyor, who had run some of the lines of the De Witt Clinton patent. He says that in his opinion the Harriet Jarrell tract is included within the boundary of the De Witt Clinton grant. His testimony, however, shows that he had very little knowledge of the lines of that large survey, and especially relative to the lines nearest to the disputed land. It appears that he did not run from known corners, but "picked up" a line which had been partly run and left off by some other surveyor. One of the lines, he says, he carried through to Guyandotte river, and missed the corner about 5,000 feet. He ran a line from a corner on Guyandotte river toward Spruce river on a branch of which the land in controversy lies, and says the distance of the line which he was running gave out about a mile from the mouth of Spruce river, and that he then turned east on a division line of the survey. He says he was then within 3 or 3½ miles of the land in controversy. His testimony is entirely too vague and uncertain to prove that the De Witt Clinton grant includes the Harriet

Jarrell claim. The very purpose of colorable title is to define the extent of one's claim by furnishing evidence of location and boundaries. But there is still a stronger reason why the aforesaid deed is not sufficient as color of title to the land in question, and that is that it purports to convey only such land within the De Witt Clinton grant as was "owned or claimed by the said Bur Wakeman at the time of his death or acquired by his said executors or trustees or either of them since his death." It does not purport to convey all the land within the De Witt Clinton grant, and there is no evidence respecting the quantity or location of the land which the deed did convey. Plaintiff does not connect with the De Witt Clinton grant. It was put in evidence by defendants, however, to show that it was an inclusive grant. Forty thousand acres of prior claims, located within its boundaries, were excluded from its operation, and it does not appear that the Harriet Jarrell claim was not a part of the land thus excluded. It is therefore not evidence of colorable title to the Harriet Jarrell tract of land.

The other deed above mentioned, from Bowman and wife and the Bowman Lumber Company to Alexander McClintock, which bears date 1st of September, 1891, is much more uncertain and indefinite as to location and description of the land conveyed by it than the first one. The only description given in it, of the lands conveyed, is by reference to other deeds by dates and by numbers and pages of the deed books wherein they are recorded. None of the deeds thus referred to are found in the record.

In view of the fact that there has been no actual adverse possession of the land in controversy, there is no limitation upon Mrs. Jarrell's right to assert title to it. Her inaction for so many years is not a matter of which plaintiff can take advantage. The rules and principles governing cases of this character are well defined, and in view of them we are compelled to affirm the judgment.

(140 Ga. 333)

CENTRAL OF GEORGIA RY. CO. v. ALLEN.

(Supreme Court of Georgia. July 19, 1913.)

(Syllabus by the Court.)

1. MASTER AND SERVANT (§§ 286, 288*)—INJURY TO SERVANT—QUESTION FOR JURY. The motion for nonsuit was properly denied.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 1001, 1006, 1008, 1010-1016, 1017-1033, 1036-1042, 1044, 1046-1050, 1068-1068; Dec. Dig. §§ 286, 288.*]

(Additional Syllabus by Editorial Staff.)

2. MASTER AND SERVANT (§ 204*)—INJURY TO SERVANT—ORDINARY CARE.

Under the express provisions of Act Aug. 16, 1909 (Acts 1909, p. 160; Civ. Code 1910,

§ 2782 et seq.), and Civ. Code 1910, § 3131, a railroad employé assumes, in the absence of express contract on the subject, no more than the "ordinary risk" of the particular business in which he is employed, and does not assume the risk of unusual dangers, which in the ordinary course of the business as conducted would not naturally occur.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 544-546; Dec. Dig. § 204.*]

Error from Superior Court, Fulton County; Geo. L. Bell, Judge.

Action by B. T. Allen against the Central of Georgia Railway Company. Judgment for plaintiff, and defendant brings error. Affirmed.

The assignment of error relied on for a reversal is upon the judgment refusing a nonsuit. The plaintiff was an employé, and the defendant was his employer. The action was for damages on account of injuries alleged to have been received through the negligence of the servants of the defendant in operating its trains. The injury occurred at a public crossing, known as "McCall's," where a street crosses defendant's line of railroad tracks on a grade level, between 4 and 5 o'clock in the morning of October 26, 1910, when it was dark. Over this crossing the defendant had three parallel main line tracks, Nos. 1, 2, and 3, about 8 feet apart. There was a parallel side track east of them, and another parallel side track west of them. At the time of the injury the plaintiff was a night watchman at the crossing, and it was his duty "to keep anybody out of the way of trains passing, and to keep trains that were passing over the crossing from hitting people, wagons, and buggies, and when people were coming and a train was coming I would wave the people back; if the people wanted to cross, and there were no trains coming, I would let them cross. My duties there as a watchman were to keep people and trains from coming into collision on that crossing and from hitting each other; and I got \$40 per month for that." The plaintiff was on duty at the crossing. Two sections of a circus train were going out of Atlanta. He had let one by, and the other was approaching about 60 feet away. He was standing near the side of main line track No. 3, and noticed a pedestrian coming from the opposite side of main line track No. 1, intending to go over the crossing. The pedestrian attempted to cross the railroad track, and the plaintiff waived him down. "He looked like he was going to come anyhow, and I stepped on the first line to start that way" to stop him, "and about that time I was knocked down" by one of the defendant's engines, which, without giving any signal by blowing a whistle or ringing a bell, backed over the crossing of track No. 3 at a high rate of speed without displaying a rear light. The plaintiff's testimony was somewhat confused as to his

position when struck, he stating at one time that he was in one place on the crossing, and at another that he was in a different place; but he offered explanation and testified, "I am positive, though, that I was between the east side track and the third main line when I was struck. I was on the west side of the three main lines when I was hit." He did not see the engine which struck him until it was gone beyond the crossing where it stopped, at which time he noticed the headlight from where he was lying, and the members of the crew picked him up. The pedestrian already referred to testified that he did not see the headlight on the back of the engine, and did not hear any signal, and did not see the engine until it struck the plaintiff; that it was running about 30 or 35 miles an hour; and that the circus train, which was nearly opposite, was not running over 20 miles an hour. The grounds of negligence alleged were that the defendant's "agents and servants who were operating said switch engine were negligent in running upon and over said crossing at a rapid and unlawful rate of speed, to wit, 30 miles an hour, and were negligent in not ringing the bell of said engine or giving some kind of warning of the approach of said engine on the crossing."

Little & Powell, of Atlanta, for plaintiff in error. Westmoreland Bros., of Atlanta, for defendant in error.

ATKINSON, J. [1, 2] By statute in this state, before the adoption of the act approved August 16, 1909 (Acts 1909, p. 160; Civil Code 1910, § 2782 et seq.), common carriers by railroad were liable for injuries to their employes resulting from negligence attributable to the employer where the injured employe was without fault. This law was amended by the act above mentioned, and since the amendment it is no longer essential that the injured employe must have been without fault; but he may recover provided the injury was not brought about "by his own carelessness, amounting to a failure to exercise ordinary care," or if he could not have avoided the consequences of defendant's negligence "by the exercise of ordinary care." But in cases where the negligence of the employe in some degree, less than indicated above, contributed to the injury, he may recover diminished damages. In Civil Code, § 3131, it is also provided that "a servant assumes the ordinary risks of his employment, and is bound to exercise his own skill and diligence to protect himself." Where there is no express contract on the subject, whatever risk the employe of a railroad company assumes can be no more than the "ordinary risk" of the particular business in which he is employed. It will not extend to an unusual danger, which, in the ordinary course of the business as conducted, would not naturally occur. In *Georgia R., etc., Co. v. Rhodes*, 56 Ga. 645, which was a suit for

damages on account of an injury to a baggagemaster on a train, it was held: "Such an employe assumes the risks necessarily incident to his occupation, but not such as result from the negligence of his coemployes." The negligence of the coemployes had reference to the operation of two trains which resulted in their collision, causing plaintiff's injury. In *Lawhorn v. Millen & Southern R. Co.*, 97 Ga. 742, 25 S. E. 492, it was ruled: "Even if a train employe, who by reason of his having full knowledge that the track of a railroad was in a dangerously defective condition and had so remained for a considerable period, can be held to have thereby assumed all risk of injury necessarily incident to riding, while engaged in his work, upon a train when being run in the usual manner and at the usual rate of speed, yet where, upon a given occasion, he was injured by a derailment of a car upon which he was riding in the due course of his employment, and, on the trial of an action against the railroad company for the injury thus sustained, proved affirmatively that the train at the time of the injury was being run at a dangerous rate of speed around a sharp curve, it was at least incumbent on the defendant to show that such rate of speed at the point in question did not exceed that at which the train had usually been run at this place." In this case a judgment granting a nonsuit was reversed. While that was not the case of a watchman at a crossing, nevertheless the ruling is an application of the law relative to the assumption of risks by railroad employes, and furnishes an example illustrative of unusual risks which are not assumed. In the later case of *A., K. & N. R. Co. v. Tilson*, 131 Ga. 395, 62 S. E. 281, a judgment overruling a nonsuit was sustained. Mr. Justice Lumpkin, in the course of the opinion, used the following language: "While an employe assumes the ordinary risks of a dangerous occupation, it could hardly be said that carelessness on the part of the engineer in the operation of his engine, or on the part of the company in regard to its track, of which he had no notice, was one of the usual and ordinary risks assumed by a 'freight hand' in the discharge of his duty, so as to present a legal bar to a recovery by him, under our statute allowing a recovery by an employe of a railroad, who is not at fault, and who is injured by negligence of other employes."

In the present case the plaintiff's duty as watchman was to remain at the crossing, where there were a number of railroad tracks over a street in a city at a grade level, to prevent injury to persons and things by defendant's trains. There appeared to him imminent danger of a catastrophe, described in the statement of facts, which he was attempting to prevent, when a switch engine moving backward on a different track, without rear lights or giving warning, and

running at 35 or 40 miles an hour over the crossing, struck him before its presence was discovered. While it was his duty to watch for trains on all the tracks, there was no evidence that this manner of operating switch engines at that place was usual, or even that it had ever occurred before. In running in the manner described the switch engine was running in violation of a statute in regard to giving signals at street crossings (Civil Code, § 2677), and was dangerous. Under all the circumstances the judge did not err in refusing to take the case from the jury on the question of assumption of risks by the plaintiff, or negligence of the defendant.

Judgment affirmed. All the Justices concur.

(140 Ga. 376)

MALLOY, Tax Collector, v. WILLIAMS et al. (Supreme Court of Georgia. July 19, 1913.)

(Syllabus by the Court.)

1. STATUTES (§ 76*)—LOCAL LAWS — OFFICES — BONDS.

The act approved August 13, 1910 (Acts 1910, p. 302), requiring the sureties on bonds of county officers in Telfair county to be guaranty companies authorized under the laws of this state to become sureties on official bonds, is violative of article 1, § 4, par. 1, of the Constitution of this state, in that it is a local law on a subject for which there was provision by an existing general law at the time of its adoption, and, if given effect, would prevent the general law from having uniform operation throughout the state.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. §§ 77½-78½; Dec. Dig. § 76.*]

2. TAXATION (§ 546*)—TAX COLLECTOR—REMOVAL.

Accordingly it was erroneous, on a quo warranto proceeding against the tax collector of Telfair county, to oust him from his office on the ground that he had not given an indemnity bond under the provisions of the act.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. §§ 1019-1040; Dec. Dig. § 546.*]

Error from Superior Court, Telfair County; M. D. Graham, Judge.

Quo warranto proceedings by G. C. Williams and others against C. W. Malloy, Tax Collector. Judgment for plaintiffs, and defendant brings error. Reversed.

L. C. Harrell and Eschol Graham, both of McRae, for plaintiff in error. W. A. Wooten, of Eastman, and W. S. Mann and W. C. McAllister, both of McRae, for defendants in error.

ATKINSON, J. [1, 2] Error is assigned on a judgment ousting a tax collector from his office on writ of quo warranto. The officer had been elected and given bond with personal sureties, and entered upon the discharge of his duties, but had not given bond with an indemnity company as surety. The act approved August 13, 1910 (Acts 1910, p. 302), declares: "Be it enacted by the General Assembly of this state, and it is hereby en-

acted by authority of the same, that from and after the passage of this act, all county officers of the county of Telfair, in this state, who are required by law to execute bonds for the discharge of their official duties, be, and they are, hereby required to give as surety on such bonds some guaranty company authorized by the laws of this state to become securities on such bonds." The ground upon which the officer was ousted from his office was that he had not given the bond required by this act. The correctness of the decision, therefore, depends upon the effect to be given to the act. It was attacked as violative of the state Constitution on several grounds, only one of which need be mentioned, viz.: The act was a local act applicable only to the county of Telfair, whereas at the time of its adoption provision had been made by existing general laws covering the subject dealt with in the act; therefore it was violative of article 1, § 4, par. 1, of the Constitution of this state (Civil Code, § 6391), which declares: "Laws of a general nature shall have uniform operation throughout the state, and no special law shall be enacted in any case for which provision has been made by an existing general law," etc.

The act of 1910, supra, includes among other county officers tax collectors; and clearly it was applicable only to Telfair county, and required the giving of indemnity companies as surety, and excluded the giving of personal sureties. At the time of the adoption of the act there were in existence laws on the subject of tax collectors' bonds as follows: Pol. Code, § 1207: "He shall also give bond and security for thirty-three and one-third per cent. more than the state tax supposed to be due from the county for the year for which said officer is required to give bond, the amount of the bond to be filed up by the comptroller general before being sent out to the county from the executive office, and shall give another bond with sufficient security, payable to the ordinary, conditioned for the faithful performance of his duties as collector of the county tax, in a sum to be fixed by such ordinary." Section 1208: "Such bond for county taxes, when given, must be approved by the ordinary, filed in his office, recorded in the book," etc. Section 1209: "Tax collectors shall not collect any portion of the county tax until such bond is given, and if they fail to give such a bond, or one satisfactory to such ordinary, he may appoint some competent person to collect the county tax." Section 292: "The official bonds of the clerks of the superior court, of sheriffs, coroners, county surveyors, county treasurers, tax collectors and receivers, given for county taxes, must be approved by the ordinary and filed in his office, and by him recorded. The bonds of tax collectors and receivers for state taxes, after being likewise approved,

must be recorded by the ordinary, and the original bond must be by him transmitted to the Governor for deposit in the comptroller general's office." Section 291: "Every official bond executed under this Code is obligatory on the principal and sureties thereon—1. For any breach of the condition during the time the officer continues in office or discharges any of the duties thereof. 2. For any breach of the condition by a deputy, although not expressed, unless otherwise declared by law. 3. For the faithful discharge of any duties which may be required of such officer by any law passed subsequently to the execution of such bond, although no such condition is expressed therein. 4. For the use and benefit of every person who is injured, as well by any wrongful act committed under color of his office as by his failure to perform, or by the improper or neglectful performance of those duties imposed by law."

These were general laws applicable in all the counties of the state, and applied to the office of tax collector. They constituted the general law in reference to the bonds of tax collectors in this state, save only the provisions of Political Code, § 282, which declares: "Guarantee or security companies incorporated under the laws of this state may become security upon the bonds of all state or county officers, and the various officers of this state, whose duty it is to approve the sureties upon such bonds, are authorized to accept such company or companies as one of the sureties or the only surety upon such bond as the solvency of such company may warrant"—and Civil Code, § 2554, which declares: "Solvent guarantee companies, surety companies, fidelity insurance companies, and fidelity and deposit companies incorporated and organized under the laws of this state, or any other state of the United States, for the purpose of transacting business of fidelity insurance, which have a paid-up capital of two hundred and fifty thousand dollars, and which shall have complied with all the requirements of law as to license required by the state, may upon proper proof thereof, and upon production of evidence of solvency, be accepted upon the bonds of all city, county, and state officers of this state; and the various officers of this state, whose duty it is to approve the sureties upon such bonds, are hereby authorized to accept such company or companies as one of the sureties, or the only surety, upon such bonds as the solvency of such company may warrant: Provided, no company shall be relieved of its liability upon any such bond by reason of the fact that the books and accounts of the principal have been examined and approved as correct by the proper authorities, when in fact there has been a breach of said bond and a loss occurring from such breach."

Under the four Code sections above mentioned, personal sureties could be given on tax collectors' bonds. Under the provisions of sections 282 and 2554, guaranty and fidelity companies possessing certain qualifications were permitted to become sureties on such bonds; but the two sections last mentioned obviously were not intended to impair the privilege of giving personal sureties under the general laws embraced in the four sections first mentioned. It appears, therefore, that at the time of the adoption of the act of 1910 there were existing general laws in regard to sureties on the bonds of tax collectors, whereby personal sureties and guaranty and fidelity companies possessing certain qualifications could be given. The local act, the clear intent of which was to prevent the tax collector, among other county officers, from giving any surety except an indemnity company, therefore, dealt with a matter covered by existing general laws, and, if carried into effect, would prevent the uniform operation of the general laws in regard to the surety on tax collectors' bonds. The act is violative of the provision of the Constitution referred to above, and should not have been given effect by the judge in passing on the case.

Judgment reversed. All the Justices concur.

(140 Ga. 364)

SOUTHERN RY. CO. v. SHEPPARD, DAVIS & NIX et al.

(Supreme Court of Georgia. July 19, 1913.)

(Syllabus by the Court.)

1. SALES (§ 233*)—CLAIMS OF THIRD PERSONS—SUFFICIENCY OF EVIDENCE.

There was no evidence to support the verdict, and it is set aside upon that ground.

[Ed. Note.—For other cases, see Sales, Cent. Dig. §§ 653-656; Dec. Dig. § 233.*]

(Additional Syllabus by Editorial Staff.)

2. SALES (§ 228*)—PURCHASE PRICE—LIABILITY OF THIRD PERSON.

Where a company sells ties under a misapprehension as to the identity of the buyer, and neglects, upon discovering the facts, to repudiate the trade and demand redelivery, or to institute proper legal proceedings, a notice to a railway company, which subsequently purchases the ties, not to move or use them, is insufficient to render the railway company liable on quantum meruit for ties which it takes and uses.

[Ed. Note.—For other cases, see Sales, Cent. Dig. § 647; Dec. Dig. § 228.*]

Error from Superior Court, Gwinnett County; B. F. Walker, Judge.

Petition by the Southern Railway Company against Sheppard, Davis & Nix and another, praying for interpleader. A judgment was rendered on directed verdict for the defendant named and petitioner brings error. Reversed.

E. O. Dobbs, of Buford, John J. & Roy M. Strickland, of Athens, and D. M. Byrd, of

Lawrenceville, for plaintiff in error. W. W. Stark, of Commerce, for defendants in error.

BECK, J. The Southern Railway Company, being indebted to the Wooley Tie Company (hereinafter called the Tie Company) in the sum of \$2,188.98, for cross-ties bought, filed its petition against the Tie Company and other parties, including Sheppard, Davis & Nix, alleging that the Railway Company had bought the ties from the Tie Company but that the other parties defendant were making demands and bringing suits against the Railway Company for ties which had been delivered upon its right of way; that, while it owed the Tie Company the amount before stated, it was all for ties; and that, if any part of this money should be adjudged to be due to the parties who were making demands upon it for the payment for ties, petitioner was ready to pay the money over to them. It prayed for interpleader between the Tie Company and the other claimants of the fund. In their plea and answer Sheppard, Davis & Nix set up two reasons why the plaintiff was liable to them for the amount of their claims: First, because the Tie Company, at a time when it had money in the hands of the Railway Company, gave defendants an order upon the Railway Company (which order is hereinafter set forth) for the amount of their claim, \$223.60, and this order amounted to an equitable assignment of that much of the funds in the hands of the plaintiff belonging to the Tie Company; and, second because the Railway Company not only took and used the cross-ties after notice not to do so without paying defendants for them, but removed and appropriated them after the filing of this suit.

The case was referred to an auditor, to whose report certain exceptions were filed. Among others, the Railway Company excepted to his finding that Sheppard, Davis & Nix were entitled to recover of the Railway Company \$223.60, in which sum he found the Railway Company indebted to Sheppard, Davis & Nix upon a quantum meruit for ties which had been delivered upon the railroad right of way and taken possession of and used by the Railway Company. This exception was allowed by the court; and it was agreed between the parties that the judge should hear the evidence "and direct a verdict as he might think advisable under the evidence. Under this authority the presiding judge directed a verdict in favor of Sheppard, Davis & Nix against the Southern Railway Company for the amount of their order." The Southern Railway Company moved for a new trial, upon the grounds that the verdict was contrary to the evidence and without evidence to support it, which motion was overruled, and the movant excepted.

There were many parties in this case, and very probably numerous issues, but the sole

issue brought to this court for review was the question as to whether or not the Southern Railway Company was indebted to Sheppard, Davis & Nix in the sum of \$223.60 for cross-ties; no question as to the plaintiff's right to have the defendants interplead being raised. The contention of the Railway Company is that it bought from the Tie Company the cross-ties for the purchase price of which Sheppard, Davis & Nix are contending, and had no dealings with Sheppard, Davis & Nix in reference to the purchase of the cross-ties, but that, on the contrary, Sheppard, Davis & Nix had sold them to the Tie Company, and they were resold by that company to the Railway Company, and delivered to the latter company upon its right of way. The jury, under the direction of the judge, found against the Railway Company upon this issue; and the question is, Was there any evidence to support the verdict?

[1] After a careful consideration of the evidence in the record, we are unable to find testimony supporting this verdict. The testimony of P. L. Wooley, a member of the firm of the Wooley Tie Company, was to the effect that, while he may not have had any direct transactions in his own person with the original owners of the cross-ties, the persons who went out and procured them from the owners were the agents of his company; and the reading of the entire testimony of P. L. Wooley shows that his company was the purchaser of the ties, and that the Tie Company should be the purchaser of the ties and deliver them to the Railway Company was in consonance with the contract which the Railway Company had made with the Tie Company. Of course, the terms of this contract were not binding upon Sheppard, Davis & Nix. It is merely referred to as showing that the testimony of P. L. Wooley in reference to the purchase of the ties from the first owners was in accord with the scheme contemplated in the contract. If this testimony of P. L. Wooley is contradicted in any respect, it is by the testimony of L. L. Davis, a member of the firm of Sheppard, Davis & Nix. His testimony in substance was as follows: "I received this letter from Mr. Fink, tie and timber agent, Southern Railway. I notified this same man not to move those ties. Those ties have been hauled off since the suit was started. I gave notice not to move them. I don't remember the exact time the Southern Railway Company took them, but after notice was given them not to move them. The Wooley Tie Company gave me this order, a copy of which is attached to my answer. I don't remember to have had transactions with the Wooley Tie Company under that system. We had done business with the Southern Cross-Tie Company. The Southern Cross-Tie Company is the one I dealt with. I don't think Wooley ever came to our town. I don't remember to have ever seen him there. At any rate, he

gave me this order, and at that time the ties were on the railroad track, and the moving of the same was after that—after I had taken this order and the railroad refused to accept it. I thought I was dealing with the Southern Tie Company. I had been." The order just referred to was as follows: "Atlanta, Ga., July 26, 1910. Mr. W. H. Fink, T. & T. Agt. So. Ry., Washington, D. C.—Dear Sir: Please deduct from the amount the Southern Railway Company owes us for cross-ties two hundred and twenty-three (\$223.60) and $\frac{60}{100}$ dollars, and prepare vouchers for this amount favor Sheppard, Davis & Nix, Commerce, Ga., charging the same to our account, and greatly oblige. Very truly yours, Wooley Tie Company."

It will be observed that by this testimony Davis does not positively deny the testimony of P. L. Wooley in reference to the purchase of ties by the Wooley Tie Company. He does say: "I don't remember to have had transactions with the Wooley Tie Company under that system. We had done business with the Southern Cross-Tie Company. The Southern Cross-Tie Company is the one I dealt with." But this very qualified denial of the testimony of Wooley, when considered in connection with the other facts in the record, does not amount to a denial of Wooley's testimony upon the real issue in this case. There is nothing in the record to show that Sheppard, Davis & Nix had any dealings with the Southern Cross-Tie Company in reference to the lot of ties in question in this case. And the other circumstance in the record, to which we have referred as destroying the force of Mr. Davis' qualified denial of P. L. Wooley's theory of the case, is to be found in other testimony of Davis himself; for he testifies that he took an order (the order set out above) for the payment of the amount of money claimed, \$223.60, signed by the Wooley Tie Company. If Sheppard, Davis & Nix really thought, at the time of selling the present lot of ties, that they were dealing with the Southern Cross-Tie Company (and it may be noted right here Davis did not claim in his testimony that he thought he was dealing directly with the Southern Railway Company), they certainly knew, when they took the order on Fink, the agent of the Southern Railway Company, that the Wooley Tie Company was the company with which they had been dealing and to which the ties had been sold by them.

[2] If they had sold the ties to the Wooley Tie Company under any false impression as to who were the actual purchasers, and that false impressions were due to any false and fraudulent representations of the agents of the Wooley Tie Company, they should have repudiated the trade and demanded a redelivery of the ties to them, or instituted legal proceedings to set aside the sale and to se-

cure possession of the ties. But they did not do this, and the mere notice to the Southern Railway Company not to move or use the ties which the latter had purchased from the Tie Company was not enough to render the Railway Company liable upon a quantum meruit for the value of the lot of ties, although it took them and used them.

The auditor in his report declined to pass upon the question whether or not the order for the payment of money given by the Tie Company to the defendants in error amounted to an equitable assignment of the \$223.60, inasmuch as under his finding the railroad company became liable for the payment of the ties upon a quantum meruit, and there is no exception by Sheppard, Davis & Nix to this finding of the auditor, and therefore the question as to whether or not the order referred to did amount to an equitable assignment, so as to entitle the payee in the order to a judgment for that amount, is not involved in the record.

Judgment reversed. All the Justices concur.

(140 Ga. 340)

BOYCE v. COOK.

(Supreme Court of Georgia. July 19, 1913.)

(Syllabus by the Court.)

BOUNDARIES (§ 52*) — PROCESSIONING PROCEEDINGS.

Under the law of processioning as it exists in this state, established lines, and not new ones, are to be fixed and determined. The location of lines, not as they ought to be, but as they actually exist, is to be sought. And it appearing in the present case that in running the line between the parties the processioners and the surveyor "ignored the claims of both sides" as to the actual location of the line between them and their respective contentions as to actual occupation, and sought alone for the discovery of the true original line, by courses and directions and certain corners on what they considered the true original line, the line traced and marked by them in this way was not run according to the law governing processioners in the discharge of their duty, and should not have been established as the true line by verdict rendered on the trial of the issue made by a protest to the return of the processioners.

[Ed. Note.—For other cases, see Boundaries, Cent. Dig. §§ 253-260, 262, 263; Dec. Dig. § 52.*]

Error from Superior Court, Walton County; H. C. Hammond, Judge.

Processioning proceedings between Mrs. Scott Boyce and T. J. Cook. Mrs. Boyce protested the return of the processioners, and from a denial of a motion for new trial, after an adverse verdict, she brings error. Reversed.

J. H. Felker and Hal G. Nowell, both of Monroe, for plaintiff in error. B. L. Cox, of Monroe, for defendant in error.

BECK, J. Processioners made a return, accompanied by a surveyor's plat, showing

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

the boundary line as marked by them between the land of the defendant in error and the land of the plaintiff in error. The latter filed a protest to the line drawn by the processioners between the two lots of land, setting forth what she claimed to be the true line, and showing that she had been in exclusive possession, for more than 25 years, of the land up to a line which she claimed should have been run. The trial of the issue thus made resulted in a verdict to establish the line run by the processioners as the true line. Mrs. Boyce, the protestant, filed a motion for a new trial, which was denied, and she excepted. The motion for a new trial contains, among other grounds, the complaint that the verdict is contrary to the law and the evidence and contrary to the following charge of the court: "You are charged that the processioners are not authorized to go in and fix what they regard as a right, proper, equitable line between the parties to the case. They must fix the actual line as it existed. They don't establish a new line; they are merely to determine and locate the old line; and they are not authorized to make a line different from the old line, because they believe it substantially right between the parties."

The evidence for the protestant in this case tended to show that the line as run by the processioners was on and over land which she had been in actual possession of for more than seven years; and the testimony of the other party tending to contradict this is very vague and indistinct, especially in that, when he speaks of having cultivated up to a certain hedge line, he fails entirely to show at what time he cultivated up to that hedge, and fails to show whether there was any of the hedge remaining at the time the processioners run the line in question or when the hedge disappeared. He seems to rely upon the contention that certain well-established corners show the line as run by the processioners was the true line between his land and that of his antagonist. If there were nothing more than this in the testimony, however, we might hesitate before disturbing the judgment of the court below refusing a new trial. But when we consider the testimony of the county surveyor and of the processioners, which was introduced by the defendant in error, it becomes clear that a new trial should be had. The county surveyor who ran the line in question testified, in substance, that he made the survey; that he remembered very little about a certain stump referred to in the testimony of other witnesses; that what he and the processioners were after getting was a line directly from the hickory tree to the iron pin; that the hickory tree was selected, because it was considered a corner on the original line. He was trying to find the original land line from the hickory tree to a stake on the east side. He found that line. He made a trial run; then, after

making certain calculations, he ran back to the hickory tree. Proper corrections were made, allowing for the variations. He testified further, showing the pains and care taken in running the proper courses and directions, and stated: "My effort was to find the original line. The original line is the old line. If they had any marked trees or corners, we would run by that; they had a sort of crooked turn row. When I go to run a line, I ignore what anybody says about it. I pay no attention to them. I can't afford to do it, of course. The commissioners [processioners] told me they wanted to run the old line, and that is what I did. The commissioners [processioners] and I under their direction didn't read this claim of Mrs. Boyce at all. This is correct. They never ran the line with any view of making the old fence line. There was no fence line there; I didn't see any fence line; could not see where the original fence was. They claimed it was at a certain place; their claims were ignored, and they run this new line there. * * * I ignored Cook's [defendant in error] claims too; ignored both claims." The testimony of the processioners showed that their conception of their duty was similar to the surveyor's conception of his duty in this particular case. They were looking for corners and endeavoring to ascertain the true line, the true original line, and they "ignored the claims of both sides."

Under this testimony the line as run by the processioners with the county surveyor was not run in accordance to the law governing processioners in cases of this kind, and the verdict establishing it should be set aside. In the case of *Bowen v. Jackson*, 101 Ga. 817, 29 S. E. 40, it was said: "Processioners are not charged, under the law as we understand it, with ascertaining and marking such lines as were originally fixed between subdivisions of land, to the exclusion of such lines as have been, before the time of processioning, established either by the act of the parties or by operation of law. When a claim is made by a coterminous owner of actual possession under a claim of right for more than seven years to a portion of the land found to be outside of the true original line, they are not to declare where the lines ought to be without regard to adverse possession, but where they really are. Any actual possession under a claim of right which has continued for more than seven years is to be respected by processioners. The question with which processioners deal is not one of prescription, but of boundary. But they are to determine the question of fact as to whether possession has been held for seven years under a claim of right. *Christian v. Weaver*, 79 Ga. 406 [7 S. E. 261]. Where actual possession has been had under a claim of right for more than seven years, such claim shall be respected, and the lines so marked by the processioners as not to interfere with such

possession. *Camp v. Cochrane*, 71 Ga. 865. In a case where the protestant objected to the line because of such possession by himself and those under whom he claimed for a great number of years, exceeding seven, it was error to disregard such claim and seek only to ascertain the original district line which correctly divided lots. And where the testimony of himself and the processioners tended to show that the surveyor was not trying to find the line between the parties, but the district line, and did not pay any attention to what either party was in possession of, and the line so run was by the jury set up as the true line between the parties, the verdict should be set aside." What is there said in the *Bowen Case*, under the facts of the present case, is controlling.

If the parties to this case are still disposed to press their adverse claims to the strip of land in dispute, and wish to have the line established by processioners, then the processioners, with the county surveyor, should run the line anew, and in doing this they should not "ignore the claims of both sides."

Judgment reversed. All the Justices concur.

(140 Ga. 277)

JACKSON v. SEABOARD AIR LINE RY.
(Supreme Court of Georgia. July 18, 1913.)

(Syllabus by the Court.)

1. REVIEW OF EVIDENCE.

The verdict is supported by the evidence.

2. MASTER AND SERVANT (§ 274*)—INJURIES TO SERVANT—EVIDENCE.

Where the widow of one who was employed by a railroad company as a flagman to perform service within its switching yards brought suit to recover damages for his alleged tortious homicide by the running of one of the defendant's cars, evidence of the general custom as to the manner of flagging trains at the point where the injury occurred, and of instructions to such flagman as to such custom, was admissible as tending to show that the deceased knew of the custom and the danger to which he was exposed while on duty as a flagman, and whether he exercised that care which an ordinarily prudent man in these circumstances would have exercised for his safety.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. §§ 939-949; Dec. Dig. § 274.*]

3. TRIAL (§ 217*)—INSTRUCTIONS—DUTY OF JURY.

It is not error for a trial judge, before beginning his instructions to the jury, to tell them of the obligation resting upon the court and upon the jurors in the trial of a case, and to call their attention to the necessity of giving close attention to the law as given them by the court, and to return "a true verdict, according to the opinion they entertain of the evidence produced to them, without favor or affection to either party, and according to the law as given in charge by the court."

[Ed. Note.—For other cases, see *Trial*, Cent. Dig. §§ 483, 485; Dec. Dig. § 217.*]

4. TRIAL (§ 233*)—INSTRUCTIONS—PLEADINGS.

It was not error for the court in charging the jury to read to them the original petition and the amended petition, where the amend-

ment worked a dismissal of the case as to one of the defendants, and the original petition was amended in several other material parts, and where there was no offer on the part of the plaintiff's attorneys to remodel the papers, and where the court instructed the jury that the part of the original petition and the amendments that had been stricken were not a part of the plaintiff's statement of the case in writing, and that the pleadings would go out with the jury, and explained to them how the amendments were related to the original petition.

[Ed. Note.—For other cases, see *Trial*, Cent. Dig. §§ 527-530; Dec. Dig. § 233.*]

5. TRIAL (§ 136*)—INJURY TO RAILROAD EMPLOYÉ—SPEED OF TRAIN—QUESTIONS FOR JURY.

In view of the evidence as to the character and surroundings of the locality where the injury occurred, it was not improper for the court to submit to the jury the question of whether a municipal ordinance regulating the speed of trains within the city limits was applicable at that particular locality.

[Ed. Note.—For other cases, see *Trial*, Cent. Dig. §§ 318, 320, 321, 323-327; Dec. Dig. § 136.*]

6. APPEAL AND ERROR (§ 1068*)—HARMLESS ERROR—INSTRUCTIONS.

None of the charges complained of embody any error requiring a new trial.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 4225-4228, 4230; Dec. Dig. § 1068.*]

Error from Superior Court, Fulton County; W. D. Ellis, Judge.

Action by Ruth Jackson against the Western & Atlantic Railroad Company and the Seaboard Air Line Railway. Action dismissed as to the first defendant, verdict for plaintiff as to the second defendant, motion for new trial by plaintiff for insufficiency of the verdict overruled, and she brings error. Affirmed.

Westmoreland Bros., of Atlanta, for plaintiff in error. Moore & Pomeroy, W. G. Loving, Brown & Randolph, and Parker & Scott, all of Atlanta, for defendant in error.

HILL, J. Mrs. Ruth Jackson, then a minor, by her next friend brought suit against the Western & Atlantic Railroad Company and the Seaboard Air Line Railway, to recover damages for the homicide of her husband, W. P. Jackson, alleging that by the concurrent negligence of both defendants her husband was killed. The case against the first-named defendant was dismissed, and an order taken amending the petition against the Seaboard Air Line Railway, and the case was tried solely against the latter. The trial resulted in a verdict for the plaintiff for \$2,500. Being dissatisfied with this verdict, the plaintiff made a motion for a new trial, which was overruled, and she excepted.

[1] 1. The first ground of the motion is that the verdict is inadequate and is not sustained by the evidence. It is argued that if the plaintiff is entitled to recover at all, she ought to recover a sum in excess of \$2,500, and that there is no evidence to support the amount found by the jury. Our Civil Code,

§ 2781, provides: "No person shall recover damage from a railroad company for injury to himself or his property, where the same is done by his consent, or is caused by his own negligence. If the complainant and the agents of the company are both at fault, the former may recover, but the damages shall be diminished by the jury in proportion to the amount of default attributable to him." There was evidence tending to show that the plaintiff's husband was killed under circumstances which showed negligence on his part and on the part of the defendant. The jury, therefore, were authorized to find that the recovery should be decreased in proportion to the contributory negligence of the husband in causing his death. We think the verdict is supported by the evidence.

[2] 2. The fourth to the fourteenth grounds, inclusive, of the motion for a new trial complain that the court erred in overruling objections to certain evidence offered by the defendant as to "the universal custom out there at this locality in those yards as to what a flagman should do in order to protect the rear of his train." The numerous questions objected to varied as to form, but nearly if not all of them related to "the custom" as to the duty of a flagman in the locality where the homicide occurred, and what instructions were given to the deceased flagman as to "the dangers surrounding yard work and places that he would have to look out for." It is insisted that the court erred in allowing the questions and answers as to the custom of flagging trains, and in allowing witnesses to testify as to what a flagman should or should not do, or that the engineer would not pay any attention to flagmen on any other track than the one on which his train was. The plaintiff offered the evidence of several witnesses which tended to show that the plaintiff, in the line of his duty, was correctly flagging the train, and that he was on the right track. It was competent, therefore, for the defendant to show what the general custom was in the yards where the homicide occurred with reference to flagging trains, and that the plaintiff's husband had been instructed as to and knew of the custom about which the witnesses testified, and that his position on a railroad track other than the one on which his train was was in violation of that custom. This evidence was admissible as tending to show that the deceased, knowing of the custom and of the daily and hourly danger to which he was thus exposed while on duty as a flagman, should have exercised that care which an ordinarily prudent man would have exercised for his own safety.

[3] 3. Complaint is made of the following preliminary instruction to the jury: "There are obligations upon the court and upon the jurors in the trial of a case. The obligation on the jury is under the solemn oaths they take to find a true verdict according to the

opinion they entertain of the evidence produced to them without favor or affection to either party and according to law as given in charge by the court. The law imposes upon the judge the solemn duty to exercise his best and most impartial skill and ability in giving you the law. Now I mention this feature of the matter particularly because it is entirely impossible for a jury to deliver a true, conscientious, and proper verdict in a case where they do not listen to the charge of the court. It is not only a matter of duty, but it is a matter of respect to the judge, that the jurors will do their best to understand the law as he gives it in charge. You understand the law is a very difficult proposition; lawyers don't understand it perfectly, and courts conscientiously differ about what it is. But you must take the law as given you by the court. The responsibility of finding the truth of a case rests upon your consciences; the responsibility of giving you the true law of a case rests on mine. In the nature of things in considering the law as given you by the court, it is well not to pick out any isolated parts of the law as given you, but to try to recollect the whole charge, and see how one part of it is related to another, because it would be impossible for the judge to give you in a paragraph, in a sentence, or a page all of the law that would relate to and be applicable to a case of this kind." It is insisted by the plaintiff in error that this preamble to the judge's charge was error, calculated to prejudice the plaintiff's case at the beginning of his instructions to the jury; that it was equivalent to saying to the jury that the plaintiff's case would appeal to their sympathy, and they would be inclined to find a verdict for her; that she was not entitled to recover; and that the court would warn the jury against making such a mistake, etc. We do not think that the instructions of the court complained of are susceptible of the construction placed upon them. We do not see how it could prejudice the plaintiff's case any more than it would the defendant's case for the court to call the attention of the jury to the obligations resting upon the court and upon the jury and admonish them of the necessity of finding "a true verdict according to the opinion they entertain of the evidence produced to them without favor or affection to either party and according to law as given in charge by the court," etc. Indeed, we fail to see how it was prejudicial to either side. All that was said by the learned judge would apply as well to the defendant as to the plaintiff. See *McDuffie v. State*, 121 Ga. 580 (13), 49 S. E. 708; *Lyles v. State*, 130 Ga. 294 (5), 60 S. E. 578; *Beck v. State*, 76 Ga. 452 (5).

[4] 4. The sixteenth ground of the motion for a new trial alleges error, because the court read to the jury plaintiff's petition as originally filed. The original suit was against two defendants. Before the trial of the case, the petition was amended by order of the court

in several material parts, which worked a dismissal of the case as to one of the defendants, and the case was tried on the petition as amended against the other defendant. It is insisted that the court should have called the attention of the jury to the pleadings as amended, and that his failure to do so prejudiced the plaintiff's case. The court instructed the jury that the petition had been amended, and also told them that the pleadings would be out with them. He also read the pleadings which had been stricken by amendment, and the other allegations which had been substituted and on which the case was tried. It is argued that this was confusing to the jury and was error calling for reversal. To this ground of the motion for a new trial the court appends the following note: "The pleadings in this case, as will be shown by the record, are voluminous. They will show that the plaintiff first charged negligence on the Western & Atlantic Railroad, that was the major defendant, and the Seaboard Air Line Company, the minor defendant. The pleadings were amended so as to strike the Western & Atlantic Railroad from the case, and during the progress of the trial the defendant, the Seaboard Air Line Railway Company, put in evidence, as admissions, some of the pleadings which had been stricken by amendment. During the argument of the case, counsel for defendant pressed upon the jury the idea that the plaintiff had laid her case in one way, prominently against one railroad, and when the hand of that railroad was disclosed she changed her mind, and, seeking somebody to hold liable, practically changed her whole case and charged it up to the Seaboard Air Line Railway Company. In other words, the insinuation to the jury was plain and palpable that the plaintiff had doctored her case, and had manufactured testimony to suit its new condition. In view of all these facts, and in view of the further fact that the court had no power to mark out what had been stricken, and in view of the fact that the whole pleadings had to go to the jury, the judge concluded that the best way to get it properly before them was to read the petition as it originally stood, and then read the amendments, and show how they were related to the original petition, and then to tell the jury that part of the original petition and the amendments that had been stricken were not a part of the plaintiff's statement of the case in writing. I respectfully say that, in order to understand the situation which called for laborious work on the part of the court, reference must be had to the original pleadings. There was no offer made by plaintiff's attorneys to remodel the papers, no offer made to conceal any part of the petition that had been stricken, and the matter was left before the judge to use his best discretion in letting the jury understand how the case stood as to pleadings when he was submitting the law

in respect thereto." We take it that the jury was one of average intelligence; and as the court read both the stricken and substituted amendments, both of which were in the jury room when they considered and made their verdict, we fail to see that the conduct of the judge in this respect was prejudicial to the plaintiff. In fact we think the court could hardly have done otherwise than as stated in his note to the ground of the motion for a new trial.

[§] 5. The following charge of the court is assigned as error: "The plaintiff has introduced in evidence an ordinance of the city of Atlanta regulating the speed of railway trains within the corporate limits. The court decides as a matter of law that such an ordinance would be reasonable; but whether it was reasonable and applicable to the time and place where it is alleged this injury occurred is for you to consider and determine along with other evidence in the case." This charge is attacked as erroneous, for the reason that it was for the court to decide whether the ordinance was reasonable and valid, and having so decided it was error to allow the jury to say whether or not the ordinance was reasonable and applicable to the time and place where the injury occurred. In the case of *Central R. Co. v. Brunswick, etc., R. Co.*, 87 Ga. 386, 13 S. E. 520, it was held: "If a city ordinance regulating the speed of trains embrace in its language the whole area of the city, and is reasonable in itself, the court may submit to the jury the question as to whether, on account of the special local conditions and surroundings, it would or would not reasonably apply to the particular locality in question; that locality being just inside the city limits." There was evidence tending to show that the place where the homicide occurred was near the city limits and was used exclusively as railroad property, and that there were no crossings or cross-paths at this place, but that the property was used entirely for railroad purposes. Whether the ordinance was reasonable as applied to this particular locality, under all the circumstances of the case, the court left to the jury. There was evidence tending to show that a greater rate of speed was habitually maintained at the place where the injury occurred, and that this was well known to the plaintiff's husband; and the question as to whether the ordinance was reasonable as applicable at the point where the injury occurred was not improperly left to the jury.

[§] 6. In some instances error was assigned on charges to the effect that in certain events the plaintiff could not recover at all. As the jury found that the plaintiff was entitled to recover, and these charges do not seem to affect the measure of damages in case of recovery, it is not apparent that these charges were injurious to her, even if in some particulars there were slight inaccuracies. In at least one of the charges, com-

plained of—that relating to the status of a person voluntarily lying down upon a railroad track—the charge was apparently more favorable to the plaintiff than she was entitled to have given. In view of the fact that the plaintiff obtained a verdict of \$2,500, and her dissatisfaction is that the verdict is too small, and in view of the evidence and the general charge, we do not think there is anything in the charges mentioned requiring a new trial. Nor do we think it would serve any good purpose to set out each of these charges at length and repeat the discussion as to them separately. We have spent much time in considering the voluminous record in this case, and all the assignments of error, and the authorities cited, as well as others, and reach the conclusion that no legal reason has been shown why the verdict should be disturbed.

Judgment affirmed. All the Justices concur.

(140 Ga. 337)

KNOTT v. MCWHIRTER.

(Supreme Court of Georgia. July 19, 1913.)

(Syllabus by the Court.)

1. PARTIES (§ 92*) — PARTIES DEFENDANT — COMMON INTEREST.

The amendment to the petition, which was demurred to by the defendant, sought to make one a party who had no common interest with the defendant in the original petition, and between whom and the original defendant there was no ground of common interest; and the court should have sustained the defendant's demurrer.

[Ed. Note.—For other cases, see Parties, Cent. Dig. §§ 150-152; Dec. Dig. § 92.*]

2. APPEAL AND ERROR (§ 874*) — REVIEW — HARMLESS ERROR.

The demurrer having been erroneously overruled, what took place in the subsequent trial was entirely nugatory; and it is entirely unnecessary to pass upon questions raised as to the rulings of the court during the progress of the trial, and as to certain portions of the charge to the jury.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3478, 3480, 3481, 3484, 3530-3540; Dec. Dig. § 874.*]

Error from Superior Court, Fulton County; Geo. L. Bell, Judge.

Action by R. M. McWhirter against J. J. Knott. Judgment for plaintiff, and defendant brings error. Reversed.

Alexander Ratteree was the owner of land lot 134 in the fourteenth district of Fulton county. Mrs. R. M. McWhirter, alleging that she was the owner of a lot which had been carved out of land lot 134, brought suit against J. J. Knott, alleging that he owned a lot of eight acres carved out of land lot 134, and lying north of the plaintiff's lot. She derived title from Alexander Ratteree through a series of conveyances, the last having been executed in 1904, and describing the land as follows: "All that tract or parcel of land situated, lying and being in land lot one

hundred and thirty-four (134) of the fourteenth district of originally Henry, now Fulton county, Ga., commencing on the right of way of the Central Railroad, at the southeast corner of Dr. Knott's lot, and extending west along Dr. Knott's line nine hundred and forty-four (944) feet to the old Newnan road, thence southeasterly nine hundred and twenty-nine (929) feet to a point on the Central road four hundred and forty (440) feet south from the starting point, thence northerly four hundred and forty (440) along said right of way to the starting point; containing four and forty-one hundredths (4.41) acres, more or less." The defendant's land adjoins petitioner's land on the north. He acquired title in the year 1882 by virtue of two deeds executed to him by W. T. Waters and A. P. Eskridge, in each of which the vendor conveyed to J. J. Knott all of his interest and title to "all that tract or parcel of land situated in the northern part of land lot one hundred and thirty-four (134) in the fourteenth (14th) district of originally Henry now Fulton county, Georgia, containing eight acres, and bounded as follows: On the west by the Newnan road, south and north by original line number 134, and east by Macon and Western Railroad." In the original petition it is alleged that Dr. Knott has entered upon the lands of petitioner, and has begun to cut down and remove valuable trees growing on the premises; that when petitioner went into possession of this land there was a fence which she alleges marked the southern line of the property claimed by Knott; that some of the land lying north of this fence was in dispute between her grantor and Knott, and is now in dispute between her and Knott; that on February 1, 1905, Knott constructed across her premises, over her protest, a fence inclosing within his land a strip of her land about 80 feet wide, and extending the entire length of her premises, and he is claiming possession of the same; that in the deed under which Knott holds the property is well defined; that the lines of petitioner's property depend upon the lines of the property of the defendant; and that it is necessary, in order to establish the exact line, that the same be surveyed. In May, 1907, the plaintiff by amendment showed the following: In 1871 Ratteree conveyed to Pritchett a tract containing 5 acres of land and to Waters a tract containing 3 acres. Waters acquired title to the 8 acres, and in 1882 Waters conveyed the 8 acres to Knott. Ratteree in 1877 conveyed to H. F. Leak 171 acres of lot of land 134, being all of that tract except the 8 acres previously conveyed. In 1885 Leak conveyed to W. H. Loftin 4.41 acres adjoining the Knott tract, and being a portion of the 171 acres last referred to. Leak is now dead, but before his death, in the year 1900, he conveyed

"said tract or parcel of land which had been conveyed by said Ratteree [to him] to his daughter and sole heir, Mrs. Maud Leak Cobbs," by deed describing the land as follows: "All that tract or parcel of land lying and being in Fulton county, being one hundred and seventy-one (171) acres, more or less, bounded south by William Walker, west by Joseph Caldwell, east and north by Asa Toland, north by Julian Ratteree, except eight acres on the north line in the old field between the big road and the Macon and Central R. R. right of way, number one hundred and thirty-four (134) in the fourteenth district of originally Henry now Fulton county aforesaid." The land conveyed to Loftin by Leak is marked by no natural landmarks, but the boundary commences at the southeast corner of the Knott tract and follows Knott's line west to the old Newnan road; and before the Loftin tract can be laid out and defined by metes and bounds, it is necessary to ascertain the southeast corner of the Knott tract and define the south line of his tract between the right of way of the Macon & Western Railroad and the old Newnan road. The dividing line between the Leak land (now Mrs. Cobbs' land) and that portion sold to Loftin (now petitioner's land) has never been definitely ascertained and marked; and before it can be fixed and determined, it is necessary to fix and determine the south line of Knott's parcel or tract. Mrs. Cobbs is interested in the location of the south line of Knott's tract, because the Loftin tract, which now belongs to petitioner, is to be laid out with reference to said south line, and Mrs. Cobbs owns the land adjoining the Loftin tract. The deed from Leak to Loftin is a warranty deed; and, if the title to any portion of the land so conveyed should fail, there would be a breach of the warranty, and Leak's estate would be liable; and, "although Leak conveyed the title of all said tract or parcel of land conveyed to him by Ratteree, together with all his other property, as petitioner is informed and believes, to his daughter [Mrs. Cobbs], yet the same was without any consideration, but made as a gift to his said daughter and only heir, and said property would be liable to any legal claim against H. F. Leak; that Mrs. Cobbs is not a bona fide owner for valuable consideration, but simply a volunteer." The land adjoining the Loftin lot (now petitioner's lot) on the south, for a distance of 929 feet, is now in the possession of Mrs. Cobbs, under the deed made by Leak, and she has no title, right, or possession which could be paramount to the title of petitioner to any portion of the land necessary to satisfy the Leak deed to Loftin, and petitioner is entitled to a tract or parcel of land which will fulfill the description and measurements of the Leak deed to Loftin. Petitioner cannot protect her rights under the original petition, the only party de-

fendant thereto being Knott, while petitioner and Knott would be bound by a judgment or decree therein, fixing and determining the south line of the Knott land; the relative rights of petitioner and Mrs. Cobbs would not be fixed by such decree, for when petitioner seeks to have her tract laid out in accordance with the dimensions given in the Loftin deed, Mrs. Cobbs can object thereto, and contend that the south line of the Knott tract was improperly located. Mrs. Cobbs therefore is interested in a decree ascertaining and fixing the southeastern corner and southern line of the Knott tract or parcel of land, and petitioner prays that Mrs. Cobbs be made a party defendant to this suit. The court allowed the amendment, and Mrs. Cobbs was made a party defendant. The deed showing the chain of conveyances putting title in petitioner, Knott, and Mrs. Cobbs are all attached to the petition as exhibits.

Knott demurred to the amendment on the grounds, among others, that the amendment seeks to bring into the case a party defendant who has no common interest with the defendant, and is an improper party to be joined with him, that if Mrs. Cobbs has encroached upon the south side of the property claimed by the plaintiff, the defendant is in no way interested in the suit, and the plaintiff should assert her rights in a distinct suit against Mrs. Cobbs, and that if the amendment should be allowed, the suit would be multifarious, in that it would embrace separate and distinct causes of actions against separate and distinct parties. This demurrer was overruled, and Knott excepted to this ruling, and to the refusal of a new trial after verdict which was adverse to him.

Jos. W. & Jno. D. Humphries and Herbert A. Sage, all of Atlanta, for plaintiff in error. P. H. Brewster, J. L. Mayson and Wimbish & Ellis, all of Atlanta, for defendant in error.

BECK, J. (after stating the facts as above). [1] 1. We are of the opinion that the court erred in overruling the demurrer to the amendment seeking to make Mrs. Cobbs a party defendant to this case. Clearly she has no common right with the plaintiff or with the defendant. Under the allegations in the petition and in the proposed amendment, when they are considered together, it distinctly appears that the description of the property which was conveyed by Leak to Loftin in 1885 was made with reference to the prior conveyances of Ratteree to Pritchett, Ratteree to Waters, and Waters to Knott, executed, respectively, in 1870, 1871, and 1882. These three deeds last referred to, especially the deed from Waters to Knott, conveying eight acres in 1882, fixed definitely and absolutely the southeast corner of the tract of land conveyed to Knott, and the southern line of Knott's property; and the northern boundary of the land now claimed by Mrs. Mc-

Whirter, which was first carved out of the land conveyed by Batters to Leak when Leak sold to Loftin, was made identical with the line constituting the southern boundary of Knott's tract of land acquired by him from Waters, or from Waters and Eskridge. There was nothing indefinite about the location of that southeast corner of Knott's land or of the southern boundary. If it afterwards became indefinite, it was because Knott crossed his southern line, and invaded territory belonging to Leak, or to Leak's successors in title, to whom had been conveyed the land immediately adjoining the tract of eight acres described in the conveyance by Waters to Knott. When in 1885 Leak conveyed to Loftin the 4.41 acres of land bounded on the north by the southern boundary of Knott's 8 acres of land, Knott could not have acquired any prescriptive title, as against Leak's grantee, Loftin. If by subsequent adverse possession he acquired a good prescriptive title to the strip of land south of the southern boundary of his land, as fixed by his deeds to the 8 acres of land, it was acquired to the loss of those who held, through subsequent conveyances, from Loftin; and if Knott acquired in this way a prescriptive title to a strip of land on the northern part of the 4.41 acres of land conveyed by Leak to Loftin, it in no way affected Mrs. Cobbs' title with which she became vested under the deed executed in 1800 by her father, H. F. Leak. If the title to any part of the land which Leak's deed to his daughter, Mrs. Cobbs, purports to convey, fails, it will be not because of any title to a strip of land acquired by Knott along the northern portions of the 4.41 acres of land, but because it embraces a part of the land which Leak had formerly conveyed to Loftin. For, examining the deed from Leak to his daughter, it seems to convey (though this may be an ambiguity) the land in land lot 134, "except eight (8) acres on the north line in the old field between the big road and the Macon and Western and Central R. R. right of way." The description we have just quoted may be ambiguous and open to this objection; but that does not affect what we have said above, that the title to the 8 acres of land to which Knott holds written title, and the 4.41 acres conveyed by Leak to Loftin, and thence, by subsequent conveyances, to the plaintiff, is not affected by the deed which Leak executed to Mrs. Cobbs, it being subsequent in date of execution and record to the deed to Loftin, through whom Mrs. McWhirter derives title, and to the deed to Knott. There can be no controversy between Knott and Mrs. Cobbs, nor has he any common interest with her. And the demurrer to the amendment seeking to make Mrs. Cobbs a party should have been sustained.

[2] 2: The court having erroneously overruled the demurrer offered by the defendant to

the amendment to the petition, what took place in the trial subsequently to the overruling of the demurrer was entirely nugatory; and it is unnecessary to pass upon the questions that were raised as to the rulings of the court during the progress of the trial, and as to certain portions of the charge to the jury. Louisville & Nashville R. Co. v. Reece, 136 Ga. 394, 71 S. E. 675.

Judgment reversed. All the Justices concur.

(140 Ga. 306)

STANLEY et al. v. CITY OF GLENNVILLE et al.

(Supreme Court of Georgia. July 18, 1913.)

(Syllabus by the Court.)

1. RELIGIOUS SOCIETIES (§ 18*) — DEEDS — CONSTRUCTION—BREACH OF CONDITIONS.

Where title was conveyed by an individual to trustees of the Baptist Institute of the Baptist Union Association, which had been incorporated (whether by consent of the Union Association or not), and such trustees, with the consent of the Union Association, conveyed the property to the deacons of a certain Baptist church, referring in the deed to a resolution of the association which made certain provisions as to the conducting of the school on the property by the grantees, and declared that in case of a willful violation thereof "the deed should be null and void, and the property revert back to the association," if this reference constituted the resolution a part of the deed and created a condition subsequent, upon a breach thereof the title would revert to the trustees of the institute, and would not pass to the unincorporated Baptist Union or its individual members.

(a) The plaintiffs were not shown to be trustees of the institute; but it was alleged that they were the executive committee of another named Baptist association, and were trustees of each of the two associations, appointed for the purpose of bringing this suit and recovering and holding the property in trust for the members of such association.

(b) The other association did not appear from the petition to have any interest in the transaction.

[Ed. Note.—For other cases, see Religious Societies, Cent. Dig. §§ 111-129; Dec. Dig. § 18.*]

2. PRINCIPAL AND AGENT (§ 171*)—RELIGIOUS SOCIETIES (§ 20*)—AUTHORITY OF AGENT—SALES—RIGHT TO ATTACK.

If the Union Association should be considered as principal and the trustees of the institute as agents, the resolution passed by the former, fairly construed, authorized a conveyance of the school property, and not merely of the house, with no land.

(a) A principal cannot receive and hold the proceeds of a sale by his agent, and at the same time attack the authority of the agent to sell.

[Ed. Note.—For other cases, see Principal and Agent, Cent. Dig. §§ 644-655; Dec. Dig. § 171.* Religious Societies, Cent. Dig. §§ 130-143; Dec. Dig. § 20.*]

Error from Superior Court, Tattnall County; W. W. Sheppard, Judge.

Action by R. M. Stanley and others against the City of Glennville and others. Judgment for defendants, and plaintiffs bring error. Affirmed.

Way & Burkhalter, of Reidsville, for plaintiffs in error. C. L. Cowart, of Glennville, and Hines & Jordan, of Atlanta, for defendants in error.

LUMPKIN, J. A petition was filed by Stanley and others, "in their own behalf and as the executive committee and trustees of an organized religious society known as the Tattnall Baptist Association, and a religious society known as the Baptist Union Association." It was alleged that the Tattnall Baptist Association was composed of 15 churches, with a total membership of 1,145, and that the Baptist Union Association was composed of 8 churches, having a total membership of 608. The purpose was to have a deed from the trustees of the Baptist Institute to the deacons of the Philadelphia Baptist Church of the Union Association, and one from the latter to the city of Glennville, canceled, and to obtain other incidental relief. The petition was dismissed on demurrer, and the plaintiffs excepted.

[1] 1. The petition did not disclose that the Tattnall Baptist Association had any interest in the matter at all. It did allege in the first paragraph that the plaintiffs and the members of the two associations were joint owners of the tract of land to recover which suit was brought against the city of Glennville. But in the fourth paragraph the plaintiffs alleged that they and the parties represented by them acquired title under a deed executed on October 13, 1891, by James J. Barnard to George W. Smith and others, "as trustees of the Baptist Institute of the Baptist Union Association, and their successors, the said parties named as trustees being, at the time of the said conveyance, trustees of the said Baptist Union Association and incorporated as such trustees by the superior court of the said county of Tattnall on the 13th day of April, 1891, for the purpose of receiving the said property and holding the same in trust for the members of the said Baptist Union Association, and for the purposes of promoting the general design and looking after the general interest of a school or academy to be established on the said lot or parcel of land, to be known as the Baptist Institute of the Baptist Union Association." It will thus be seen that, while the plaintiffs alleged that the members of the Tattnall Baptist Association were part owners of the property, the deed under which they claimed showed no interest in the members of that association.

We will therefore consider the matter only with reference to the Baptist Union Association. That association had no title conveyed to it or its members, but the title was conveyed to trustees of an institute, who had been incorporated for the purpose, as alleged in the original petition. And though by amendment it was alleged that the trustees of the institute as such obtained a char-

ter from the superior court after their appointment by the Baptist Union Association as trustees of the institute, and without any authority from the Baptist Union Association for that purpose, this did not make the conveyance operate as one to general trustees of a church for church purposes; but, whether they were incorporated or not, the deed conveyed the title to the trustees of the institute. These trustees, who held the legal title, made a conveyance to the deacons of the Philadelphia Missionary Baptist Church. The deed contained a recital that it was made in pursuance of a resolution passed by the Union Baptist Association. From a copy of the resolution attached to the plaintiffs' petition it appears that it was resolved that the association should convey the property to the Philadelphia Baptist Church. Certain provisions were therein made in regard to the manner in which the institute should be conducted and it was declared that for a willful violation of any of such provisions "the deed should be null and void, and the property revert back to the Union Association." If the deed from the trustees of the institute to the deacons of the Philadelphia Baptist Church was rendered null and void by reason of the breach of a condition subsequent on the part of the grantees, the title would be in the grantors; and this is true, whether the grantors be considered as individuals or as forming a body corporate. There could not be a reversion to those who never had title. The language of the resolution cannot be construed as creating a conditional limitation over to a third person. Moreover, it does not appear that the Baptist Union Association was incorporated, so as to be able to take title or to bring suit as an entity. *Kelsey v. Jackson*, 125 Ga. 113, 50 S. E. 951. The trustees of the institute were not parties, and it did not appear that the plaintiffs were successors to those who signed the deed. According to the allegations, it seems that the plaintiffs were elected trustees of the two Baptist associations, and for the purpose of suing and holding what they might recover. They were not trustees of the institute, but rather trustees for litigation. Nor could the plaintiffs, as trustees of such association, or as individuals, bring suit to recover the property, based on a reversion because of a condition subsequent broken, inasmuch as it does not appear that the plaintiffs in any capacity ever had title, or that there was any reversion to them. In so far, therefore, as the case is based upon the idea of a reversion because of the breach of a condition subsequent on the part of the deacons of the Philadelphia Baptist Church, the plaintiffs showed no title which they could enforce.

[2] 2. The plaintiffs also sought to deny the authority of the trustees of the institute to sell anything but the building. While one part of the resolution declared that "the build-

ing known as the Baptist Institute of Glennville" should be conveyed to the Philadelphia Baptist Church of Glennville, yet in other parts of the resolution reference was made to the school property as a whole, and to the operation of it as a whole. Fairly construed, it is evident that it was intended that the school lot, as well as the house itself, should be conveyed. Moreover, if it were sought to attack the act of the grantors on the ground that they were agents who exceeded their authority, it appeared that a consideration was paid, and that there was nothing to show that the alleged principals did not receive and retain such consideration, or that they ever tendered it back.

The plaintiffs showed no title in themselves, and there was no error in sustaining the demurrer to the petition.

Judgment affirmed. All the Justices concur.

(140 Ga. 318)

CRUMP v. CRUMP et al.

(Supreme Court of Georgia. July 18, 1913.)

(Syllabus by the Court.)

EXECUTION (§ 245*) — CONFIDENTIAL RELATIONS—SALE.

Where one was present at a sale of land under a *fi. fa.* issued from a justice court, and participated in the sale by assisting and aiding the purchaser, who was his mother, and to whom he sustained confidential relations, by loaning her money with which to make the purchase and making such "arrangements" as were necessary, he being present "for the purpose of protecting his mother" in what she did, he could not afterwards, having subsequently to the date of the sale bought the interest of the defendant in *fi. fa.*, attack the sale on the ground that it was void, because the *fi. fa.* was not properly backed and the levy was excessive.

[Ed. Note.—For other cases, see *Execution*, Cent. Dig. §§ 681-686; Dec. Dig. § 245.*]

Error from Superior Court, Banks County; C. H. Brand, Judge.

Action for partition between R. T. Crump and J. W. Crump and others. From the granting of a new trial, R. T. Crump brings error. Reversed.

One of the heirs at law of R. G. Crump, deceased, made application for partition of a tract of land in Banks county. It appears from the pleadings and admissions duly made that the widow of said deceased had a life estate in said land, that she was dead, and that there were several children, each originally owning, at the death of their father, R. G. Crump, one undivided seventh vested remainder interest in the land in question. It was mutually admitted that R. T. Crump had purchased and owned the interest of T. R. Crump, and thus owned two-sevenths; that J. W. Crump, one of the respondents, had purchased and owned the interest of W. F. Crump, another of the heirs, and thus

owned two-sevenths; and that two of the heirs, Mem Crump and Mary E. Kealer, each owned one-seventh, their original shares. But R. T. Crump claimed to own a third seventh, originally belonging to J. C. A. Crump, through a sheriff's deed under levy and sale to the mother, Mrs. A. H. Crump, and a deed of gift from Mrs. A. H. Crump to R. T. Crump. On the other hand, J. W. Crump claimed to own this seventh under a deed direct from J. C. A. Crump.

An order was passed, agreed on by counsel for the respective parties, that certain commissioners appointed should so divide the land as to give R. T. Crump two-sevenths, J. W. Crump two-sevenths, Mem Crump one-seventh, Mary Kealer one-seventh, and should lay off one-seventh for the interest or share of J. C. A. Crump, and that the question of ownership of this last seventh part should be determined by trial. J. C. A. Crump, having been made a party, appeared and set up a claim to this share. After hearing evidence offered on the trial of this issue, the court directed the jury to return a verdict that the seventh interest belonging originally to J. C. A. Crump belongs to R. T. Crump, and not to J. W. Crump or J. C. A. Crump. J. W. Crump filed a motion for new trial. The motion was sustained, and a new trial granted. R. T. Crump excepted.

H. H. Perry, of Gainesville, for plaintiff in error. W. B. Little and Geo. L. Goode, both of Carnesville, for defendants in error.

BECK, J. (after stating the facts as above). We are of the opinion that the verdict directed by the court was demanded under the pleadings and evidence in the case, and that, having properly directed the verdict, the judge erred when subsequently, upon motion of one of the losing parties, J. W. Crump, he set it aside. Whether or not the sale of the interest of J. C. Crump in the lands in question, which was made by the sheriff of Banks county in the year 1885, would be held to be void on the ground that the levy was excessive, or on the ground that the *fi. fa.*, which was levied by a bailiff of Banks county, and under which the sale took place, was not backed by a justice of the peace or a notary public of Banks county, if the question were raised by a party entitled to make such a question, we think that the defendant in error was clearly estopped from making that issue. He was present at the sale; he knew or could have known all of the facts upon which he now bases the contention that the sale was void; and yet under his own evidence it appears that he participated in the proceedings which resulted in the sale of the land to his mother. With her he gave a note for the principal and interest due on the *fi. fa.*, leaving the *fi. fa.* to proceed for the cost, which was not paid. The mother was a bidder at that sale, and he was there with her. The

defendant in error himself testified that the sheriff put up the land "to sell for the costs, and she bought it in for the costs. I furnished the money, \$5, and mother paid it. I loaned her the money. I was with her. I helped her make all the arrangements—trying to protect her in it. I was with her for that purpose. I was with mother to protect her, and try to keep her from being broke up. I was here as long as the sale lasted. I let her have \$5 to pay that cost; that was what went to the sheriff. I helped her make all the arrangements she made that day."

Considering the relations of the defendant in error to his aged mother, who was being protected by him and assisted by him at the sale, the fact that he loaned her the money to make the purchase, and that he made all the arrangements for her in the purchase and participated in the sale, we do not think that there can be any doubt that he is estopped from now asserting that the mother, whom he had assisted in making the purchase at the sheriff's sale and in obtaining the sheriff's deed executed in pursuance of that sale, did not obtain a title to the land which she purchased. Code, §§ 4627, 4628. See, also, in this connection, *Reichert v. Voss*, 78 Ga. 54, 2 S. E. 558; *Crosby v. Meeks*, 108 Ga. 126, 83 S. E. 913; *Bourquin v. Bourquin*, 120 Ga. 115, 47 S. E. 639. And, that being true, this plaintiff in error, her grantee in a deed duly executed, also obtained title; and, the evidence showing this being uncontroverted, the court, as said above, properly directed a verdict in favor of R. T. Crump, and should have permitted it to stand.

Judgment reversed. All the Justices concur.

(140 Ga. 430)

WHITFIELD et al. v. MEANS.

(Supreme Court of Georgia. July 21, 1913.)

(Syllabus by the Court.)

1. WILLS (§ 627*)—CONSTRUCTION.

Item 7 of a will contained the following language: "I give, bequeath, and devise to my daughter, Mary E. Means, wife of John S. Means, lot No. — of my tract of land lying in said county, on Middle river, now owned by me, whereon I now live, to have said lot of land No. — to her and her children and to the exclusion of all other persons whatever, said lot of land in fee, to her and her child and children, all rights thereto appertaining." This was a devise to Mrs. Means and her children, and vested title in her and such of her children as were living at the date of the will and at the death of the testator, as tenants in common. *McCord v. Whitehead*, 98 Ga. 381, 25 S. E. 767.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 1452-1459; Dec. Dig. § 627.*]

2. WILLS (§ 627*)—CONSTRUCTION.

The direction in a subsequent item of that will that certain named grandchildren of the testator be paid by Mary E. Means and other named children of the testator a certain sum of money in lieu of the grandchildren's proportionate part of the real estate, connected with the recital that the testator had bequeathed all

of his land to his daughter, Mary Means, and other children, would not authorize a different construction of the provisions of item 7 from that which we have given it in the preceding headnote.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 1452-1459; Dec. Dig. § 627.*]

3. TENANCY IN COMMON (§ 38*)—UNLAWFUL OUSTER—RIGHT OF ACTION.

It follows that, where one of the children of Mary E. Means took possession of the lands devised in item 7 of the will, having purchased the interest of Mary Means, the mother, and having ousted the other tenants in common, the tenants in common so ousted could maintain an action for the recovery of their interest in the land.

[Ed. Note.—For other cases, see Tenancy in Common, Cent. Dig. §§ 100-104, 107-118; Dec. Dig. § 38.*]

4. DEMURRER TO PETITION.

The court erred in sustaining a general demurrer to the petition.

Error from Superior Court, Franklin County; D. W. Meadow, Judge.

Action by Mrs. A. M. Whitfield and others against T. B. Means. Judgment for defendant, and plaintiffs bring error. Reversed.

Mrs. A. M. Whitfield, Hugh Means, and others brought their action for the recovery of certain land against T. B. Means, the brother of petitioners, alleging that they and T. B. Means were the children of Mary E. Means, and were the joint owners and tenants in common of the land sued for, which had formerly belonged to Thomas J. Langston, who died in the year 1885, leaving a will, the seventh and ninth items of which were as follows:

"Item Seventh. I give, bequeath, and devise to my daughter, Mary E. Means, wife of John S. Means, lot No. — of my tract of land lying in said county, on Middle river, now owned by me, whereon I now live, to have said lot of land No. — to her and her children and to the exclusion of all other persons whatever, said lot of land in fee, to her and her child and children, all rights thereto appertaining."

"Item Ninth. I desire and direct that my grandchildren, namely, Joel T. Langston, Rebecca E. Viles, wife of John T. Viles, Georgia B. Langston, children of Reuben B. Langston, deceased, be paid by William F. Langston, Nancy Aderhold, Mary E. Means, and Martha M. Means the sum of — in lieu of their proportional share of my real estate, having bequeathed my entire tract of land to said William F. Langston, Nancy W. Aderhold, Mary E. Means, and Martha M. Means, said proportional share as the said Reuben B. Langston, deceased, would be entitled to was he living at the time. Each share being individually paid to them individually and remain their individual property."

The plaintiffs alleged that, under the provisions of item 7 of the will, they became tenants in common with their mother and their brother, T. B. Means, and that T. B.

Means had by purchase acquired the interest of their mother in the lands, and had done and performed such acts as amounted to an ouster of petitioners.

Jas. H. Skelton, of Hartwell, for plaintiffs in error. J. N. Worley, of Elberton, and W. R. Little, of Carnesville, for defendant in error.

BECK, J. Judgment reversed. All the Justices concur.

(140 Ga. 342)

WARE & HARPER v. MYRICK BROS.

(Supreme Court of Georgia. July 19, 1913.)

(Syllabus by the Court.)

BROKERS (§ 56*)—RIGHT TO COMMISSION.

An allegation that the plaintiffs, as brokers and sales agents, had effected a trade for a certain pool room and near-beer saloon at 170 Edgewood avenue, in the city of Atlanta, was not supported by proof that the plaintiffs had procured a purchaser willing, ready, and able to buy, provided the business of selling near beer and conducting a pool room at that place was not, upon the re-establishment of the zone within which such business could legitimately be conducted, excluded from such zone, when the evidence showed that 170 Edgewood avenue was not within the zone within which the business referred to could be conducted after the re-establishment of the district or territory where such a business would be lawful. The evidence of the plaintiffs failed to support the essential allegation of the petition, and a nonsuit was properly directed.

[Ed. Note.—For other cases, see *Brokers*, Cent. Dig. §§ 85-89; Dec. Dig. § 56.*]

Error from Superior Court, Fulton County; J. T. Pendleton, Judge.

Action by Ware & Harper against Myrick Bros. Judgment for defendants, and plaintiffs bring error. Affirmed.

Moore & Pomeroy and W. W. Hood, all of Atlanta, for plaintiffs in error. Evins & Spence and F. E. Radensleben, all of Atlanta, for defendants in error.

BECK, J. Ware & Harper, a firm, alleging that they were engaged in the brokerage and commission business for the sale of real estate and "business propositions," brought suit against Myrick Bros., alleging, in the first count, that the defendants, "about the 19th day of May, 1911," placed with petitioners for sale a certain near-beer saloon and pool room on Edgewood avenue, being then operated by Myrick Bros., agreeing to pay petitioners the sum of \$200 upon finding a purchaser therefor; that during the agency they found a person able, willing, and ready to purchase, and who actually purchased, said property in accordance with said contract; and that petitioners' commissions were therefore earned. In the second count it is alleged that, on or about the date above named, petitioners procured and interested a proposed purchaser, one S. M. Dunn, for a cer-

tain near-beer saloon and pool room owned by the defendants, located on Edgewood avenue, in the city of Atlanta; that the defendants accepted the benefits of the services of petitioners in the matter, and sold said saloon and pool room to the purchaser found by petitioners; and that the defendants thereby became liable for the value of such services, to wit, \$200. After hearing the evidence, the court granted a nonsuit, and the plaintiffs excepted.

The grant of a nonsuit was unquestionably right. The evidence introduced by plaintiffs shows that they did procure a purchaser for the fixtures and stock of defendants' pool room and near-beer saloon, located at 170 Edgewood avenue. The fixtures and stock here referred to are what are referred to in the contract as the "business proposition" for which the plaintiffs were to find a purchaser. But while they found a purchaser for this "business proposition" at 170 Edgewood avenue, according to the evidence "it was understood that, if the license at 170 Edgewood avenue could not be renewed, there would be no sale." The "zone" within which near beer could be sold was re-established, and did not include 170 Edgewood avenue; and consequently, as agreed with Dunn, the proposed purchaser, the sum of \$100, which he had paid to bind the trade, was returned to him in accordance with the understanding that, if the near-beer "zone" should be so restricted as not to include 170 Edgewood avenue, the sale should not be consummated. All negotiations for the sale of the near-beer saloon and pool room in the place where Myrick Bros. were conducting the business at the time they entered into the contract with Ware & Harper, to wit, at 170 Edgewood avenue, were terminated. And, according to the evidence introduced by the plaintiffs themselves, when the \$100 which had been paid to Ware & Harper to bind the trade was returned to Dunn, Myrick Bros. did not have a lease on the property at 142 Edgewood avenue. There was no trade pending, and the relations of the proposed purchaser with Ware & Harper ceased, when the money was returned to Dunn, and he then abandoned all idea of purchasing the property. Subsequently Myrick Bros., it seems, did lease a room or store at 142 Edgewood avenue, and moved the furniture and other personal property which they had sought to sell through Ware & Harper from 170 Edgewood avenue to 142 Edgewood avenue. Some time after the trade between Ware & Harper and Dunn had been finally abandoned, one of the firm of Myrick Bros. sent for Dunn and asked him if he would consider a trade at 142 Edgewood avenue, to which Dunn replied in the affirmative, and a trade was agreed upon and the purchase price fixed. Ware & Harper did not have anything to do with this last transaction.

There is nothing in the evidence tending to establish the allegations in the petition that the plaintiffs had sold the near-beer saloon and pool room at 170 Edgewood avenue. There was a conditional sale of this "business proposition," as it is termed in the contract; but the evidence for the plaintiffs shows that the contingency, upon the happening of which the trade was to be declared noneffective, actually happened. In brief, the plaintiffs undertook to handle for sale a "business proposition" at 170 Edgewood avenue, and they did not handle it. The sale of the same physical property at 142 Edgewood avenue was an entirely different proposition from that which they had undertaken to sell for the defendants.

Judgment affirmed. All the Justices concur.

(140 Ga. 302)

KENNEDY v. JONES.

(Supreme Court of Georgia. July 18, 1913.)

(Syllabus by the Court.)

1. BILLS AND NOTES (§ 510*)—PRESENTMENT—TIME—EVIDENCE—PAYMENT BY CHECK OF THIRD PERSON.

In a suit by a vendor of land against a vendee to recover a part of the purchase money, where one of the pleas of the defendant was that the plaintiff received certain checks for the amount of money sued for, which he failed to present within a reasonable time, and that on account of the drawer's insolvency, occurring between the receipt of the checks by the vendor and their presentation to the drawee bank, the checks were not paid, an admission by the plaintiff that he had the checks 10 days after he received them and used them to pay for land purchased from another is relevant on the issue of presentation within a reasonable time.

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. §§ 1746-1759; Dec. Dig. § 510.*]

2. BILLS AND NOTES (§ 510*)—PRESENTMENT—PAYMENT BY CHECK OF THIRD PERSON—EVIDENCE.

Where it is relevant to show that, if a check had been promptly presented, it would have been honored by the drawee bank, it is competent for a witness to testify that the drawer gave him a check for about the same sum a few days later on the same bank, which was paid and credited to his account by the bank before the presentation of the dishonored check; and the witness' deposit book containing the entry is admissible in connection with his testimony.

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. §§ 1746-1759; Dec. Dig. § 510.*]

3. BILLS AND NOTES (§§ 404, 498*)—BURDEN OF PROOF—CHECK.

A vendor of land, who receives from his vendee the check of a stranger, payable to and indorsed by a third person, to be collected and its proceeds applied to the payment of the purchase money, is bound to exercise reasonable diligence in the presentation of the check; and if he is lacking in such diligence, and the check is dishonored because of the drawer's insolvency intervening before its presentment, the loss will fall on the vendor. Although the drawer may be overdrawn in his account with the drawee, nevertheless, if the latter receives

deposits from the drawer and pays his checks, it is the duty of a holder of a check of such drawer to present it, with reasonable diligence, to the drawee.

The instruction of the court, even if subject to the criticism of its verbiage, was in essential harmony with the foregoing principles, and, when considered in connection with the evidence, is not ground for a new trial.

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. §§ 1091-1099, 1101-1103, 1688-1694; Dec. Dig. §§ 404, 498.*]

(Additional Syllabus by Editorial Staff.)

4. BILLS AND NOTES (§ 1*)—"CHECKS."

A "check" is a commercial device intended to be used as a temporary expedient for actual money, and is generally designed for immediate payment, and not for circulation.

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. § 1; Dec. Dig. § 1.*]

For other definitions, see Words and Phrases, vol. 2, pp. 1109-1112; vol. 8, p. 7600.]

Error from Superior Court, Tattnall County; B. T. Rawlings, Judge.

Action by S. C. Kennedy against L. W. Jones. Judgment for defendant, and plaintiff brings error. Affirmed.

H. C. Beasley, of Reidsville, and Hines & Jordan, of Atlanta, for plaintiff in error. Way & Burkhalter, of Reidsville, for defendant in error.

EVANS, P. J. S. C. Kennedy sold to L. W. Jones a tract of land for \$1,500. Jones paid the purchase money by paying \$463.93 in cash, and by delivering to J. D. Kennedy, for S. C. Kennedy, two checks, dated Glenville, Ga., January 4, 1908, drawn by W. R. Purvis on the People's Bank at Glenville, Ga., both payable to the order of B. F. Dowdy, for the sum of \$508.02 each, and both indorsed by Dowdy. The checks were delivered on January 6, 1908. On January 16th Kennedy delivered these checks to L. B. Dukes in part payment of a tract of land which he had bought from Dukes in Wayne county, Ga. Dukes deposited these checks in the Merchants' & Farmers' Bank of Jessup January 18, 1908, and they were forwarded to the Citizens' & Southern Bank of Savannah, Ga., which latter bank forwarded them February 6, 1908, to the bank at Glenville, for collection. The payee bank declined to pay the checks, because the drawer had no funds sufficient to pay them. It appeared from the evidence that during the interval between the drawing and the presentation of the checks the account of W. R. Purvis was overdrawn; but it also appeared that during this time he had made numerous deposits and drawn several checks, which were paid by the drawee bank. The amount of the deposits was largely in excess of the checks dishonored. When the checks were dishonored, Kennedy sued out an attachment against Jones for so much of the purchase money of the land sold by him to Jones as was represented by the checks. The defendant pleaded that he was not indebted, because the checks

were accepted in payment of the land, and because of the delay in presenting the checks for payment by Kennedy and his transferee, alleging that the drawer had become insolvent after giving the checks, and for this reason the money could not be made out of him. The jury found in favor of the defendant, and the plaintiff's motion for a new trial was overruled by the court.

[1] 1. The court allowed in evidence a plea filed by the plaintiff, Kennedy, to a suit brought against him by L. B. Dukes. It appeared from that plea that the checks drawn by Purvis on the Glenville bank in favor of Dowdy, which were delivered by Jones to Kennedy in part payment of the land, had been used by Kennedy in paying for the land bought from Dukes. Kennedy averred in that plea that these checks were delivered to Dukes on January 16, 1908, and were accepted by him as payment for the land purchased. The evidence was objected to on the ground of irrelevancy. The evidence was not irrelevant. It was admitted in that plea that Kennedy was in possession of the checks as late as January 16th, and this was relevant to the issue as to whether or not he acted with reasonable promptness in the collection of the checks.

[2] 2. A witness was allowed to testify that the drawer of the checks delivered by Jones to Kennedy also gave him a check on the same bank at a time between the drawing and the dishonor of the checks in controversy, which was paid and credited to his account by the bank. The witness identified this item in his deposit book. The deposit book was then offered in evidence, and was admitted over objection. The testimony was admissible, and so was the book in connection with the testimony.

[3, 4] 3. A check is a commercial device intended to be used as a temporary expedient for the actual money. It is generally designed for immediate payment, and not for circulation, and therefore it becomes the duty of the holder to present it for payment as soon as he reasonably may; and, if he does not, he keeps it at his own peril. *Daniels v. Kyle*, 5 Ga. 245; *Comer v. Dufour*, 95 Ga. 378, 22 S. E. 543, 80 L. R. A. 800, 51 Am. St. Rep. 89. Most usually the question of prompt presentation arises in cases of attempts to hold the drawer or indorser liable because of the subsequent insolvency of or suspension of payment by the drawee. But where a vendor of property receives a check drawn by a stranger in favor of a third person for the payment of property, and there is no agreement that it is taken as an absolute payment, the vendor, who thus becomes the holder, is under a duty to his vendee to present the check to the drawee with reasonable promptness; and if, by failing to do so, the check is not paid, because either of the drawer's or drawee's intervening insolvency,

the loss must fall on the vendor. There may be conditions which will excuse the holder's delay in making presentation, as where the drawer has no funds and no ground for a reasonable expectation that the check will be paid. 5 Cyc. 533. The basis for this excuse is that the law does not require a vain thing. The burden is upon the holder to show such excuse. If it appears that at the time the check was drawn the drawer had an arrangement with the drawee to honor the check, or from a course of business dealings such an arrangement might be implied, or that subsequently sums of money in excess of the check were paid by the drawee on other checks, the holder will not be relieved of the duty of exercising due diligence in the presentation of the check, because it cannot be said that if the check had been presented with reasonable promptness it would not have been paid. *Hamlin v. Simpson*, 105 Iowa, 125, 74 N. W. 906, 44 L. R. A. 397; *Robinson v. Ames*, 20 Johns. (N. Y.) 146, 11 Am. Dec. 259.

The circumstance that the drawer may have overdrawn his account, and there may not have been anything to his credit, will not necessarily excuse want of presentation of the check of the holder with due diligence. For, as we have seen, either from an express or implied agreement between the drawer and drawee, or from their course of dealings, the drawer may have had a reasonable expectation for the payment of his check, and the holder would be under a duty to use reasonable diligence in its presentation. In the instant case it appears that in the interval between the drawing of the check and its presentation the drawee paid numerous checks of the drawer, the aggregate being largely in excess of the amount of those in controversy. The plaintiff resided within seven miles of Glenville. He gives no reason whatever for retaining the checks without presentation to the bank; and it appears that on the day that he, in company with his father, left for Wayne county, they spent a part of the day in Glenville, having the checks in their possession, and they discussed the advisability of presenting them for payment. Of their own volition they preferred not to present the checks, but retained them to be used in the purchase of the Wayne county land. The plaintiff's transferee deposited them with his bank, and 30 days elapsed before their presentation to the drawee bank. This evidence came from the plaintiff, and was not in dispute. The jury were well authorized to find that the failure to collect the checks was due to the plaintiff's negligence in presenting them. Under such circumstances, the charge of the court complained of, even if open to the criticism of its verbiage, was in such essential harmony with the law regarding the presentation of checks, as above enunciated, that there was

no abuse of his discretion in refusing to grant a new trial.

Judgment affirmed. All the Justices concur.

(140 Ga. 266)

ALEXANDER, SMITH & CO. v. FIRST NAT. BANK OF FRESNO.

(Supreme Court of Georgia. July 18, 1913.)

(Syllabus by the Court.)

1. WITNESSES (§ 37*) — EVIDENCE (§§ 157, 271*) — APPEAL AND ERROR (§ 1050*) — HARMLESS ERROR—SELF-SERVING DECLARATIONS.

The rulings of the court on the admissibility of evidence do not afford ground for reversal of the judgment.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. §§ 80-87; Dec. Dig. § 37;* Evidence, Cent. Dig. §§ 460-470, 1068-1079, 1081-1104; Dec. Dig. §§ 157, 271;* Appeal and Error, Cent. Dig. §§ 1068, 1069, 4153-4157, 4166; Dec. Dig. § 1050.*]

2. EVIDENCE (§ 231*) — CARRIERS (§ 58*) — CLAIM OF THIRD PARTY—PRIORITY—TRANSFER OF BILL OF LADING.

Where a packing company delivers to a common carrier goods to be transported to a distant point, consigned to the order of the shipper, with direction to notify a designated person at the place of delivery, and a bill of lading is duly issued by the carrier to the consignor, and the latter attaches the bill of lading to his draft for the price of the goods on the person to be notified, and delivers it with the bill of lading, which is indorsed in blank, to his bank to be placed to his credit on his general account, and the amount of the deposit is credited to the depositor's general account and drawn against by him, the bank acquires title to the goods represented by the bill of lading, which can be asserted against the lien of a subsequent attachment creditor of the consignor.

(a) On the trial of a claim case between the bank and a judgment creditor of the consignor, where the undisputed evidence shows that the bank, in the manner indicated in the preceding note, acquired title from the consignor before the levy of the attachment, the fact that after the bank had acquired title the consignor wrote letters seeking to induce the person to be notified to accept and pay for the goods, and others seeking to make disposition of the goods, would not affect the title of the bank, which had not received reimbursement to cover the advancement made to the consignor.

(b) The evidence demanded a verdict for the claimant.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 835-839, 852-859; Dec. Dig. § 231;* Carriers, Cent. Dig. §§ 179-190; Dec. Dig. § 58.*]

Error from Superior Court, Fulton County; W. D. Ellis, Judge.

Action by Alexander, Smith & Co. against the Malaga Packing Company, in which the First National Bank of Fresno filed a statutory claim to the property. Judgment for claimant on directed verdict, and plaintiffs bring error. Affirmed.

Thomas & King, of Atlanta, for plaintiffs in error. J. H. Porter, of Atlanta, for defendant in error.

ATKINSON, J. Alexander, Smith & Co., in Atlanta, Ga., sued out an attachment against the Malaga Packing Company, a nonresident, and caused it to be levied on certain peaches and raisins as the property of the defendant. The First National Bank of Fresno filed a statutory claim to all of the attached property. At the conclusion of the evidence on the trial of the claim case, the judge directed a verdict in favor of the claimant, and the plaintiffs excepted.

[1] 1. Error was assigned upon the ruling of the court permitting the cashier of the claimant bank to testify: "On August 31, 1909, the Malaga Packing Company deposited as cash a draft on Alexander, Smith & Co., of Atlanta, Ga., for \$2,547.87, and bill of lading was attached to said draft, covering 1,050 56-pound cases of peaches and 100 40-pound cases of seeded raisins. This draft was forwarded by the First National Bank of Fresno to Atlanta, for collection." This evidence was admitted over the objections: (a) That it was secondary evidence. (b) "Because it appears from the answer of the witness, heretofore given, that he was cashier of the First National Bank of Fresno; it appears from his answers that he could not possibly know of the facts to which he is attempting to testify; that his knowledge would necessarily be derived either from the books or from the receiving teller; he does not state that he knows of his own knowledge these things, but he says that a draft was deposited with the bank; now he does not state that it was deposited with him as cashier; on the contrary, it is generally understood, unless the proof is to the contrary, I should think it would be presumed that a deposit would necessarily be made with the receiving teller." There is no merit in these objections. The witness purported to give his personal information in regard to the matters testified about. He was subject to cross-examination, and further inquiry could have been made of him to develop the fact that his testimony was secondary, if it was such, or to develop the fact that he had not testified from his personal information, if such were the truth of the case. But further inquiry as to these matters was not made, and the testimony as introduced does not show that it was subject to the objections urged to its admissibility.

Another assignment of error was upon the ruling of the court in allowing the same witness to testify: "State whether you authorized any correspondence between Alexander, Smith & Co., and the Malaga Packing Company." The objection urged to this evidence was that it was irrelevant and a self-serving declaration. The plaintiff was contending that the claimant bank had not derived title from the defendant in execution by virtue of the assignment of the bill of lading, and, bearing on that question, introduced certain letters from the Malaga Pack-

ing Company to Alexander, Smith & Co., written subsequently to the assignment of the bill of lading, and calling upon Alexander, Smith & Co. to pay the draft. The testimony objected to was merely intended to show this correspondence was without authority from the claimant bank, and did not affect its right as a bona fide holder of the bill of lading for value. The evidence was not "a self-serving declaration" in any sense, and while it might have been irrelevant or immaterial on the theory that such evidence would not have defeated the title of the bank as a bona fide holder for value of the bill of lading (*Coker v. First Nat. Bank of Memphis*, 112 Ga. 71, 37 S. E. 122), the fact that it was admitted could not harm the plaintiff, nor furnish ground for a reversal of the judgment.

Error was also assigned on the ruling of the court admitting in evidence "the deposit slip and draft and bill of lading, which are marked Exhibits A, B, and C, respectively, which witness testified was deposited with the claimant bank, also certified copy of the account of the Malaga Packing Company with the First National Bank of Fresno, for a certain period as therein stated," over the objection that "there has been no proof that the money or draft called for by this deposit slip was actually deposited with the bank, the only evidence being that of the cashier, who, we submit, could not possibly, from the very nature of things, have knowledge of this fact." There was an additional objection to the admissibility of the draft and bill of lading on the ground that "there is no connection of the bill of lading with these particular goods." An examination of the evidence introduced by the claimant, and that introduced by the defendant in execution, shows plainly that the bills of lading referred to covered the goods which were levied upon. The cashier was a competent witness to testify that the draft was actually deposited with the bank, and that the bill of lading was delivered to the bank in connection with such deposit. The purport of his testimony as to these matters was that he was testifying from personal information. Accordingly, there was no merit in any of the objections urged to this part of the testimony.

[2] 2. The uncontradicted evidence shows the following in regard to the circumstances under which the claimant acquired title to the property levied on under the attachment. The Malaga Packing Company, the defendant in attachment, delivered to a common carrier for transportation certain peaches and raisins, for which three separate bills of lading were duly issued. The goods were consigned to the order of the consignor for delivery at Atlanta, Ga., and contained direction to "notify Alexander, Smith & Co." at the place of delivery. The bills of lading were indorsed

in blank by the Malaga Packing Company, and on the 31st day of August, 1909, the consignor made a draft for the price of the goods on Alexander, Smith & Co., to whom they had been sold, and attached to the draft so indorsed the bills of lading issued by the common carrier, and thereupon delivered the same to the First National Bank of Fresno. The Malaga Packing Company was a general customer of the bank, and the full amount of the draft was on the date mentioned above placed to the credit of the Malaga Packing Company, who thereafter proceeded to check against it and other deposits which were made from day to day. Alexander, Smith & Co. refused to accept the goods on arrival and declined to pay the draft, and the Malaga Packing Company did not repay to the First National Bank of Fresno the amount advanced to it. The attachment was not levied until October, about six weeks after the First National Bank of Fresno received the bill of lading and credited the Malaga Packing Company with the proceeds of the draft.

The reasoning in the case of *National Bank of Webb City v. Everett*, 136 Ga. 372, 71 S. E. 680, applies so aptly to the facts of this case that it is unnecessary to enter into a further discussion. According to the ruling in that case, the claimant bank was clothed with title which it could assert against the attachment creditor of the Malaga Packing Company. Stress was laid upon the fact that, after the bank became the holder of the draft and bill of lading, the Malaga Packing Company corresponded with Alexander, Smith & Co., endeavoring to induce them to accept the goods and pay the draft, and also wrote other letters in regard to shipping the goods to other persons for disposal; it being contended that evidence of this character tended to impeach the title of the claimant, and thereby raise a question for determination by a jury. But evidence of similar character was involved in the case of *Coker v. First Nat. Bank of Memphis*, supra, and it was held that notwithstanding such evidence the verdict for the claimant was demanded. In the case last cited the bill of lading was actually "indorsed over" by the claimant to the consignor of the goods to enable him to dispose of the goods for the exclusive benefit of the claimant. Under the doctrine of the case cited, the fact that the Malaga Packing Company had such correspondence as above indicated, looking to a disposition of the rejected goods and the collection of the draft, did not have the effect to impeach the title of the claimant, which had advanced money on the strength of the property represented by the bill of lading and had not been fully reimbursed. There was no error in directing a verdict in favor of the claimant.

Judgment affirmed. All the Justices concur.

(140 Ga. 263)

HARDIN v. ADAIR et al.

(Supreme Court of Georgia. July 18, 1913.)

*(Syllabus by the Court.)***EXECUTION (§ 256*)—SHERIFF'S SALE—RIGHTS OF BIDDERS—RESALE.**

While a bona fide bidder at a sheriff's sale, who is able to comply with his bid, has a right, where his bid is willfully disregarded by the officer offering the property for sale, to go into equity for the purpose of compelling a resale of the property, and to have the sale resumed at the point of his bid, provided such bidder acts with reasonable promptness, yet if he delays for an unreasonable time, and is thereby guilty of laches, equity will interpose a bar to his action. In the present case, a delay of two years after the sale, before the bringing of the suit to compel a resale, showed a lack of due diligence and an unreasonable delay.

[Ed. Note.—For other cases, see Execution, Cent. Dig. §§ 723-733; Dec. Dig. § 256.*]

Error from Superior Court, Fulton County; J. T. Pendleton, Judge.

Action by Kate G. Hardin against G. W. Adair and C. W. Mangum. Judgment for defendants, and plaintiff brings error. Affirmed.

On January 9, 1912, the plaintiff filed her petition against C. W. Mangum, sheriff of Fulton county, and George W. Adair, alleging as follows: Mangum, sheriff, exposed for sale, on January 4, 1910, a certain house and lot on West Peachtree street, in the city of Atlanta, under a certain *fi. fa.* George W. Adair bid \$48,000 for the property, and petitioner bid \$50,000. Although she was the highest bidder, the sheriff willfully and utterly disregarded her bid, and knocked the property down to Adair. On the day of the sale she went to the sheriff and offered to pay him the \$50,000, and he refused to take the money or to make her a deed. The property is worth \$100,000. She is ready and able to tender the \$50,000 into court, or give good security to guarantee an upset bid from her of \$50,000, if the court will order a resale of the property. She prays that the sale to Adair be set aside, that the property again be exposed for sale at the bid offered by petitioner, and that it be knocked down to her, or to such person as shall make a higher bid. The defendants demurred to the petition on various grounds, among others, on the ground that the petitioner's right of action was barred by reason of laches on her part in filing her equitable petition. The court sustained the demurrer generally, and the plaintiff excepted.

Lowndes Calhoun, of Atlanta, for plaintiff in error. Rosser & Brandon and Aldine Chambers, all of Atlanta, for defendants in error.

BECK, J. (after stating the facts as above). Under the facts of the case the court properly held that the petition should be dismissed. The plaintiff had been guilty of such laches

as would render it clearly unjust and inequitable at this date to enforce her demand for a resale of the property. Section 4369 of the Civil Code is as follows: "The limitations herein provided apply equally to all courts; and in addition to the above, courts of equity may interpose an equitable bar, whenever, from lapse of time and laches of the complainant, it would be inequitable to allow a party to enforce his legal rights." And we can scarcely conceive of a clearer case for the application of the provisions in reference to the interposition of the equitable bar than this. The property sold for \$48,000. The plaintiff's own bid was \$50,000, according to her allegations. There is no allegation that, except in the matter of not crying the plaintiff's bid, the sale was not conducted in such a way as to give every one attending full opportunity of bidding, and there is some presumption that the amount bid was in the neighborhood of the real value of the property. The property is alleged to be now worth \$100,000, a sum double in amount that of the plaintiff's bid. We do not think that a court of equity would tolerate—certainly not aid—a party in delaying the making of a claim, where delay would amount to giving to the party guilty of the delay an opportunity to speculate in the value of the property which she seeks to have resold. In the two years between the sale and the filing of the petition in the present case, she had an opportunity to watch the trend of the market for real estate in the locality in which the property in controversy is situated, and to ascertain whether it would be profitable or not to press her claim of a right to a resale or to abandon it. If bona fide she had desired to have a resale and to have opportunity of bidding on this property, she should have proceeded promptly. In reference to an analogous question, the substance of a decision of the Supreme Court of the United States is thus stated by Mr. Pomeroy, in his work on Equity Jurisprudence: "As the question whether the sale should be vacated or not depends upon the facts as they existed at the time of the sale, so, in taking proceedings to avoid such sale, the plaintiff should act upon his information as to such facts, and not delay for the purpose of ascertaining whether he is likely to be benefited by a rise in the property, since that would practically amount to throwing upon the purchaser any losses he might sustain by a fall, and denying him the benefit of a possible rise." 5 Pom. Eq. Jur. 47. Under the circumstances alleged in this petition, the plaintiff could not wait, and make her action in setting aside the sale dependent upon the question whether it is likely to prove a profitable speculation. *Id.* 47.

Although the statute in reference to the resale of land at administrator's sale, under Civil Code, § 8071, fixes no time limit within which sale must be had, this court held, in

the case of *Saunders v. Bell*, 56 Ga. 442, that "where, at an administrator's sale, property is bid off and the bidder refuses to take it, and the administrator elects to resell and proceed against the first purchaser for the deficiency arising from such sale, he must resell the property as soon as practicable; and if he delay, without the consent of the bidder, for 12 months, on the ground of stringency of the times, such delay will forfeit his right to recover, and a nonsuit will be properly awarded." In that case Bell was a bidder for the property, and it was knocked off to him at the amount of his bid, and afterwards he declined to comply with his bid and take the property. The administratrix, after delaying for 12 months, again offered the land for sale, and after receiving bids knocked it off at a certain price considerably less than Bell's bid at the first sale, and subsequently brought suit against Bell for the difference. Upon the trial of this suit the plaintiff was nonsuited upon the ground, among others, that she had not put up the land for resale until 12 months had elapsed from the time of the first sale. The excuse offered by the administratrix was the stringency of the money market and the hardness of the times. This court, in reference to this question, said: "We think that the court properly granted the nonsuit. The land should have been offered for sale again as soon as practicable. Any unreasonable delay, with the assent of the bidder, would put it in the power of the estate to speculate upon the bidder by selecting such time to resell as would be to the interest of the estate and adverse to that of the bidder." See, also, the case of *Roberts v. Smith*, 137 Ga. 30, 72 S. E. 410. In the case of *Duffey v. Rutherford*, 21 Ga. 363, 68 Am. Dec. 459, it was ruled: "At a sheriff's sale, A. bid \$1, B. bid \$2, A. bid \$3, and B. bid \$3.50; but the sheriff fraudulently refused to cry this bid, and knocked off the property to A. at \$3. Held, that B. had the right to go into equity, and have the sale resumed at the point of his bid." But in that case there is nothing to show that the plaintiff asking the resale did not move with reasonable promptness and diligence.

Judgment affirmed. All the Justices concur.

(140 Ga. 332)

FELTY v. SOUTHERN FLOUR & GRAIN CO.

(Supreme Court of Georgia. July 19, 1913.)

(Syllabus by the Court.)

1. SALES (§ 333*)—REMEDY OF SELLER—NOTICE OF RESALE.

If a vendee refuses to take and pay for goods bought, one of the remedies given the vendor by Civil Code 1910, § 4131, is: "He may sell the property, acting for this purpose as agent for the vendee, and recover the differ-

ence between the contract price and the price on resale." However, before the vendee will be liable for such difference, it must appear that he was notified of the vendor's intention to resell at the vendee's risk. *Green v. Ansley*, 92 Ga. 647, 19 S. E. 53, 44 Am. St. Rep. 110; *Davis Sulphur Ore Co. v. Atlanta Guano Co.*, 109 Ga. 607, 34 S. E. 1011; *Mendel v. Miller*, 126 Ga. 835, 837, 56 S. E. 88, 7 L. R. A. (N. S.) 1184.

(a) Nothing was said in *McCord v. Laidley*, 87 Ga. 221, 13 S. E. 509, contrary to what was held in the above-cited cases. It appears from the record in *McCord v. Laidley*, of file in this court, that the petition specifically alleged that notice of the resale was given to the vendee, and that on the trial such notice was proved by the plaintiff and not denied by the defendant. The record raised no point as to want of notice, and the opinion rendered in the case dealt only with the controlling points. That case, therefore, is not even a "physical precedent" for holding that notice to the vendee of resale at his risk is not necessary.

(b) The fact that the vendor tendered the goods and that the vendee refused to accept them is no reason why a notice of resale by the vendor at the vendee's risk should not be given. This is true because the right to recover the difference between the contract price and the price on resale is given to the vendor only where the vendee refuses to take and pay for the goods bought; and manifestly there could be no refusal to take the goods by the vendee unless he had the opportunity to take them—that is, unless they had been offered or tendered to him by the vendor. What was said in *Davis Sulphur Ore Co. v. Atlanta Guano Co.*, 109 Ga. 607, 34 S. E. 1011, to the effect that proof of tender of the goods and demand for payment by the vendor, and refusal by the vendee to take the goods or pay for them, would dispense with the necessity of notice to the vendee of the vendor's intention to resell at the vendee's risk, was not necessary to the decision there rendered, and the last sentence in the opinion clearly shows that the ruling made was distinctly put on the fact that the petition did not allege that the vendee was notified of the resale.

[Ed. Note.—For other cases, see *Sales*, Cent. Dig. § 919; Dec. Dig. § 333.*]

2. SALES (§ 339*)—TRIAL—NONSUIT.

The action being for the recovery of the difference between the contract price and the price on resale by the plaintiff of goods sold by the plaintiff to the defendant, which the latter refused to take and pay for, and there being no evidence of any notice to the defendant of the intention of the plaintiff to resell the goods at the defendant's risk, the plaintiff was not entitled to recover, and therefore the court properly granted a nonsuit.

[Ed. Note.—For other cases, see *Sales*, Cent. Dig. §§ 924, 926; Dec. Dig. § 339.*]

Error from Superior Court, Fulton County; J. T. Pendleton, Judge.

Action by A. Felty against the Southern Flour & Grain Company. Judgment for defendant, and plaintiff brings error. Affirmed.

Geo. B. Rush, of Atlanta, for plaintiff in error. Walter McElreath, of Atlanta, for defendant in error.

FISH, C. J. Judgment affirmed. All the Justices concur.

(140 Ga. 375)

RUNYAN v. HOBGOOD.

(Supreme Court of Georgia. July 19, 1913.)

*(Syllabus by the Court.)***JUSTICES OF THE PEACE (§ 135*)—EXECUTION—TRAVERSE OF RETURN—SUFFICIENCY.**

The statute provides that, except in cases where the defendant in a justice court *fi. fa.* points out levy land in his possession, a constable is without authority to levy such *fi. fa.* on land, unless there is no personal property to be found sufficient to satisfy the debt. Where a constable makes an entry on a justice court *fi. fa.* of "Due search made and no personal property found on which to levy this *fi. fa.*," it is no traverse of his return to simply allege that no search was made. In order to make an issue, it must be averred in the traverse that the defendant did have personal property on which to levy the *fi. fa.*

[Ed. Note.—For other cases, see *Justices of the Peace*, Cent. Dig. §§ 426-447, 749; Dec. Dig. § 135.*]

Error from Superior Court, Gordon County; A. W. Fite, Judge.

A traverse was filed by A. E. Hobgood to a constable's return on a *fi. fa.* issued after judgment, which traverse was sustained, and R. H. Runyan brings error. Reversed.

J. M. Lang, of Calhoun, for plaintiff in error. O. N. Starr, of Calhoun, for defendant in error.

EVANS, P. J. A justice court *fi. fa.* was levied on land, and a claim was interposed. Prior to the levy on the land the constable indorsed this entry on the *fi. fa.*: "Due search made, and no personal property found on which to levy this *fi. fa.*" The claimant filed a traverse to this return, averring that its falsity consisted in the fact that at the time of the entry the constable had not made any search for personal property. The case was heard by the court by consent of parties. The claimant submitted testimony tending to show that the constable made the entry upon presentation of the *fi. fa.* to him, without going to the defendant's house to search for personal property. The court sustained the traverse.

Civil Code, § 4767, provides that "no constable shall levy" a justice court *fi. fa.* on land, "unless there is no personal property to be found sufficient to satisfy the debt, which fact must appear by an entry on the execution to be levied by a constable of the county where such execution was issued, or where the property to be levied upon may be found: Provided, that the defendant shall have the right in all cases to point out any portion of his property in his possession he may think proper; and should he point out land to be levied upon, the above entry of 'no personal property' may be omitted." The object of the statute is to require satisfaction of justice court executions by levy and sale of personal property, unless the defendant therein points out land in his possession. It is the lack of personal property owned by the

defendant which authorizes the levy on land, and not the failure of the constable to search for it. *McKoy v. Edwards*, 65 Ga. 328. Of course, a conscientious officer would not make the entry of "No personal property" without some endeavor to find personal property, unless his knowledge of the defendant, or his environment and property, was such that he knew that he had no personal property. The preliminary requisite to the levy of the *fi. fa.* on land is the entry of "No personal property" on it. That is the officer's return, and a traverse of it must put that fact in issue, viz., that the defendant had no personal property on which to levy the execution at the time of the entry. The traverse in the instant case did not challenge the verity of the return that the defendant had no personal property on which to levy; it simply denied that the officer had made a search. The traverse was insufficient in law, and the evidence was also insufficient to show the falsity of the essential part of the constable's return.

Judgment reversed. All the Justices concur.

(140 Ga. 291)

YOUNG MEN'S CHRISTIAN ASS'N v. ESTILL et al.

(Supreme Court of Georgia. July 18, 1913.)

*(Syllabus by the Court.)***1. FRAUDS, STATUTE OF (§ 84*)—STOCK SUBSCRIPTION—DONATION TO CHARITABLE CORPORATION.**

An oral promise to a charitable corporation to give a specific sum of money for the construction of a building, to be devoted to carrying out the design of such corporation, as soon as the work begins, is not a subscription to shares of stock of a commercial corporation, and is not within the clause of the statute of frauds which requires contracts for the sale of goods, wares, and merchandise to the amount of \$50 or more to be in writing.

[Ed. Note.—For other cases, see *Frauds*, Statute of, Cent. Dig. §§ 154-161; Dec. Dig. § 84.*]

2. FRAUDS, STATUTE OF (§ 49*)—AGREEMENTS TO BE PERFORMED WITHIN A YEAR—CONTINGENCY.

Where the time when the contract is to be performed depends on some contingency, it is within the statute of frauds, provided the contingency cannot happen within the year; but, if it may happen, it is not within the statute.

[Ed. Note.—For other cases, see *Frauds*, Statute of, Cent. Dig. § 74; Dec. Dig. § 49.*]

3. SUBSCRIPTIONS (§ 5*)—CONTRACTS (§ 56*)—DONATION—ENFORCEMENT—CONSIDERATION—MUTUAL SUBSCRIPTIONS.

As a general rule, a promise to donate money to a charitable purpose is gratuitous and unenforceable, unless some consideration therefor exists. But a consideration of a promise to donate money to a charitable corporation is supplied where the corporation, during the life of the promisor, and before a withdrawal of the promise, and in reliance on his promise, as well as that of others, expended money and incurred enforceable liabilities in furtherance of the enterprise the donors intended to promote. The original gratuitous

promise will thus be converted into a valid and enforceable contract.

(a) Civil Code, § 4246, considered in connection with foregoing ruling, as being limited to cases of mutual written subscriptions.

[Ed. Note.—For other cases, see Subscriptions, Cent. Dig. §§ 6, 7; Dec. Dig. § 5;* Contracts, Cent. Dig. §§ 844, 349-353; Dec. Dig. § 56.*]

4. SUBSCRIPTIONS (§ 21*) — ACTION TO ENFORCE—PLEADING.

The publication in a newspaper, owned and controlled by a corporation of which the promisor was president and principal stockholder, and with his knowledge, and without repudiation by him, of a list of subscribers to a charitable corporation, embracing his own, is relevant as tending to show an admission of the promisor to donate the particular sum to the charitable enterprise.

[Ed. Note.—For other cases, see Subscriptions, Cent. Dig. §§ 25-29; Dec. Dig. § 21.*]

Error from Superior Court, Chatham County; W. G. Charlton, Judge.

Action by the Young Men's Christian Association against M. H. Estill and others, executors. Judgment for defendants, and plaintiff brings error. Reversed.

The Young Men's Christian Association, a corporation, brought suit against the executors of J. H. Estill to recover an amount alleged to be due on a verbal contract to give \$500 for the construction of a building to be devoted to the general purposes of the plaintiff corporation. It was alleged that the directors of the plaintiff corporation determined to erect in the city of Savannah a large building for the benefit of the young men of the city and country, and for the advancement of the cause represented by the plaintiff, which is entirely charitable and benevolent; the plaintiff having no capital stock and not being organized for corporate benefit or gain, but solely for the advancement of the purposes of the Young Men's Christian Association. On April 21, 1905, W. B. Stubbs and J. B. Reid, representing the plaintiff, solicited from Mr. Estill a subscription for the construction of the building. Mr. Estill agreed to subscribe and did subscribe \$500, and the following memorandum was made on a card at the time: "Will give \$500 as soon as work begins." This memorandum was not signed by Mr. Estill, and the subscription was verbal. Subscriptions were made by others for the same purpose, prior and subsequent to the promise of Mr. Estill, all of which were mutual subscriptions for the common object; and because of the subscriptions made by Mr. Estill and others the work was undertaken by the plaintiff. The contract was given out and the work completed at a very large expense; and if the subscriptions had not been made by Mr. Estill and others, the work would not have been undertaken by the plaintiff. Subsequently, on March 15, 1906, in an issue of that date of the Savannah Morning News, a public gazette, then and now published in

the city of Savannah, and owned by a company of which Mr. Estill was the president, and the chief, if not the sole, stockholder, and the management of which was controlled by him, a local item was published, calling attention to the merits of the improvement contemplated, and giving a list of the subscriptions up to that date; there being a large number published, including among them the subscription of Mr. Estill for \$500. Although Mr. Estill was cognizant of the fact that his subscription had been taken by the plaintiff, and this fact had been published to the world by his newspaper, he never repudiated or disavowed the same. The contract for the erection of the building was let on April 24, 1907, and the work was begun on June 3, 1907, and on the last-mentioned day the subscription became due and payable. On November 9, 1907, Mr. Estill died, and on November 12, 1907, his will was duly probated and letters testamentary issued to his executors. The executors refuse to pay the subscription of Mr. Estill to the plaintiff and judgment is prayed for the sum of \$500, the amount of the subscription, with interest thereon from June 3, 1907. The court sustained a demurrer to the petition and dismissed it.

Adams & Adams, of Savannah, for plaintiff in error, Osborne & Lawrence, of Savannah, for defendants in error.

EVANS, P. J. (after stating the facts as above). [1] 1. A promise to donate money to a charitable corporation in furtherance of the design of its creation stands upon a different footing from a subscription to shares in a commercial corporation, in their relation to that clause of the statute of frauds which requires contracts for the sale of goods, wares, and merchandise to the amount of \$50 or more to be in writing. In *Hightower v. Ansley*, 126 Ga. 8, 54 S. E. 939, 7 Ann. Cas. 927, it was held that a contract for the sale of shares of stock in an incorporated company of the value of \$50 or more fell within this clause of the statute. Should this holding be applied to a subscription for shares, treating the corporation as selling shares to the subscriber, there would be no analogy to a promise to donate money to a charitable institution. A promise to buy shares in a commercial corporation is quite dissimilar from a promise to donate money to an eleemosynary institution. A promise of the latter kind does not fall within this clause of the statute.

[2] 2. The promise alleged was one to give \$500 to the charitable corporation, upon the beginning of the contemplated work of constructing a building in furtherance of the general corporate design. This contingency could occur within a year; and the rule is settled in this state that, where the time when a contract is to be performed depends

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r. Indexes

on some contingency, it is within the statute of frauds requiring contracts not to be performed within a year to be in writing, if the contingency cannot happen within a year; but, if it may happen within a year, it is not within the statute. *Burney v. Ball*, 24 Ga. 505.

[3] 3. The Young Men's Christian Association is a charitable corporation, and its directors determined to erect in the city of Savannah a large building for the advancement of the cause represented by it, which was entirely charitable and benevolent. Several persons subscribed in writing, promising to give named sums of money for the accomplishment of the enterprise. When Mr. Estill was solicited for a subscription, he promised to give \$500 for the work as soon as the work of constructing the building began. The local newspaper owned and published by a company of which he was the chief, if not the only, stockholder, and managed by him, published a list of the subscribers, which included his name among the rest, as subscribing the amount which he had orally promised to give. The building was completed at great expense, in reliance upon the subscriptions of promises of Mr. Estill and others. Work began upon the building more than six months before the death of Mr. Estill, and has been fully completed. Mr. Estill never withdrew or repudiated his promise to pay the amount he promised to donate. His executors deny the binding force of his promise to donate \$500 to the enterprise. The contention is that a promise to donate a named sum to a charitable purpose is purely gratuitous and unenforceable, for want of a consideration. If Mr. Estill had signed a subscription contract with others to erect this building, the mutual promises of the subscribers would have furnished a good consideration. Our Code declares that "in mutual subscriptions for a common object the promise of the others is a good consideration for the promise of each." Civil Code, § 4246. This section has been held applicable to subscriptions to build churches, and to locate assembly grounds of a religious denomination at a particular point. *Wilson v. First Presbyterian Church*, 56 Ga. 554; *Owensby v. Georgia Baptist Assembly*, 137 Ga. 698, 74 S. E. 56, Ann. Cas. 1913B, 238. The petition alleges that other subscriptions were made by other persons before and after Mr. Estill's promise to give \$500, and that all of them, including Mr. Estill's verbal promise, were mutual subscriptions for the common object. Notwithstanding this allegation, we do not think the case in hand comes within the Code section quoted. That section has application to mutual subscriptions, which means written promises mutually entered into by the subscribers. The statute is not sufficiently broad to include oral promises, and cannot be extended so as to cover the promise in the case at bar.

A promise to donate money to a charitable

purpose is gratuitous and unenforceable, unless some consideration therefor exists. Such a promise amounts to nothing more than a voluntary offer, which may be withdrawn before being acted upon. But if, on the faith of the promise, the promisee, before withdrawal of the promise, expends money and incurs enforceable liabilities in furtherance of the enterprise the promisor intended, to promote, the consideration is supplied, and the promise is rendered valid and binding. *Owensby v. Georgia Baptist Assembly*, supra; *School District of Kansas City v. Sheldley*, 138 Mo. 672, 40 S. W. 656, 37 L. R. A. 406, 60 Am. St. Rep. 578; *McCabe v. O'Connor*, 69 Iowa, 134, 28 N. W. 573; *Amherst Academy v. Cowls*, 6 Pick. 427, 17 Am. Dec. 387; *Richelleu Hotel Co. v. International Military Encampment Co.*, 140 Ill. 248, 29 N. E. 1044, 33 Am. St. Rep. 234; 1 Page on Contracts, § 298; 1 Elliott on Contracts, § 228. In 1 Parsons on Contracts (8th Ed.) § 453, it is said: "On the important question, how far voluntary subscriptions for charitable purposes, as for alms, education, religion, or other public uses are binding, the law has in this country passed through some fluctuation, and cannot now be regarded as on all points settled. Where advances have been made, or expenses or liabilities incurred by others in consequence of such subscriptions, before any notice of withdrawal, this should, on general principles, be deemed sufficient to make them obligatory, provided the advances were authorized by a fair and reasonable dependence on the subscriptions; and this rule seems to be well established." The death of the promisor before any liability has been incurred on the faith of the promise would, of course, serve to withdraw or revoke the promise.

We do not think that, because the promise to give rests in parol, it is unenforceable after it has been acted on. If the promise is found in a written subscription by the promisor and others, the mutual promises furnish a consideration under our Code. But the promise to give to a charitable purpose need not be in writing to be an enforceable contract, where the promisee has acted on the faith of it. So long as the promise is gratuitous, it is without consideration; but, when acted on, there is not only mutuality of contract, but a consideration for the contract. If A. promise to buy a house for his nephew, that is nothing; but if A. promise to buy a house for his nephew, and request the nephew to enter into a contract of purchase in the nephew's own name, and the nephew does so, the law implies a promise on the part of A. to reimburse the nephew any part of the purchase money which he may be called on to pay. *Skidmore v. Bradford*, L. R. 8 Eq. 134.

[4] It was alleged that in a local newspaper, owned by a company of which Mr. Estill was the president, and the chief, if not the sole, stockholder, there appeared an

article calling attention to the merits of the enterprise, giving a list of the subscriptions up to that time, which included a subscription of Mr. Estill for \$500. It was further alleged that, although Mr. Estill was cognizant that his subscription had been taken for \$500, and that it had been so published to the world through his newspaper, he never repudiated or disavowed the same. The ground of the special demurrer was, not that it was improper to plead evidentiary facts, but that the evidentiary facts pleaded were irrelevant. These allegations were relevant, as tending to show an admission by Mr. Estill of his promise to donate \$500 to the plaintiff for the purpose of constructing the building.

Judgment reversed. All the Justices concur.

(140 Ga. 259)

YANCEY et al. v. LAMAR-RANKIN DRUG CO.

(Supreme Court of Georgia. July 19, 1913.)

(Syllabus by the Court.)

1. FRAUDULENT CONVEYANCES (§ 3*)—BULK SALES—CONSTRUCTION OF STATUTE.

Under the "sale in bulk" act (Civ. Code 1910, § 3226), the following transactions are declared to be fraudulent and void as against creditors of the vendor, when the provisions of the act are not complied with: (1) Every sale or transfer of a stock of goods, wares, or merchandise in bulk; (2) or of substantially the entire business theretofore conducted by the vendor of such a stock; (3) or every sale or transfer of such a stock out of the usual or ordinary course of business or trade of the vendor.

[Ed. Note.—For other cases, see *Fraudulent Conveyances*, Cent. Dig. § 5; Dec. Dig. § 3.*]

2. FRAUDULENT CONVEYANCES (§ 5*)—BULK SALES—CONSTRUCTION OF STATUTE.

The act is in derogation of the common law, and of the right to alienate property without restriction, and is therefore to be strictly construed. *Cooney v. Sweat*, 133 Ga. 511, 66 S. E. 257, 25 L. R. A. (N. S.) 758.

[Ed. Note.—For other cases, see *Fraudulent Conveyances*, Cent. Dig. §§ 4, 6; Dec. Dig. § 5.*]

3. FRAUDULENT CONVEYANCES (§ 47*)—SALE IN BULK.

So construed, the provisions of the act did not apply to a transaction whereby a co-partnership composed of two persons engaged in a grocery business sold a two-thirds interest in their stock of goods to two other persons, whereupon one of the original partners retired from the firm, and the same business was thereafter conducted in the name of a new firm, composed of the remaining original partner and the two purchasers. Such transaction did not fall within either of the classes set forth in the first headnote. While it may have been out of the usual and ordinary course of business or trade, it was not a sale or transfer of a stock of goods, wares, or merchandise. See *Stovall Co. v. Shepherd Co.*, 10 Ga. App. 498, 73 S. E. 761, and *Fairfield Shoe Co. v. Olds*, 176 Ind. 526, 96 N. E. 592, holding that the provisions of the "sale in bulk" law do not apply to a sale by a partner of his interest in a stock of merchandise to his copartner.

[Ed. Note.—For other cases, see *Fraudulent Conveyances*, Cent. Dig. § 34; Dec. Dig. § 47.*]

4. FRAUDULENT CONVEYANCES (§ 47*)—BULK SALES—APPLICATION OF STATUTE.

In view of the rulings above stated, the court erred in holding that the transaction set out in the third headnote came within the purview of the "sale in bulk" act, and in directing a verdict for the plaintiff in *fi. fa.* on the trial of the issue formed by a traverse of the answer of the garnishees, the purchasers of the two-thirds interest in the partnership.

[Ed. Note.—For other cases, see *Fraudulent Conveyances*, Cent. Dig. § 34; Dec. Dig. § 47.*]

Error from Superior Court, Gwinnett County; O. H. Brand, Judge.

Action by the Lamar-Rankin Drug Company against A. T. Yancey and others. Judgment for plaintiff, and the garnishee defendants bring error. Reversed.

O. A. Nix and I. L. Oakes, both of Lawrenceville, for plaintiffs in error. N. L. Hutchins, of Lawrenceville, for defendant in error.

FISH, C. J. Judgment reversed. All the Justices concur.

(140 Ga. 263)

HOOD v. VENABLE

(Supreme Court of Georgia. July 19, 1913.)

(Syllabus by the Court.)

1. DIVORCE (§ 245*)—SEPARATE MAINTENANCE—MODIFICATION OF JUDGMENT.

Where a suit for permanent alimony was pending, and an application for temporary alimony was included in the petition, and there was also a prayer for custody by the wife of the children, and at the hearing the prayer for the custody of the children was abandoned, and the judge held that, on account of his inability to decide from the evidence the grave question as to misconduct upon the part of the wife, he would leave the entire question of alimony to a jury, and where afterwards the children were permitted by the husband to return upon a visit to the mother under an order of the court directing that they be permitted to visit her for a period of about a week, and the children actually remained with the mother for about four years, the husband making no demand for their return, and making no effort to recover custody of them, and where it appears, further, that the wife fell into a physical decline and became utterly helpless and unable to provide for herself or the children, who still remained with her, it was competent for the judge, notwithstanding that at first he had decided to refer the entire question of alimony to a jury, to reopen the question, and modify or change his judgment, and allow alimony on a proper showing therefor.

[Ed. Note.—For other cases, see *Divorce*, Cent. Dig. §§ 691-695; Dec. Dig. § 245.*]

2. ALLOWANCE OF ALIMONY.

There was no abuse of discretion in allowing alimony, or in the amount allowed.

Error from Superior Court, Jackson County; O. H. Brand, Judge.

Action by Beulah V. Hood against Ben Hood. Subsequent to rendering judgment the court reopened and modified the same, and defendant brings error. Affirmed.

Geo. A. Johns, of Winder, and Jno. J. Strickland, of Athens, for plaintiff in error. J. A. B. Mahaffey, of Jefferson, and Shackel-

ford & Shackelford, of Athens, for defendant in error.

ATKINSON, J. Judgment affirmed. All the Justices concur.

(140 Ga. 379)

SOLOMON v. SOLOMON.

(Supreme Court of Georgia. July 19, 1913.)

(Syllabus by the Court.)

1. DIVORCE (§ 326*)—FOREIGN DIVORCE—COLLATERAL ATTACK—CONSTRUCTIVE SERVICE.

A judgment of divorce, based on constructive service, is not within the provisions of the Constitution of the United States and statutes passed thereunder, requiring that full faith and credit shall be given in each state to the public acts, records, and judicial proceedings of every other state. Such judgment, based entirely on constructive notice, without actual notice or provision for the same to the nonresident defendant, may be collaterally attacked for fraud. *Matthews v. Matthews*, 139 Ga. 123, 76 S. E. 855.

[Ed. Note.—For other cases, see Divorce, Cent. Dig. §§ 827-830, 840; Dec. Dig. § 326.*]

2. ALIMONY—CUSTODY OF CHILD.

The judge did not abuse his discretion in awarding alimony and counsel fees to the wife, nor was the allowance excessive in amount. Nor did the judge abuse his discretion in awarding the custody of the child to the mother pending the divorce proceeding.

Error from Superior Court, Chatham County; W. A. Charlton, Judge.

Action between P. E. Solomon and A. B. Solomon. From the judgment, P. E. Solomon brings error. Affirmed.

W. R. Hewlett and Herschel P. Cobb, both of Savannah, for plaintiff in error. Horton Bros. & Burruss, of Atlanta, and Twiggs & Gazan, of Savannah, for defendant in error.

EVANS, P. J. Judgment affirmed. All the Justices concur.

(140 Ga. 388)

ANDERSON v. HUMPHRIES.

(Supreme Court of Georgia. July 19, 1913.)

(Syllabus by the Court.)

1. EXCEPTIONS, BILL OF (§ 58*)—SUFFICIENCY—SERVICE.

Under the rulings in *Westfield v. Mayor*, etc., of Toccoa City, 80 Ga. 735, 6 S. E. 471, and *Advance Lumber Co. v. Moreland*, 132 Ga. 352, 35 S. E. 86, a mere statement entered on a bill of exceptions, and signed by counsel for plaintiff in error, to the effect that he had served a copy of the bill of exceptions by delivering it to counsel for defendant in error, with no official entry of service or affidavit thereof as provided by the statute, is not sufficient; and a case brought up by such bill of exceptions will be dismissed on motion.

[Ed. Note.—For other cases, see Exceptions, Bill of, Cent. Dig. §§ 100-105; Dec. Dig. § 58.*]

2. APPEAL AND ERROR (§ 435*)—SERVICE—WAIVER BY APPEARANCE.

The appearance in this court of counsel who represented the party in whose favor the

judgment was rendered in the court below, and the making by him of a motion to dismiss the writ of error for want of service, among other grounds, does not operate as a waiver of service or an agreement for the case to proceed, under Civ. Code 1910, § 6160, par. 3.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2184-2190; Dec. Dig. § 435.*]

Error from Superior Court, Cobb County; N. A. Morris, Judge.

Action between A. H. Anderson and W. A. Humphries. Judgment for Humphries, and Anderson brings error. Dismissed.

R. O. Lovett, of Atlanta, for plaintiff in error. Geo. F. Gober, of Atlanta, for defendant in error.

LUMPKIN, J. Writ of error dismissed. All the Justices concur.

(140 Ga. 429)

STEINE v. SILVER et al.

(Supreme Court of Georgia. July 21, 1913.)

(Syllabus by the Court.)

REVIEW ON APPEAL.

The exceptions to the charge of the court are without merit, and there is abundant evidence to support the verdict. *Allen v. Pearce*, 84 Ga. 608, 10 S. E. 1015; *Jones v. Dannenberg Co.*, 112 Ga. 426, 37 S. E. 729, 52 L. R. A. 271.

Error from Superior Court, Warren County; B. F. Walker, Judge.

Action between Max Steine and Myer Silver and others. From the judgment, Steine brings error. Affirmed.

E. P. Davis and L. D. McGregor, both of Warrenton, for plaintiff in error. E. T. Shurley and M. L. Felts, both of Warrenton, for defendant in error.

BECK, J. Judgment affirmed. All the Justices concur.

(140 Ga. 346)

COLUMBIAN NAT. LIFE INS. CO. v. MILLER.

(Supreme Court of Georgia. July 19, 1913.)

(Syllabus by the Court.)

1. INSURANCE (§ 668*)—ACTION ON ACCIDENT POLICY—SUFFICIENCY OF EVIDENCE.

Where a policy of accident insurance provided that it "does hereby insure * * * against bodily injuries sustained through accidental means (excluding suicide, sane or insane, or any attempt thereat, sane or insane) and resulting directly therefrom, independently and exclusively of all other causes," and where, on the trial of a suit brought by the beneficiary in the policy against the insurance company, to recover the amount named in it for the accidental death of the insured, the testimony for the plaintiff tended to show that the sole cause of the death of the insured was by accidental asphyxiation, and the testimony for the defendant tended to show that the death was due to apoplexy or fainting and unconsciousness preceding asphyxiation, it was not error for the court to submit to the jury, under proper instructions,

the question of whether the insured came to his death by accidental asphyxiation, independently and exclusively of all other causes, or whether it was caused by apoplexy or fainting and unconsciousness preceding asphyxiation.

(a) The verdict was supported by the evidence.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 1556, 1732-1770; Dec. Dig. § 668.*]

2. INSURANCE (§ 668*) — ACCIDENT POLICY — CONSTRUCTION — NOTICE — QUESTION FOR JURY.

An accident policy of insurance provided that "written notice of an accident, on account of which a claim may be made, must be given to the company at its home office in Boston as soon as may be reasonably possible, together with full particulars thereof and the full name and address of the insured," and the policy provided also that a like notice was to be given in case of "bodily injury or death." The policy did not contain a clause providing for its forfeiture in case of failure to give the notice as required. The insured was found dead in his bathroom, which was tightly closed, lying near the bathtub, partly undressed, under circumstances from which the jury might have inferred that he died from accidental asphyxiation. The beneficiary did not give notice of the death of the insured to the company until 18 days after his death, for the reason, assigned by her, that she had been sick in bed several days previous to the death of the insured, and was in a nervous condition for several weeks afterwards. *Held*, that it was not error for the court to submit to the jury the question whether the plaintiff had given the required notice as soon as reasonably possible under all the facts and circumstances; he having also charged them that if the notice was not so given the plaintiff could not recover.

(a) Nor was it error for the court to refuse to hold, as matter of law, that the policy was void because notice was not given until 18 days after the death of the insured.

(b) The verdict for the plaintiff was not contrary to law because the notice was not given until 18 days after the death of the insured, or for any other reason assigned.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 1556, 1732-1770; Dec. Dig. § 668.*]

Fish, C. J., dissenting.

Error from Superior Court, Fulton County; Geo. L. Bell, Judge.

Action by Josie B. Miller against the Columbian National Life Insurance Company. Judgment for plaintiff, and defendant brings error. Affirmed.

Watkins & Latimer, of Atlanta, for plaintiff in error. Smith & Hastings, of Atlanta, for defendant in error.

HILL, J. Mrs. Josie B. Miller, the widow of Carlton H. Miller, as the beneficiary under a certain policy of accident insurance issued by the Columbian National Life Insurance Company to Carlton H. Miller on or about the 29th day of January, 1910, brought suit against the company to recover the amount named in the policy. The result of the trial was a verdict and judgment in favor of the plaintiff for the full amount named in the policy. The trial court having overruled a motion for a new trial, the defendant

accepted. The policy sued on provided: "The Columbian National Life Insurance Company of Boston, Mass., does hereby insure Carlton H. Miller against bodily injuries sustained through accidental means (excluding suicide, sane or insane, or any attempt thereat, sane or insane) and resulting directly therefrom, independently and exclusively of all other causes." It also provided: "Written notice of an accident, on account of which a claim may be made, must be given to the company at its home office in Boston as soon as may be reasonably possible, together with full particulars thereof and the full name and address of the insured. Like notice of bodily injury or death, on account of which a claim is to be made, must be given to the company as soon as may be reasonably possible after the occurrence of the accident causing such bodily injury or death."

There are two controlling issues in this case. (1) Was the death of the insured caused through accidental means (excluding suicide, etc.), and did it result directly therefrom, independently and exclusively of all other causes? (2) Was the policy void because the written notice, required to be given to the company as soon as "reasonably possible after the occurrence of the accident causing such bodily injury or death," was not given until 18 days after the death of the insured?

[1] 1. On the trial the issue first above stated was submitted to the jury, and their finding was in favor of the plaintiff. There seems to be no dispute that at the time of the death of the insured the policy was of full force and effect, nor as to the amount of the liability of the defendant company, if liable at all. The plaintiff's evidence tended to show that the insured died about 1 o'clock p. m. on April 6, 1911. He was found dead in his bathroom at about his usual lunch hour on the date named, undressed except as to his underwear, and the bathroom was filled with gas. It was the practice of the insured to take a bath in the middle of the day after he came in from town. The plaintiff went to the bathroom and found it closed, and gas was escaping. She and a servant opened the door, and found the deceased lying on the floor of the bathroom, right by the bathtub, and the room was filled with gas. The deceased was lying as if he might have fallen against the bathtub. The room had one window, which was closed when the plaintiff and the servant first entered. Gas was escaping from an instantaneous gas heater located in the bathroom and used for heating water. The heater has a "little pilot" that lights it, and which has to be turned on. "You light the pilot, and you turn the water and the gas on, and the pilot lights the gas itself. The gas and water are turned on at the same time, and then the pilot lights the gas and heats the water as it comes through." When

the deceased was found, the water was turned on, and the gas was escaping. Partly burned matches were upon the bathroom floor near the heater. The deceased was drinking the night previous to his death, though he was not an habitual drinker. From this evidence for the plaintiff, we think the jury was authorized to find that the death of the insured was caused by accidental asphyxiation, independently and exclusively of other causes, although the testimony of the defendant tended to show that death had resulted from apoplexy. The insistence of the defendant is that, even if the death of the insured was due to asphyxiation, it was preceded by fainting and unconsciousness, and that those causes contributed to the accident, and, this being so, his death did not come within the provisions of the policy which would render the company liable in case of accidental death—that the death thus occasioned did not result directly from accidental means, “independently and exclusively of all other causes.” In the case of *Freeman v. Mercantile Mutual Accident Association*, 156 Mass. 351, 30 N. E. 1013, 17 L. R. A. 753, it was held: “An accidental fall causing peritonitis which results in death will render the insurer liable under an accident insurance policy limiting the insurer’s liability to cases where an injury is the proximate cause of death, even although by reason of a former attack of the disease the deceased was liable to a recurrence of it.” In a somewhat similar case it was held that an injury which resulted in hernia was the proximate cause of death from peritonitis, which resulted from a surgical operation skillfully performed for the hernia as the only possible means of saving the life of the injured. *Travelers’ Ins. Co. v. Murray*, 18 Colo. 296, 26 Pac. 774, 25 Am. St. Rep. 267. So, in a case where a death following an external, visible, and bodily injury caused by an accident was held to be the result of such accident within the meaning of an insurance policy. *Nat. Ben. Ass’n v. Grauman*, 107 Ind. 288, 7 N. E. 233. In the case of *National Ben. Ass’n v. Rowman*, 110 Ind. 355, 11 N. E. 316, it was held that intoxication, although a crime, is not necessarily the proximate cause of the death of one who was thrown from a wagon while intoxicated. In the case of *Manufacturers’ Accident Indemnity Co. v. Dorgan*, 58 Fed. 945, 7 C. C. A. 581, 22 L. E. A. 620, the insured was “seen on an island in the brook playing a trout.” Twenty minutes later he was discovered lying in the brook with his face downward, and submerged in six inches of water, dead. The bank was about 18 inches above the water, and there were in the water stones, egg-sized and smaller, upon which he might have struck his head. There were two bruises on his forehead. The policy in that case provided that it did not extend to any case except where the accidental injury shall be the sole cause of disability or death.

Judge Taft, in delivering the opinion of the Circuit Court of Appeals, said: “We are of the opinion that in the legal sense, and within the meaning of the last clause, if the deceased suffered death by drowning no matter what was the cause of his falling into the water, whether disease or a slipping, the drowning in such case would be the proximate and sole cause of the disability or death, unless it appeared that death would have been the result, even had there been no water at hand to fall into. The disease, would be but the condition; the drowning, would be the moving, sole, and proximate cause.”

And so the jury were authorized to find from the evidence in this case that the insured was asphyxiated by escaping gas, and that this caused his death, independently and exclusively of his fainting or unconscious condition.

[2] 2. The next question for consideration is, whether the plaintiff, as the beneficiary named in the accident policy sued on, forfeited her right to sue and collect the amount named in the policy by reason of her failure to give full notice of the accident to the defendant company at its home office in Boston as soon as was “reasonably possible,” as provided by the policy. The testimony for the plaintiff tended to show that she gave the notice 18 days after the death of her husband, and that before his death she was sick in bed, and that after his death she was in a nervous condition for several weeks. There was also evidence tending to show that after the notice was given to the company, the plaintiff’s attorneys received a letter from it, insisting that no liability attached to the company because, as it insisted, the death of the insured was due to causes not covered by the policy, but stating that the company had instructed its district agent to submit proof of loss by the plaintiff if she so desired. The letter set up no contention of forfeiture for failure to give notice within a reasonable time, but denied all liability solely on the ground of the cause of the death. Nor did the policy itself contain any clause providing for its forfeiture in case of failure to give notice as required. The court submitted to the jury the question whether the plaintiff had given the notice required as soon as reasonably possible, under all the facts and circumstances, and charged them that if the notice was not so given, the plaintiff could not recover. On this point the court charged the jury: “Now, whether or not the plaintiff has complied with that provision of the contract, and, if not, whether or not a reasonable excuse has been given for a failure to comply with the terms thereof, is submitted to you along with the case, and you will take all the evidence and circumstances of the case and say by your verdict whether the plaintiff is entitled to recover or not.” This charge is objected to on the ground that it submitted to the in-

ry the question whether or not a reasonable excuse had been given for a failure to comply with the contract relating to notice, and further that there was no evidence showing any reason whatever for a failure to do so, and no evidence to support the charge. This ground of the motion is without merit. There was evidence tending to show that prior to and immediately after the death of the insured the plaintiff was sick and in a nervous state of health, and we think the court properly decided that it could not say, as a matter of law, that the proper notice had not been given, but would submit to the jury the question as to whether the notice had been given as soon as reasonably possible, under all the circumstances of the case, and, if the notice was not so given, the plaintiff could not recover. The jury found for the plaintiff on all questions of fact submitted to them, and we cannot say that their verdict is without evidence to support it.

In the case of *Southern Fire Ins. Co. v. Knight*, 111 Ga. 622, 36 S. E. 821, 52 L. R. A. 70, 78 Am. St. Rep. 216, a fire insurance policy contained requirements and conditions, the violation of which by the insured would work a forfeiture of the policy, and the policy contained a stipulation requiring the insured to furnish proofs of loss within 60 days after the fire, but did not make the failure to give such notice a ground of forfeiture, and under the terms of the policy the insurer was not liable to make payment until after 60 days from the receipt of such proofs of loss; the policy further providing that no suit thereon should be brought unless commenced within 12 months after the fire. It was held that, "if the insured furnished the required proofs of loss in time for at least 60 days to elapse between the date upon which they were furnished and the expiration of the 12 months limitation, the policy was not forfeited by a failure to furnish such proofs within 60 days after the fire occurred." In delivering the opinion of the court, Cobb, J., said: "It has been often held, and may now be considered as settled law, that if there is an express stipulation in a policy of fire insurance that the furnishing of proofs of loss within a specified time shall be a condition precedent to a recovery, or that a failure to submit the proofs within the time limited in the policy shall forfeit the same, such failure on the part of the insured will be fatal to his right to recover. See 13 Am. & Eng. Enc. of Law (2d Ed.) 328, notes 7 and 8. There is not in the policy involved in the present investigation either a stipulation that the furnishing of proofs of loss within 60 days shall be a condition precedent to a recovery, or that the failure so to do shall operate as a forfeiture of the policy. While the decisions of the American courts are not entirely uniform on this question, the current of authority seems to be that, in the absence of a stipulation providing

that the furnishing of proofs within a designated time shall be a condition precedent to recovery, or that the failure to submit the proofs within such time shall work a forfeiture of the policy, the failure so to do will operate simply to postpone the right of the insured to bring a suit until after he has furnished the proofs of loss required by the policy. This results from the familiar rule that forfeitures are not favored, and that a contract will not be construed to work a forfeiture unless it is manifest that it was the intention of the parties that it should have that effect." See 4 Joyce on Ins. § 3282. The fact that the policy in the instant case provides that it is made subject to the conditions and stipulations which are a part thereof does not distinguish it from the *Knight Case*, supra, where the policy (as shown by the original record) contained the provisions that: "This policy is made and accepted subject to the foregoing stipulations and conditions, together with such other provisions, agreements, or conditions, as may be indorsed hereon or added hereto." In the case of *Harp v. Fireman's Fund Ins. Co.*, 130 Ga. 726, 728, 61 S. E. 704, 14 Ann. Cas. 299, this court reaffirmed the decision in the *Knight Case* on this point, after reviewing it, and declined to overrule it. On the question of what is a reasonable time within which to give notice, see the following cases: *Fidelity, etc., Co. v. Courtney*, 186 U. S. 342, 22 Sup. Ct. 833, 46 L. Ed. 1193; *Ward v. Maryland Casualty Co.*, 71 N. H. 262, 51 Atl. 900, 93 Am. St. Rep. 514; *Remington v. Fidelity, etc., Co.*, 27 Wash. 429, 67 Pac. 992; *American, etc., Co. v. Norment*, 91 Tenn. 1, 18 S. W. 395; *Germania Fire Ins. Co. v. Deckard*, 3 Ind. App. 361, 28 N. E. 868; *Carey v. Farmers', etc., Ins. Co.*, 27 Or. 146, 40 Pac. 91; *Ætna Life Ins. Co. v. Fitzgerald*, 165 Ind. 317, 75 N. E. 262, 1 L. R. A. (N. S.) 426, 112 Am. St. Rep. 232, 6 Ann. Cas. 551. In *Donahue v. Windsor, etc., Fire Insurance Co.*, 56 Vt. 374, where the policy provided that the notice should be given "forthwith," and the notice was not given for 22 days, it was held that it was a question of fact for the jury to say whether the notice was in compliance with the terms of the policy.

8. The other grounds of the motion for a new trial are without substantial merit.

Judgment affirmed. All the Justices concur, except FISH, C. J., dissenting.

(140 Ga. 415)

LANE et al. v. NEWTON et al.
(Supreme Court of Georgia. July 21, 1913.)

(Syllabus by the Court.)

1. FRAUDULENT CONVEYANCES (§ 255*)—ACTION TO CANCEL—PARTIES—HUSBAND AND WIFE.

Where creditors seek by equitable petition to cancel a deed made by a husband to his wife, it is necessary to make the grantor a party de-

fendant. If he be dead, his legal representative must be made a party, or a sufficient reason must be alleged and proved to excuse such failure.

(a) In the present case certain persons, alleging themselves to be creditors and holders of a security deed from a husband, attacked a conveyance made by the husband to his wife. They alleged that there was no administration on the estate of the husband, and that no application for administration was pending. The plaintiffs made parties defendant to the action the wife and two of the children of the decedent, who were alleged to be adults, averring that he left "several children, among whom" were those named. A demurrer was interposed, on the ground that the administrator of the decedent should be made a party, and the answer denied that there was no administration, and named the administrator who had been appointed.

The record does not show that he was ever made a party, nor was any proof adduced to show that in fact there was no administration. *Held*, that a decree of cancellation could not be rendered under such circumstances, for want of proper parties defendant.

[Ed. Note.—For other cases, see *Fraudulent Conveyances*, Cent. Dig. §§ 741-750; Dec. Dig. § 255.*]

2. FRAUDULENT CONVEYANCES (§§ 74, 274*)—GIFT BY INSOLVENT DEBTOR—VALIDITY—CIRCUMSTANTIAL EVIDENCE.

Under the ruling in *First National Bank of Cartersville v. Bayless*, 96 Ga. 684, 23 S. E. 851, a gift by a debtor, insolvent at the time, is void as to his then existing creditors, whether made for the purpose of defrauding them or not; but such a gift is not void as against a subsequent creditor, unless at the time of making it there was an intention on the part of the debtor to defraud such creditor.

(a) It is not held that an intention to defraud subsequent creditors as a class might not be sufficient relatively to one of them, although the intention to defraud was not directed against him specially.

(b) Under the ruling in the above-cited case, although money may have been obtained from a subsequent creditor for the purpose of paying off debts existing when the gift was made, this alone would not make the gift void as to such creditor, if the conduct of the debtor throughout the entire transaction was honest, and he had no intention to defraud.

(c) An intent to defraud may be inferred from circumstances.

[Ed. Note.—For other cases, see *Fraudulent Conveyances*, Cent. Dig. §§ 186-190, 806; Dec. Dig. §§ 74, 274.*]

3. FRAUDULENT CONVEYANCES (§ 208*)—FRAUD OF SUBSEQUENT CREDITORS—HUSBAND AND WIFE.

If an insolvent husband makes a voluntary conveyance of his property to his wife, with an intention to borrow money and pay off his existing indebtedness, knowing that he is in embarrassed or failing circumstances, and probably will not be able to repay the money thus borrowed, and intending by this scheme to save the property for his wife, such a conveyance is fraudulent, and the creditors lending the money with which the former indebtedness is discharged can attack it on that ground, as prior creditors could have done.

[Ed. Note.—For other cases, see *Fraudulent Conveyances*, Cent. Dig. §§ 631, 633; Dec. Dig. § 208.*]

4. FRAUDULENT CONVEYANCES (§§ 163, 210*)—FRAUD OF SUBSEQUENT CREDITORS—HUSBAND AND WIFE—RECORD.

If a debtor transfers his property to his wife, whether voluntarily or for value, and

thereafter procures another to lend him money with which to pay off the existing indebtedness, representing the property to be his, and thus fraudulently obtains money on the faith of the security furnished by the property, and gives a security deed to the lender, who lends the money without knowledge or notice of the conveyance to the wife, and if the wife actively participates in such fraud, or knowingly permits her husband to hold himself out as the owner of the property to obtain such credit, the deed to her will yield to that of the creditor; and, if it affects the security of the creditor, it can be canceled as fraudulent.

(a) The fact that a deed is recorded, even though it may be a deed for value, does not necessarily prevent one from whom the grantor procures money, by representing the property to be his, from having an equitable remedy against the grantor and grantee, if the latter actively participates in the fraud, or knowingly permits the grantor to hold himself out as the owner of the property, and thus procure credit on the faith of it.

[Ed. Note.—For other cases, see *Fraudulent Conveyances*, Cent. Dig. §§ 510, 517, 634; Dec. Dig. §§ 163, 210.*]

5. RECORDED INSTRUMENTS — VOLUNTARY DEED.

The rule as to the effect of recording a voluntary deed upon the rights of a subsequent purchaser for value and without notice, or of one occupying the legal status of a purchaser for value, is sufficiently stated in *Martin v. White*, 115 Ga. 866, 42 S. E. 279.

Error from Superior Court, Jenkins County; B. T. Rawlings, Judge.

Action by J. D. Newton and another against Elmira Lane and others. Judgment for plaintiffs, and defendants bring error. Reversed.

J. D. Newton and A. H. C. Newton brought their petition against Elmira Lane and her sons, Remer, John, and Thomas, alleging in substance as follows: In 1908 T. J. Lane was indebted to the Daniel Sons & Palmer Company in a sum represented by notes aggregating \$195.77, and on another note for the amount of \$94.80 principal, besides interest and attorney's fees. The creditor also had a mortgage on certain live stock and other personal property, much of which remains in the hands of the defendants. The creditor brought suit on the notes first mentioned, to the December term of the city court of Millen, and also foreclosed the mortgage on personalty. Lane was unable to pay the debt, and in great distress applied to the plaintiffs to lend him the money with which to do so. He offered to give notes for the loan, and to secure them by a deed to a certain parcel of land containing 301 acres, of which he was then in possession, and which he had held for 25 years. He represented that this was his own and was entirely without incumbrance of any kind. On January 6, 1909, the plaintiffs loaned him \$644 for the purpose of paying the indebtedness. They took his note therefor, and he executed to them a deed to secure such note, containing therein a power of sale, if the note should not be paid at maturity. Lane died in November, 1909, without having paid any part of the note, "leaving defendant, Elmira Lane,

his widow, and several children, among whom are the defendants, Remer, John, and Thomas, of adult age. * * * No administration has been granted upon the estate of said T. J. Lane, and no application is pending therefor. Since his death his widow has refused to make any payment, and has declared that she owns the land. Upon examination of the records of the superior court, the plaintiffs have found the record of a deed from Lane to his wife, dated September 12, 1908, and recorded September 21, 1908, conveying the same tract of land as that above mentioned. While the deed recites a consideration of \$1,800, the plaintiffs charge that it was a voluntary deed; that no consideration was paid; that it was fraudulent, and intended to hinder and delay the collection of the debt of the Daniel Sons & Palmer Company, and was so known to be by Mrs. Lane; that, being a voluntary deed, its record did not constitute notice to the plaintiff; that it was void as to Daniel Sons & Palmer Company, because it was without consideration, and was intended to hinder, delay, and defraud that company; "and petitioners having furnished the money for the express purpose of paying said debt, and being upon no notice of the existence of said deed, and the said T. J. Lane continuing in the actual possession and management of the same, petitioners are in equity subrogated to all the rights of the said Daniel Sons & Palmer Company to subject said land and cancel said deed as well as the property embraced in the mortgage; and they hereby set up such right of subrogation, and ask such decree as will enforce their said right." As further reason for the cancellation of the deed as a fraud upon the rights of the plaintiffs, they alleged that in the latter part of December, 1908, or the first part of January, 1909, just before the making of the security deed to them, Mrs. Lane executed and delivered to her husband, without consideration and as a gift to him, a fee-simple deed to the land. Plaintiffs charge that Lane had been advised that the previous deed would not protect the land against the debt of Daniel Sons & Palmer Company, and they believed that Lane was acting in good faith to them when he assured them that the title was in him and that there was no incumbrance upon the land. But the deed so made to him has been fraudulently kept off the record, and is now in the possession of his family, or has been fraudulently concealed or destroyed. The value of the land consists largely of the marketable timber on it, and but for such timber the plaintiffs would not have loaned the money or have regarded the security as sufficient. The defendants have commenced to cut the timber and to saw it into lumber, preparatory to removing and selling it. If this is done, the value of their security will be largely destroyed, and the plaintiffs will be remediless, as the defendants

are insolvent and unable to respond in damages. They have already committed damages to the extent of \$150. Plaintiffs pray for an injunction to restrain the further felling, sawing, or removing of the timber; that the deed from Lane to his wife be canceled; and that plaintiffs have judgment for the damages already done. The notes attached as exhibits were dated January 6, 1909, and became due October 1 and October 15, 1909.

The defendants demurred to the petition on the grounds, among others, that no reason was set forth in the petition why the plaintiffs should be subrogated to the rights of Daniel Sons & Palmer Company, and that there was a nonjoinder of parties, because the administrator of the estate of Lane, deceased, was not made a party defendant. The demurrer was overruled, and exceptions pendente lite were filed, and error was assigned thereon in the bill of exceptions later sued out. The defendants did not admit or deny the allegations as to the transactions between Lane and the plaintiffs, but denied that the deed from Lane to his wife was fraudulent or without consideration. They allege that Mrs. Lane signed a deed for delivery to her husband for a consideration of \$1,800, but he did not pay the purchase money, and she declined to deliver the deed. They denied that such deed was a deed of gift, or was ever delivered. They denied that the estate of Lane was unrepresented, and alleged that Remer Y. Lane, Jr., was the duly appointed and qualified administrator of the estate of T. J. Lane.

A verdict was rendered in favor of the plaintiffs. The defendants moved for a new trial, which was overruled, and they excepted.

R. P. Jones, of Millen, for plaintiffs in error. W. Woodrum, of Millen, and E. L. Brinson, of Waynesboro, for defendants in error.

LUMPKIN, J. (after stating the facts as above). [1] 1. Where creditors seek by equitable petition to cancel a deed made by a husband to his wife, it is necessary to make the grantor a party defendant. *Palmer v. Inman*, 122 Ga. 226, 50 S. E. 86; *Paulk v. Ensign-Oscamp Co.*, 123 Ga. 467-469, 51 S. E. 344. If he is dead, his legal representative must be made a party, or a sufficient reason shown to excuse the failure to do so. In this case the plaintiffs brought their petition against the wife of the decedent and three of his sons, who were alleged to be adults; but it does not appear that these were all of the children. On the contrary, it was alleged that Lane died leaving a widow and "several children, among whom were" the three who were made defendants. It was alleged that the defendants were insolvent and unable to answer in damages; but it was not alleged that the estate of Lane was insolvent, or that there would be no administration and no

need for any. In the answer of the defendants they denied that there was no administration, and stated who was the administrator. It nowhere appears in the record that it was shown that there was no administration, or that the administrator was made a party; nor was any excuse advanced for the failure to do so. No diminution of the record was suggested, but in the brief of counsel for defendant in error it was alleged that, "when administration was granted on his estate, the administrator was made a party." Upon reading this, we issued an order to the clerk of the superior court, requiring him to send up a certified copy of the order making the administrator a party; but the clerk certified that he had made diligent search of the records, and had found that "there was never an order taken making the administrator of T. J. Lane a party to said suit." The bill of exceptions recited that the case was between the plaintiffs and Mrs. Lane and her three sons, and it contained no intimation that an administrator was ever made a party. As the administrator of Lane and Mrs. Lane were the two necessary parties defendant, the failure to make the administrator a party defendant in error and to serve him, if he was a defendant in the court below, would have been fatal. But no such point was made or suggested. Counsel for the plaintiffs in error, in effect, stated in his brief that he insisted on all of the grounds of error taken by him. Thus we have, so far as this record shows, a case where a deed has been adjudged to be fraudulent and has been decreed to be canceled without the presence of the maker of it, or his administrator, or all of the heirs. This necessitates a reversal.

[2-4] 2. One ground of the demurrer attacked the allegations of the plaintiff that they were subrogated to the right of Daniel Sons & Palmer Company to attack the deed by Lane to his wife, because it was a voluntary deed made to hinder, delay, and defraud that company, and because, when such company was pressing for the collection of the indebtedness to it, and had brought suit thereon, the plaintiffs were induced, on representations of Lane, to advance the money to pay off the pressing indebtedness. There is a difference between the status of creditors of an insolvent person existing at the time when a voluntary deed is made and that of subsequent creditors. First National Bank of Cartersville v. Bayless, 96 Ga. 684, 23 S. E. 851. After declaring broadly the existence of the distinction, even where the subsequent creditor loans money with which to pay the prior debts, still in the opinion, on pages 687, 688, of 96 Ga., and page 853 of 23 S. E., it was said: "If, when he [a husband] made the conveyance [to his wife], he had an intention to borrow money and pay off his existing indebtedness, knowing that he was in embarrassed or failing circumstances, and

probably would not be able to repay the money borrowed, and intending by this scheme to save the house and lot to his wife, the conveyance would have been fraudulent, and the bank [the subsequent creditor] would have been subrogated to the rights of the pre-existing creditors whose debts were paid with the money borrowed from the bank." The subrogation referred to exists so far as concerns attacking the conveyance for fraud. Four authorities are cited in that case as sustaining the right of a person from whom money is borrowed in order to pay off an existing indebtedness to be subrogated to the status of the creditor whose indebtedness is thus paid, as to attacking for fraud a voluntary conveyance made while the first debt was in existence but before the second was created. The first of these is Wait on Fraudulent Conveyances (3d Ed.) § 103, which reads as follows: "A device to which fraudulent insolvents often resort consists in making a voluntary conveyance and following this up by paying all the antecedent or existing creditors, practically with the moneys derived from the credit extended by subsequent creditors. *Savage v. Murphy*, 34 N. Y. 508, 90 Am. Dec. 733, already quoted, was such a case. It is a most unsubstantial mode of paying a debt to contract another of equal amount. It is the merest fallacy to call such an act getting out of debt, and the case should be treated as if the prior indebtedness had continued throughout, or as a case of a continued or unbroken indebtedness." The second authority cited is Bump on Fraudulent Conveyances (4th Ed.) § 296. It is there said: "The general rule in regard to voluntary conveyances undoubtedly is that they are void only so far as may be necessary to satisfy prior creditors, and that if they are paid the conveyance will stand. The mere fact, however, that the prior debts have been paid off, will not alone render the transaction valid, though it is entitled to great weight. A great deal will depend upon the mode in which such debts are paid. Paying off one debt by contracting another is not getting out of debt. * * * In such instances the subsequent creditors are subrogated to the rights of the creditors whose debts their means have been used to pay. Any other rule would simply permit the debtor to take the property of subsequent creditors and give it to his donee." The other two authorities sustain the same doctrine. *Rudy v. Austin*, 56 Ark. 85, 19 S. W. 111, 35 Am. St. Rep. 85; *Savage v. Murphy*, 34 N. Y. 508, 90 Am. Dec. 733.

The difference between claiming subrogation to a contract or to a lien, and claiming the right to attack a voluntary deed as fraudulent, if money borrowed from the attacking party was used to pay off antecedent debts, and without knowledge on his part of the making of the conveyance, is clear. The decisions relied on by counsel for the plain-

tiff in error (*McCowan v. Brooks*, 113 Ga. 532, 39 S. E. 115, *Sackett v. Stone*, 115 Ga. 466, 41 S. E. 564, and *Ragan v. Standard Scale Co.*, 128 Ga. 544, 546, 58 S. E. 31) were in cases where an effort was made by one who advanced money to pay off and discharge a lien or security to be subrogated to the rights of the holder thereof. What we are now discussing is the making by an insolvent creditor of a voluntary conveyance, and then borrowing money from another and discharging prior debts as creating substantially a continuing indebtedness, rather than a cessation of debt and the creating of a distinct subsequent debt. It seems to the writer that the decision in the Case of First National Bank of Cartersville, above cited, does not go as far as the authorities on which it relies, and that it does not clearly distinguish between the status of independent subsequent creditors of an insolvent who makes a voluntary conveyance and that of a subsequent creditor who lends money to pay prior debts which are thus discharged. That decision requires an actual fraudulent intent by the grantor in such a deed toward a subsequent creditor in order to obtain subrogation to the position of prior creditors paid with the money furnished by the subsequent creditor, although the prior creditor could attack a voluntary conveyance by an insolvent without showing actual fraudulent intent. Really the entire matter of attacking such conveyances rests on the ground of fraud. In some instances the law declares that certain acts are fraudulent without proof of intent, such as a gift of his property by an insolvent as against creditors (primarily meaning existing creditors). In other instances (such as sales or gifts, relatively to subsequent creditors generally), the intent to defraud is a necessary element. Such an intent may be inferred from circumstances. What circumstances will authorize such an inference need not now be discussed. The ground for holding that in some instances a subsequent creditor is subrogated to the status of a prior creditor as to attacking a voluntary deed for fraud is that his money went to pay the debt antedating the gift, and therefore, relatively to the person furnishing the money, in substance there was a continuity of debt, rather than a discharge from debt and the creation of a new debt. 1 Moore on Fraud. Conv. 268-270, and notes. The writer does not deem it necessary to consider here whether "subrogation" is the most apt expression in such cases, or whether it is more strictly a continuous state of indebtedness; but the authorities use that term.

If a trap were set by a husband and wife for the purpose of defrauding a subsequent creditor, and he were defrauded, it would not seem that he needed any subrogation in order to attack the fraud. If only the intent of the husband is deemed necessary, this

would make the subrogation of a subsequent creditor depend on an intent of one party to a voluntary conveyance. See, in this connection, note to *Hagerman v. Buchanan*, 14 Am. St. Rep. 732, 739, 745. But, under our statute, the decision above cited stands as the law, unless modified on formal review.

There is also a statement, in one of the grounds of the motion for a new trial, that the question of subrogation was abandoned, though much of the allegation of fraud was on that subject. The charge of the court should have distinguished between prior and subsequent creditors.

[5] If the reconveyance from Mrs. Lane to her husband was a deed of gift, and it was delivered, then the plaintiffs acquired a good title, and the deed from Lane to his wife does not need to be canceled. Perhaps there may be a decree declaring the fact and requiring a record. What is said in *Martin v. White*, 115 Ga. 866, 42 S. E. 279, covers the question as to the effect of recording a deed which is in fact voluntary, relatively to a subsequent purchaser for value without notice.

As we find it necessary to reverse the judgment for want of proper parties, which point was raised both in the demurrer and in the answer, and because of the failure to make any distinction in the charge between antecedent and subsequent creditors, which infected much of the charge, we deem it unnecessary to discuss in detail the various grounds of the motion for a new trial.

Judgment reversed. All the Justices concur.

(140 Ga. 297)

THORNQUIST v. OGLETHORPE LODGE
NO. 1.

(Supreme Court of Georgia. July 18, 1913.)

(Syllabus by the Court.)

1. WILLS (§ 470*)—CONSTRUCTION.

If two clauses of an item of a will are so inconsistent that both cannot stand, the later will prevail; but the whole item is to be taken together, and operation is to be given to every part of it, if this can be done without violating its terms or the intention of the testator. Such intention is to be sought by considering the item as a whole, rather than detached parts of it separately.

[Ed. Note.—For other cases, see *Wills*, Cent. Dig. § 988; Dec. Dig. § 470.*]

2. WILLS (§ 686*)—CONSTRUCTION—"WHILE UNMARRIED."

A testatrix devised and bequeathed her entire estate, after the payment of her debts, to her executors as trustees upon the following uses and trusts: "(a) To provide for my faithful friend and companion, the nurse of my son [naming him], to wit [naming her], while unmarried, such modest support as she has had while living with me; provided, however, that no more than one-half of the income of my estate shall be devoted to this purpose. (b) To pay over to my son [naming him] during his natural life the balance of the net income from my estate, after providing therefrom for the support of said [nurse named]. (c) From and after the death of my said son, leaving him sur-

viving a child or children, or the child or children of a deceased child, to pay his share of the net income of my estate for the maintenance and support of such child or children, or child or children of a deceased child, during the life of said [nurse], and at and after her death, then in trust to convey said property to said surviving child or children of my said son [naming him], the child or children of a deceased child to stand in the place of their parent, and to take per stirpes and not per capita. (d) In the event of the death of my said son [naming him] without issue him surviving, then and in that event to pay the entire income from my estate to said [nurse named] during her lifetime, and from and after her death, then in trust to convey my entire estate to "a certain lodge of the order of Odd Fellows, to be held, managed, and controlled by the trustees for the time being of such lodge, and the income to be applied to the support and relief of the needy widows and orphans of members of such lodge. The woman named as the faithful friend, companion, and nurse married, and her husband subsequently died. The son of the testatrix died without leaving issue. Held, that upon the marriage of the friend and nurse her interest in the estate terminated, and was not revived by the subsequent death of her husband; and upon the death thereafter of the son of the testatrix, without leaving descendants him surviving, the lodge of Odd Fellows became the sole legatee, for the purpose of carrying into effect the trust created for the widows and orphans of its members.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 1631-1637; Dec. Dig. § 686.*]

Error from Superior Court, Chatham County; W. G. Charlton, Judge.

Equitable action by Missouri Thornquist against Oglethorpe Lodge No. 1. Judgment for defendant, and plaintiff brings error. Affirmed.

The will of Eliza Anne Bennett, which was admitted to record in common form in 1900, contained the following item: "Item Second. I give, devise and bequeath unto my executors hereinafter named as trustees and their successors, all and every part and parcel of my estate, real and personal, including all money, choses in action, rights and credits belonging to me, after the payment of my just debts as hereinbefore provided, upon the following uses and trusts, that is to say: (a) To provide for my faithful friend and companion, the nurse of my son, George Wolfe Bennett, to wit, Missouri Thurman, while unmarried, such modest support as she has had while living with me, provided, however, that no more than one half of the income of my estate shall be devoted to this purpose. (b) To pay over to my said son, George Wolfe Bennett, during his natural life the balance of the net income from my estate, after providing therefrom for the support of said Missouri Thurman. (c) From and after the death of my said son, leaving him surviving a child or children, or the child or children of a deceased child, to pay his share of the net income of my estate to the maintenance and support of such child or children, or child or children of a deceased child, during the life of said Missouri Thurman, and at and

after her death, then in trust to convey said property to said surviving child or children of my said son, George Wolfe, the child or children of a deceased child to stand in the place of their parent, and to take per stirpes and not per capita. (d) In the event of the death of my said son, George Wolfe, without issue him surviving, then in that event to pay the entire income from my estate to said Missouri Thurman during her lifetime, and from and after her death then in trust to convey my entire estate to Oglethorpe Lodge No. 1, Independent Order of Odd Fellows, of Savannah, Georgia, to be held, managed and controlled by the trustees for the time being of such lodge, the income thereof to be applied by them to the support and relief of the needy widows and orphans of members of said lodge, in so far as the same may be necessary; and should there be any balance of income, such balance shall be invested by such trustees for the same uses and purposes. It is my will that the trustees for the time being of said Oglethorpe Lodge shall be the sole judges as to the widows and orphans who shall take the benefit of the support and relief provided for herein, and as to the amount thereof, and the continuance of the same. And I further authorize and empower such trustees for the time being, without the order of any court, at public or private sale, and on such terms as they may elect, to convey and dispose of any and all of my estate, the proceeds of such conveyance or disposal to be invested and held by them upon the uses and trusts hereinbefore set out."

Missouri Thurman married Thornquist, who later died, and she remained a widow. George Wolfe Bennett died without issue surviving him. The executors and trustees named in the will resigned, and Brooks became the administrator cum testamento annexo. The property subject to the terms of the item of the will above quoted consisted, at the time the litigation began, of about \$475 in cash, and a lot of land of the approximate value of \$1,000. Missouri Thornquist claimed that she was entitled to the entire income from such property. Oglethorpe Lodge No. 1, Independent Order of Odd Fellows, of Savannah, Ga., contended that, Missouri Thurman having married, it was entitled to the entire income from the property, and also to have a conveyance of the property, to be held by it upon the trusts set forth in the second item of the will. The administrator being unwilling to pay over to either of these parties the income from the property until their conflicting claims were settled, Missouri Thornquist filed an equitable petition for the purpose of obtaining a construction of the will and determining her rights. The presiding judge construed the item of the will above quoted in favor of the defendant, Oglethorpe Lodge No. 1. Mrs. Thornquist excepted.

Geo. H. Richter, of Savannah, for plaintiff in error. Wilson & Rogers, of Savannah, for defendant in error.

LUMPKIN, J. A testator died leaving a will, the second item of which is set out in the statement of fact. Missouri Thurman, who was mentioned as a beneficiary under subsections (a) and (d) of the item of the will, married, but afterward became a widow. The son of the testatrix mentioned in the will has died without leaving issue surviving him. Missouri Thornquist (formerly Missouri Thurman) claims that she is entitled to the entire income from the property, while Oglethorpe Lodge No. 1, Independent Order of Odd Fellows, of Savannah, contends that, Missouri Thurman having married, it is entitled to the entire income from the property, and also to have a conveyance of the same made to it, upon the trusts set forth in the will.

Counsel for the plaintiff in error argued that it was the intention of the testatrix to provide for Missouri Thurman, her faithful friend and companion, during such time as the latter was unmarried, whether before she married or during widowhood, and that the words "while unmarried," were not words of limitation under which the beneficiary lost her interest by marriage. He further contended that, if this were not correct, nevertheless there were two testamentary schemes included in the second item of the will, one embraced in the first part of the item, and the other embraced in subdivision (d) thereof and that the preceding divisions might be entirely eliminated from this item and leave the last-mentioned provision to stand alone. He further argued that, if it should be held that there was merit in the contention that the words "while unmarried" constituted a limitation, there was an irreconcilable conflict between the anterior and posterior provisions of the item, and that in such a case the latter would prevail. On behalf of the defendant in error it was contended that the second item of the will should be construed as a consistent whole, and that the clauses should not be construed as inconsistent, if this could be avoided, and that, so construed, the provision made for Missouri Thurman (afterwards Missouri Thornquist) terminated after her marriage, and did not revive upon the death of her husband, or upon the death of the son of the testatrix without issue surviving him.

[1] It is rudimentary law that in the construction of wills the court will seek diligently for the intention of the testator, and will give effect to it as far as it may be consistent with the rules of law. Civil Code, § 3900. It is well settled that, "If two clauses of a will are so inconsistent that both cannot stand, the later will prevail; but the whole will is to be taken together, and operation is to be given every part of it, if this can be done without violating its terms or the in-

tervention of the testator. And the intention of the testator is to be sought by looking to the whole will rather than to detached parts of it." Rogers v. Highnote, 126 Ga. 740, 56 S. E. 93. In Kimbrough v. Smith, 128 Ga. 692, 58 S. E. 24, Mr. Justice Evans said: "Before a posterior provision shall be given the effect of nullifying a devise previously made in the will, the conflict between the two provisions must be irreconcilable." See, also, 40 Cyc. 1413.

[2] In the light of these rules let us examine the provisions of the second item of the will here involved. The testatrix included several subdivisions marked by letters under the same item, thus indicating that they were considered to be closely related, and as forming together such a single purpose as to be included in one item, rather than such separate and distinct testamentary schemes or legacies as to be divided into separate items. We think that item second presents a single testamentary scheme with certain subdivisions thereof, rather than distinct and conflicting testamentary schemes. In that item the first thought presented by the testatrix was to make provision for the benefit of her friend and companion, Missouri Thurman, "while unmarried." At that time the beneficiary was unmarried, and these words evidently mean while or so long as she remained in that condition. 2 Bl. Com. *155. The testatrix could hardly have intended that the beneficiary might first take under the will, and then by marriage cease to be a beneficiary, and then again become a beneficiary by the death or divorce of her husband. The legacy was not of that elusive character which might be subject to the description, "Now you see it, and now you don't." It might have been that the woman for whom the testatrix was providing would need more assistance if she married and had a large family than if she remained unmarried, or the same thing might have been true if, perchance, marriage with her had proved a failure; but it was evidently not the testamentary purpose to provide for according to what she might need in such circumstances, but to make provision for her benefit so long as she did not see fit to marry.

Upon her marriage provision under subsection (a) terminated, and the beneficiary could not alternately take and not take under the will, according as she might marry, become a widow or a divorcee, and remarry. Later in the item the testatrix made provision for her son to receive "the balance of the net income from my estate, after providing therefrom for the support of said Missouri Thurman." She thus contemplated that a part of the income, not exceeding one-half thereof, should be devoted to the support of Missouri Thurman, while unmarried, and the residue of the income should be paid to the son. By subdivision (d) it was provided that, in the event of the death of the son of the testatrix, without issue, him surviving, the executors

should pay the entire income from the estate to said Missouri Thurman during her lifetime. Having provided that Missouri Thurman should receive less than the entire income while she should remain unmarried, and that the son of the testatrix should receive the balance, subdivision (d) then provided that, in the event of the death of her son without leaving issue, "the entire income" should be paid to Missouri Thurman. In other words, having provided for a part to be used for the benefit of Missouri Thurman while she remained unmarried, the testatrix then provided for the balance of the income, which would be going to her son, to be added to that which would be used for Missouri Thurman, thus paying the entire income to the latter. The testatrix contemplated that Miss Thurman should then be receiving some of the income, which upon a contingency would be increased so as to include the whole of it. This was not an independent or conflicting testamentary scheme, destroying that which had preceded it in the same item; but it should be construed in harmony with that which had preceded it. As we have seen that the provision for Missouri Thurman made in the first part of this item terminated upon her marriage, so, also the addition thereto made in the latter part of the same item terminated upon the same event. Thus this legatee remained an object of the bounty of the testatrix so long as she did not marry; but, when she married, this terminated the provision made for her in the will, and the legacy did not revive by reason of the death of her husband. The death of the husband did not reproduce life in the legacy.

Upon careful consideration of the second item of the will, we hold that the trial judge correctly construed it, that after the marriage of Missouri Thurman she no longer took any interest thereunder, and that, after the death of the son of the testatrix leaving no issue surviving him, the Oglethorpe Lodge No. 1 became the sole legatee for the purpose of carrying out the trust created in its favor.

Judgment affirmed. All the Justices concurred.

(140 Ga. 490)

MELDRIM v. MELDRIM.

(Supreme Court of Georgia. July 21, 1913.)

(Syllabus by the Court.)

1. APPEAL AND ERROR (§ 719*) — PRESENTATION FOR REVIEW—SUFFICIENCY.

Where error is not assigned in the main bill of exceptions, nor in the Supreme Court, upon exceptions pendente lite brought up in the record, the questions raised by them will not be considered. *Shaw v. Jones, Newton & Co.*, 138 Ga. 446, 66 S. E. 240; *Jones v. Ragan*, 136 Ga. 653 (7), 71 S. E. 1098.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2968-2982, 3490; Dec. Dig. § 719.*]

2. INTERPLEADER (§ 29*)—CLAIMANTS TO PROCEEDS OF INSURANCE POLICY—EVIDENCE.

The court did not err in admitting in evidence a certified copy of the original judgment and decree of absolute divorce granted in the suit between Robert Lee Meldrim and Mrs. Mollie Meldrim, over the objection that the same was irrelevant and immaterial.

[Ed. Note.—For other cases, see Interpleader, Cent. Dig. § 57; Dec. Dig. § 29.*]

3. INTERPLEADER (§ 29*)—CLAIMANTS TO PROCEEDS OF INSURANCE POLICY—EVIDENCE.

Nor was it error to admit in evidence, over the same objection, a certified copy of the marriage license of Robert Lee Meldrim and Johnnie E. Joiner, together with a certificate of the minister who officiated at the marriage, stating that Robert Lee Meldrim and Johnnie E. Joiner were duly joined in matrimony by him, the minister, on the 10th day of November, 1906.

[Ed. Note.—For other cases, see Interpleader, Cent. Dig. § 57; Dec. Dig. § 29.*]

4. INTERPLEADER (§ 29*)—CLAIMANTS TO PROCEEDS OF INSURANCE POLICY—EVIDENCE—CONTRACT.

It was not error for the court to admit testimony tending to show that the date "24th day of April" was by mistake written for "4th day of April," and the date "24th day of October," when it should have been "4th day of April," over the objection that the same was immaterial.

[Ed. Note.—For other cases, see Interpleader, Cent. Dig. § 57; Dec. Dig. § 29.*]

5. TRIAL (§ 329*)—VERDICT—PARTIES.

The court did not err in directing the verdict over the objections presented.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 774-776, 782; Dec. Dig. § 329.*]

Error from Superior Court, Sumter County; Z. A. Littlejohn, Judge.

Bill of interpleader by the Locomotive Engineers' Mutual Life & Accident Insurance Association against Mrs. Johnnie Meldrim and Mrs. Mollie J. D. Meldrim, praying that they be required to interplead and for other relief. From the judgment, Mrs. Mollie J. D. Meldrim brings error. Affirmed.

The Locomotive Engineers' Mutual Life & Accident Insurance Association, hereafter referred to as the Association, brought its petition against Mrs. Johnnie Meldrim and Mrs. Mollie J. D. Meldrim, praying that the two named defendants be required to interplead, etc. It alleged as follows: The Association issued upon the life of one Robert Lee Meldrim two insurance policies, aggregating the face value of \$3,000. In each of said policies Mrs. Mollie Meldrim was named as the beneficiary to whom the insurance was to be paid upon the death of Robert Lee Meldrim. He died on the 5th day of August, 1910, and proof of his death was duly made. Mrs. Mollie Meldrim was the lawful wife of Robert Lee Meldrim at the time of the issuance of the policies, and, so far as the policies themselves indicate, is still the beneficiary named in them. She has brought suit upon the policies against the Association, to recover the amount of the insurance. The Association has been advised that, subsequently to the issuance of the insurance policies and prior to the death of Robert Lee

Meldrim, he claimed to have procured a divorce from Mrs. Mollie Meldrim, and that afterward he intermarried with Johnnie E. Joiner, and at the time of his death was living with her as his wife. She also has brought suit upon the policies, seeking to recover the amount of insurance, alleging that she is temporary administratrix upon the estate of Robert Lee Meldrim, and claiming that as temporary administratrix and as the wife of Robert Lee Meldrim she is entitled to recover said insurance. The Association has been advised that Mrs. Mollie Meldrim, prior to the death of Robert Lee Meldrim, executed a contract in connection with an alimony suit, whereby said policies of insurance became assigned to said Robert Lee Meldrim or to such beneficiary as he might thereafter name, and that a decree was rendered in the alimony suit, by virtue of which, it is contended, Mrs. Mollie Meldrim was divested of all interest in said policies as the beneficiary thereof; but the Association is advised that on that particular point said decree is ambiguous, and that the claims of the two defendants are such as to render it doubtful or dangerous to the Association to pay the insurance to either until their claims can be determined under proper pleadings. The Association has no interest in the controversy, further than to protect itself as a mere stakeholder desiring to ascertain to whom the amount of the insurance should be paid.

An order was passed, requiring the named defendants to interplead, and they were enjoined from further prosecuting their individual suits against the Association. Mrs. Mollie Meldrim pleaded that the "entire estate of Robert Lee Meldrim consists solely of the insurance funds now in the hands of the court, as beneficiary, if they do not belong to Mrs. Mollie Meldrim"; that the estate of Robert Lee Meldrim is indebted to Mrs. Mollie Meldrim, as alimony under the decree of the court, in the sum of \$30 per month from August 1, 1910, down to this time, and she will continue to be entitled to receive from said estate the sum of \$30 per month so long as she lives and remains single; that Mrs. Johnnie Meldrim is not entitled to receive said insurance individually or as heir at law of Robert Lee Meldrim; that the policies are due and payable to Mrs. Mollie Meldrim as the beneficiary named in them; that Robert Meldrim "understood, and in his lifetime acted on his understanding, that the rights of Mrs. Mollie Meldrim to said policies did not expire until December 24, 1910, and so stated to witnesses;" and that the contract and decree for alimony have not been complied with by Robert Lee Meldrim, and hence said representative of said Robert Lee Meldrim has no right to the proceeds of said insurance." The last two allegations just quoted were stricken on demurrer, and exception to this ruling was taken *pendente lite*. There was no assignment of error upon

this, in the main bill of exceptions or upon the hearing in the Supreme Court; and the same is true of another exception *pendente lite* found in the record.

Mrs. Johnnie Meldrim pleaded as follows: She was the lawful wife of Robert Meldrim at the time of his death, and Mrs. Mollie Meldrim ceased to be the beneficiary in the policies on the 4th day of June, 1910. Robert Lee Meldrim, before his last marriage, procured a divorce from Mrs. Mollie Meldrim; and at the time of his death Mrs. Johnnie Meldrim was living with him as his wife. On April 4, 1906, Mrs. Mollie Meldrim and Robert Meldrim executed a contract in view of a certain alimony suit then pending, whereby said policies of insurance, prior to the death of Robert Meldrim, "became assigned to him or such beneficiary as he might name." By reason of this contract an order of court was passed under date of April 14, 1906, embodying in part the terms of said contract, and on December 17, 1906, a verdict and judgment purporting to be upon consent were rendered in Sumter superior court, said verdict and said judgment having been prepared by the attorneys of record of Mrs. Mollie Meldrim; but through inadvertence the word "October" was erroneously and mistakenly written by the draftsmen of said verdict, instead of the word "April," in fixing the time when, by the terms of the contract of April 4, 1906, and the decree of April 14, 1906, the assignment of all interest of Mrs. Mollie Meldrim in the insurance policies to Robert Lee Meldrim should become effective. Said contract was executed April 4, 1906, and by the terms thereof all the right or interest of Mrs. Mollie Meldrim terminated at the expiration of fifty months from that date. Copies of the contract and of the verdict and decree are attached to the pleadings.

Upon the trial the jury by their verdict found the facts to be as follows: "That R. L. Meldrim and Mrs. Mollie J. Meldrim married on the 9th day of January, 1889, and that a legal and valid divorce was granted between the parties, Robert Lee Meldrim and Mollie J. D. Meldrim, releasing one from the other, and from all marital obligations one toward the other, and absolutely dissolving the marital tie between them, on April 26, 1906; that Robt. Lee Meldrim and Johnnie E. Meldrim, née Joiner, were lawfully married on the 10th day of November, 1906, and that Johnnie E. Meldrim remained the lawful wife of Robt. Lee Meldrim until his death on Aug. 5, 1910; that Johnnie E. Meldrim is now the widow of Robt. Lee Meldrim, deceased; that Johnnie E. Meldrim is the duly appointed and qualified temporary administratrix of Robt. Lee Meldrim, deceased, said Robt. Lee Meldrim having departed this life on August 5, 1910; that Johnnie E. Meldrim, as temporary administratrix of the estate of Robt. Lee Meldrim, deceased, is entitled to receive the entire fund, the proceeds of two

insurance policies issued by the Locomotive Engineers' Mutual Life & Accident Insurance Association on the life of Robt. Lee Meldrim, amounting to the sum of \$3,000, with lawful interest thereon; and that, as the lawful wife of Robt. Lee Meldrim and only heir at law of said deceased, she is entitled to receive said fund, subject, however, to any claim of any creditor of the estate of Robt. Lee Meldrim, deceased, which may be of legal priority to her claim as wife and heir at law."

Mrs. Mollie Meldrim filed a motion for a new trial, which was overruled, and she excepted.

L. J. Blalock, of Americus, for plaintiff in error. J. E. Sheppard and J. A. Hixon, both of Americus, and Oliver & Oliver, of Savannah, for defendant in error.

BECK, J. (after stating the facts as above). [1-4] 1-4. The rulings made in headnotes 1, 2, 3, and 4 require no elaboration.

[6] 5. The fourth ground of the amendment to the motion for a new trial complains of the allowance and direction of the verdict over the following objections: "That the verdict is far outside of any issue authorized by this record or the pleadings; that there is no appearance here by Mrs. Johnnie E. Meldrim individually, and that it is therefore beyond the scope of the pleadings and the interpleader to cover anything by the verdict and the decree that tends to fix the right between Mrs. Johnnie E. Meldrim individually and this former wife; and that the issue is as to whether Mrs. Mollie J. D. Meldrim is entitled to it as beneficiary, or Mrs. Johnnie E. Meldrim as temporary administratrix." In approving the grounds of the motion the court appended this note: "Counsel for Mrs. Mollie J. D. Meldrim stated that they were willing that a verdict be directed awarding the insurance money to Mrs. Johnnie E. Meldrim as administratrix, but objected to the verdict going further than as above suggested." Construing the fourth ground of the motion in the light of this note, it will be seen that the objections to the direction of a verdict are narrowed to the special objection that there was no appearance by Mrs. Johnnie E. Meldrim, the defendant in error, individually, and that it was therefore beyond the scope of the pleadings "and the interpleader" to cover anything by the verdict and the decree that tends to fix the rights between Mrs. Johnnie Meldrim individually and the plaintiff in error.

With this contention of the plaintiff in error we cannot agree. In the petition for interpleader it is alleged that she was temporary administratrix upon the estate of Robert Lee Meldrim, and claiming that as such temporary administratrix, "and as the wife of Robert Lee Meldrim, she is entitled

to recover said insurance against petitioner." And in the fourth paragraph of the prayers to the petition it is prayed that "Mrs. Johnnie Meldrim [not Mrs. Johnnie Meldrim as administratrix] be made a party to this bill for interpleader." And the answer of Mrs. Mollie Meldrim, the plaintiff in error, is thus headed: "Locomotive Engineers' Mutual Life & Accident Ins. Association v. Mrs. Mollie J. D. Meldrim and Mrs. Johnnie Meldrim. Bill for Interpleader, etc. In Sumter Superior Court." And in the answer of Mrs. Mollie Meldrim she thus raises the distinct issue as to whether Mrs. Johnnie Meldrim is entitled to receive the fund individually: "Whereupon she [Mrs. Mollie Meldrim] says that said Johnnie E. Meldrim is not entitled to receive said fund individually, or as heir at law of Robert Lee Meldrim, if she is such heir." And evidence was introduced which showed that Mrs. Johnnie Meldrim was the heir of Robert Lee Meldrim, and his sole heir at law. Other evidence was introduced tending to show that Mrs. Mollie Meldrim had no interest whatever in the estate of Robert Lee Meldrim. In view of these allegations in the pleadings and the scope of the evidence, we do not think that the special objections raised to the direction of a verdict are meritorious.

Judgment affirmed. All the Justices concur.

(140 Ga. 406)

GIRVIN v. GEORGIA VENEER & PACKAGE CO.

(Supreme Court of Georgia. July 21, 1913.)

(Syllabus by the Court.)

MASTER AND SERVANT (§ 256*)—INJURY TO SERVANT—PETITION—SUFFICIENCY.

The petition in this case was sufficient to withstand a general demurrer, and the court erred in sustaining the same.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 809-812, 815; Dec. Dig. § 258.*]

Fish, C. J., and Atkinson, J., dissenting.

Error from Superior Court, Glynn County; C. B. Conyers, Judge.

Action by K. E. Girvin against the Georgia Veneer & Package Company. A general demurrer to the petition was sustained, and plaintiff brings error. Reversed.

F. H. Harris and D. W. Krauss, both of Brunswick, for plaintiff in error. Ryals, Grace & Anderson, of Macon, and A. J. Crovatt, of Brunswick, for defendant in error.

HILL, J. This case is here on exception to the judgment of the court below, sustaining a general demurrer to the petition. The plaintiff alleged substantially the following case: Ralph Girvin, her 15 year old son, was an employé of the defendant, and was engaged by it to work in a safe place within its mill building proper, and should not have

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

been placed at work where he was killed, namely, at a vat of boiling water, which was entirely disconnected with his work within the mill, and was the place where logs and timber were prepared for manufacture. The defendant in the operation of its business had and used two large vats, which contained a large quantity of boiling and scalding water, and into which the defendant placed logs for the purpose of steaming and cooking them as proper material to be manufactured into boxes, baskets, etc. The vats were at all times filled with boiling and scalding water, and the place was dangerous, and one where only men employes were able to and did appreciate properly the danger, and guarded themselves accordingly. The defendant did usually have grown men and not boys and youths to perform the work around the vats. In order to render the place reasonably safe to its employes the defendant should have placed a guard rail or some protection around the vats, so that if any person or employe should lose his balance and come near falling into a vat, such employe or person could quickly seize the guard rail or protection, and save himself from falling into the vat and scalding to death. The defendant was careless and negligent, and in utter disregard of the lives of its employes and others, by neglecting to place around and near such vats any safeguard, railing, or protection whatever, and the lack of such protection was a menace and danger to the safety and lives of the employes working around the vats. The plaintiff's son was absolutely inexperienced in working around the vats. He was immature in judgment and appreciation of danger, and by reason thereof was unable to comprehend and appreciate the danger and know of the same in order to guard against it and the negligence of the defendant. The defendant did not warn the deceased of the danger to which he was subjected, as was its duty to do, nor could deceased have remembered the warning if it had been given him, or have appreciated his danger, in order to protect and guard himself therefrom. On the 6th day of July, 1911, Ralph Girvin, in the first part of the day's work, was engaged in his usual and customary duty under his employment in the mill. After the noon hour the mill became "short-handed," and the defendant insisted upon placing a number of boys, including plaintiff's son, at work in and around the vats, for the purpose of placing logs therein. By reason of his tender years her son did not know and appreciate his right to decline to perform service around the vats of boiling water; and by reason of the coercion of his employers, and against his will, he was forced to perform the service of placing logs in the vats, whereby he lost his life. About 30 minutes after he had been placed at work putting logs in the vats, and while rolling a log towards the vat, his feet slipped, and he fell into the vat, and died on the same

day as a result of being scalded and burned. His death was due to the carelessness and negligence of the defendant, its agents, servants, and employes. It was negligent in changing her son's place of work from the mill to the dangerous place at the vat. He had familiarized himself with the work around the machinery in the mill, and was in comparatively little or no danger therefrom; whereas, he was entirely without experience in handling the logs and timber being prepared at the vats for manufacture within the mill, the attendant danger of which was great and entirely dissimilar to that of the mill machinery. The danger was as follows: The logs and timber, after being cut into sections of from three to six feet long, were placed on a way leading to the vats, and those handling the logs, in order to place them in the vats, were required to roll the section along the way parallel to the verge of the vat until reaching the verge, when the section would fall over the edge and into the boiling water. The person rolling the section along the way to the vat would have the section of timber, about three feet in diameter, always between him and the vat, and in pushing it would be in a stooping position, bringing his head and the trunk of his body almost at right angles with his lower limbs; and by reason of this position, and the intervention of the section of the log, his view of any danger of any kind along the way, including the near approach to the vat, would necessarily be impaired and obstructed, all of which was known to the defendant, or by proper exercise of care could have been known, and the defendant could have provided against the danger by placing a guard rail at the verge of the vat, so that the section of a log reaching the guard rail would be stopped, thus putting the person pushing the log on notice of its arrival at the vat, and then, by raising or removing the rail the section of log would fall into the vat. Her son being so engaged in pushing the section of timber along the way into the vat, his entire attention being applied to keeping the section in motion, his entire physical strength being applied to his work, his body being in the position described, and he having pushed or rolled the section of timber to the verge of the vat, and there being no guard rail to arrest its motion, it fell over the edge into the vat; and the plaintiff's son, exerting his strength in rolling the timber, by the natural momentum of the section of timber his body fell with it into the vat, with the result as stated.

We think the petition as a whole is sufficient to withstand the general demurrer. It was alleged that the deceased, a minor, was hired to work in the mill—a safe place—but that he was forced by the defendant and its agents to leave the safe place and to work in a place of danger around the vats of scalding water, where, owing to the negli-

gent conduct of the defendant and its agents, he lost his life. He was 15 years of age. He was put to work at a highly dangerous place, without warning or instruction, and without any safeguard or railing around the boiling vats of water, or other protection to prevent employes from slipping and falling into the water while engaged in rolling logs therein, so far as the record discloses.

In 1 Labatt on Master & Servant, § 19, it is said: "The almost universally accepted doctrine is that the care to be observed to avoid injuries to children is greater than in respect to adults. That course of conduct which would be ordinary care when applied to persons of mature judgment and discretion might be gross, and even criminal, negligence towards children of tender years. The same discernment and foresight in discovering defects and dangers cannot reasonably be expected of them that older and experienced persons habitually employ; and therefore the greater precaution should be taken where children are exposed to danger. Upon this ground he has been held liable for the following acts of negligence: Not insisting on the use by a minor of certain safeguards provided for the servants; requiring a minor to do work which is not within the compass of his age and experience; requiring a minor to encounter risks of an unusual kind, although such work is within the scope of his employment; augmenting the risks of a minor's service by giving him additional duties to perform; transferring a minor to new duties involving greater dangers than those involved in the work for which he was originally hired; setting a minor at a task which he has neither the strength nor the skill to perform; failing to prevent a minor from doing work in a dangerous way, when there is a temptation of a person of his years to do it so; allowing a minor to do things injurious to his health." In the case of *May v. Smith*, 92 Ga. 95, 96, 18 S. E. 360 (44 Am. St. Rep. 84) Bleckley, C. J., said: "There was evidence from which the jury could infer that the machine by which the plaintiff below was injured was dangerous to an inexperienced person, and that the danger was not sufficiently obvious to be apparent to such a person without proper explanation and warning. That the plaintiff was not a child, but was 17 years of age, would not deprive him of the right to be warned, if, as a question of fact, the employers, or the man representing them, ought, under all the circumstances, to have inquired of him as to his experience, or taken notice of the probability that he was so inexperienced as to render it proper to give him warning. That his age alone did not deprive him of the right of being warned is established by many authorities (citing numerous cases)." In the case of *A. & W. R. R. Co. v. Smith*, 94 Ga. 107, 20 S. E. 763, it was held: "(1) There is no presumption of law that a minor over 14 years of age, who applies for a posi-

tion involving dangerous service, is aware of the danger and needs no instruction. (2) The obligation to instruct an employe, before putting him to work, as to any of his duties which are dangerous does not necessarily follow, as matter of law, from his minority when employed, his inexperience, the fact that the service is dangerous, and the fact that his inexperience is known to the employer. In a case like the present it is a question for the jury whether the particular service was so dangerous, and its dangers so obscure, or whether the information of the employe was so limited, or his mind so immature, at the time he was injured, as to render it needful and proper that instructions should have been given him when he was employed, or at some time previous to the injury." This was a case in which the plaintiff, a boy 17 years of age was employed as a train hand, and received injuries while endeavoring to couple two cars. On the question of the duty of a master to warn minors and inexperienced persons, see 1 Hopkins on Personal Injuries (2d Ed.) §§ 300, 301. In *Hobbs v. Small*, 4 Ga. App. 627, 62 S. E. 91, it was held: "The court erred in sustaining a general demurrer to a petition, in an action by a servant against his master for personal injuries received pending the employment, alleging, in substance, that the plaintiff, a boy 16 years of age, wholly inexperienced, was put to work, without instruction or warning, upon a machine which was highly dangerous, was lacking in the usual and common safety devices employed on such machines, and was being used to do work of a character for which it was not intended, whereby it was rendered more dangerous; it being also alleged that the master knew all these things and the servant did not, that the master assured him that he could do the work at the machine all right, and that the injury occurred immediately upon his attempting to operate it, and before he had the opportunity of discovering its dangers."

But it is argued that the danger in this case was so obvious that no warning was necessary from the master to the servant. In the case of *Betts Co. v. Hancock*, 139 Ga. 198, 77 S. E. 77, a boy 13½ years old was placed by the master to work immediately above a rapidly revolving "re-saw," which was not covered, and the boy fell upon the "re-saw" and was injured. The plaintiff having recovered a verdict, this court, in upholding the trial court in denying a motion for a new trial made by the defendant, said (page 208 of 139 Ga., page 82 of 77 S. E.): "Whether the danger to the plaintiff in this case from the saw and place to work was so obvious to him that no warning of such danger was necessary from the master, and whether the minor was of such age and capacity as to be cognizant of the obvious danger and appreciate the hazard and to guard against it, were questions of fact for

the jury to determine from the evidence. It was for the jury to say, in the light of the evidence, whether the age and capacity of the minor were such as to bring him within the rule where no warning is necessary from the master, and where he must guard against obvious danger." In the Civil Code, § 8130, it is provided: "If there are latent defects in machinery, or dangers incident to an employment, unknown to the servant, of which the master knows or ought to know, he must give the servant warning in respect thereto." 2 Bailey on Personal Injuries (2d Ed.) § 358, p. 954. In view of the allegations of the petition: That the deceased was 15 years of age; that he was forced by the master from a safe to a dangerous place of work; that he was inexperienced and of immature judgment, so as not to make him cognizant of the obvious danger to which he was exposed, and to appreciate the same, etc.—we think these were questions which should be submitted to a jury, in order that they may determine whether the age and capacity of the minor were such as to bring him within the rule where the master is not bound to give the servant warning in cases of obvious danger.

Judgment reversed. The other Justices concur, except

FISH, C. J., and ATKINSON, J. (dissenting). Considering only the allegations of the petition that are well pleaded, and not the mere conclusions of the pleader, we are of the opinion that the petition does not set forth a cause of action, and that the court properly sustained a general demurrer thereto.

(140 Ga. 411)

SINGER v. SANTA PAULA COMMERCIAL CO.

(Supreme Court of Georgia. July 21, 1918.)

(Syllabus by the Court.)

SALES (§ 164*)—LIABILITY FOR PRICE—PARTIAL FULFILLMENT BY SELLER.

A suit to recover for a shipment of only a part of the goods ordered and sold (a quantity of walnuts) upon a contract signed by the seller and the purchaser, containing the stipulation that, "owing to impossibility to estimate quantity of No. 1 hard-shell grade, or either of the second grades, which will be produced, rendering it impracticable to agree as to prorating these grades, it is understood that all orders for No. 1 hard-shell, No. 2 hard-shell, and No. 2 soft-shell walnuts are conditional, and to be accepted provided available at the time the No. 1 soft-shell variety is shipped" (all of the walnuts ordered falling within the grade referred to in the part of the writing quoted), was demurrable, it appearing that the defendant declined to receive the part of the order shipped; for, whether the stipulation that "all orders * * * are conditional, and to be accepted provided available," means that it was absolutely optional with the seller to fill the orders, he being the judge as to whether the walnuts ordered were available or not, or whether the quoted stipulation should be construed as meaning that, if the goods ordered were "available,"

the seller was bound to fill the order, the seller could not, by only partially filling the order and delivering a part of the goods ordered, upon a refusal by the purchaser to accept the goods shipped in partial fulfillment of the order, recover the value of the goods so-shipped.

[Ed. Note.—For other cases, see Sales, Cent. Dig. §§ 386-390; Dec. Dig. § 164.*]

Error from Superior Court, Fulton County; Geo. L. Bell, Judge.

Action by the Santa Paula Commercial Company against H. L. Singer. Judgment for plaintiff, and defendant brings error. Reversed.

The suit was to recover \$801.75, which it was alleged the plaintiff had lost in consequence of the refusal of the defendant to take a shipment of 120 sacks of walnuts, valued at \$1,695.04. After having endeavored to induce the defendant to take the nuts, it is insisted he was bound to take under the terms of a contract hereinafter set forth, and after due notice to the defendant the plaintiff sold the nuts for \$1,093.29. The contract upon which the suit is predicated, so far as material to the issues involved, is as follows:

"Santa Paula, Cal., Sept. 21, '07.

"H. L. Singer, Atlanta, Ga. (buyers) have this day bought, and the Santa Paula Commercial Company (a corporation) has sold, the following quantities of walnuts to be packed in bags of about 100 pounds each, at the prices herein named:

"Sacks California No. 1 soft-shell walnuts at per pound: 50 sacks California No. 2 soft-shell walnuts at 12; 75 sacks California No. 1 hard-shell walnuts at 14½; 50 sacks California No. 2 hard-shell walnuts at 11½.

"Pacific weights, as per terms and conditions herein stated, to be delivered. F. o. b. common shipping point, California, crop of 1907. Terms: Net cash, sight draft, with bill of lading attached; draft to be held pending arrival and inspection of shipment. Quality: Good average of the section where grown, season stated, and association's grading or equal.

"(1) All sales are based on estimate of the season's crop for the No. 1 soft-shell grade; and in the event of the crop falling short from any cause, delivery will be made proportionately or in filled orders in hand when shortage is ascertained.

"(2) Other Grades.—Owing to impossibility to estimate quantity of No. 1 hard-shell grade or either of the second grades which will be produced, rendering it impracticable to agree as to prorating these grades, it is understood that all orders for No. 1 hard-shell, No. 2 hard-shell, and No. 2 soft-shell walnuts are conditional, and to be accepted provided available at the time the No. 1 soft-shell variety is shipped.

"(3) Owing to crops usually furnishing at least 10 per cent. of No. 2 soft-shell variety, it is agreed by buyers that seller has the

option of including in deliveries nuts of this grade up to 10 per cent. of the entire shipment. If seller is enabled to obtain orders for a considerable quantity of No. 2 soft-shell walnuts, it will not avail itself of its option of shipping 10 per cent. of this grade to buyers, preferring that same should be omitted."

The foregoing paragraphs are numbered for convenience of reference in the opinion. The shipments alleged to have been made were as follows: 20 sacks of California No. 2 soft-shell walnuts, at 12 cents per pound, amounting to \$282.60; 50 sacks of California No. 1 hard-shell walnuts, at 14½ cents per pound, amounting to \$787.64; 50 sacks of California No. 2 soft-shell walnuts, at 11½ cents per pound, amounting to \$624.80. The defendant demurred, on the grounds that the petition set forth no cause of action, that it showed on its face that the plaintiff had not fulfilled the terms of this contract, and, further, that the contract sued upon was void for want of consideration and for lack of mutuality. The court overruled the demurrer, and the defendant excepted.

Robt. C. & Philip H. Alston, of Atlanta, for plaintiff in error. Hamilton Douglas and O. B. Reynolds, both of Atlanta, for defendant in error.

BECK, J. (after stating the facts as above). Paragraph 1 of the contract relates to the sale of walnuts classified as "No. 1 soft-shell grade." No walnuts of this grade were ordered. No part of that paragraph qualified the portions of the contract contained in paragraph 2 or paragraph 3, and we cannot agree with the contention that paragraph 2 of the contract should be read in the light of paragraph 1. There is nothing in the wording of paragraph 2 or paragraph 3 which makes the construction of the terms of either of these paragraphs depend upon the interpretation of the terms of the other; but, on the other hand, if we make the expression contained in paragraph 1, "All sales are based on estimate of the season's crop for the No. 1 soft-shell grade," apply to the next two paragraphs, the contract becomes unintelligible. Counsel for the defendant in error advances the suggestion that paragraph 2 should be construed together with paragraph 1, and that, thus construed, the contract means that "at the time when, disposing of the crop, the 1907 shipments were made of No. 1 soft-shell, at that time defendant in error had the right to ship all or any part of orders on hand for grades falling under proviso No. 2." This construction is not sound, because in paragraph 2 stipulations are made which authorize the seller to fill orders for the grades referred to in paragraph 2, independently of any of the stipulations which are contained in paragraph 1; it being expressly provided in paragraph 2 that "all orders for No. 1 hard-shell, No.

2 hard-shell, and No. 2 soft-shell walnuts are conditional, and to be accepted provided available at the time the No. 1 soft-shell variety is shipped." Under this proviso it was declared that the seller was not bound to ship any part of the order falling under the grades mentioned in paragraph 2 of the contract, unless they were "available at the time the No. 1 soft-shell variety is shipped." And the reference in paragraph 2 to "the time the No. 1 soft-shell variety is shipped" does not have the effect of making the stipulation in paragraph 1 in reference to the last-mentioned grade in any way qualify the stipulations in the other paragraphs pertaining to any other grades. The only effect of the proviso in paragraph 3 was to give the seller the privilege of substituting as much as 10 per cent. of the No. 2 soft-shell grade in any other grade order, and it did not bind him to do that or anything else. If there is to be found any binding obligation under this so-called contract upon the seller, it is to be found in "paragraph 2."

Under the stipulations in paragraph 2 that "it is understood that all orders for No. 1 hard-shell, No. 2 hard-shell, and No. 2 soft-shell walnuts are conditional, and to be accepted provided available at the time the No. 1 soft-shell variety is shipped," either the seller had the privilege and option, in the first place, of shipping the entire amount of each grade ordered, or of not making any shipment at all, or, in the second place, the stipulation quoted meant that, if the grades ordered were "available," the seller was bound to fill the order. But whether the first or the second construction is placed upon this paragraph of the contract, and in that paragraph is embraced all of the grades ordered, the seller could not, under the first construction, by shipping a part of the order, supply the consideration, so as to give the contract the element of mutuality, which was wanting at the time of its execution, if the contract meant that it was absolutely in the power of the seller to ship or not; he being the judge of whether the grades mentioned were available or not. Or, if the second construction is placed upon it, that the seller was bound to ship, if available, still we do not think that he could, by a partial shipment, fulfill his obligation under the contract. If the walnuts were available, he was bound to fill the order as given; if not available, then he was not bound; and if he attempted to fulfill his obligations under the contract by sending less than the entire order, the purchaser was not bound to receive it. Consequently, it appearing that the seller had shipped and offered to deliver only a part of the quantity of walnuts ordered, he was not entitled, upon a refusal by the purchaser to accept his partial filling of the order, to recover.

Judgment reversed. All the Justices concur.

(13 Ga. App. 154)

HICKS, Sheriff, v. J. A. WARFIELD & CO.
(No. 4,783.)

(Court of Appeals of Georgia. Aug. 11, 1913.)

*(Syllabus by the Court.)***1. SHERIFFS AND CONSTABLES (§ 101*)—DUTIES—LIABILITY.**

"An officer like a sheriff must be diligent as well as honest." Where an attachment is placed in the hands of the sheriff, to be levied upon certain described personal property, it is his duty to make a diligent search for the property, and, in the absence of a statutory replevy bond, to seize and hold the same. If the sheriff makes no search, but relying upon the statement of the defendant that the property is in his possession, and that when the officer calls for it he will produce it, or will give him the bond, makes an entry of a levy on the attachment, leaving the property in the defendant's possession, the sheriff on failure of the defendant to produce the property or give the bond is liable to the plaintiff for any damage resulting from the neglect to perform his official duty.

[Ed. Note.—For other cases, see *Sheriffs and Constables*, Cent. Dig. § 174; Dec. Dig. § 101.*]

2. SHERIFFS AND CONSTABLES (§ 138*) — BREACH OF DUTY—DAMAGES—BURDEN OF PROOF.

Where an attachment is placed in the hands of a sheriff to levy upon personal property therein described, and he does not make a levy, or after making a levy, leaves the property in the defendant's possession, without taking the statutory bond for its retention, and the property cannot subsequently be found, a presumption arises that the plaintiff in the attachment was injured and damaged, and, on the trial of a rule against the sheriff, the burden is on him to show to the contrary.

[Ed. Note.—For other cases, see *Sheriffs and Constables*, Cent. Dig. §§ 290-296; Dec. Dig. § 138.*]

Error from City Court of Oglethorpe; R. L. Greer, Judge.

Action by J. A. Warfield & Company against D. A. Hicks, Sheriff. Judgment for plaintiff, and defendant brings error. Affirmed.

J. J. Bull & Son, of Oglethorpe, for plaintiff in error. F. Chambers & Son, of Macon, for defendant in error.

HILL, C. J. The questions in this case arise on a rule against a sheriff for failure to take the statutory bond for property levied on under an attachment for purchase money. The judge, who tried the rule without the intervention of a jury, made it absolute; and the writ of error challenges the correctness of that judgment. The facts were not in dispute. Briefly stated, they are as follows: Warfield & Co. sued out an attachment for purchase money, and placed it in the hands of the sheriff to be levied. The sheriff made an entry of levy on the property described therein. Subsequently a declaration in attachment was filed, and a final judgment taken in favor of the plaintiff for the property, and the execution issued thereon was also placed in the hands of the sheriff. It appears from the evidence that the entry of levy made by the sheriff on the attachment, according to his answer to the

rule, was made by him upon the statement of the defendant in attachment that the sheriff could not find the property described to levy on it, but that it was in the defendant's possession, and that he would deliver the property to the sheriff on demand, or would give him a statutory bond therefor. Upon this statement and promise of the defendant the sheriff made the entry of levy. The defendant failed and refused to deliver the property described in the entry of levy, and also refused to give the statutory bond, and thereupon this rule was brought against the sheriff.

[1] We think it is very clear that the judgment of the trial judge was correct. The answer to the rule set up no defense in law whatever, either for the making of the entry of levy, which was untrue, or for the failure of the sheriff to take the statutory bond. It was the plain duty of the sheriff, when the attachment was placed in his hands, to make diligent search for the property, and, when found, to seize it. He had no right to rely upon the statement of the defendant in attachment that he would deliver the property, or give the statutory bond. The duty of the sheriff was to make the levy, seize the property thereunder, and demand the bond, and, on a failure to give it, it was his duty to take possession of the property and keep it to answer the attachment. "An officer like a sheriff must be diligent as well as honest." He had no right to take the mere word or promise of the defendant in attachment to produce the property or give bond, and if he did so, he did so at his peril. The statement in the sheriff's answer that he made the entry of levy on the attachment through mistake, in that the entry recited that the property levied upon was in the possession of the defendant, when in fact it was not in his possession, construed with the further allegation made by the sheriff, in his answer, that he made this entry relying solely upon the defendant's statement that the property was in his possession, and that he would deliver it or give the statutory bond, shows that the untrue entry was made through lack of diligence on the part of the sheriff. The sheriff is liable to be ruled for his failure to take the replevy bond in an attachment case as required by law. *Ford v. Perkerson*, 59 Ga. 359; *Boyles v. Bank*, 96 Ga. 796, 22 S. E. 582. If a sheriff makes a false return, he is liable to answer in damages to any one who is injured thereby. *Duncan v. Webb*, 7 Ga. 187. And if a sheriff, when he seizes property, turns it over to the defendant, without taking a bond, he does so at his peril. *Steamboat Co. v. Bartholomess*, 67 Ga. 455. According to the sheriff's answer, he left the property in the defendant's possession merely upon the promise of the defendant that he would produce it or give the bond. This was a most flagrant failure on the part

of the sheriff to perform his official duty, and to take the bond or seize the property. The only excuse he could give for not making the levy was that after diligent search he can find no property to levy upon. The entry of levy was calculated to deceive the plaintiff. He relied upon this official statement that the property of the debtor had been seized by the sheriff, and was lulled into security, and thus the defendant in attachment was enabled by the misconduct of the sheriff and the want of any further activity on the part of the plaintiff to make away with the property, and to leave the plaintiff remediless, especially as the defendant in attachment was insolvent. There can be no doubt on this branch of the case that the trial judge properly made the rule absolute; the answer of the sheriff setting up no defense whatever.

[2] It is said, in the next place, that there is no allegation or proof that the plaintiff was injured or damaged by this misconduct of the sheriff. It has been held that when an execution has been placed in the hands of an officer for collection, and he fails to collect it in the time prescribed by law, the law presumes that the plaintiff was injured, and, upon a rule to show cause, the burden is upon him to show that his neglect has caused no injury to the plaintiff. *Reeves v. Parish*, 80 Ga. 222, 4 S. E. 788; *Hixon v. Callaway*, 2 Ga. App. 680, 53 S. E. 1120. Irrespective of this presumption, we think that the facts, even as set up in the answer of the sheriff, show that the plaintiff was injured by the sheriff's failure to perform his duty.

Judgment affirmed.

(13 Ga. App. 169)

COOPER v. CITY OF FT. VALLEY. (No. 4,982.)

(Court of Appeals of Georgia. Aug. 11, 1913.)

(Syllabus by the Court.)

1. INTOXICATING LIQUORS (§ 236*)—VIOLATION OF ORDINANCE—EVIDENCE.

Where the accused is charged with a violation of a valid municipal ordinance prohibiting the keeping in possession of intoxicating liquors for the purpose of illegal sale, the possession of the liquors and proof of one sale will authorize a conviction. *Sawyer v. City of Blakely*, 2 Ga. App. 159, 58 S. E. 399.

[Ed. Note.—For other cases, see *Intoxicating Liquors*, Cent. Dig. §§ 300-322; Dec. Dig. § 236.*]

2. INTOXICATING LIQUORS (§§ 236, 238*)—VIOLATION OF ORDINANCE—EVIDENCE.

The case is squarely within the principle of numerous decisions of the Supreme Court and of this court, that when one is given money to purchase intoxicating liquor for the person from whom the money is received, and the recipient of the money goes away, and subsequently returns with the liquor, and delivers it to the person giving him the money, a prima facie case is made that the one taking the money and delivering the liquor is either the seller or interested in the sale, and the burden is up

on him to show to the contrary. Where the only effort to carry this burden is by the statement of the accused, the question is exclusively for the jury. *Bray v. City of Commerce*, 5 Ga. App. 605, 63 S. E. 596, and citations.

[Ed. Note.—For other cases, see *Intoxicating Liquors*, Cent. Dig. §§ 300-322, 324-330; Dec. Dig. §§ 236, 238.*]

3. VERDICT SUSTAINED.

No error of law is complained of, and the evidence supports the verdict.

Error from Superior Court, Huston County; H. A. Mathews, Judge.

R. L. Cooper was convicted of violating a city ordinance, and from a judgment of the superior court brings error. Affirmed.

R. N. Holtzclaw, of Perry, for plaintiff in error.

HILL, C. J. Judgment affirmed.

(13 Ga. App. 54)

MOORE v. CALVERT MORTGAGE & DEPOSIT CO. (No. 4,840.)

(Court of Appeals of Georgia. July 8, 1913.)

(Syllabus by the Court.)

1. APPEAL AND ERROR (§ 870*)—FINAL JUDGMENT—EXCEPTIONS—REVIEW.

Where a bill of exceptions contains a valid exception to a final judgment, all proper and timely exceptions to interlocutory rulings will be considered without reference to whether the exception to the final judgment is meritorious.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 8451, 8487-8489, 8491-8512; Dec. Dig. § 870.*]

2. PLEADING (§ 263*)—ANSWER—AMENDMENT.

Where a defendant in his original answer makes no reference to certain paragraphs in the petition, containing material averments, an amendment to the answer expressly denying such paragraphs is a sufficient joinder of issue thereon, although there is in the amendment no withdrawal of the admissions of the paragraphs in the original answer, implied from the failure to answer them.

[Ed. Note.—For other cases, see *Pleading*, Cent. Dig. § 802; Dec. Dig. § 263.*]

3. PLEADING (§ 121*)—ANSWER—GENERAL DENIAL—FORM—ADMISSION.

An answer, averring merely that the defendant can neither admit nor deny a specified paragraph, without adding that he is without sufficient information upon which to base either an admission or denial, must be treated as an admission.

[Ed. Note.—For other cases, see *Pleading*, Cent. Dig. §§ 245-248; Dec. Dig. § 121.*]

4. PLEADING (§ 129*)—ANSWER—DENIAL—ADMISSION.

An allegation in a petition in reference to a matter peculiarly within the knowledge of the defendant must be expressly denied, or else it will be taken as having been admitted.

[Ed. Note.—For other cases, see *Pleading*, Cent. Dig. §§ 270-275; Dec. Dig. § 129.*]

5. BUILDING AND LOAN ASSOCIATIONS (§ 38*)—LOANS—USURY—PLEADING.

As the answer, properly construed, admitted that the plaintiff was a building and loan association and authorized as such to do business in this state, and as it appeared from the answer that the notes sued on did not exceed an aggregate of the principal sum and 8 per cent. interest thereon for the full period of the loan, divided into monthly installments as rep-

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

represented by the notes sued on, the transaction was not usurious, and the court did not err in striking the defendant's answer and directing a verdict for the plaintiff for the full amount sued for.

[Ed. Note.—For other cases, see Building and Loan Associations, Cent. Dig. §§ 43-47, 49-59; Dec. Dig. § 33.*]

Error from City Court of Fitzgerald; D. E. Griffin, Judge.

Action by the Calvert Mortgage & Deposit Company against Mrs. A. L. Moore. Judgment for plaintiff, and defendant brings error. Affirmed.

McDonald & Grantham, of Fitzgerald, for plaintiff in error. C. B. Teal and L. Kennedy, both of Fitzgerald, for defendant in error.

POTTLE, J. The petition alleged that the plaintiff was a building and loan association incorporated under the laws of the state of Maryland, and that the defendant was indebted to it upon 43 promissory notes for \$30.25 each, being part of a series of 72 notes, all dated September 8, 1908, the first maturing October 8, 1908, and the others maturing the 8th day of each succeeding month, respectively, for 71 consecutive months thereafter. It was further alleged that payment of the notes was secured by a deed to real estate. Copies of the notes and a copy of the deed were exhibited with the petition. In each note it is recited that the plaintiff is a building and loan association, that the defendant is a member or stockholder in the company, and that the note is executed in payment of dues on stock and interest on a loan. In the deed it is recited that the plaintiff is a building and loan association, and that the defendant has subscribed for 15 shares of stock, par value of \$100 each, and has procured from the company under its charter and by-laws an advance or loan of \$1,500 and has executed a series of notes corresponding to those described in the petition. It is further recited in the deed that, upon default in the payment of any of the notes, the company shall have the right to declare the whole debt due. Reference is also made in the deed to certain by-laws of the company, providing for the maturity of the stock. The plaintiff prayed for a recovery of a general judgment on the notes and for a special judgment setting up a lien on the land described in the deed. In each of the notes it is stipulated that the maker agreed to pay all costs "including ten per cent. as attorney's fees." In the deed it is stipulated that in the event legal proceedings should be adopted for the collection of the debt the maker should be liable "for ten per cent. on the indebtedness hereby secured as attorney's fees." The defendant answered admitting all the allegations in the petition except that paragraph in which the right to recover attorney's fees was claimed;

but the fact that written notice was given as required by the statute in order to bind the defendant for the payment of attorney's fees was not denied. The defendant further answered that she had paid 29 of the series of notes as set out in the petition and that the loan was infected with usury; the company having exacted about \$350 more interest than it was entitled to.

The defendant amended her answer by denying the indebtedness as set forth in the petition by averring that she was unable either to admit or to deny, for want of sufficient information, that the plaintiff was a corporation of the state of Maryland, organized for the purpose of engaging in the business of a building and loan association; and also averring that, for want of sufficient information she could neither admit nor deny the allegation that she had made default in the payment of the notes, and that the company had notified her of its option to declare the whole debt due. The amendment further answered that the defendant had only received "in money from the plaintiff company the sum of \$1,425." The usury claimed was set forth in detail in the answer; it being averred that the defendant had received only \$1,425, to which should be added \$9.51 for interest up to maturity of the first note, from which should be deducted the amount of the first note. Interest is then calculated on this new principal to the maturity of the second note, and so on, until the last note. It is averred in the amendment that a large part of these notes had been paid from time to time, and that the defendant is really indebted to the plaintiff in the sum of \$765.91; that all of the indebtedness claimed by the plaintiff in excess of this amount is usurious. It is further averred that the scheme adopted by the plaintiff in selling the defendant stock was a mere subterfuge to cover up the usurious transaction, and that the plaintiff is in fact not a building and loan association, or authorized to do business in Georgia under the laws of this state.

The trial judge struck the defendant's original and amended answer and directed a verdict for \$1,012.75, principal, \$101.02 interest, and \$111.37 as attorney's fees, together with all cost, and the further finding "in favor of plaintiff's lien upon the premises described in plaintiff's petition." A motion for a new trial, on the general ground that the verdict was contrary to the law and the evidence, was overruled, and the defendant has filed her bill of exceptions assigning error upon the striking of her answer, upon the direction of the verdict, and upon the overruling of the motion for a new trial.

[1] 1. A question of practice is suggested in the brief of counsel for the defendant in error. The direct exception to the direction of a verdict cannot be considered because it

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

came too late. The motion for a new trial is without merit, because, if the court properly struck the defendant's answer, the verdict in the plaintiff's favor was the logical result, and it cannot be said to be contrary to the evidence. It is suggested that we ought not to consider the assignment of error upon the striking of the defendant's answer, because there is no meritorious exception to a final judgment, or to one which would have been final if it had been rendered as claimed by the excepting party. The reply to this is that the judgment overruling the motion for a new trial is a final judgment, and, while the exception to it is not meritorious, it is a sufficient assignment upon which to fasten a complaint, made by proper and timely exceptions, that the court erred in striking the defendant's answer. If the judgment striking the answer was erroneous, then everything else that took place during the progress of the trial was nugatory. An exception to a final judgment was necessary to enable us to consider the complaint that the court erred in striking the defendant's answer; but, having served this purpose, it may be wholly disregarded. This suggests a reason why there might not properly be legislation dispensing with the necessity of making a totally useless exception to a final judgment in such a case as the one now in hand.

[2] 2. The petition contained 16 paragraphs. In the original answer the defendant admitted paragraph 1, relating to her residence, admitted the execution of the note sued on, and denied paragraph 15. In the original answer no reference was made to any of the other paragraphs in the petition. By amendment to the answer the defendant denied, by number, certain of the paragraphs to which no reference had been made in the original answer. In paragraph 6 of the petition it was alleged that the plaintiff was a corporation "organized for the purpose and engaged in the business of a building and loan association." In the eighth paragraph it was alleged that the defendant had made default in the payment of four of the notes sued on, and that the plaintiff had notified her of its option to declare the whole debt due. In reference to these two paragraphs it is alleged in the amended answer that "defendant can neither admit nor deny paragraphs 6 and 8 of the plaintiff's petition." By way of further answer, after setting forth a long calculation for the purpose of showing that usury was charged, the defendant, in paragraph 5, averred that the scheme adopted by the plaintiff, "in proposing to sell her stock in said company, was and is a mere subterfuge to cover up the usurious transaction." It is suggested in the brief of counsel for the defendant in error that, under a proper construction of the defendant's answer, she ought to be held to have admitted all of the substantial averments in the petition. It is contended that, in view of the

fact that the original answer in effect admitted all of the allegations except the claim for attorney's fees, the defendant cannot, in the amendment, by a mere general denial of certain numbered paragraphs join issue with the plaintiff without expressly withdrawing the admissions made in the original answer. By failing to answer certain paragraphs in the petition, the defendant is held to have admitted them; but the necessary effect of the amendment in which these paragraphs are expressly denied is to withdraw implied admission resulting from the failure in the first instance. Where, in an answer, a paragraph is admitted, if the defendant wishes to deny this paragraph in an amendment, the better practice would be to expressly withdraw the admission. Withdrawals by implication, like repeals by implication, in statutes, are not favored but such withdrawals will be allowed where the only reasonable construction to be given the amendment is that the defendant intended to withdraw an admission previously made. This is the only construction which can be given to an amendment which expressly denies an averment previously admitted.

[3] 3. The main contention which the defendant sought to make in her answer was that the plaintiff was not a building and loan association within the meaning of the statutes of this state, authorized to aggregate at the date of the loan the principal and interest for the entire period of the loan and divide the sum of the principal and interest for the entire period of the loan into monthly or other installments, or take notes therefor, if in so doing no greater rate of interest than 8 per cent. was charged. Civil Code 1910, § 2878. The vital question, therefore, was whether or not the plaintiff was a building and loan association within the meaning of the statutes of this state which authorize such associations to engage in transactions of the nature above indicated, even though in so doing a greater rate of interest than 8 per cent. on the principal sum loaned is charged. It was distinctly alleged in the petition that the plaintiff was an association of this character. If the defendant desired to join issue in reference to this matter, it was incumbent upon her to expressly deny this averment, or to state that for want of sufficient information she could neither admit nor deny the same. She did neither, but contented herself with an answer that she could "neither admit nor deny" the averment in reference to this material matter. We have recently held that such an answer must be taken as an admission. *So. Bell Telephone & Telegraph Co. v. Shamoss*, 12 Ga. App. 463, 77 S. E. 312. It is only when the defendant has no information in reference to a matter alleged in the petition that he can neither admit nor deny; and, before such an answer will be accepted, he must allege that he makes it because he is without sufficient information to enable him truth-

fully either to admit or to deny. As the defendant's pleadings stood at the trial, she was in the attitude of admitting the allegation that the plaintiff was a building and loan association, authorized under its charter to do business as such in this state. Nor do the other averments in the amended answer help the defendant. In the light of the admission that the plaintiff was a building and loan association, the allegation in paragraph 5 that the scheme adopted by it was a mere subterfuge to cover up an usurious transaction must be taken as a mere conclusion of the pleader; and the facts set forth in the answer to support this conclusion are not sufficient for this purpose, if the plaintiff is in fact, as the defendant admits, a building and loan association.

[4] 4. The general averment in the amended answer that the defendant "can neither admit nor deny" the allegation that she has made default in the payment of four of the notes, and that the plaintiff had notified her of its intention to declare the whole debt due, was insufficient, for two reasons: First, because, as above indicated, such an answer must be regarded as an admission; and second, because the allegations, being in reference to matters peculiarly within the knowledge of the defendant, called for an express denial by her. *Raleigh & Gaston Railroad Co. v. Pullman Co.*, 122 Ga. 700, 50 S. E. 1008; *So. Bell Tel. & Tel. Co. v. Shamos*, *supra*; *Civil Code* 1910, § 5637.

[5] 5. While the defendant denied liability for attorney's fees, she did not deny having received the preliminary notice required by the statute in order to bind her by the stipulation in the notes to pay attorney's fees. The question whether the plaintiff had charged usury was a mere matter of calculation. In one paragraph of the answer the defendant avers that she received from the plaintiff only \$1,425 in money. This was an equivocal answer. The plaintiff alleged that it had loaned the defendant \$1,500. If this was not true, the defendant should have unequivocally denied it. Taking the answer most strongly against the defendant, as it must be done, it does not appear but that the defendant received \$1,425 in money, and the other \$75 in some other valuable consideration. Upon the basis of a loan of \$1,500, the plaintiff was entitled to charge \$720 interest, and to divide the aggregate of principal and interest, to wit, \$2,220, into 72 monthly payments, each of which would have amounted to \$30.83. As the defendant was required to pay only \$30.25 in monthly installments, it is apparent that no usury was charged. As to whether the defendant could raise the question that the plaintiff was not a building and loan association, after having contracted with it as such, and in reference to the question upon whom the burden of proof rested upon this issue, see *McIntosh v. Thomasville*

Real Estate & Improvement Co., 138 Ga. 128, 74 S. E. 1088. The record in the present case does not call for a decision upon either of these questions. The court did not err in striking the defendant's answer and directing a verdict for the full amount of principal, interest, and attorney's fees sued for. The stipulation in the notes in reference to attorney's fees was sufficiently definite and authorized a recovery of 10 per cent. of the principal and accrued interest. *Hamilton v. Rogers*, 128 Ga. 27, 54 S. E. 926. There is no sufficient assignment of error in the record to call for a decision in reference to the power of the city court to award a special judgment against the land described in the security deed. Upon this question, however, see *Edenfield v. Bank of Millen*, 7 Ga. App. 645, 67 S. E. 896.

Judgment affirmed.

(13 Ga. App. 171)

W. D. BARBER & SON v. SINGLETARY
et al. (No. 4,549.)

(Court of Appeals of Georgia. Aug. 12, 1913.)

(Syllabus by the Court.)

1. SALES (§ 267*)—WARRANTY—CONSTRUCTION.

An express warranty will exclude an implied warranty on the same or a closely related subject, but does not exclude an implied warranty on an entirely different subject. Consequently it was not error for the trial judge to charge the jury that the defendants had the right to rely upon either an express warranty or an implied warranty, in a case in which the express warranty was confined to the age and soundness of the mule, and, the mule having been purchased for a plow mule, there was a plea that he was worthless as a work mule, and evidence supporting that allegation, to the effect that the mule would not plow.

[Ed. Note.—For other cases, see *Sales*, Cent. Dig. §§ 760-761; Dec. Dig. § 267.*]

2. SALES (§ 267*)—EVIDENCE (§§ 213, 265*)—ACTION FOR PRICE—COMPROMISE OFFER.

The fact that the maker of a note, given for the purchase price of a mule, offered to return the mule and to pay \$30 for the hire thereof, this offer being declined by the seller, did not require a finding in favor of the plaintiff for \$30 or any other sum. So far as appears from the record, the defendant's proposition was an offer of compromise, and could properly have been excluded from the testimony.

[Ed. Note.—For other cases, see *Sales*, Cent. Dig. §§ 760, 761; Dec. Dig. § 267.* *Evidence*, Cent. Dig. §§ 745-751, 753, 1029-1050; Dec. Dig. §§ 213, 265.*]

3. APPEAL AND ERROR (§ 1002*)—VERDICT—CONFLICTING EVIDENCE.

The evidence authorized the verdict.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 3935-3937; Dec. Dig. § 1002.*]

Error from City Court of Cairo; J. K. Singletary, Judge.

Action by W. D. Barber & Son against O. H. Singletary and others. Judgment for defendants, and plaintiff brings error. Affirmed.

M. L. Ledford, of Cairo, for plaintiff in error. R. C. Bell, Ira Carlisle, and J. S. Weathers, all of Cairo, for defendants in error.

RUSSELL, J. Barber & Sons sued O. H. Singletary and Berry Singletary upon a promissory note, which recited that it was given for purchase money of a certain mule. The note also created a mortgage lien upon the mule. The mortgage had been foreclosed, and the suit proceeded for the balance due upon the note after the proceeds of the mortgage sale had been credited upon it. The jury returned a verdict in favor of the defendants. Barber & Sons made a motion for a new trial, and they except to the judgment refusing it. There are two assignments of error.

[1] 1. It is insisted that the court erred in instructing the jury as follows: "I charge you that the defendants plead a failure of consideration, and they have the right to rely upon either an express warranty or an implied warranty, and if they have shown that there has been an express warranty or an implied warranty, and that the consideration has failed, and that they have carried the burden in whole or in part, and that they have produced a preponderance of the evidence, then you will find in favor of the defendants the amount they have shown the consideration to have failed, whether in part or in all." The point is made that since an express warranty will exclude an implied warranty, and since the note contained warranties as to the title and the absence of outstanding liens, as well as a warranty in reference to the age of the mule, the court erred in telling the jury that they might consider the breach of any warranties which might be implied. It is true, of course, as was held in *De Loach Mill Mfg. Co. v. Tutweiler Coal & Iron Co.*, 2 Ga. App. 493, 58 S. E. 790, following the ruling of the Supreme Court in *Johnson v. Latimer*, 71 Ga. 470, that an express warranty excludes implied warranties upon the same subject; that only in the absence of an express warranty can a breach of an implied warranty be considered. This rule is well settled, not only in this state, but in other jurisdictions. Express warranty as to any particular subject will exclude any warranty by implication upon the same subject. But an express warranty on one subject does not exclude an implied warranty on an entirely different subject. For instance, an express warranty of title will not exclude an implied warranty of soundness, or an implied warranty of merchantability, or an implied warranty of such training and strength as will enable a mule, which has been purchased for the particular purpose of farm work, to do such work. An express warranty of quality will not exclude an implied warranty of title, nor will an express warranty that the article shall be in good order exclude an implied warranty

of fitness for the purpose intended. When a known, described, and definite article is ordered of a manufacturer, even though it be stated that it is required for a particular purpose, yet if the known, described, and definite thing is of the kind and quality called for by the order, and is actually supplied, there is no implied warranty that it will answer the particular purpose intended by the buyer. *Cranksaw v. Schweizer Manufacturing Company*, 1 Ga. App. 364 (12), 53 S. E. 222; *De Loach v. Tutweiler*, 2 Ga. App. 493, 58 S. E. 790; *Cyc. 31, 392*; *Fay & Eagan Co. v. Dudley*, 129 Ga. 314, 58 S. E. 826. It may be stated as a general rule that where there is a sale of personal property under an express warranty as to quality, there is no implied warranty. *Brooks Lumber Co. v. Case Threshing Machine Co.*, 136 Ga. 754, 72 S. E. 40; *Malsby v. Young*, 104 Ga. 205, 30 S. E. 854; *Elgin Jewelry Co. v. Estes*, 122 Ga. 809, 50 S. E. 939; *Moultrie Repair Co. v. Hill*, 120 Ga. 730, 48 S. E. 143. All of these, however, are cases in which it was sought to vary an express contract of warranty, either by the addition or substitution of implied warranties contradictory to or variant from the terms of the express contract of warranty. They fall under the general rule that an express warranty in the sale of goods excludes all implied warranties on the same subject. It is equally well settled that when a warranty of suitability can be implied as to a subject not touched or covered by the express warranty, the breach of this implied warranty may be used as a defense. As was well stated by Judge Powell in *Hawley Down Draft Furnace Co. v. Van Winkle Gin & Machinery Co.*, 4 Ga. App. 85 (1), 60 S. E. 1008: "While in the contract of sale there can be no coexistence of express and implied warranties on the same subject, since the one, ipso facto, excludes the other, still this exclusion does not necessarily extend to every feature of the contract." See, also, *Stimpson Computing Scale Co. v. Taylor*, 4 Ga. App. 567, 61 S. E. 1131; *City of Moultrie v. Schofield Sons & Co.*, 6 Ga. App. 464, 65 S. E. 315. In the case last cited the rule is stated that if an order be given for a specific article, and if the defined and described article be afterward supplied, there is no implied warranty that it will answer the purpose for which it was intended by the buyer. In the case now before us the sellers expressly warranted that the mule was sound and eight years old, and that their title was perfect. It was alleged and proved that a part of the contract, which was not reduced to writing (and which naturally was not included in the instrument executed by the purchasers), was a statement upon the part of the sellers that the mule was a good plow mule. This was a warranty upon an entirely different subject from those included in the instrument, and therefore the judge did not err in permitting the jury to ascertain whether there had been a breach of this warranty.

and in charging that the defendants had a right to rely upon the failure of consideration arising from the breach of either the express or the implied warranties, if the jury believed such warranties had been made. Since there was no issue as to the fact that the warranty, to the effect that the mule was a good plow mule, was made, and the only question was as to whether the mule corresponded with this warranty, the charge of the court could not in any event have harmed the plaintiffs.

[2] 2. Upon the trial of the case, one of the defendants admitted that he had offered the plaintiffs \$30 for the hire of the mule, and that he would return the mule to them in cancellation of the trade. It is insisted by learned counsel for the plaintiffs that since this testimony was uncontradicted, the admission of liability demanded a verdict in favor of the plaintiffs. We cannot concur in this opinion, since it appears from the record that this was a mere offer of compromise, not accepted by the plaintiffs, who proceeded to foreclose their mortgage, and themselves bought in the mule at the sale.

[3] 3. The evidence of the quality of the mule and its adaptability for plowing was in conflict. There was testimony that it was a good plow mule; there was also testimony that the animal was entirely untrained and abnormally lazy. The jury resolved this issue in favor of the defendants. Since the trial judge approved that solution of the question, it is beyond the power of this court to interfere.

Judgment affirmed.

(13 Ga. App. 246)

CUMMINGS v. ARNOLD. (No. 4,989.)
(Court of Appeals of Georgia. Aug. 16, 1913.)

(Syllabus by the Court.)

1. APPEAL AND ERROR (§ 722*)—REVIEW—ASSIGNMENTS OF ERROR—WANT OF VERIFICATION.

The assignments of error raising the point that the court should not have proceeded with the trial, for the reason that the attorney for the defendant had leave of absence, not being fully verified by the trial judge, will not be considered by this court.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2990-2996; Dec. Dig. § 722.*]

2. PLEADING (§ 352*) — MOTION TO STRIKE.

The absence of a defendant or of his sole counsel does not authorize the striking of a plea setting up a valid defense to the action. In such a case, though the court may proceed with the trial if no sufficient reason for a continuance appears, the plaintiff is not relieved from establishing the affirmative of the issue formed by the filing of a proper plea. The timely filing of a proper and sufficient plea puts the plaintiff upon proof of his claim or demand, whether the defendant be present or absent.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 1078-1091, 1125; Dec. Dig. § 352.*]

Error from City Court of Lexington; Joel Cloud, Judge.

Action by N. D. Arnold against C. B. Cummings. Judgment for plaintiff, and defendant brings error. Reversed.

Jno. J. & R. M. Strickland, of Athens, for plaintiff in error. Paul Brown, of Lexington, for defendant in error.

RUSSELL, J. Arnold sued Cummings upon two promissory notes. The case was continued for several terms, and on December 4, 1912, in the absence of the defendant and his counsel, the court entered a judgment in favor of the plaintiff. Neither the defendant nor his counsel was present at the term of the court at which this judgment was rendered. On February 3, 1913, the defendant filed a motion to set aside the judgment. The court refused to set the judgment aside, and the defendant excepted.

[1] 1. The motion to set aside a judgment is based upon two grounds. We decline to deal with the first ground, because the trial judge does not fully verify the statement of the bill of exceptions with regard to the leave of absence of the defendant's counsel. In an explanatory note the judge states that it was publicly announced, during the presence of the attorney at the regular November term, 1912, of the city court of Lexington, that there would be an adjourned term, mainly for the purpose of trying cases represented by nonresident attorneys. The defendant's counsel is a nonresident attorney, and the judge certifies that no mention was made of the case at bar at the time that counsel asked for leave of absence. As it is the duty of counsel themselves to keep informed of the exact status and condition of all proceedings in which they are interested, and certainly is not ordinarily the duty of a trial judge to inform attorneys having cases in his court as to when adjourned terms will be held, we may say in passing that, even if the assignment of error upon this ground had been fully verified, we should probably have sustained the finding of the lower court upon this point.

[2] 2. When the instant case was called for trial, the plaintiff's counsel made a motion to strike the defendant's answer, and the court granted this motion. Thereafter, without proof, the court entered a judgment in favor of the plaintiff as upon an unconditional contract to which no issuable defense had been filed upon oath. In striking the plea the court erred, and for this error the court should have set aside the judgment. The absence of a defendant or of his sole counsel does not authorize the striking of a plea setting up a valid defense to the action. In such a case, though the court may proceed with the trial no sufficient reason for a continuance appears, the plaintiff is not relieved from establishing the affir-

ative of the issue formed by the filing of a proper plea. In the instant case the defendant had filed a plea, to which no timely objection had been offered by demurrer. In this plea, which was verified by his oath, the maker of the note set up that one of the notes was given under duress and that the other was without any consideration whatever. The plea appears to present a good defense. It was too late to demur at the time of making the motion to strike, and the motion to strike could not properly have been sustained, for the allegations of the answer are sufficient to withstand a general demurrer. The filing of a proper and sufficient plea puts the plaintiff upon proof of his claim or demand, whether the defendant is present or absent.

Cases can be imagined in which the plaintiff might not be willing to swear in contradiction of the defendant's plea, and likewise instances may occur in which the plaintiff, as well as the defendant, might be absent without sufficient cause. In the present case the record is silent as to this; but if it had happened that Mr. Arnold, as well as Mr. Cummings, was absent, why should Mr. Arnold, rather than Mr. Cummings, be permitted to sustain his side of the pending issue without proof? Certainly, if the case had been one in which the defendant had filed a plea that the note was barred by the statute of limitations, and an inspection of the note itself had demonstrated that the plea was sustained, the court would have been as much authorized to strike this plea as the one actually filed. But we do not apprehend that in such a supposititious case the learned judge who presided would have struck the plea. The order striking the plea should be set aside, and the case should be reinstated upon the second ground of the motion.

Judgment reversed.

(13 Ga. App. 206)

UNDERWOOD v. STATE. (No. 4,943.)

(Court of Appeals of Georgia. Aug. 15, 1913.)

(Syllabus by the Court.)

WITNESSES (§ 293*)—CRIMINAL LAW (§§ 393, 394*)—PRIVILEGE OF ACCUSED—EVIDENCE ILLEGALLY OBTAINED—UNREASONABLE SEARCHES.

"Courts should liberally construe the constitutional provision against compelling the accused to be a witness against himself, and refuse to permit any first or doubtful steps which may invade his rights in this respect."

(a) Where a person was arrested on suspicion of keeping on hand intoxicating liquors in his place of business, the arrest being made without a warrant, and, the officers, while holding him in illegal custody, violently seized his person and, against his utmost resistance, took from his pocket the keys to his iron safe, and with the keys unlocked the safe and found therein intoxicating liquors, testimony, on his trial for the offense of keeping intoxicating liquors on hand at his place of business, as to

the finding of the liquors in his safe should have been excluded, because the evidence was wrongfully obtained by the officers, in criminal violation of the law, by an unlawful search and seizure following an unlawful arrest, and the accused was thus compelled to give evidence tending to criminate himself, in violation of the constitutional restriction on that subject.

[Ed. Note.—For other cases, see *Witnesses*, Cent. Dig. §§ 1009-1014; Dec. Dig. § 293;* *Criminal Law*, Cent. Dig. §§ 871-876; Dec. Dig. §§ 393, 394.*]

Error from City Court of Americus; W. M. Harper, Judge.

C. E. Underwood was convicted of keeping intoxicating liquors at his place of business, and brings error. Reversed.

Underwood was convicted of a violation of the Penal Code 1910, § 426, in keeping on hand at his place of business intoxicating liquors, and, his motion for a new trial having been overruled, he excepted.

From the evidence it appears that the chief of police, with other policemen, went to the place of business of the accused without a warrant, and instituted a search for intoxicants. While this search was in progress the accused closed and locked his iron safe. This act aroused the suspicion of the officer, and he ordered the accused to open the safe for inspection. The accused refused to do so, and the officer thereupon, without a warrant, arrested him on suspicion, and took him to the police barracks, leaving a policeman in charge of the storehouse. At the police barracks, in the presence of the solicitor of the city court and of several policemen, the chief ordered the prisoner to give up his keys to the iron safe. Again the accused refused to do so, and thereupon the officers caught hold of him, and, forcibly and against his will and protest, overcoming by violence his resistance, took from his pocket the keys of his safe. Leaving the accused in custody at the barracks, the chief hurried to the storehouse, securing on his way the services of a locksmith, and, on reaching the storehouse, ordered the locksmith to turn the combination of the safe; and when this was done the officer unlocked the safe, using the keys he had secured from the person of the accused for that purpose, and found in it 114 pints of whisky, which he seized. Based upon the evidence thus obtained, a warrant was sworn out against the accused, and an accusation was filed, on which he was tried and convicted.

On the trial the accused objected to the introduction of the testimony as to the unlocking of his safe and the discovery of the whisky therein, on the ground that such testimony was not admissible, because it was in violation of the provisions of the Constitution of the state, that "no person shall be compelled to give testimony tending in any manner to criminate himself." The admitting of this testimony is the subject of the controlling assignment of error.

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

C. R. Winchester and L. J. Bialock, both of Americus, for plaintiff in error. Zack Childers, Sol., of Americus, for the State.

HILL, C. J. (after stating the facts as above). The specific objection made to the admission of the testimony as to the finding of the liquor was that the evidence was obtained by the officers while the accused was under an illegal arrest and by means of a key forcibly taken from his person, and that, therefore, he was compelled to give testimony tending to criminate himself, in violation of the constitutional provision on that subject. This constitutional provision is in the following language: "No person shall be compelled to give testimony tending in any manner to criminate himself." Article 1, § 1, par. 6, of the Constitution of this state. This constitutional provision and the other of kindred import, that "the right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated" (article 1, section 1, paragraph 16), had all the dignity of maxims in the earliest days of English history, and were brought, with other fundamental principles of the common-law system of England, by our ancestors to America as a part of their birthright. In other words, these constitutional restrictions are but the expression of the unwritten common-law rights which had come to be recognized in England in revolt against the thumb-screw and rack of early days. *Marshall v. Riley*, 7 Ga. 367; *Thornton v. State*, 117 Wis. 338, 98 N. W. 1107, 98 Am. St. Rep. 924. As to the application of these fundamental principles the decisions of the courts are in great conflict and in some confusion. Two distinct lines of interpretation have been announced by the courts of this country. One is a liberal construction of these constitutional guarantees in favor of the rights of the citizen, and the other is a literal and restricted construction, confining the application of the principle within very narrow limits. The latter construction may be stated generally as follows: "Though papers and other subjects of evidence may have been illegally taken from the possession of the party against whom they were offered, or otherwise unlawfully obtained, this is no valid objection to their admissibility, if they are pertinent to the issue. The court will not take notice how they were obtained, whether lawfully or unlawfully; nor will it form issues to determine that question." 1 *Greenleaf on Evidence*, § 245a. In equivalent phraseology this rule has been enunciated by the majority of the courts of final resort. It was said by the Supreme Court of Illinois, in the case of *Gindrat v. People*, 138 Ill. 103, 27 N. E. 1065, that courts in the administration of the criminal law are not accustomed to be oversensitive in regard to the sources from which evidence comes, and will avail them-

selves of all evidence that is competent and pertinent, regardless of how it was obtained. Adopting this technical construction, it is held by these courts that the provision relating to self-crimination must be strictly testimonial, in other words, that it is applicable to the accused only as a witness, and must be directed to a positive, overt act on the part of the accused personally, and does not include acts of other persons. One learned authority expresses this view of the rule as follows: "It seems to us an unfounded idea that the discoveries made by the officers and their assistants, in the execution of process, whether legal or illegal, or where they intrude upon a man's privacy without any legal warrant, are of the nature of admissions made under duress, or that it is evidence furnished by the party himself upon compulsion. The information thus acquired is not the admission of the party, nor evidence given by him, in any sense. The party has in his power certain mute witnesses, as they may be called, which he endeavors to keep out of sight, so that they may not disclose the facts he is desirous to conceal. By force or fraud access is gained to them, and they are examined to see what evidence they bear. That evidence is theirs, not their owners." *State v. Flynn*, 36 N. H. 64. Mr. Wigmore, in his treatise on Evidence, takes this view of these constitutional restrictions, citing many decisions in support of his contention, and combating the soundness of the decision of the Supreme Court of the United States announcing a contrary opinion, in the case of *Boyd v. United States*, 116 U. S. 616, 6 Sup. Ct. 524, 29 L. Ed. 746. 4 *Wigmore on Evidence*, §§ 2251-2270.

Liberal construction in favor of the rights of the citizen has been adopted by this court, beginning with the case of *Hammock v. State*, 1 Ga. App. 126, 58 S. E. 66, where it is held that: "When, by an unlawful search and seizure under an illegal arrest, a person is compelled by an officer of the law to furnish incriminating evidence against himself, such evidence is not admissible against him in a criminal prosecution." In the *Hammock Case* Judge Powell calls attention to the fact that the decisions of the Supreme Court of this state in the interpretation of these constitutional restrictions are not in absolute harmony, and declares: "If we were untrammelled by some of these decisions, our own views of the sacred character of these constitutional rights of the private citizen might induce us to extend the rule further than we do." He then endeavors to harmonize the apparently conflicting decisions of the Supreme Court, and concludes with the statement that the ruling in the *Hammock Case* is not in conflict with any of the decisions of that court. Without extending the discussion along this line, and omitting any effort to harmonize conflicting decisions, we put our opinion in the present

case, under the facts, on the decisions in Day v. State, 63 Ga. 668, Evans v. State, 106 Ga. 519, 32 S. E. 659, 71 Am. St. Rep. 276, and Hammock v. State, supra. In the Day Case it was held that: "Evidence that a witness forcibly placed defendant's foot in certain tracks near the scene of the burglary, and that they were of the same size, is not admissible. A defendant cannot be compelled to criminate himself by acts or words." Chief Justice Warner, as was his custom, briefly disposed of the question by the statement that such testimony was in violation of the constitutional provision which declared that: "No person shall be compelled to give testimony tending in any manner to criminate himself." In the Evans Case the Day Case was referred to and approved, and it was held that: "Evidence which was offered by the state and admitted showing that the accused, while not under legal arrest, had been compelled to put his hand in his pocket and surrender a pistol, thus disclosing that he was violating the law, was not admissible on the trial of such person for the offense of carrying a concealed weapon, alleged to have been committed on that occasion;" the decision being put squarely upon the same constitutional provision as in the Day Case. Judge Cobb, in the Evans Case, also attempts to harmonize the apparently conflicting decisions of the Supreme Court on this subject, and he deduces from all the decisions this rule, that: "The law in this state is that evidences of guilt found upon a person under legal arrest may be used in evidence against him; but that, where a person not in legal custody is compelled to furnish incriminating evidence against himself, the evidence is not admissible." In the Hammock Case, where the facts were identical with those of the Evans Case, Judge Powell, speaking for the court, says: "Under the Constitution, persons are protected against unlawful searches and seizures, and also against being compelled to give testimony tending in any manner to incriminate themselves. A violation of the former right does not necessarily render evidence, incidentally disclosed thereby, inadmissible; a violation of the latter right does. When the act in question is a concurrent violation of both rights, the person is none the less to be protected." In other words, in the Hammock Case it is held that the evidence was inadmissible under the constitutional restriction against unlawful search and seizure of the person, as well as under that provision which prohibits the compulsion from the accused of criminating evidence against himself. Where the arrest is legal, evidence obtained by a search and seizure is admissible; where the arrest is illegal, evidence thus obtained is inadmissible.

It may be here stated that there are many decisions in conflict with the Day Case, the Evans Case, and the Hammock Case, on the same state of facts. The majority of these

are gathered in a note to the case of State v. Turner, in 136 Am. St. Rep. 135 et seq. In our opinion there is no substantial difference in the facts of the present case and those of the three cases above relied upon. Here the accused was arrested without a warrant on suspicion. His premises were searched without a warrant on suspicion. When he refused to open his safe at the command of the officer, he was arrested and taken to the police barracks. His custody was wholly illegal, and the officer was guilty of the offense of false imprisonment. When he reached the police barracks, the chief of police and other officers again demanded of him his keys, which he declined to give up. The officers then forcibly took from him his keys, overcoming his utmost resistance. In other words, they committed an unpardonable trespass, for the purpose of finding evidence tending to incriminate him. In endeavoring to find evidence sufficient to establish the crime which they suspected he was guilty of, these officers of the law committed much graver offenses than the one of which they suspected the accused. He was suspected of keeping intoxicating liquors on hand at his place of business, an offense *malum prohibitum*. They illegally deprived him of his liberty, they searched his premises illegally, they made an assault and battery upon his person, and in so doing they violently pulled down the constitutional bulwarks which protected him as a citizen, both as to his person and as to his property. The language of Chief Justice Bleckley, in *Rusher v. State*, 94 Ga. 366, 21 S. E. 594, 47 Am. St. Rep. 175, is here pertinent: "The law ought to hold out no encouragement to violent and lawless men to commit crime for the sake of detecting a previous crime and bringing the offender to punishment. The law should never suffer itself to become an enemy or antagonist to its own reign." Here, under the facts, was a multiplication of crimes committed by the officers of the law, crimes against the inherent rights of the citizen, secured by the Constitution of this state, in order that a comparatively venial offense, made so by statute, but not inherently an offense, could be detected. If such means could be adopted in the detection of crime and were approved by the courts, the law would not only be antagonistic to its own reign, but a state of anarchy would exist. In the case of *Rusher v. State*, supra, while it is held that the rule is well established that independent facts discovered in consequence of a constrained confession made by a prisoner are admissible in evidence, the following important qualification is made to the rule: "Unless it appears that criminal violence was used in procuring the confession or making the discovery." The inference is clear from this qualification that, where the incriminating facts are discovered by criminal violence, they are not admissible against the accused. Here the keys were

taken from the person of the accused by a criminal assault and battery made upon him by the officers of the law.

It is said by counsel for the state that the forcible taking of the keys from the accused was not material, that the discovery of the liquors in his storehouse was an independent fact, and admissible as such under the well-established law on that subject, and that the means adopted to make the discovery, or, in other words, to open the safe, were immaterial; but in the Day Case, *supra*, the correspondence of the tracks to the foot of the accused, and in the Hammock Case, *supra*, and in the Evans Case, *supra*, the discovery of a pistol on the person of the accused, were independent facts, but nevertheless they were held to be inadmissible, because the accused in those cases were under illegal arrest, and the evidence against them was obtained by compulsion, while they were held in unlawful custody. True, the officers might have gone to the safe and without a warrant broken it open, and in that event the testimony probably might have been admissible; but they did not pursue that course. They forced the accused to give up his keys. In other words, they forced him to give into their possession the means of discovering the incriminating fact. It is wholly immaterial that they might have discovered the incriminating fact otherwise. We are simply discussing the method employed by the officers to compel the accused to furnish the means whereby the incriminating evidence was discovered. On the trial of Aaron Burr, 1 Burr's Trial, 245, it was held in substance by the great Chief Justice Marshall, that the prohibition against one's being compelled to be a witness against himself should not be limited to the mere exclusion of oral statements against himself; that, if a link in the evidence which he could not be required to furnish were to be furnished by some fact, document, or property which he had a right to keep secret, the mantle cast about him by the Constitution would be as much rent as if he were forced to furnish it by word of mouth.

The two provisions of the Constitution which we have been discussing appear in the fundamental law of every state of this Union, as well as in the federal Constitution. They are the sacred civil jewels which have come down to us from an English ancestry, forced from the unwilling hand of tyranny by the apostles of personal liberty and personal security. They are hallowed by the blood of a thousand struggles, and were stored away for safe-keeping in the casket of the Constitution. It is infidelity to forget them; it is sacrilege to disregard them; it is despotic to trample upon them. They are given as a sacred trust into the keeping of the courts, who should with sleepless vigilance guard these priceless gifts of a free government. We hear and read much of the lawlessness of the people. One of the

most dangerous manifestations of this evil is the lawlessness of the ministers of the law. This court knows and fully appreciates the delicate and difficult task of those who are charged with the duty of detecting crime and apprehending criminals, and it will uphold them in the most vigilant, legal discharge of their duties; but it utterly repudiates the doctrine that these important duties cannot be successfully performed without the use of illegal and despotic measures. It is not true that in the effort to detect crime and to punish the criminal "the end justifies the means." This is especially not true when the means adopted are violative of the very essence of constitutional free government. Neither the liberty of the citizen nor the sanctity of his home should be invaded without legal warrant. Suspicion is no substitute for a legal warrant, and the badge of authority is the emblem of law and order, and gives no right to the wearer to arrest without warrant, imprison without authority, and torture without mercy. Any compulsory discovery of self-incriminating evidence is abhorrent to a proper sense of justice and is intolerable to American manhood. What is commonly known as the methods of the "third degree," so frequently used by zealous officials or interested detectives, may be an appropriate part of that jurisprudence which holds that every man is guilty when accused of crime until he proves his innocence; but it has no place in the jurisprudence of a land where the cardinal principle of humanity and justice is that every man is presumed to be innocent until his guilt is shown by legal evidence beyond a reasonable doubt. These arbitrary methods of discovering crime are subversive of the fundamental principles of law, destructive of the indefeasible rights of personal liberty, personal security, and private property, and place at the mercy of every petty official and conscienceless criminal the life, liberty, and reputation of the citizen. They flourished in the dark days of the Star Chamber and the Spanish Inquisition, but could not exist in the clear atmosphere of political liberty and personal freedom. Besides, these instruments of oppression are successful only when used against the ignorant or the wicked. The former cannot combat the artifice and tricks of the experienced official, and the latter will not hesitate to involve the innocent to himself escape detection. Therefore courts of justice will not approve such methods to discover crime, and the law, seeking pure and impartial sources of evidence, will refuse to admit compulsory confessions of guilt, and condemns as dangerous, untrustworthy, and without probative value testimony against others obtained by the use of physical torture or mental coercion.

In the instant case the only evidence of guilt having been discovered in the forcible violation of the constitutional provision that

no man shall be compelled to give testimony that in any manner tends to criminate himself, the conviction was unlawful.

Judgment reversed.

(13 Ga. App. 214)

HILLIS v. C. T. COMER & CO. (No. 4,966.)
(Court of Appeals of Georgia. Aug. 15, 1913.)

(Syllabus by the Court.)

AGRICULTURE (§ 7*)—SALE OF FERTILIZER—
ACTION FOR PRICE—DEFENSE.

The provisions of section 1794 of the Civil Code of 1910 do not extend to the tagging of commercial fertilizers. Under the terms of this section a sale of commercial fertilizer which has not been analyzed as evidenced by its registration is illegal, and any contract made in pursuance of such a sale is void, but a sale of fertilizer, without the tags which are required to be purchased in order that the state may secure its revenue therefrom, is not necessarily illegal; nor is a note given for fertilizer void for the sole reason that the tags were not attached to the sacks.

[Ed. Note.—For other cases, see Agriculture, Cent. Dig. §§ 13, 14; Dec. Dig. § 7.*]

Error from City Court of Waynesboro; Wm. H. Davis, Judge.

Action by C. T. Comer & Co. against R. J. Hillis. Judgment for plaintiff, and defendant brings error. Affirmed.

H. A. Boykin, of Sylvania, and H. J. Fullbright, of Waynesboro, for plaintiff in error. Brinson & Hatcher, of Waynesboro, for defendant in error.

RUSSELL, J. The defendant in the court below had purchased 48 tons of fertilizer from the plaintiff, and had given his note for \$1,080 therefor. When he was sued on the note he filed a plea that the sacks containing the guano did not have attached to them the tags sent out upon application by the Department of Agriculture. The defendant did not defend upon the ground that no inspection of the fertilizer had been made, or that the guaranteed analysis of the ingredients had not been stamped on the sacks as required by law, or that the fertilizers sold did not come up to and correspond with the guaranteed analysis, nor did he plead that the manufacturer or seller had not paid the tax of 10 cents per ton as required by law. Upon demurrer to the answer, upon the ground that it set up no valid defense, the plea was struck in the lower court, and the bill of exceptions challenges the correctness of this ruling.

The plaintiff in error claims that, in order to legalize the sale of fertilizers, three things must necessarily be done by the sellers: (1) The fertilizers must be registered with the Commissioner of Agriculture, under the terms of section 1771 of the Civil Code; (2) They must be branded and inspected as required by that section of the Code; and (3) after the fertilizers have been properly registered and inspected, the manufacturers and manip-

ulators, or their agents, shall attach tags procured from the Commissioner of Agriculture, under the provisions of section 1793 of the Code, to each bag, barrel, or package, as an evidence that the seller has complied with the requirements of the law. It is insisted that the provision of section 1771 as to registering and inspection is not more mandatory than the requirement of section 1793 as to the procurement of tags, and the requirement that they be attached to the several bags, barrels, or packages containing fertilizers, and therefore that the trial judge erred in striking the defendant's answer, in which it is alleged that, "while it is recited in the note that the fertilizers were branded and tagged as required by law, yet, as a matter of fact, the fertilizers were not tagged at all, and the sale was therefore illegal and in violation of the plain requirements of the statute, and for that reason this defendant is not liable, under the law, for the same." We are not now required to pass upon the validity of a plea setting up that the manufacturer or seller of the fertilizers had not in fact paid the tax required by the provisions of section 1793 of the Civil Code, or had failed to purchase a sufficient number of tax tags to tag every bag or package of fertilizer manufactured or sold by him. No such plea was filed in this case, and that question is not presented. While the purchaser of fertilizer is not specially concerned with the consideration of the question as to whether the manufacturer or seller of the fertilizer he purchases has paid the tax required by law, still it may be that where it is shown that a seller or manufacturer in a particular instance is so conducting his business as to deprive the state of its revenue, and operating a business in violation of the law, the case will fall within the principle announced in *Ford v. Thomason*, 11 Ga. App. 359, 75 S. E. 269, as applicable to real estate dealers, and by the Supreme Court in *Murray v. Williams*, 121 Ga. 63, 48 S. E. 686, as applicable to physicians.

The single question here presented is whether the failure of the manufacturer or seller to tag fertilizers is a good defense to an action brought to recover the purchase price of such fertilizers. We think the trial judge rightly held that the mere failure to tag the fertilizer presented no defense to the purchaser. We cannot agree with the argument of the learned counsel for the plaintiff in error that the requirement as to tagging, as it affects the purchaser, is the same as the requirements of section 1771 as to registration and inspection of fertilizers offered for sale in this state. The provisions of sections 1771 and 1772 are designed for the protection of all users of fertilizers. Section 1771 requires the manufacturers and sellers of fertilizers to register the names of the brands they desire to sell, and the guaran-

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

teed analysis thereof, with the Commissioner of Agriculture. Section 1772 requires this guaranteed analysis to be branded or printed on each sack or package which is intended for sale. Section 1794 expressly declares that: "It shall not be lawful for any manufacturer or company, either by themselves or their agents, to offer for sale in this state any fertilizer or fertilizer material that has not been registered with the commissioner of agriculture as required by this chapter. The fact that the purchaser waives the inspection and analysis thereof shall be no protection to said party selling or offering the same for sale." It will thus be seen from a reading of this section that the sale of fertilizers which is denounced as illegal is where such fertilizer has not been registered as required by sections 1771 and 1772, and that no reference whatever is made therein to the tax tags or the subject of tagging. Section 1793 is purely a revenue measure, for except in the case of cotton seed meal (see *Griner v. Baggs*, 4 Ga. App. 232, 61 S. E. 147), which is almost wholly nitrogenous in its nature, the affixing of tags is not intended to take the place of the branding or printing upon the sack, barrel, or other package required by section 1772. The law recognizes the fact that the tags may become detached from the packages in the ordinary course of trade and shipment (*Holt v. Navassa Guano Co.*, 114 Ga. 666, 40 S. E. 735), and the statute is therefore particular in its requirement that the guaranteed analysis, as well as the name of the manufacturer or seller, shall be plainly printed on each and every package. *Hamlin v. Rogers*, 78 Ga. 631, 3 S. E. 259. We hold, therefore, that the provisions of section 1794 of the Civil Code, by its express terms, do not extend to the tagging of commercial fertilizers. Under the terms of this section a sale of commercial fertilizer which has not been registered in conformity with the analysis required by section 1772 of the Code is illegal, and no contract made in pursuance of such a sale is valid, but a sale of fertilizer without the tax tags, which are required to be purchased in order that the state may secure its revenue, is not for that reason necessarily illegal, nor is a note given for fertilizer void for the sole reason that the tax tags were not attached to the sacks of fertilizers which were the consideration of the note. This ruling is not in conflict with any of the decisions of the Supreme Court cited by the plaintiff in error.

In *Hamlin v. Rogers*, supra, Judge Hall, delivering the opinion of the court, held that the court did not err in refusing to charge that if the fertilizer did not have the inspector's tag attached to the sacks at the time of the sale, then the plaintiffs cannot recover. It is true that in that case Judge Hall's ruling was placed partly upon the fact that tags were shown to have been missing from only

5 or 6 sacks out of 30, and he remarked that the request was inapposite, considering the vague and indefinite character of the testimony; but he holds distinctly that the purpose of the tags is to afford evidence that the inspection fees have been paid, and that whether the absence of tags would have the effect of showing that the sale was illegal is very questionable.

In *Allen v. Pearce*, 80 Ga. 418, 7 S. E. 82, the suggestion in the *Hamlin Case*, supra, that the absence of tags might not have the effect of rendering the sale illegal was criticised by Chief Justice Bleckley for the reason, as stated, that the presence of the tags was the only authentic evidence the seller had that the fertilizer had undergone the inspection which the law required. Under the law as it then stood (embodied in section 1553a et seq. of the Code of 1882), the learned Chief Justice correctly held that the presence of the tag was the only authentic evidence of a legal inspection. Under the provisions of that section it was made a misdemeanor for any manufacturer, dealer, or other person to offer any fertilizer for sale or distribution without having the brand tag, or such other device as the commissioner might require, showing the analysis of the contents of the package. But by the provisions of the act of 1898 (Acts of 1898, p. 100) the branding of the analysis upon the sack was made essential, and, as has already been pointed out, it is only the failure to brand the analysis on the sack which is now made penal. Under the provisions of section 1772 the guaranteed analysis of each sack or package is required to be plainly printed or branded thereon, and thus the ostensible contents of the fertilizer is brought home to the purchaser, in a manner and by means of a label which cannot be detached.

Sections 1785, 1786, 1787, and 1788 of the Civil Code expressly provide the means by which the purchaser may test the truthfulness of the statements branded upon the sack.

The ruling in *Holt v. Navassa Guano Co.*, 114 Ga. 666, 40 S. E. 735, as in *Young v. Murray*, 8 Ga. App. 204 (3), 59 S. E. 717, held merely that when the defendant pleads that the fertilizer was not tagged as required by law, he carries the burden of proving this allegation.

Judgment affirmed.

(13 Ga. App. 148)

COULSON v. STATE. (No. 4,425.)
(Court of Appeals of Georgia. Aug. 11, 1912.)

(Syllabus by the Court.)

1. CRIMINAL LAW (§ 1111*)—BILL OF EXCEPTIONS—VERITY.

A statement in a bill of exceptions that certain specified exceptions pendente lite were duly certified by the court, and duly filed and entered on the minutes of the court, must be

accepted as true, and cannot be impeached by the reviewing court, although the exceptions pendente lite referred to are not in the record, and although the clerk of the lower court, in answer to an order requiring him to certify and send up the exceptions pendente lite, certifies that no such exceptions pendente lite are of file or entered on the minutes, that if any such were filed they have not been recorded, and are not now of file, and that he has no recollection that any were filed and no record of any having been filed.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2894-2896; Dec. Dig. § 1111.*]

2. CRIMINAL LAW (§ 918*) — NEW TRIAL — GROUNDS—RULINGS ON PLEADINGS.

Rulings upon the sufficiency of the pleadings are not proper subject-matter for a motion for a new trial.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2137-2145; Dec. Dig. § 918.*]

3. COURTS (§ 66*)—TERMS.

While the judge of the city court of Fitzgerald is authorized, in his discretion, to hold special terms of that court, and has the same power that judges of the superior courts have in that respect, still the power of the judge of the city court of Fitzgerald to keep a term of his court open, by adjournment, from one day until another, does not extend beyond the next regular term, since otherwise two terms of the same court could be held at the same time. Consequently the court erred in sustaining a demurrer to a plea to the jurisdiction, setting up that the court was being held at an unauthorized time, that it had no authority to adjourn the term to a day in July, subsequent to the time for holding the regular June term, and that because of the lack of such authority, the May term expired prior to the fourth Monday in June.

[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 231-242; Dec. Dig. § 66.*]

4. JUDGMENT (§ 11*)—VALIDITY — JURISDICTION.

Since the plea to the jurisdiction and the objection to the jurors should have been sustained, the subsequent verdict and judgment were void.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 14, 14½; Dec. Dig. § 11.*]

Error from City Court of Fitzgerald; *W. Wall, Judge.*

Anna Coulson was convicted of crime, and brings error. Reversed.

Elkins & Wall, of Fitzgerald, for plaintiff in error. Alex J. McDonald, Sol., of Fitzgerald, for the State.

RUSSELL, J. [1] In the brief of the solicitor of the city court of Fitzgerald the point is made that there is no proper exception to the sustaining of the demurrer mentioned in the bill of exceptions and the striking of the plea of the defendant, for the reason that the defendant failed to file exceptions pendente lite. As appears from the record, the point presented by the exceptions to that judgment is the controlling issue in the case, and yet, if not properly presented by the exceptions pendente lite, it is not before this court for consideration; it is

this court cannot deal with the point as a ground of the motion for a new trial. Treating the brief of the counsel for the defendant in error as being in the nature of a suggestion of a diminution of the record, this court passed an order requiring the clerk of the city court of Fitzgerald to complete the record by certifying and sending up to this court the bill of exceptions pendente lite, which it was certified in the main bill of exceptions had been duly certified and filed. In response to this order the clerk of the city court of Fitzgerald certifies that "there are no exceptions pendente lite of file in this office or entered on the minutes. If any have been filed they have not been recorded, and are not now of file, and I have no recollection that any were filed, and no record of any having been filed."

In spite of the certificate of the clerk we cannot sustain the contention of counsel for the state that the question as to the correctness of the court's ruling in sustaining the demurrer and striking the defendant's plea is not before the court for consideration. It is of course well settled that in case of conflict between the statements of the bill of exceptions and the record, the record will control; but, so far as we are aware, this rule has not heretofore been, nor do we think it should be so, extended as to include statements of fact in the bill of exceptions certified to by the presiding judge, as to which the record is silent. In such cases as that now before us it is not an instance of conflict between the recitals of the bill of exceptions and the record, but merely a case in which the recitals of the bill of exceptions are not corroborated by the record. In other words, the record does not contradict a single recital contained in the bill of exceptions; and though, on the other hand, it does not affirm these recitals, this same condition would obtain in the case of any writ of error in which certain recitals of the bill of exceptions might be deemed sufficiently full to dispense with the specification of a particular portion of the record as unnecessary to be transmitted to this court. If the exceptions pendente lite, when transmitted as a part of the record, had evidenced or developed conflict with the recitals in the bill of exceptions, as to the time of filing or as to the subject-matter of the exceptions, or as to any material matter, the record would control, but the mere fact that no exceptions pendente lite appear in the transcript of the record as transmitted does not even suggest a conflict, nor offer occasion for surmise that perhaps no exceptions pendente lite were in fact ever filed. The suggestion that none were ever filed (like a speaking demurrer) must necessarily have its origin in something dehors the record, and the recitals of a bill of exceptions

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

verified by the certificate of the presiding judge, if indeed they can be contradicted at all, cannot be impeached in this way.

If we are at liberty to consider the certificate of the clerk to the effect that the exceptions pendente lite referred to in the bill of exceptions are not upon the record, and that none were ever filed so far as he recollects, still the contents of the certificate in the present case do not effectually dispute the statement of the bill of exceptions that exceptions pendente lite were filed. The clerk does not positively affirm that no exceptions pendente lite were filed, he states only that he has "no recollection that any were filed," and without any reference to the clerk making the certificate in this case (whom we recognize as an official more than ordinarily efficient), it would not do to hold that exceptions pendente lite had not been duly certified by the presiding judge, and properly filed, merely because they were not entered upon the record. They should be entered upon the record, but instances may be imagined in which the nonperformance of this duty would be entirely due to the neglect of the clerk, and in such a case the rule that no person shall suffer from the misprision or neglect of a public officer should be applied.

[2] 2. In the motion for a new trial an effort is made to assign error upon the ruling of the court in striking upon demurrer certain written objections to the jury, in the nature of a plea, offered by the defendant before arraignment; and a new trial is asked upon the ground that because of this error the subsequent proceedings on the trial were null and void. A motion for a new trial is not an appropriate means for the review of rulings upon pleading. Whether the ruling sustaining the demurrer be right or wrong, it is not proper subject-matter for a motion for a new trial. *Wheeler v. State*, 4 Ga. App. 325, 61 S. E. 409; *Williams v. State*, 4 Ga. App. 853, 62 S. E. 525; *Kelly v. Malone*, 5 Ga. App. 618, 63 S. E. 639. As was said in *Mayor and Council of Dublin v. Dudley*, 2 Ga. App. 762, 59 S. E. 84, quoting from Chief Justice Lumpkin in *Sutton v. McLeod*, 29 Ga. 594: "This principle is hoary with age. We bow to it reverently."

[3] 3. Before pleading to the merits of the accusation filed against her in the city court of Fitzgerald the defendant filed a special plea to the jurisdiction of the court. This plea alleged that the court was without jurisdiction to try the defendant at that time, for the reason that she had demanded and was entitled to a jury trial, and that the jury then in attendance upon court was not qualified to try her, and that the court could not, without her consent, legally try her, or submit the issues of fact in her case to the jury then in attendance upon the court;

for the reason that the jury in attendance was the jury originally drawn to attend the regular May term, 1912, of said court, and that the adjourned term at which they were then in attendance was being held as the May adjourned term, and yet was being held in the month of July, and at a date subsequent to the time for the regular July term, which had been regularly held. The defendant further pleaded that the court did not have authority to pass an order adjourning the May term to a date subsequent to the date fixed by law for the regular June term, and had no authority to require the same jury to attend the adjourned term subsequent to the time for holding the June term. The solicitor filed a demurrer to this plea, contending that the plea set up no reason why the court had no jurisdiction to try the defendant at that term of the court, designated as the May quarterly term. The court sustained the demurrer and struck the plea. Thereafter the case proceeded to trial, and the trial resulted in the conviction of the defendant.

We think the court erred in sustaining the demurrer and in striking the plea to the jurisdiction. The judge of the city court of Fitzgerald is authorized, in his discretion, to hold special terms of that court. He has the same power, with reference to the holding of special and adjourned terms of court, as the judges of the superior court, but no more. Since the judges of the superior court are required by law to adjourn each term at least five days before the time fixed by law for beginning the next term, it is plain that while he might call a special term at any such time as he might deem it proper to hold one, for the dispatch of public business, still a judge of the superior court could not adjourn one term of his court and continue the life of that term at a period subsequent to another regular term, without violating the express terms of the statute. The judge of the city court of Fitzgerald, being governed by the rules that govern the judges of the superior courts, has no power to keep a term of his court open by adjournment, from one day until another, beyond the next regular term. If he could do so, two terms of the same court could be held at the same time. Without the power to adjourn the court to a date subsequent to the next regular term, he could not compel the attendance of the jurors; and, since the qualifications of these jurors ceased with the adjournment of the court, they were disqualified to serve, and the plea should have been sustained, and the case should have been continued.

[4] 4. Since the plea to the jurisdiction and the objection to the jurors should have been sustained, the subsequent verdict and judgment were null and void.

Judgment reversed.

(13 Ga. App. 174)

SOUTHERN EXPRESS CO. v. COHEN.

(No. 4,600.)

(Court of Appeals of Georgia. Aug. 12, 1913.)

*(Syllabus by the Court.)***1. APPEAL AND ERROR (§ 1052*) — EVIDENCE (§ 317*)—HEARSAY—CURE OF ERROR.**

The error of admitting testimony which is legally inadmissible may be rendered harmless, when the point or fact in question is subsequently proved by sufficient competent evidence, but this rule is not one of universal application. The harmful effect of the original error is not cured, but rather aggravated, by admitting other testimony which, though not objectionable upon the same ground as that first admitted, is, for other reasons, none the less illegal and prejudicial.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4171-4177; Dec. Dig. § 1052; Evidence, Cent. Dig. §§ 1174-1192; Dec. Dig. § 317.*]

2. EVIDENCE (§§ 123, 242, 243*)—WITNESSES (§ 81*)—DECLARATIONS OF AGENT—EFFECT AS EVIDENCE—RES GESTÆ.

The rule that the declarations of an agent are not admissible against his principal, unless they were made at a time when the agent was engaged in a transaction within the scope of his agency, and was acting in behalf of his principal, is ancient and well established. The declaration or admission of an agent which binds his principal must be one made dum ferret opus, and so closely connected with an act done in behalf of his principal, which is within the scope of his agency, as to be free from the suspicion of device or afterthought, and thus to become a part of the res gestæ.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 351-368, 898-915; Dec. Dig. §§ 123, 242, 243.*; Witnesses, Cent. Dig. § 208; Dec. Dig. § 81.*]

3. CARRIERS (§ 185*)—Loss of Goods—EVIDENCE.

Other than an alleged admission of an agent of the defendant, there was no proof of delivery to the defendant of the goods the value of which was sued for. If the evidence of this admission was competent, it must be adopted as a whole; and, so treating it, it showed that the goods had been delivered to the plaintiff. If the evidence was not admissible, the plaintiff was not entitled to recover, because the proof failed to show that the goods were ever in the possession of the defendant.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 835-850; Dec. Dig. § 185.*]

Error from City Court of Savannah; Davis Freeman, Judge.

Action by Joe Cohen against the Southern Express Company. Judgment for plaintiff, and defendant brings error. Reversed.

Lawton & Cunningham, of Savannah, for plaintiff in error. Shelby Myrick, of Savannah, for defendant in error.

RUSSELL, J. Cohen brought an action for damages against the Southern Express Company for failure to deliver a package of skirts, which he had purchased from the Manhattan Skirt Company of New York, and which had been delivered by the Skirt Company to the Adams Express Company in New York, for transportation to Savannah via the Southern Express Company. According

to the testimony, such shipments were transferred from the Adams Express Company to the Southern Express Company at Richmond, Va. The jury returned a verdict in favor of the plaintiff, and the express company excepts to the judgment overruling its motion for a new trial.

[1] Plaintiff's right to recover turns upon the question whether the package in suit was ever in fact delivered to the Southern Express Company. In the trial of the case, over the objections of the defendant's counsel, the judge of the city court permitted the introduction of testimony to the effect that an agent of the express company admitted that the express company had received the package in question. It was testified that the admission was made by the agent of the express company in the trial of a suit brought by the Manhattan Skirt Company against Cohen to recover the purchase price of the package of skirts. In the trial of the present case the agent of the express company, Mr. Lafitteau, himself testified that in the previous case mentioned he stated as a witness that the express company was in possession of this package, and had delivered it to Cohen; but he explained that in making this admission he was giving merely such information as he derived from the records of the company, which he had before him at that time, and was basing his opinion upon the approximate correspondence in weight between the package delivered to Cohen and the alleged weight of the package sold Cohen by the Manhattan Skirt Company. The magistrate before whom the case of the Manhattan Skirt Company against Cohen was tried was also a witness in the case at bar, and he testified that Lafitteau admitted, on the trial of the former case, that the Southern Express Company had delivered to Cohen the package of skirts, the failure to deliver which is the basis of the present suit.

We are of the opinion that the learned trial judge erred in admitting the testimony as to the declaration of the express company's agent Lafitteau. It is true that he testified that he had authority to settle any claims against the company growing out of the loss of shipments, and likewise authority to make settlements with reference to the delay or loss of packages which were not promptly delivered. It is to be borne in mind, however, that Lafitteau did not make the admission in March, 1909, while the question of the delivery of the package was afoot, and when an effort was being made to trace the package, nor while he was engaged in his duties with relation to the carriage of the package, or the adjustment of the alleged loss, but made it at least several months thereafter as a witness, and at a time when he was not acting in behalf of his principal, the defendant company, nor at its suggestion, so far as it appears from the record.

When the plaintiff first testified to the admission of Lafitteau, in the Manhattan Skirt Company case, it appears from the record that Lafitteau was in court, and a competent witness. It would seem, therefore, that Cohen's testimony upon this point was mere hearsay, and for that reason inadmissible. Counsel for the defendant in error, practically conceding this, argue that the error of the court primarily, in admitting the testimony of Cohen upon this subject, was cured by the fact that subsequently Lafitteau (who was a competent witness) testified to substantially the same effect, and the cases of *Monahan v. National Realty Co.*, 4 Ga. App. 684, 62 S. E. 127, and *Thompson v. Wilkinson*, 9 Ga. App. 867, 71 S. E. 678, are cited in support of this proposition. In the *Monahan Case*, supra, we held: "It is undisputed, in the evidence, that the person who is said to have made this admission was the defendant's superintendent, and in general charge of the building; and, when he was placed upon the stand as a witness, he practically admitted the entire statement which had been attributed to him, and testified to the truth of the facts therein related. If, therefore, there was any error in the admission of the statement primarily, it was cured by the introduction later of higher testimony." As a general rule, the error of admitting testimony which is legally inadmissible may be rendered harmless if the fact to which it relates is subsequently proved by sufficient competent evidence. But even this rule is not without its exceptions. Certainly the harmful effect of the original error is not cured, but rather aggravated, by admitting other testimony which is illegal and prejudicial, though it may not be objectionable upon the same ground as that first admitted. Conceding that the error of allowing the statement of Mr. Lafitteau in another case, between different parties, to be proved by Cohen, when Lafitteau was alive and accessible to the court, might have been cured by proof from Lafitteau that he, as agent of the express company, had made a declaration by which the defendant would be bound, we will next inquire whether the declaration of Lafitteau was made under such circumstances and at such a time as that it could legally bind his principal.

[2] 2. Section 3606 of the Civil Code declares: "The agent is a competent witness either for or against his principal. His interest goes to his credit. The declarations of the agent as to the business transacted by him are not admissible against his principal, unless they were a part of the negotiation, and constituted the *res gestæ*, or else the agent be dead." This rule was of force, and universally recognized by law writers before the adoption of our Code. The rule that the declaration of an agent is not admissible against his principal, unless made at the time when the agent was engaged in

a transaction within the scope of his agency, and acting in behalf of his principal, is ancient and well established. 1 Greenleaf on Evidence (16th Ed.), § 184c; 1 Enc. Ev. 538 et seq.; *Sweet Water Manufacturing Company v. Glover*, 29 Ga. 399. The declaration or admission of an agent which binds his principal must be one made *dum ferve*t, opus, and so closely connected with an act done in behalf of his principal which is within the scope of his agency as to be free from the suspicion of device or afterthought, and thus to become a part of the *res gestæ*. Measuring the admission of Lafitteau as a witness by this well-established rule, it does not seem to us that his statement as a witness, in a case in which his principal was not even a party, and apparently made several months after the transaction, was admissible. It is to be borne in mind that in the case at bar Lafitteau did not admit that the package in question had ever been in the possession of the Southern Express Company. The extreme extent of his admission was that he had testified in another suit, to which the express company was not a party, forming his opinion from the company's records, that the package had been in the possession of the express company, and had been by it delivered to Cohen. In the present trial he admitted that his judgment as to the possession and delivery of the package arose from the apparent similarity in weight between the package claimed to have been lost and certain packages which were delivered about the same time to Cohen. Upon the trial now under review he did not admit that the express company had ever received the package in question. But even if he had admitted upon the trial of the present case that the express company received the package in question, his principal would not be bound by that declaration. "Testifying as a witness in a lawsuit is no part of the *res gestæ* of a transaction involved in the litigation; and, as a general rule, the declarations of an agent, to affect his principal, must be a part of the *res gestæ*." *Sizer v. Melton*, 129 Ga. 143, 58 S. E. 1055. "No sayings of an agent are admissible against his principal, except what he says concerning his appointed business while he is doing it—*dum ferve*t opus." *Sweet Water Manufacturing Company v. Glover*, 29 Ga. 399 (2). The package involved in the present case should have been delivered, in the ordinary course, on March 25 or 26, 1909. The trial in which it is here insisted that the declaration of the agent was inadmissible was had on May 22, 1912. So far as Mr. Lafitteau's agency for the purpose of delivering the package was concerned, the transaction had long been closed. As a witness, he was no more the agent of the express company than of the opposite party, because presumably he would testify to the truth, and, though the agent of the express company, he is made competent to

testify either for or against his principal. Civil Code, § 3606.

[3] 3. Other than an alleged admission of an agent of the defendant, there was no proof of delivery to the defendant of the goods the value of which was sued for by the plaintiff. If the evidence of this admission was competent, it must be adopted as a whole, and, so treating it, it showed that the goods had been delivered to the plaintiff. If the evidence was not admissible, the plaintiff was not entitled to recover, because the proof failed to show that the goods were ever in the possession of the defendant.

Judgment reversed.

(13 Ga. App. 134)

GRANTHAM v. FLEMING. (No. 4,608.)
(Court of Appeals of Georgia. Aug. 15, 1913.)

(Syllabus by the Court.)

1. REVIEW OF EVIDENCE.

The evidence authorized the verdict.

2. PLEADING (§ 416*)—RULING ON DEMURRER—FAILURE TO EXCEPT.

The defendant, by a demurrer, brought in question the right of the plaintiff to recover, and raised the point that he was not entitled to recover because it did not appear that he was a legally licensed physician, and therefore not entitled to collect pay for any services. No exceptions were filed to the judgment overruling the demurrer, and it therefore became the law of the case, binding alike upon the parties and the court.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 1397-1400; Dec. Dig. § 416.*]

3. PHYSICIANS AND SURGEONS (§ 24*)—ACTION FOR COMPENSATION—INSTRUCTIONS.

The defendant "went to trial facing a species of compound estoppel," and relieved the plaintiff of the necessity of proving his right to practice medicine and to collect for professional services rendered; and therefore the court did not err in instructing the jury that if the plaintiff rendered the alleged services as a physician to the defendant, and the defendant accepted these services, and the jury found them to have been of any value, the plaintiff was entitled to recover such an amount as the services might be shown to be worth, especially as there is no evidence tending to show that the plaintiff was not a legally licensed physician.

[Ed. Note.—For other cases, see Physicians and Surgeons, Cent. Dig. §§ 53-62; Dec. Dig. § 24.*]

Error from Superior Court, Wayne County; C. B. Conyers, Judge.

Action by A. Fleming against H. P. Grantham. Judgment for plaintiff, and defendant brings error. Affirmed.

Jas. W. Poppell and Oscar Nail, both of Jesup, for plaintiff in error. Thomas & Gibbs, of Jesup, for defendant in error.

RUSSELL, J. In the county court of Wayne county Fleming sued Grantham on an open account for services as a physician in attending the defendant for a fractured hip; and, on appeal, the case was tried in the superior court.

Originally the account contained items for medicine and the services of another physician, but these were stricken. Except as to these items a demurrer, on both general and special grounds, was overruled, and the case went to trial upon that part of the account which covered the personal services of the plaintiff. The defendant set up, by way of recoupment, that the plaintiff failed to exercise a reasonable degree of care and skill in treating him as a physician, and that by reason of the plaintiff's negligence, mistreatment, and malpractice, his leg was misset, and he was damaged in the sum of \$500. The jury found against the plea of recoupment, and in favor of the plaintiff for the full amount claimed for his services. The defendant's motion for a new trial was overruled, and he brought the case to this court on exceptions to the judgment refusing a new trial.

[1] 1. So far as the general grounds of the motion for a new trial are concerned, it is sufficient to say that while there was evidence in behalf of the defendant which would have authorized the jury to return a verdict in his favor, the testimony for the plaintiff amply supports the verdict rendered.

[2] 2, 3. The defendant sought to make the point that the plaintiff was not entitled to recover, for the reason that it was not shown that the plaintiff was lawfully authorized to practice medicine or surgery. In one of the special grounds of the motion for a new trial it is complained that the court erred in refusing the defendant's request for an instruction to the jury, to the effect that in order to recover for services as a physician, it must be shown that the plaintiff was a legally licensed physician, and had registered as prescribed by law. It is, of course, well settled that a physician who has failed to register in compliance with the provisions of sections 1684 and 1685 of the Civil Code (1910) is not entitled to recover for professional services. *Murray v. Williams*, 121 Ga. 63, 48 S. E. 686. In the statement of account attached to the plaintiff's petition, the indebtedness claimed was "for medical attention from January 15 to February 12, 1906, fractured hip, \$100." The petition was silent as to whether he was a legally licensed and registered physician. The defendant demurred to the petition generally, and also on the specific ground that it was not alleged that the plaintiff was a licensed physician and authorized to practice medicine. The demurrer was overruled, and no exception was taken to the judgment on the demurrer. It matters not, therefore, whether the ruling on the demurrer was right or wrong; it became the law of the case, and is conclusive upon the parties thereto. The judgment on the demurrer, as long as it stands unreversed, is conclusive as to all questions necessarily involved in the decision. *Georgia Northern Railway Co. v.*

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

Hutchins, 119 Ga. 504, 46 S. E. 659. The demurrer not only raised the question as to the sufficiency of the plaintiff's allegations to authorize a recovery, but it specifically raised the point that he was not entitled to recover, because it did not appear that he was authorized to practice medicine, or to collect for professional services rendered as a physician. In passing upon the demurrer the court was compelled to decide that it was not necessary for the plaintiff to show affirmatively that he was legally authorized to practice medicine. We think the lower court erred in the ruling upon the demurrer, but, as there was no exception to the ruling, it became the law of the case, and controlled every phase of the trial where a contact with the legal principle announced was effected.

This case differs from that of *Horsley v. Woodley*, 12 Ga. App. 456, 78 S. E. 260, in two respects: (1) In that case there was no demurrer to the petition upon the ground that there was a failure to allege one of the essential prerequisites necessary to entitle the plaintiff to recover; and (2) in the present case it does not appear (as it did affirmatively appear in that case) that the plaintiff was in fact not entitled to recover, because a recovery would be illegal. No evidence was adduced in this case tending to show that the plaintiff had not registered in the county of his residence (*Jones v. State*, 8 Ga. App. 412, 69 S. E. 315), or that he was otherwise not qualified to practice medicine.

[3] By not excepting to the ruling on the demurrer, the defendant, to use the language of *Justice Lumpkin*, in *Richmond Hosiery Mills v. Western Union Telegraph Company*, 123 Ga. 221, 51 S. E. 293, "went to trial facing a species of compound estoppel." He was concluded by the judgment on the demurrer as to the right of the physician to collect his fee, in the absence of evidence showing affirmatively that the plaintiff was not a duly licensed and registered physician. The court therefore did not err in charging the jury that the plaintiff would be entitled to recover, if the jury believed he rendered the services alleged, whatever amount the evidence might establish those services to be worth. *Cross v. Coffin-Fletcher Co.*, 123 Ga. 820, 51 S. E. 704; *Moss v. Chappell*, 126 Ga. 200, 54 S. E. 968, 11 L. R. A. (N. S.) 398.

The court did not err in refusing the request for instructions, to the effect that the plaintiff could not recover unless it appeared from the evidence that he was a physician authorized by law to practice medicine, for the reason that "It is not within the power of the trial judge to give to either party the benefit of a contention which he is himself estopped to urge." *Sims v. Ga. Ry. & Elect. Co.*, 123 Ga. 645, 51 S. E. 574. That the defendant, by his failure to except to the ruling upon the demurrer, was estopped to deny the plaintiff's right to practice medicine, and his right to collect fees therefor, see also

Moody v. Cleveland Woolen Mills, 133 Ga. 746, 66 S. E. 908; *Myers v. Griner*, 120 Ga. 725, 48 S. E. 113; *McElmurray v. Blodgett*, 120 Ga. 15, 47 S. E. 531.

It is insisted in the motion for a new trial that the court erroneously stated the contention of the defendant, and virtually instructed the jury that "the plaintiff is entitled to recover." The instruction to which exception is taken is as follows: "In considering the case, gentlemen, if you find, by a preponderance of evidence, that the plaintiff, with the defendant's permission, treated him as a practicing physician (all of which facts are denied by the defendant), if you find this is established, and nothing more, then the plaintiff will be entitled to recover whatever he has shown to be a proper amount for that service." We fail to see wherein the defendant was injured by this charge. It is true that the court incorrectly stated that the defendant denied that the plaintiff treated him with his permission; for it appears from the answer of the defendant that the services, which the defendant avers were unskillful, were rendered with his permission. However, it could not have harmed the defendant for the jury to be told that the defendant denied giving permission, because coupled with this immaterial matter was the greater proposition, strenuously contended for by the defendant, that the defendant denied that the plaintiff treated him as a practicing physician. There is no merit in the contention that the court erred in the instruction upon the ground that he virtually instructed the jury that the plaintiff was entitled to recover, because, for the reason already stated, the defendant was precluded from denying that the plaintiff was a practicing physician. He admitted, in his answer, that he permitted the plaintiff to serve him, and the judge very properly stated to the jury the well-settled rule that one who knowingly accepts services of value is liable to such person upon a quantum meruit.

The learned trial judge, no doubt, based his ruling upon the demurrer on the decision of the Supreme Court in *Durand v. Grimes*, 18 Ga. 693, which, like the present case, was an action upon an account for services rendered by a physician, and in which it was held that: "It is too late, after the defendant has pleaded to the merits of the action, and the cause has been submitted upon the appeal, for the defendant to demur to the declaration upon the ground that the plaintiff, who sues as a physician, has not alleged in his writ that he was licensed to practice medicine." The case now before us originated in the county court, and the demurrer was not filed until after the appeal to the superior court. However, no matter what reasons influenced the trial judge in his ruling upon the demurrer, there was no exception to that ruling, and it was not necessary for the plaintiff to prove that he

was a legally licensed physician, and the defendant was estopped from contesting what might otherwise have been a material point in the issue. The ruling of the court upon the demurrer became the law of the case, and it was not within the power of the court to change it. Under the decision in *Georgia Northern Ry. Co. v. Hutchins*, supra, the court was bound to adhere to this ruling throughout the subsequent conduct of the case, regardless of the consequences.

Judgment affirmed.

(12 Ga. App. 855)

GEORGIA LIFE INS. CO. v. McCRANIE.
(No. 4,730.)

(Court of Appeals of Georgia. June 25, 1913.)

(Syllabus by the Court.)

1. INSURANCE (§ 659*)—ACTION ON POLICY—EVIDENCE.

In the trial of an action upon a life insurance policy, where the defense is that the insured met his death by suicide, and the plaintiff contends that his self-destruction was accidental, and the defendant introduces evidence that, shortly prior to his death, the insured stated that he intended to commit suicide, because his wife had been unfaithful to him, it is not erroneous to permit the plaintiff to introduce evidence of the good character of the wife for chastity. This evidence was admissible upon the theory that a husband with sound mind would not charge his wife with infidelity, when there was no evidence upon which such a charge could have been founded.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 1691-1693; Dec. Dig. § 659.*]

2. INSURANCE (§ 662*)—ACTION ON POLICY—EVIDENCE — ATTORNEY'S FEES — "BAD FAITH."

In the trial of an action upon a life insurance policy, where it is sought to recover damages and attorney's fees on account of "bad faith" of the company in refusing to pay the claim, it is erroneous to reject testimony of one of the general officers of the insurance company, showing that prior to the refusal to pay the loss he investigated the circumstances and in good faith reached the conclusion that the company was not liable; such testimony disclosing facts sufficient to show probable cause for refusing to pay the loss.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 1697, 1698, 1700-1706; Dec. Dig. § 662.*]

For other definitions, see Words and Phrases, vol. 1, p. 662.]

3. INSURANCE (§§ 602, 665*)—ACTION ON POLICY — ALLOWANCE OF ATTORNEY'S FEES — SUFFICIENCY OF EVIDENCE.

The evidence demanded a finding that the refusal of the defendant to pay the loss was not made in bad faith, and the verdict finding attorney's fees was contrary to the evidence.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 1498, 1555, 1707-1728; Dec. Dig. §§ 602, 665.*]

4. JUDGMENT AFFIRMED CONDITIONALLY.

Except as above indicated, no material error was committed, and the judgment will be affirmed upon the condition that the plaintiff will write off the sum recovered as attorney's fees.

(Additional Syllabus by Editorial Staff.)

5. INSURANCE (§ 662*)—ACTION ON POLICY—DOCUMENTARY EVIDENCE.

In an action on a life insurance policy, letters of administration were not inadmissible because they described deceased as "Chas. H. McCranie" instead of "Charlie H. McCranie," as he was described in the proof of death and the policy, where it was undisputed that the names referred to the same person.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 1697, 1698, 1700-1706; Dec. Dig. § 662.*]

6. INSURANCE (§ 662*)—ACTION ON POLICY—EVIDENCE.

Proof of death was not inadmissible, in an action on an insurance policy, because the policy was mistakenly described therein as for \$400 instead of for \$4,000, or because it was stated therein that the death was caused by carbollic acid taken by mistake for bay rum.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 1697, 1698, 1700-1706; Dec. Dig. § 662.*]

7. WITNESSES (§ 374*)—CREDIBILITY—ADMISSION OF EVIDENCE.

In an action on a life insurance policy, evidence that a brother of one witness was in litigation with plaintiff, though of slight evidential value, was admissible upon the question of the credibility of the witness.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. §§ 1201, 1202; Dec. Dig. § 374.*]

8. WITNESSES (§ 379*)—IMPEACHMENT.

Where, in an action on a life insurance policy, a witness testified that he told certain persons that insured stated to him that he intended to commit suicide, evidence was admissible to show, not only that the witness had not repeated the statements as claimed, but that he had said he knew nothing about the case.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. §§ 1209, 1220-1222, 1247-1256; Dec. Dig. § 379.*]

9. APPEAL AND ERROR (§ 1050*)—HARMLESS ERROR—ADMISSION OF EVIDENCE.

In an action on an insurance policy, error in permitting a witness to state his opinion that insured could not distinguish a bottle of carbollic acid from one containing bay rum or one containing chloroform is harmless, where the jury see the three bottles, and can reach their own conclusions in the matter.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1068, 1069, 4153-4157, 4166; Dec. Dig. § 1050.*]

10. INSURANCE (§ 662*)—ACTION ON POLICY—EVIDENCE.

In an action on a life insurance policy, it was not error to permit an agent of the insured to testify that insured took out the insurance in order to borrow money on it, and that the agent sought out the insured, where such evidence may have shed some light upon the issue of whether the insured committed suicide.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 1697, 1698, 1700-1706; Dec. Dig. § 662.*]

11. INSURANCE (§ 646*)—ACTION ON POLICY—BURDEN OF PROOF.

In an action on a life insurance policy, the presumption was that insured's death was accidental, and the burden was on the insurer to establish the defense that he committed suicide.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 1555, 1645-1668; Dec. Dig. § 646.*]

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

Error from City Court of Eastman; J. A. Neese, Judge.

Action by A. L. McCranie, administratrix, against the Georgia Life Insurance Company. Judgment for plaintiff, and defendant brings error. Affirmed on condition.

Walter M. Clements and Roberts & Smith, all of Eastman, W. L. & Warren Grice, of Hawkinsville, Wm. B. Birch, of Macon, and Jones & Chambers, of Atlanta, for plaintiff in error. W. A. Wooten and Chas. W. Griffin, both of Eastman, for defendant in error.

POTTLE, J. The death of the insured resulted from taking carboic acid. The policy was made payable to his estate, and suit was instituted by his wife as administratrix. The plaintiff claims that the death of the insured was accidental, and the defendant contends that his self-destruction was intentional. Death by suicide was not covered by the policy. The plaintiff recovered the amount of the policy, which was \$4,000, besides interest, and 20 per centum of this amount as attorney's fees.

[1] 1. The defendant introduced witnesses who testified, in substance, that shortly before the death of the insured he threatened to commit suicide, giving as his reason his belief that his wife had been unfaithful to him and in one instance giving the names of men with whom he claimed she had sustained criminal relations. In several grounds of the motion for a new trial complaint is made that the court committed error in permitting the introduction of evidence as to the good character of the insured's wife and her reputation for chastity in the community in which she lived. It is argued that this testimony raised a false issue in the case; that the real question was whether the insured had said that his wife had been unfaithful to him, and not whether the charge was true. It is contended that the company did not undertake to establish the truth of the charge, but merely undertook to show that the husband had made the charge and had assigned this as a reason why he no longer desired to live.

The general rule is that in an action by a woman upon a policy of insurance upon the life of her husband her character is not involved, and evidence of her good character is not admissible. Nor is her character as a witness in her own behalf admissible, where no impeaching evidence has been introduced by the defendant. *Travelers' Insurance Co. v. Sheppard*, 85 Ga. 751, 12 S. E. 18. In the present case Mrs. McCranie testified as a witness, and an effort was made to impeach her by proof of contradictory statements made previously to the trial in reference to matters material to the main issue in the case. In such a case it is well settled that testimony of a witness may be supported by general good character. Civil Code, § 5881. Aside from this, we think the evidence was admissible for another reason.

While at least two witnesses testified that the insured had made statements reflecting upon his wife's character, the proof is overwhelming that she was a chaste woman, and that her character in this respect was unassailable. The husband was dead. His lips were sealed. He could not be heard to deny the testimony of the witnesses who claimed that he had made these serious charges against his wife. It is true that the question of the truth or falsity of these charges was not in issue, but since there could be no direct proof that the husband had not impeached his wife's character for chastity she could only resort to indirect and circumstantial evidence to refute these charges. It is not reasonable to suppose that a man of sound mind would charge with unchastity a wife against whom no breath of suspicion had arisen in the community in which she had resided for many years. The jury might well reason that no husband would bring such a charge against such a wife. The wife might well say: "My husband did not and would not make such a serious reflection upon my character without at least some evidence upon which to base it, and if I can show that there was no such evidence, and that such a charge, if made, would have been wholly without foundation, such proof will justify the inference that no such reflection was in fact made upon my character by my husband." We recognize fully the force of the defendant's contention that the evidence was prejudicial to the company's defense, and was calculated to arouse in the minds of the jury a spirit of resentment against the company for undertaking to assert that the husband had assigned his wife's unfaithfulness as a reason for destroying his life; but this was one of the risks which the company took, and it cannot complain of the conclusion on this question reached by the jury, which was practically demanded by the evidence. If the testimony of the witness in reference to the reasons assigned by the insured for taking his life was untrue, the jury might also conclude that the testimony that the insured had threatened to take his life was equally false.

[2] 2. The statute of this state allows attorney's fees to be recovered against an insurance company in suits upon insurance policies, "provided it shall be made to appear to the jury trying the same that the refusal of the company to pay said loss was in bad faith." This statute has been held to be a constitutional and valid law. *Harp v. Fireman's Fund Insurance Co.*, 130 Ga. 726, 61 S. E. 704, 14 Ann. Cas. 299. Bad faith, as used in this statute, has been defined to mean "any frivolous or unfounded refusal in law or in fact to comply with the requisition of the policy holder to pay according to the terms of his contract and the conditions imposed by statute." *Cot-*

ton States Life Ins. Co. v. Edwards, 74 Ga. 220 (4). See, also, American Insurance Co. v. Bailey, 6 Ga. App. 424, 65 S. E. 160. Where unusual and apparently unnecessary delay in paying the claim is shown, the burden is upon the company to show that the refusal was made in good faith. Missouri Insurance Co. v. Lovelace, 1 Ga. App. 446, 466, 58 S. E. 93. In the present case, therefore, the burden was upon the company to make it appear that its refusal to pay was not frivolous or unfounded, either in law or in fact. By showing that the contract did not authorize a recovery in case of suicide, the company acquitted itself of the charge that its defense was unfounded in law. In undertaking to carry the burden of proof that the refusal to pay was not also unfounded in fact, the company offered the testimony of Mr. Hall, its general counsel, to the following effect: When the death of the insured was reported to the company, Mr. Hall instituted an investigation as to the circumstances under which the accused met his death. The company furnished blank forms for proofs of death, and within 30 days thereafter the wife of the insured and the physician who was called to attend him came to Macon for a personal conference with the general counsel of the company in reference to the claim. In this conference the physician stated that the insured had been taking bay rum for toothache, but had not been in the habit of swallowing it for the toothache. He further stated that the first impulse would be to expel from the mouth carbollic acid, if taken in the mouth unawares. From this conversation, and on account of other facts and circumstances which illustrated the cause of the death of the insured, Mr. Hall, in good faith as general counsel for the company, reached the conclusion that the insured had met his death by suicide, and he therefore advised the company to decline to pay the claim. The court repelled this testimony upon the ground that it was irrelevant and immaterial.

Counsel for the defendant in error contend that the evidence was properly rejected under the authority of the Sheppard Case, supra, 85 Ga. 751, 12 S. E. 18. In that case the plaintiff sought to introduce in evidence an affidavit made by a brother of the insured and submitted to the company, in connection with the preliminary proofs of death, prior to the suit. This affidavit contained a recital of the circumstances of the disappearance of the insured, based mainly on hearsay, together with some representations as to a reward having been offered for the recovery of the body, and as to the character of the river and the nature of the obstacles to the finding of the body therein. The affidavit furnished names and addresses of the persons acquainted with the river, as having knowledge of these obstacles. The

company's defense in that case was that the insured had committed suicide by drowning, and the plaintiff's contention was that his death was accidental. The Supreme Court held: "The good or bad faith of an insurance company in refusing to pay after demand is to be determined by the evidence adduced at the trial upon the merits of the controversy, and not by ex parte affidavits produced to the company as preliminary proof or for the company's information to induce voluntary payment. Probable cause for refusing payment will negative the imputation of bad faith, and without such probable cause refusal will be at the company's peril. Ex parte affidavits are not admissible to illustrate the question of good or bad faith."

While there is some language in the above-stated case by the Supreme Court which would support the contention of the defendant in error in the present case, it must be apparent that the decision upon its facts does not control the instant case. In its last analysis it amounts to no more than a ruling that what may be imparted to the company in preliminary proofs of death by the beneficiary, or in affidavits supporting such proofs, would not be admissible for the purpose of showing bad faith on the part of the company in refusing to pay. We do not understand that decision to hold that the company would not be permitted to show that it had in good faith instituted an investigation, had received information which satisfied it of nonliability, and offered to prove, not by ex parte affidavits, but by sworn testimony, what investigation it did make and just what information it had received and the evidence upon which it relied in passing upon the question of liability. The circumstances surrounding the death of the insured in the present case were extremely suspicious. The insured, while alone and in the daytime, took from a medicine cabinet a bottle of carbollic acid and swallowed a sufficient quantity of the poison to cause his death in a short space of time. No one saw him take it, and no one could say with certainty whether his act was intentional or not. In order to determine this question, all the facts and circumstances which threw light upon the question of intention were proper matters for consideration by the jury. Among these was the very important circumstance, detailed to Mr. Hall by the physician who attended the insured, that upon taking carbollic acid in the mouth the first impulse would be to expel it rather than to swallow it. And that, while it was claimed that the insured was taking bay rum for the toothache, the fact was that he had not been in the habit of swallowing bay rum, but simply holding it in his mouth in order to relieve the pain. These statements of the physician, in connection with other facts and circumstances, led Mr. Hall to advise his

client to decline to pay the claim. In so doing he says he acted in good faith, honestly believing that the company was not liable. As a representative of the company in the transaction, he had a right to testify affirmatively that he acted in good faith. Such testimony was a statement of fact, and not of a mere conclusion. *Hale v. Robertson*, 100 Ga. 168, 27 S. E. 937. In the *Sheppard Case* it was held that "probable cause for refusing payment will negative the imputation of bad faith." The purpose of the testimony of Mr. Hall was to show that the company had probable cause for refusing to pay the claim. Certainly it was at least a jury question whether Mr. Hall stated sufficient facts in his testimony to authorize the conclusion that the company had probable cause for the refusal. In *Blackwell v. American Central Insurance Co.*, 80 Mo. App. 75, the court said: "It must be borne in mind that the statutory punishment is not inflicted merely for the reason that it turns out at the trial there was, in reality, no reason for the delay. The question is, How did matters appear before the trial, as judged by a prudent and reasonable man seeking to find out the facts about an occurrence which it was his duty to investigate?"

The company is punished for its refusal to pay the claim. The question is, Did it then act in bad faith? If it had probable cause for refusing, its refusal cannot be said to be either frivolous or unfounded, and hence in bad faith. Whether it had probable cause at that time must be determined by the facts and circumstances as they then existed, and by the knowledge which the company then had. Suppose, for example, a thoroughly reputable man had informed the company that he was present with the insured at the time of his death, heard him say that he was going to commit suicide by taking poison, and saw him deliberately take the bottle of carbolic acid and swallow its contents. No one would contend that, with such information, a refusal to pay would be frivolous or unfounded. But suppose this witness should die before the trial, and the company be left, therefore, without any defense, and the plaintiff should insist upon trying the case simply for the purpose of mulcting the company in attorney's fees and damages, could it be held that the company would be precluded from proving that it had received this information from the person since deceased, in order to exculpate itself from the charge of bad faith? And yet this is exactly what would happen if the contention of the defendant in error be sound and some of the intimations in the *Sheppard Case*, as well as in the case of *Missouri Insurance Co. v. Lovelace*, be applied in all their strictness. If the company is to carry the burden of proving good faith, it seems to us it ought to be permitted to prove anything which would negative the existence of bad faith at the

time it refused to pay the loss. Of course, if subsequent to the refusal to pay and prior to the trial it ascertained that its information was incorrect, its continued refusal to pay would justify the imputation of bad faith. All these would be questions for the jury. In our opinion it was error to exclude the testimony of Mr. Hall.

[3] 3. The evidence was conflicting, and authorized the finding of the jury that the self-destruction of the insured was accidental. It did not, however, demand such a finding. On the contrary, there were many circumstances which would have authorized the conclusion that the insured met his death by suicide. There is absolutely nothing in the evidence to justify the inference that the company acted in bad faith in refusing to pay the claim, except the fact that there was evidence that the death of the insured was accidental rather than intentional. The 12 men composing the jury found this to be the fact, but certainly it cannot be said that every reasonably prudent man must have reached the same conclusion. There was much expert testimony to the effect that on account of the burning sensation resulting almost immediately upon taking the carbolic acid into the mouth the natural impulse would be to expel it. It also appears that carbolic acid has a pronounced odor differing from that of bay rum, and this is a fact which the court might know judicially. When this is considered in connection with the fact that the poison was taken in the daytime, and with the further evidence that the insured had stated to more than one person that he intended to kill himself, the evidence itself acquits the company of bad faith. The verdict against the company must be accepted as a finding that these things were not true; but the statute does not contemplate that in every case of conflicting evidence the company may be penalized by the imposition of attorney's fees. The question is, Was the refusal to pay wholly frivolous and unfounded, either in law or in fact, or were there facts and circumstances sufficient to justify the conclusion of nonliability by a reasonably careful and prudent man? The jury are not authorized to find that the refusal to pay was in bad faith, merely because, in their opinion, the company ought to have paid the claim.

[4-6] 4. Other than as above indicated, we find no substantial error. The letters of administration were not inadmissible because they described the deceased as "Chas. H. McCranie," whereas the proof of death was that of Charlie H. McCranie, and the policy was issued to Charlie H. McCranie. These names import the same person, and there was no contention that they did not in fact relate to the same person. Nor was the proof of death inadmissible because the policy was therein described by mistake as being for \$400, and the policy sued on was for \$4,000.

The fact that in the proof of death it was stated that carbolic acid was taken by mistake for bay rum did not render the proofs inadmissible. The policy required the cause of death to be given. One witness testified that he prepared the proof of death and the statement made by the attending physician; that the physician wrote out his answers without any assistance. The witness was asked if he explained to the physician "the facts of the affidavit." He replied that he did not; that "when we fixed the proof of death we had no idea of this suit." This answer was evidently made in explanation of the failure of the witness to explain to the physician the facts in the affidavit. The answer was not inadmissible for any of the reasons assigned.

[7] It was not error to permit proof that a brother of one of the witnesses was in litigation with the wife of the insured, the plaintiff in the case. This was of slight evidentiary value, but was a proper matter for consideration by the jury in passing upon the credibility of the witness.

[8] A witness who had testified in reference to statements made to him by the insured, which tended to show that the insured intended to take his own life, claimed that he had repeated these statements to certain named persons. These persons were permitted to testify that no such statements had been repeated to them by the witness. It is contended that no proper foundation was laid for impeaching the witness by proof of contradictory statements. There was no error in admitting the testimony. The witness having claimed that he told certain persons what the insured had stated to him, it was competent to show that the witness had not repeated the statements as he claimed. This was simply impeaching the witness by disproving facts about which he testified, and was material as tending to discredit his testimony in reference to what he claimed the insured had told him. It was further competent to prove by one of these persons that the witness had not only repeated such a

statement which he claimed the insured had made, but had stated affirmatively that he did not know anything about the case.

[9] It was probably error to permit a witness to examine three bottles, one containing bay rum, one carbolic acid, and one chloroform, and state that, in his opinion, the insured could not have told one from the other. In view of the fact, however, that the jury could see the three bottles and reach their own conclusion in reference to the matter, we do not think the admission of this testimony, even if erroneous, sufficient to justify the grant of a new trial.

[10] It was not error to permit an agent of the insurance company to testify that the insured took out the insurance in order to borrow money on it, and that the agent sought the insured for the purpose of inducing him to take the insurance. This testimony had little bearing upon the case, but may have shed some light upon the question in issue, in view of the fact that the insured met his death some six or seven months after the insurance was taken out. Even if erroneous, the admission of the evidence was not of sufficient importance to justify the grant of a new trial. It was not prejudicial error in this case to charge that pleadings are in no sense evidence and have no value as evidence, but that the jury should refer to them solely for the purpose of ascertaining the issues between the parties.

[11] Nor was it error to charge the jury, in substance, that when death was shown the law would presume it accidental, and the burden was upon the company to prove that the case came within the exception in the policy. *Travelers' Ins. Co. v. Gaynor*, 12 Ga. App. —, 77 S. E. 1072.

As the verdict against the company for the full amount of the policy was authorized by the evidence, and as no material error was committed which affected the plaintiff's right to recover this amount, the judgment will be affirmed, on condition that the plaintiff write off the sum recovered as attorney's fees.

Judgment affirmed on condition.

